

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE WRIT PETITION (PIL) NO.111 OF 2005

People for Elemination of Stray Troubles  
by its Convener Dr.Rosario Menezes & Anr. .. Petitioners  
V/s

State of Goa by its Chief Secretary & Ors. .. Respondents

WITH  
APPELLATE SIDE WRIT PETITION NO.8120 OF 2007

S.A.Mohite (Col.) & Others .. Petitioners  
V/s

The Secretary, Union Department of Culture  
Govt.of India, New Delhi & Others .. Respondents

WITH  
APPELLATE SIDE WRIT PETITION NO.3069 OF 2007

Ayurvarta Prabodhini .. Petitioner  
State of Maharashtra & Ors. .. Respondents

WITH  
APPELLATE SIDE WRIT PETITION NO.6257 OF 2006

People for Elimination of Stray Troubles  
Through its Convenor Dr.Rozario Menezes  
& Anr. .. Petitioners  
V/s

Union of India & Ors. .. Respondents

WITH  
ORDINARY ORIGINAL CIVIL JURISDICTION  
ORIGINAL SIDE WRIT PETITION NO.447 OF 2007

All India Animal Welfare Association .. Petitioner  
V/s

Brihanmumbai Municipal Corporation & Anr. .. Respondents

WITH  
ORIGINAL SIDE WRIT PETITION (L) NO.1432 OF 2004

In Defence of Animals .. Petitioner  
V/s

Union of India & Ors. .. Respondents

WITH  
ORIGINAL SIDE WRIT PETITION NO.1596 OF 1998

Viniyog Parivar Trust & Ors. .. Petitioners  
V/s

Municipal Corporation of Gr.Bombay & Ors. .. Respondents

**APPEARANCE**

**W.P.(PIL) No.111 of 2005**

Mr.Jaydeep S.Deo for Petitioners.

Mr.Subodh Kantak, Advocate General with Mr.Manish Salkar, AGP, and Mr.B.V.Phadnis for Respondent Nos.1 to 4.

Ms.Norma Alvaris for Resp.Nos.5, 6 & 7.

Mr.Raj Panjwani, Amicus Curiae.

Mr.G.E.Vahanvati, Solicitor General of India with Mr.Vinod Joshi, Mr.Rajiv Chavan and Mr.Anurag Gokhale for Respondent No.47 - Union of India.

Mr.V.R.Dhond with Mrs.S.R.Kumbat for Respondent No.48.

Mr.V.Gurumurthy for Intervener- People for Animals, Mumbai and All India Animal Welfare Association.

Mr.J.P.Cama, Senior Counsel i/by Mrs.Ranjana Todankar for S.P.C.A.

Mr.Aspi Chinoy, Senior Counsel with Mr.Zal Andhyarujina i/by M/s.Rustomji & Ginwala for Intervener- Welfare of Stray Dogs.

Mr.R.M.Kadam, Advocate General with Mr.S.K.Chinchlikar for Respondent-State.

**W.P.No.8120 of 2007**

Mr.A.V.Anturkar with Mr.S.B.Deshmukh for the Petitioners.

Mr.G.E.Vahanvati, Solicitor General of India with Mr.R.Raghuvanshi, Additional Solicitor General of India with Mr.Rajiv Chavan, Vinod Joshi, Devadatta Kamat, Mr.A.M.Sethna, Ms.Rutuja Ambekar, Mr.Anuraj Gokhale, Mr.R.F.Lambay and Mr.Vikas K.Singh for Respondent No.1.

Mr.R.M.Kadam, Advocate General with Mr.R.M.Patne, AGP, and Mr.S.R.Nargolkar for Respondent No.2.

Mr.R.G.Ketkar for Respondent No.3.

Mr.A.S.Doctor i/by Smt.Rekha Rajgopal for Respondent No.4.

Mr.Ashok Tajane for Respondent No.5.

**W.P.No.3069 of 2007**

Mr.S.M.Gorwadkar with Mr.H.V.Kode for the Petitioner.

Mr.R.M.Kadam, Advocate General with Mr.R.M.Patne, AGP, & Mr.S.R.Nargolkar, AGP for Respondent No.1 & 5.

Mr.G.E.Vahanvati, Solicitor General of India with Mr.R.Raghuvanshi, Additional Solicitor General of India with Mr.Rajiv Chavan, Vinod Joshi, Devadatta Kamat, Mr.A.M.Sethna and Ms.Rutuja Ambekar & Mr.Anuraj Gokhale for Respondent No.2.

Mr.K.K.Singhvi, Senior Counsel with Mr.D.H.Mehta and Ms.Shobha Ajithakumar for Respondent No.3.

Mr.Ram Apte for Respondent No.4.

**W.P.No.6257 of 2006**

Mr.Jaydeep Deo for the Petitioner.

Mr.G.E.Vahanvati, Solicitor General of India with Mr.R.Raghuvanshi, Additional Solicitor General of India with Mr.Rajiv Chavan, Vinod Joshi, Devadatta Kamat, Mr.A.M.Sethna and Ms.Rutuja Ambekar & Mr.Anuraj Gokhale for Respondent No.1.

Mr.R.M.Kadam, Advocate General with Mr.R.M.Patne, AGP, for Respondent No.2.

Mr.V.R.Dhond with Mrs.S.R.Kumbhat for Respondent No.3.

Mr.Subodh Kantak, Mr.Manish Salkar, AGP with Mr.B.V.Phadnis for Respondent No.4-State of Goa.

Mr.K.K.Singhvi, Senior Counsel with Mr.D.H.Mehta and Ms.Shobha Ajithakumar for Respondent No.5.

**W.P.No.447 of 2007**

Dr.Jigeesha Thakore, Hon.Secretary of the Petitioner-in-person, present.

Mr.K.K.Singhvi, Senior Counsel with Mr.D.H.Mehta and Ms.Shobha Ajithakumar for Respondent No.1 & 2.

**Writ Petition (L) No.1432/2004.**

Mr.Rahul Thakur i/by Mr.Anil Zodpe for Petitioner.

Mr.G.E.Vahanvati, Solicitor General of India with Mr.R.Raghuvanshi, Additional Solicitor General of India with Mr.Rajiv Chavan, Vinod Joshi, Devadatta Kamat, Mr.A.M.Sethna and Ms.Rutuja Ambekar & Mr.Anuraj Gokhale for

Respondent No.1 & 6.

Mr.R.M.Kadam, Advocate General with Ms.Geeta Shastri, AGP for Respondent No.2-State of Maharashtra.

Mr.K.K.Singhvi, Senior Counsel with Mr.D.H.Mehta and Ms.Shobha Ajithakumar for Respondent No.3 & 4.

Mr.V.R.Dhond with Mrs.S.R.Kumbhat for Respondent No.5.

**W.P.No.1596 of 1998**

None for Petitioner.

Mr.K.K.Singhvi, Senior Counsel with Mr.D.H.Mehta and Ms.Shobha Ajithakumar for Respondent No.1 & 2.

Mr.R.M.Kadam, Advocate General with Ms.Geeta Shastri, AGP for Respondent No.3-State of Maharashtra.

Mr.Gulam Vahanvati, Solicitor General of India with Mr.R.Raghuvanshi, Additional Solicitor General of India with Mr.Rajiv Chavan, Mr.Vinod Joshi, Mr.Devadatta Kamat, Mr.A.M.Sethna and Ms.Rutuja Ambekar & Mr.Anuraj Gokhale for Respondent No.4 & 6.

Mr.V.R.Dhond with Mrs.S.R.Kumbhat for Respondent No.5.

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**CORAM: DR.S.RADHAKRISHNAN,  
D.B.BHOSALE, AND  
SMT.V.K.TAHILRAMANI, JJJ.**

Date of reserving the Judgment: 17th October, 2008

Date of Pronouncement of Judgment: 19th December, 2008.

**JUDGMENT: (Per Dr.S.Radhakrishnan, J.)**

1. In the above, the following questions have been referred to us by the Hon'ble the Chief Justice:-

(1) Whether in the circumstances and seriousness of the problem, the danger posed and the menace caused by the stray dogs, resort can be had to the provisions of Sub-section (3) of Section 11 of the Prevention of Cruelty to Animals Act, 1960 and the relevant provisions of the Bombay Municipalities Act, Maharashtra Municipalities Act and the Goa

Municipalities Act and other enactments?

(2) Whether inspite of the aforesaid provisions of sub-section (3) of Section 11 of the Prevention of Cruelty to Animals Act, 1960 and other Acts referred to above, the killing of the stray dogs has to be totally prohibited?

2. Before answering the aforesaid two questions a little background would be necessary to understand the same. A Division Bench of this Court by a Judgment and Order dated 5th October, 1998 had laid down various guidelines to deal with the problem of stray dogs. The above order was passed with the consent of all the parties, including Municipal Corporation of Greater Bombay and the intervenors. The same was called Comprehensive Guidelines for Dog Control and Management. Under the aforesaid Guidelines, rabid dogs, critically ill dogs and fatally injured dogs could be put to sleep, by humane methods.

3. In the aforesaid Guidelines, it is clearly spelt out that the primary objective was to evolve means to control the population of dogs to achieve its gradual reduction and stabilise the same on a long term basis and thereby to control and reduce the incidents of rabies.

4. In the preamble of the aforesaid Guidelines, it categorically mentions that the indiscriminate destruction of stray dogs to minimise the incidents of

rabies and controlling their population has not succeeded. The aforesaid Guidelines were framed in view of the need to evolve a more effective, result oriented guidelines for dog control and management.

5. The aforesaid Guidelines lay down that no stray dogs shall be killed as a rule, subject to the exception of critically ill, violent, fatally injured or rabid dogs. It also lays down that violent, diseased and incurably ill and mortally wounded dogs and those capable of transmitting diseases as identified and diagnosed by a qualified veterinarian be killed, shall be euthanised by a humane manner.

6. The Municipal Corporation of Greater Mumbai approached the Supreme Court of India against the above order. However, before the Hon'ble Supreme Court, Municipal Corporation sought leave to withdraw the same with liberty to move this Court by way of a Review Petition.

7. Accordingly, the said Review Petition was disposed of by the Division Bench of our Court on 25th June, 1999. In the said order, it is categorically held that the order does not call for any review or modification except clarification in respect of certain clauses. In the said order it is observed that in case of any genuine difficulties in implementing the same, the same

can be solved in the meeting of the Monitoring Committee. The above order also reiterates that the emphasis is that the dog management shall be in such a manner that putting dogs to sleep may be the last resort and in that respect, if necessary, the approach of the Corporation shall also change. In the said order, certain clarifications were issued regarding capturing of stray dogs. Finally the said Review Petition was disposed of with the remark, subject to the aforesaid clarifications, all concerned shall make sincere attempts to implement the scheme in the spirit in which the Guidelines were framed.

8. Thereafter, the Bombay Municipal Corporation started implementing the above Guidelines with full vigour and was also allocating funds in their annual budgets, for the purpose of controlling stray dogs by adopting sterilization methods.

9. The figures of Bombay Municipal Corporation would indicate the effectiveness of sterilization methods in controlling the stray dog population and lesser incidences of rabid dog bite deaths.

10. Thereafter another Division Bench heard another Writ Petition in the Goa Bench of our Court, and felt that the Guidelines issued in the order dated 5th October, 1998 was not a judgment and was more in the

nature of a consent order. Over and above, the above Division Bench also felt that the earlier Division Bench had not taken into account the provisions of Prevention of Cruelty to Animals Act, 1960, especially Section 11 thereof and the relevant provisions of Bombay Municipal Corporation Act, Maharashtra Municipalities Act and Goa Municipalities Act. The above Division Bench felt that in the light of the aforesaid legal provisions the concerned Municipal Commissioners will have the power to kill the stray dogs, to control the stray dog problem. In the light of the above order dated 7.1.2003 the matter has been referred to us to answer the above two questions.

11. In the meanwhile, the Central Government has framed the **Animal Birth Control (Dogs) Rules 2001** (hereinafter called as ABC Rules for brevity sake) under the Prevention of Cruelty to Animals Act, 1960. The Relevant Rules, viz. Rules 3, 5(b), 6, 7, 9, 10, 11 and 13 read as under:-

**Rule 3: Classification of dogs and their Sterilization:-**

(1) All dogs shall be classified in one of the following two categories;

(i) pet dogs, (ii) street dogs.

(2) The owner of pet dogs shall be responsible for the controlled breeding, immunization, sterilization and licensing in accordance with these rules and the law for the time being in force within a specified local area.

(3) The street dogs shall be sterilized and immunized by participation of animal welfare organizations, private individuals and the local authority.

**Rule 5(b):** The Committee constituted under Rule 4 shall be responsible for planning and management of dog control programme in accordance with these rules. The Committee may authorize veterinary doctor to decide on case to case basis the need to put to sleep critically ill or fatally injured or rabid dogs in a painless method by using sodium pentathol. Any other method is strictly prohibited.

**Rule 6: Obligation of Local Authority:**

(1) The Local Authority shall provide for:-

(a) establishment of a sufficient number of dogs pounds including animal kennels/shelters which may be managed by animal welfare organizations;

(b) requisite number of dog vans with ramps for the capture and transportation of street dogs;

(c) one driver and two trained dog catchers to be provided for each dog van;

(d) an ambulance cum clinical van to be provided as mobile center for sterilisation and immunization.

(e) incinerators to be installed by the local authority for disposal of carcasses.

(f) periodic repair of shelter or pound.

(2) If the Municipal Corporation or the local authority thinks it expedient to control street dog population, it shall be incumbent upon them to sterilize and immunize street Dogs with the participation of animal welfare organizations, private individuals and the local authority.

(3) The animal welfare organizations shall be reimbursed the expenses of sterilization/immunization at a rate to be fixed by the Committee on fortnightly basis based on the number of sterilization/immunization done.

**Rule 7: Capturing/ sterilization/ immunization/ release:**

(1) Capturing of dogs shall be based on:

(a) Specific complaints (for which the local authority in consultation with the Monitoring Committee shall set up a dog control cell to receive complaints about dog nuisance, dog bites and information about rabid dogs) and

(b) General:

(i) On receipt of specific complaint about nuisance or dog bite the same shall be attended on priority basis, irrespective of the area from which the complaint comes. On receipt of such complaint the details such as name of the complainant, his complete address, date and time of complaint, nature of complaint etc. shall be recorded in a register to be maintained for permanent record.

(ii) Capturing for general purpose will be on such dates and time to be specified by the Committee.

(2) The dog capturing squad shall consist of:

(i) The driver of the dog van,

(ii) Two or more trained employees of the local authority who are trained in capturing of dogs,

(III) One representative of any of the animal welfare organization.

Each member of the dog squad shall carry, a valid identity card issued by the local authority. The dog capturing squad will be accompanied by a representative of an Animal Welfare Organisation nominated for the purpose.

(3) On receipt of specific complaint or for capturing dogs in normal course the dog squad will visit the concerned area, capture the dogs identified by the complainant in case of complaint oriented capturing and other dogs in case of general capturing. All the dogs caught will be tagged for identification purposes and to ensure that the dogs are released in the same area after sterilization and vaccination. Only stipulated number of dogs, according to the Animal Birth Control Program target, shall be caught by the van. A record of dogs captured shall be

maintained in a register, mentioning therein the name of the area/locality, date and time of capture, names of persons in the dogs squad on that particular day and details about dogs captured such as number of male dogs, number of female dogs, number of puppies etc.

(4) The dogs shall be captured by using humane methods such as lassoing or soft loop animal catchers such as those prescribed under the provisions of Prevention of Cruelty (Capture of Animals) Rules 1979.

(5) While the dogs are being captured in any locality the representative of the local authority or of the animal welfare organization accompanying the dog squad will make announcements on a public address system that dogs are being captured from the area for the purpose of sterilization and immunization and will be released in the same area after sterilization and immunization. The announcement may also briefly educate the residents of the area about the dog control programme and solicit the support of all the residents reassuring them that the local authority is taking adequate steps for their safety.

(6) The captured dogs shall be brought to the dog kennels /dog pounds managed by the Animal Welfare Organizations (AWOs). On reaching the dog pounds all the dogs shall be examined by the veterinarians and healthy and sick dogs should be segregated. Sick dogs should be given proper treatment in the hospitals run by Society for Prevention of Cruelty to Animals (SPCA)/ other institutions and only after they are treated they should be sterilized and vaccinated. The dogs will be sterilized/vaccinated under the supervision of the veterinarians of the hospital run by the Society for Prevention of Cruelty to Animals (SPCA), Animal Welfare Organization or other dog shelters. After necessary period of follow up, the dogs shall be released at the same place or locality from where they were captured and the date, time and place of their release shall be recorded. The representative of Animal Welfare Organizations (AWOs) shall accompany the dog squad at the time of release also.

(7) At a time only one lot of dogs shall be brought for sterilization, immunization at one dog kennel or dog pound and these dogs shall be from one locality. Two lots from different areas or localities shall not be mixed at the same dog pound or dog kennel.

(8) The dog kennel must have sufficient space for proper housing and free movement of dogs. The place should have proper ventilation and natural lighting and must be kept clean. Adults and puppies must be housed separately and amongst the adults the males and females also should be housed separately. Adequate arrangement for drinking water and food shall be made for dogs while in captivity.

(9) Female dogs found to be pregnant shall not undergo abortion (irrespective of stage of pregnancy) and sterilization and should be released till they have litter.

**Rule 9: Euthanasia of Street Dogs:** Incurably ill and mortally wounded dogs as diagnosed by a qualified veterinarian appointed by the committee shall be euthanised during specified hours in a humane manner by administering sodium pentathol for adult dogs and Thiopental Intra-peritoneal for puppies by a qualified veterinarian or euthanized in any other humane manner approved by Animal Welfare Board of India. No dog shall be euthanised in the presence of another dog. The person responsible for euthanising shall make sure that the animal is dead, before disposal.

**Rule 10: Furious or dumb rabid dogs:**

(1) On the receipt of complaints from the public to the Dog Control Cell of the Local Authority or on its own, the dog squad of the Local Authority would catch such dogs, suspected to be rabid.

(2) The caught dog would then be taken to the pound where it would be isolated in an isolation ward.

(3) The suspected rabid dog would then be subjected to inspection by a panel of two persons i.e. (i) a veterinary surgeon appointed by the Local Authority and (ii) a representative from an Animal Welfare Organization.

(4) If the dog is found to have a high probability of having rabies it would be isolated till it dies a natural death. Death normally occurs within 10 days of contracting rabies. Premature killings of suspected rabid dogs therefore prevents the true incidence of rabies from being known and appropriate action

being taken.

(5) If the dog is found not to have rabies but some other disease it would be handed over to the AWOs who will take the necessary action to cure and rehabilitate the dog.

**Rule 11: Disposal of Carcasses:** The carcasses of such euthanised dogs shall be disposed of in an incinerator to be provided by the local authority.

**Rule 13: Application of rules where local bye-laws etc., exist;** If there is in force in any area to which these rules extend, any Act, rule, regulation or bye-law made under any law for the time being in force by the State or the Local Authority in respect of any of the matters for which provision is made in these rules, such rule, regulation or bye-law shall to the extent to which -

(a) it contains provisions less irksome to the animal than those contained in these rules, shall prevail;

(b) it contains provisions more irksome to the animal than those contained in these rules, be of no effect.

. The above ABC Rules were brought into force on 24.12.2001.

12. The relevant provisions of Prevention of Cruelty to Animals Act, 1960 read as under, including the Preamble:-

(i) Preamble:-

An Act to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to the prevention of cruelty to animals.

(ii) Section 11(1) (1):

If any person mutilates any animal or kills any animal including stray dogs by using the method of strychnine injections in the heart or in any other unnecessarily cruel manner he shall be punishable in the case of a first offence, with fine which shall not be less than ten rupees but which may extend to fifty rupees, and in the case of a second or subsequent offence committed within three years of the previous offence, with fine which shall not be less than twenty five rupees but which may extend to one hundred rupees or with imprisonment for a term which may extend to three months or with both.

**(iii) Section 11(3) (b):**

Nothing in this Section shall apply to the destruction of stray dogs in lethal chambers or by such other methods as may be prescribed.

**(iv) Section 38(1):**

Power to make rules - The Central Government may, by notification in the Official Gazette, and subject to the condition of previous publication, make rules to carry out the purposes of this Act.

**(v) Section 38(2) (ea)**

In particular, and without prejudice to the generality of the forgoing power, the Central government may make rules providing for all or any of the following matters namely;

(a).....

(aa)....

(b).....

(c).....

(d).....

(e).....

(ea) the other methods of destruction of stray dogs referred to in clause (b) of sub-section (3) of Section 11.

**(vi) Section 38A**

Rules and regulations to be laid before Parliament- Every rule made by the Central

Government or by the Committee constituted under section 15 and every regulation made by the Board shall be laid, as soon as may be after it is made, before each house of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation, as the case may be, or both Houses agree that the rule or regulation, as the case may be, should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation.

13. Mr.Jaydeep Deo appearing for the Petitioners in Writ Petition (PIL) No.111 of 2005 strongly contended that in the light of the provisions of Goa Municipalities Act, the Municipal Commissioner has the power to kill all the stray dogs, despite the ABC Rules.

14. In the light of the above, Mr.Deo submitted that the Municipal Commissioner could kill all the stray dogs, despite the above ABC Rules, and also in view of Section 11(3) of the Prevention of Cruelty to Animals Act 1960. Mr.Deo's submission is that in the light of Section 11(3) of the Prevention of Cruelty to Animals Act, the provisions of Goa Municipality Act prevail.

15. Mrs.Norma Alvares, the learned Counsel appearing on behalf of the Respondent Nos.5, 6 & 7 in Writ Petition (PIL) No.111/2005, has submitted as under:-

**RELIANCE ON ARTICLES 51 & 21 OF THE CONSTITUTION OF INDIA:-**

With regard to the issues under Reference, viz. Whether in the circumstances and seriousness of the problem, the danger posed and menace caused by stray dogs, resort can be had to the provisions of sub-section (3) of Section 11 of the Prevention of Cruelty to Animals Act, 1960 and the relevant provisions of the Bombay/Maharashtra & Goa Municipalities Acts and other enactments, and whether inspite of the aforesaid provisions of Section 11(3) of the Prevention of Cruelty to Animals Act and other Acts referred to above, the killing of dogs has to be totally prohibited, the learned Counsel Mrs.Norma Alvares has **firstly referred to Articles 51 & 21 of the Constitution of India.** She has submitted that under Article 51 of the Constitution of India citizens have a fundamental duty to show compassion to all living creatures. She has also submitted that stray animals, being homeless/abandoned, are especially deserving of compassion from society and killing of such a stray animal merely because it is ownerless would amount to lack of compassion and would therefore be a violation of Article 51. Referring to Section 21 of the Constitution, Mrs.Norma Alvares has submitted that Article 21 confers the right to life on all citizens. According to her this may be interpreted to include protection to the citizen from any source that poses a threat to his/her life, and therefore, in

certain circumstances, some animals like some human beings may be viewed as a threat to human life and restricting the movement of such animals or euthanising them in extreme circumstances may be deemed appropriate in order to safeguard the citizens' right to life. According to her, prohibiting euthanasia of animals totally, even if they pose a threat to right to life of the citizens, may lead to violation of Article 21 of the Constitution of India. Referring to the Animal Birth Control (Dog) Rules, 2001 the learned Counsel Mrs. Norma Alvares has submitted that those rules have been framed by th State with regard to stray dogs which may balance the well-being of humans with the compassion that is required to be shown to stray dogs. The learned Counsel has further submitted that Rule 9 of the aforesaid Animal Birth Control (Dog) Rules permits the euthanasia of street dogs if they are diagnosed by a qualified veterinarian to be incurably ill or mortally wounded. According to her as per the provisions of Rule 9, such illnesses which may pose a threat to humans, then in such cases, if a qualified medical expert determines that it is cruel to keep the animal alive, the street dog may be euthanised in a humane manner. Thereafter referring to Rule 10 of the aforesaid Animal Birth Control (Dog) Rules 2001, the learned Counsel Mrs. Norma Alvares has submitted that the Rule 10 provides that in case of dogs suspected to be rabid, such dogs may immediately be removed from the public place and may be

isolated. According to her killing of a dog that is merely suspected to be suffering from rabies is counter productive as it will never be known whether or not the animal, in fact, had rabies, thereby making it impossible to correctly advise people who had some contact with the animal as to whether or not they need to take any protective measures. It is the submission of Mrs.Norma Alvares that the aforesaid Animal Birth Control (Dog) Rules 2001 nicely balance the right to life conferred on human beings (Art.21) with their duty to show compassion to all living creatures (Art.51).

16. **REFERENCE & RELIANCE ON THE PREVENTION OF CRUELTY TO ANIMALS ACT; (SECTIONS 11 & 13) ;** The learned Counsel Mrs.Norma Alvares has strongly submitted that Section 11(3) (b) of the Prevention of Cruelty Act ought not to be read independently of the other provisions of the Act relating to prevention of cruelty to animals. She has submitted that it would be an error to interpret Section 11 (3)(b) as permitting the indiscriminate destruction of all stray dogs. Mr.Norma Alvares has vehemently submitted that there can be no general killing of stray dogs under the Prevention of Cruelty to Animals Act, however, if circumstances require that the stray dog is to be euthanised then Section 11(3) (b) of the Act permits the same provided it is in accordance with the prescribed method in which case it will not be construed as violation of section 11(1)(1) which

protects the stray dogs from being mutilated or killed. Section 11(3)(b) thus confers on the State the power to regulate the destruction of particular stray dogs. According to her it would also be an error to interpret section 11(3) (b) as permitting the killing of all stray dogs merely because they are ownerless, as this would obviously render meaningless the protection given to stray dogs by Section 11(1) (1). She has submitted that Section 11 (3)(b) requires the circumstances under which the exception clause may be taken recourse to, keeping in mind the provisions of Section 11(1)(1) which prohibits the killing of animals in a cruel manner. Accordingly to her Section 13(3) specifies the circumstances under which the destruction of an animal is permitted- namely, if the animal is so diseased or so severely injured or in such a poor physical condition that it would be cruel to keep the animal alive. Thus, according to Mrs.Norma Alvares, section 13(3) under which the destruction of animals is permitted would exclude all healthy animals. It is therefore the submission of the learned Counsel Mrs.Norma Alvares that Section 11 (3) (b) of the Prevention of Cruelty to Animals Act does not permit the indiscriminate, mass destruction of all stray dogs.

17. **REFERENCE TO GOA MUNICIPALITIES ACT, 1968;**  
**(SECTION 278) ;** . The learned Counsel Mr.Norma Alvares thereafter referred to the provisions of section 278 of

the Goa Municipalities Act, 1968, which reads as under:-

(1) A Council may by public notice require that every dog while in the street and not being led by some person shall be muzzled in such a way as to allow the dog freely to breathe and to drink, while effectually preventing it from biting.

(2) When a notice under sub-section (1) has been issued, the Chief Officer may take possession of any dog found wandering unmuzzled in any public street or place and may either detain such dog until its owner has within three clear days claimed it, provided a proper muzzle for it and paid all the expenses of its detention or may, subject to the provisions of sub-section (3) and (4), cause it to be sold or destroyed.

(3) When a dog which has been detained under sub-section (2) is wearing a collar with the owner's name and address thereon, or a number ticket or any other mark by which the owner of the dog can be identified, such dog shall not be destroyed until a letter stating the fact that it has been so detained has been sent to the said address and the dog has remained unclaimed for three clear days.

(4) Any dog which is not claimed within the period

specified in sub-section (3), or any dog the owner of which has failed to comply with the provisions of sub-section (2) within the specified period therein, may be sold or destroyed by the Chief Officer after having been detained for the period of three days specified in sub-section (3);

Provided that any dog which is found to be rabid may be destroyed at any time.

(5) The Chief Officer may at any time destroy, or cause to be destroyed, or confine or cause to be confined, for such period as he may consider necessary, any dog or other animal suffering from rabies or reasonably suspected to be suffering from rabies or bitten by any dog or other animal suffering or suspected as aforesaid.

18. The learned Counsel Mr. Norma Alvares has submitted that the aforesaid provisions are with respect to both; owner dogs (pets) and stray dogs. Dogs that are claimed by someone are pet dogs and ownerless dogs are strays. According to her, it is therefore clear that the stray dogs are not considered a separate species. Stray dogs can have all the qualities ascribed to pet dogs except the human owner. She has submitted that as per the provisions of Section 278 (2) the unclaimed dogs may be

sold or destroyed. She has led stress on the phraseology "may be" used in Section 278(2), and has submitted that there is no mandatory duty cast on any Municipal Council to destroy dogs as there is no use of "shall be" in the said section 278(2).

19. So far as Section 278(4) and (5) are concerned, the learned Counsel Mrs. Norma Alvares has submitted that the said sections deal with destruction of rabid dogs/ dogs suspected to be suffering from rabies. The proviso to Section 278 (4) states that the rabid dogs may be destroyed without following the provision of sale or return. According to her no distinction has been made between a pet dog and a stray dog. The law simply ensures that a rabid dog is not returned to the society. She submits that the law prescribes two different courses of action to be adopted in the case of dogs picked up from the street - one for dogs found to be suffering from rabies (terminally ill) and another for healthy dogs. According to her the law provides that the dog that may pose a threat to society (whether pet or stray) should under no circumstances be returned to society, and the dogs which may be re-claimed or sold are not a threat to the society. According to her if unclaimed dog is not a threat to the society, Article 51 of the Constitution becomes relevant because the unclaimed dog, not being a threat to the society, ought not to be destroyed merely because it is not claimed or

because there is no taker/ buyer for the dog. She has further submitted that Article 51 which enshrines that compassion must be shown to living creatures, is an obligation not only on the citizens of this country, but by extension, it is also the duty of the State (and all its executive institutions e.g. Municipalities, Panchayats etc.), and hence the Municipality too has a duty to be compassionate to animals and to refrain from killing stray dogs except as prescribed by law. She has further submitted that the management of animals in the Municipality, the regulation and control of the dog population and the task of ensuring that the animal population is healthy and free from diseases (particularly diseases that may threaten human life) is an integral part of the primary responsibility of Municipal Authorities and other local bodies in the State.

**20. REFERENCE AND RELIANCE ON ANIMAL BIRTH CONTROL (DOG) RULES, 2001;** The learned Counsel Mrs. Norma Alvares thereafter referred to the aforesaid Animal Birth Control (Dog) Rules, 2001 - the ABC (Dog) Rules, which prescribes a sterilization-cum-vaccination scheme especially for stray dogs, with full details as to how it is to be implemented. The said scheme is advocated by leading animal welfare organizations around the world and by the WHO, among others. The said scheme is supported by the Animal Welfare Board of India, and

presently it is implemented in several states of India. According to the learned Counsel the aforesaid ABC Schsme fulfils the mandate of the Constitution of India to show compassion to living creatures, and it also ensures a long term, permanent & sustainable solution to the problem of overpopulation of stray dogs and enables the Municipalities and Panchayats to effectively fulfill their obligation of managing the dog population in their respective jurisdictions. According to her, indiscriminate killing of dogs in order to control their numbers has never solved the problem of the management of street dogs anywhere in the world, and nor is mass destruction of dogs the answer to the spread of zoonotic diseases or the occurrence of dog bites. Thereafter referring to a report titled "Incidence of Rabies and Dog Bites in Goa-2003 which was based on a survey conducted by the Department of Preventive and Social Medicine & supported by WHO, the learned Counsel Mrs.Norma Alvares has submitted that the said report has reported that 76% of dog bites during the previous year were from pet dogs and 24% from stray dogs. Referring to the cases of **Viniyog Parivar Trust & Another V/s Municipal Corporation of Greater Mumbai & Ors. and People for Animals & Anr.V/s.Panaji Municipal Council & Ors.**, the lerned Counsel Mrs.Norma Alvares has submited that the only appropriate and effective way to control and reduce the stray dog population and to ensure that the existing strays are healthy is through a programme

of sterilization and immunization of dogs.

21. Mr.Kantak, the learned Advocate General of State of Goa, fully adopted the arguments of Mrs.Norma Alvares and stated that the ABC Rules prevail over the Goa Municipalities Act and that the Municipal Commissioner of Goa can exercise his power subject to ABC rules, for the purpose of killing stray dogs.

22. Mr.Goolam E.Vahanvati, the learned Solicitor General of India, appearing on behalf of Union of India, has submitted as under:-

The learned Solicitor General of India, Mr.G.E.Vahanvati has clarified certain legal issues which have been raised interalia relating to the construction of the provisions of the Mumbai Municipal Corporation Act-1888 (State Act) and the Prevention of Cruelty to Animals Act-1960. Dealing the the Constitution provissions, Mr.Vahanvati, the learned Solicitor General has submitted that Article 51A(g) of the Constitution enjoins upon every citizen of India "to have compassion for living animals". According to him "Prevention of cruelty to animals" as a subject falls under Entry 17 of the Concurrent List, and Entry 29 of the Concurrent List covers 'Prevention of the extension from one state to another of infectious or contagious diseases affecting man, animals or plants'. With regard to the Legislative

measures the learned Solicitor General of India, Mr. Vahanvati has dealt with the Prevention of Cruelty to Animals Act-1960 which was enacted by Parliament, the preamble of which states:

"An Act to prevent the infliction of unnecessary pain or suffering on animals and for that purpose to amend the law relating to the prevention of cruelty to animals".

23. The learned Solicitor General of India has submitted that the aforesaid Act viz. Prevention of Cruelty to Animals Act-1960 and Rules made thereunder form an exhaustive legislative scheme for the prevention of cruelty to animals. He has further submitted that the said Act was enacted to give effect to the recommendations of the Committee which was appointed by the Central Government to investigate and suggest measures for prevention of cruelty to animals. The Statement of Objects and Reasons of the said Act also state that apart from declaring certain type of acts as offences, the Act also provides for establishment of Animal Welfare Board for promoting measures of animal welfare. Section 3 of the Act provides for constitutional mandate under Article 51A(g) and casts a duty upon every person having charge of an animal to take all reasonable measures to ensure the

well being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering. The provisions of Section 9 of the said Act provides for the functions of the Animal Welfare Board of India, and sub-clause (f) thereof states that the Board shall take all such steps as the Board may think fit to ensure that unwanted animals are destroyed by local authorities , whenever it is necessary to do so either instantaneously or after being rendered insensible to pain or suffering.

24. Referring to the Animal Birth Control (Dog) Rules 2001 the learned Solicitor General of India has submitted that the said Rules have been framed by the Central Government in exercise of its powers under Section 38(1) and (2) of the Prevention of Cruelty to Animals Act. Section 38(2) (ea) of the PCA Act provides for making of rules by the Central Government in the matters of the other methods of destruction of stray dogs referred to in clause (b) of sub-section 3 of Section 11. According to Mr.Vahanvati, the rules enacted under Section 38 of the PCA Act lay down a scientific and holistic scheme to reduce dog population by sterilization and immunization of stray dogs by participation of animal welfare organizations, private individuals and local authorities, and the scheme formulated under these Rules is not intended to jeopardize human life but at the same time to treat animals with care, compassion and in a humane manner so

as to achieve a gradual reduction and stabilization in the population of stray dogs on a long term basis. The learned Solicitor General Mr.Vahanvati has further submitted that these rules are based on the guidelines formulated by this Court in Writ Petition No.1596/1998 and are in conformity with the "Guidelines for Dog Population Management" published by World Health Organization (WHO) and WSPA in 1990. Elaborating Rule 3(3) of the Animal Birth Control (Dog) Rules-2001 Mr.Vahanvati, the learned Solicitor General has contended that the said Rule 3(3) states that street dogs shall be sterilized and immunized by participation of animal welfare organizations, private individuals and the local authority. He has further submitted that Rule 7 of the ABC (Dog) Rules lays down a detailed and comprehensive procedure for the capturing/sterilisation/immunization /release of dogs, and Rule 9 thereof deals with euthanasia of Street Dogs, which reads as under:-

"Incurably ill and mortally wounded dogs as diagnosed by a qualified veterinarian appointed by the Committee shall be euthanised during specific hours in a humane manner by administering sodium pentathol for adult dogs and Thiopental / intraperitoneal for puppies by a qualified veterinarian or euthanised in any other humane manner approved by the Animal Welfare Board of India. No dog shall be euthanised in the presence of another dog. The person

responsible for euthanizing shall make sure that the animal is dead before disposal".

25. Thereafter Mr.Vahanvati has submitted that Rule 10 of the said ABC (Dog) Rules provides for control/management of furious or dumb rabid dogs. According to him under the composite Central Legislative Scheme, stray dogs can be destroyed only under Rule 9 and Rule 10 of the Rules, and the Rules are an integral part of the Act to secure the prevention of cruelty to animals. According to him Section 11 (3)(b) of the Principal Act (PCA Act) only states that it is not an offence for destruction of stray dogs in lethal chambers or by such other methods as may be prescribed, however, the circumstances in which the destruction of stray dogs is to be effected is prescribed in Rule 9 and Rule 10 of the ABC (Dog) Rules 2001.

26. It is the contention of Mr.Vahanvati that there is no conflict at all between the Rules and the Act. The Rules have been formulated under Section 38(1) and (2) of the PCA Act, interalia to carry out the purposes of the Act. Further these rules have been laid before the Parliament and have obtained the approval of the Parliament and in such circumstances, under the Central Legislative Scheme, the stray dogs can be destroyed only if they are incurably ill, mortally wounded or rabid.

27. Referring to Section 9(f) of the PCA Act, Mr.Vahanvati has submitted that the Board shall take all such steps as the Board may think fit to ensure that unwanted animals are destroyed by local authority whenever it is necessary to do so. According to him the words "whenever it is necessary to do so" relates to the circumstances in which the Board should perform its function envisaged under Section 9(f) of the Act, and such circumstances are prescribed under Rules 9 & 10 of the ABC (Dog) Rules 2001. Thus Rules 9 & 10 prescribe the circumstances when it is necessary to destroy unwanted animals. Therefore, it is the submission of Mr.Vahanvati that, looked at from any angle, the Act and the Rules form a composite Legislative Scheme for prevention of cruelty to animals and under these composite legislative scheme stray dogs can be destroyed only in the situations mentioned in Rule 9 & 10 of the Rules. According to Mr.Vahanvati the Rules are an integral part of the Central Act, and are not mere executive instructions. Further Mr.Vahanvati has submitted that the Rules made under the Act have to undergo the rigors of legislative sanction under Section 38A which mandates legislative approval to every Rule made by the Government. In these circumstances, it is submitted by Mr.Vahanvati that the Rules made by the Central Government have to be laid before Parliament and if both the Houses agree for the same then the Rules can have the effect of part of the statute as the Principal

Act itself. In support of this submission, the learned Solicitor General has referred to and relied upon the judgment of the Hon'ble Supreme Court in the case of **Express Newspapers V/s.UOI - AIR 1958 SC 578**. He referred to paragraph 235 of the the judgment, which reads as under:-

"The rule was framed by the Central Government by virtue of the authority vested in under Section 20 of the Act and was a piece of delegated legislation which if the rules were laid before both the Houses of Parliament in accordance with Section 20(3) of the Act acquired the force of law. After the publication of these rules, they became a part of the Act itself and any decision thereafter reached by the Wage Board by a majority as prescribed therein was therefore lawful and could not be impeached in the manner suggested."

28. Thereafter Mr.Vahanvati has vehemently submitted that Article 254(2) of the Constitution has no application in the present case. According to him the argument that the BMC Act has primacy over the Central Act by virtue of Article 254(2) is factually and legally wrong. It is the contention of Mr.Vahanvati that the Presidential assent obtained in respect of Maharashtra

Act 51 of 1975 was under Article 200 and not under Article 254(2), and therefore the argument about repugnancy under Article 254(2) fails. According to him if the assent is not obtained under Article 254, then the primacy argument under Article 254(2) cannot be raised at all.

29. It is the contention of Mr.Vahanvati that the scope of Article 254(2) is well defined and the law in respect of interpretation of assent of the President under Article 254(2) is well settled. According to him for Article 254(2) to apply the State law must receive the Presidential assent under Article 254(2) after a specific proposal for assent outlining the areas of repugnancy is made, however there is no such proposal in the present case. Even otherwise, Mr.Vahanvati submits that if a matter falls outside the proposal which has been given to the President for assent then even if the assent is received in respect of the entire Act, the primacy of the State law would be only with regard to the matter covered in the proposal. In support of this contention Mr.Vahanvati, the learned Solicitor General has referred to the Constitution Bench of the Apex Court in the case of **Kaiser-I-Hind Pvt.Ltd. and another V/s.National Textile Corporation (Maharashtra North) Ltd. and Others - (2002) 8 SCC 182**, wherein the aforesaid proposition has been conclusively laid down. Referring to the observations made by the Apex Court in

Paragraph Nos.16 & 20 of the aforesaid judgment, Mr.Vahanvati has submitted that the Apex Court has laid down the parameters for consideration of President's assent and has considered whether a President's assent would give a blanket overruling of all the Central laws. The relevant observations of the Apex Court in Paragraph 20 of the judgment are as under:-

20. .... Proposal by the State pointing out repugnancy between the State law and of the law enacted by the Parliament is sine qua non for 'consideration and assent'. If there is no proposal no question of 'consideration' or 'assent' arises. For finding out whether 'assent' given by the President is restricted or unrestricted, the letter or the proposal made by the State Government for obtaining 'assent' is required to be looked into."

30. In any case, Mr.Vahanvati submits that the question of application of Article 254(2) does not arise at all as the BMC Act is not a law which pertains to a matter in the Concurrent List but is in respect of "local government" which falls in Entry 5 of the List II. Referring to the judgment of the Apex Court in the case of **Bar Council of India V/s.Board of Management Dayanand College - (2007) 2 SCC 202**, the learned Solicitor General Mr.Vahanvati has submitted that it is only when the law made by the State Legislature falls in the

Concurrent List, the question of application of Article 254(2) arises.

31. It is the contention of Mr.Vahanvati that in the present case harmonious construction has to be adopted vis-a-vis the Central Legislative Scheme and the BMC Act. It is further contended My Mr.Vahanvati that the argument made by the learned Sr.Counsel on behalf of the BMC that there is a conflict between the Central Act and the BMC Act, is misconceived. According to him under the well settled principles of interpretation the first rule to be applied is the principle of harmonious construction and that both the Central Legislative Scheme and the BMC Act can co-exist. It is further contended by the learned Solicitor General that the State Legislation has to construed and read in the light of the Central Legislative Scheme which occupies the filed in relation to the prevention of cruelty to animals. Mr.Vahanvati has contended that the Central Act and the Rules made thereunder prescribe the situations and the circumstances under which stray dogs can be exterminated, and the discretion which is conferred by the proviso to Sectin 191-BA(2) of the BMC Act has to be exercised in the circumstances and the situations mentioned in Rules 9 & 10 of the ABC (Dog) Rules-2001, and if such a construction is adopted there is no conflict whatsoever between the Central Act and the State Act. It is his submission that the harmonious

construction is not only a principle of interpretation of statutes but it is a duty cast on the Courts. In support of this submission the learned Solicitor General has referred to and relied upon the Privy Council's judgment in the case of **Citizen Insurance Company of Canada V/s. William Parsons - 1881 LR 7 AC 96**, wherein the following observations of the Privy Council are relevant:-

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers which they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation

of the statute than is necessary for the decision of the particular question in hand."

32. Thereafter, referring and relying upon the decision of the Federal Court in the case of **Governor General in Council V/s. Province of Madras - 1945 FCR 179**, the learned Solicitor General of India has further submitted that the same duty of reconciling apparently conflicting provisions was also reiterated by the Federal Court. The relevant observations of the Federal Court in the aforesaid decision at page 191 are as under:-

"But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear."

33. Therefore, it is the contention of Mr. Vahanvati, the learned Solicitor General of India that when a harmonious construction of statutes is possible, the argument of repugnancy cannot be allowed to be raised at all. According to him, in the present case, the correct construction of the Central and State statutes would be

that the power of the Commissioner under proviso to Section 191-BA(2) of the BMC Act can be exercised only in the circumstances mentioned in Rule 9 and 10 of ABC (Dog) Rules 2001, which will be the most reasonable view and most harmonious construction of the Central and the State Acts.

34. The learned Solicitor General of India has further submitted that the words used in the proviso to Section 191-BA (2) are "The Commissioner may cause the dogs to be destroyed". Therefore laying more stress on the word "may" used therein Mr.Vahanvati has contended that the aforesaid proviso confers a discretionary power on the Commissioner, which has to be exercised in accordance with certain parameters. According to him this discretion granted to the Commissioner is not an unbridled discretion or absolute power, but such a discretion has to be exercised by the Commissioner keeping in view the situations and circumstances under Rules 9 & 10 of the ABC (Dog) Rules 2001. According to him it is only when the dogs are mortally wounded or rabid, the Commissioner should use his powers under Section 191-BA (2) to destroy such dogs, and if such a construction is adopted there would be no case of repugnancy at all.

35. The learned Solicitor General of India, Mr.Vahanvati has further contended that in any case the

Central Act occupies the field. According to him, the Prevention of Cruelty to Animals Act, 1960 and the Rules made thereunder are a comprehensive scheme for prevention of cruelty to animals. According to him it is a complete code and covers the field in respect of the subject "Prevention of Cruelty to Animals" under Entry 17 of List III. Thereafter the learned Solicitor General has submitted that it is well settled that a State Legislation which is in conflict with the Central Act has to yield to the primacy of the Central Legislation under Article 254(1). In the present case, Mr.Vahanvati submits that the intention of the Parliament is clear that the Central Legislation should cover the field in respect of the subject of Prevention of Cruelty to Animals, and in these circumstances, any conray State Legislation has to be read down to give effect to the Central Legislation.

36. Thereafter referring to and relying upon the Constitution Bench decision of the Apex Court in the case of **Tikkaramji V/s.State of UP - AIR 1956 SC 676**, the learned Solicitor General of India has contended that in the aforesaid case the Hon'ble Supreme Court has approved the dictum of **Issac J.in 1926 37 CLR 467**, and held that "The conclusive test is whether the legislature evinces an intention to cover the whole field", and it was further held that "the Conclusive test to determine was whether a competent legislature

expressly or implicitly evinces its intention to cover the whole field". Relying upon the aforesaid decisions, the learned Solicitor General has submitted that it is the submission on behalf of the Union of India that the Prevention of Cruelty to Animals Act-1960 and the Rules made thereunder is a comprehensive legal scheme for the purposes of the prevention of cruelty to animals and as such a Central Legislative Scheme will have primacy over any contradicting State Law, and as such, in these circumstances, the discretion conferred by proviso to Section 191-BA (2) of the BMC Act cannot override the Central Legislation but has to read subject to the provisions of the Central Legislative Scheme.

37. It is the contention of Mr.Vahanvati, the learned Solicitor General of India, that for the purposes of Article 254 the Rules framed under the law enacted by Parliament is as much a law as the Principal Law itself. He has further reiterated that the Act and the Rules form a composite legislative scheme. Relying upon a decision of the Hon'ble Supreme Court in the case of **Express Newspapers - AIR 1958 SC 578 and 1995 (Supp) 2 SCC 348 (supra)**, it is the submission on behalf of Union of India made by the learned Solicitor General of India Mr.Vahanvati that for the purposes of Article 254 also the Rules made under the Central Act are as much part of law as the principal Act itself. In support of his contention, Mr.Vahanvati has also referred to and relied

upon another decision of the Apex Court in the case **State of Jammu & Kashmir V/s.M.S.Farooqi - (1972) 1 SCC 872**, wherein the Constitution Bench of the Supreme Court has held that the All India Services (Discipline and Appeal) Rules which was made under the Central Act was in conflict with the State of Jammu & Kashmir Government Servants (Prevention of Corruption) Act 1962 and therefore held that the State Act had to be read down so as to give effect to the Rules. In the said case the State of Jammu & Kashmir Government Servants (Prevention of Corruption) Act 1962 had provided for additional punishment which had not been provided in the Discipline and Appeal Rules. The Apex Court therefore held that since the Rules which were framed under the Central Act did not contain any such punishment, and therefore, both the statutes could not go together, and as such the State Act has to be read down to give primacy to the All India Services (Discipline and Appeal) Rules. Mr.Vahanvati, the learned Solicitor General of India also referred to and relied upon the decision of the Apex Court in the case of **State of Tamil Nadu V/s.Aadhiyaman Educational & Research Institute - (1995) 4 SCC 104**, wherein the Supreme Court has held that for the purposes of Article 254, Central Legislation would include subordinate legislation made under the Central law.

38. Lastly, it is submitted by the learned Solicitor

General of India that even if there was a conflict between the Central Rules and the BMC Act so far as the present case is concerned, the Central Rules would get primacy under Article 254(1) of the Constitution.

39. Mr.Raj Panjwani, the learned Amicus Curiae has mainly contended that the ABC Rules enacted by the Central Government under Section 38 of the Prevention of Cruelty to Animals Act, 1960 (PCA Act) are legislative in character and forms a part of the said Act, and in view of the provisions of Article 254 (1) of the Constitution, the ABC Rules being Central Government Rules, shall prevail over the State Municipal Laws.

40. According to Mr.Panjwani, PCA being a special Act dealing with prevention of pain and suffering of animals, the general municipal law dealing with animals would give way to the special law enacted by the Parliament. It is the submission of Mr.Panjwani that the ABC Rules were enacted in 2001 whereas the BMC Act was enacted much prior in time, and it is the settled principle of statutory interpretation that a subsequent law shall prevail over an earlier law on the same subject matter.

41. Mr.Panjwani has further submitted that answering the issues under reference as formulated in the order dated 7.1.2003 in PIL W.P.No.9 of 2001 would be an

academic exercise inasmuch as neither the petition nor the said issues raise the validity of the Animal Birth Control (Dog) Rules 2001. The learned Amicus Curiae has submitted that Article 228 of the Constitution empowers the Hgh Court to decide a substantial question of law, the determination of which is necessary for the disposal of the case. According to him the reference had arisen as the Hon'ble Division Bench of this Court was of the view that the judgment in W.P.No.1596 of 1998 needs reconsideration, and the directions contained in the said judgment have since acquired a statutory flavour by the enactment of the ABC Rules.

42. Mr.Raj Panjwani, the learned Amicus Curae has further contended that Section 38 of the PCA Act under in exercise which ABC Rules-2001 have been made by the Central Government does not suffer from excessive delegated legislation. According to him the said ABC Rules fall within the guidelines as found in the provisions of the Prevention of Cruelty to Animals Act, 1960 and seek to promote the object and purpose of the Act. The said Rules, Mr.Raj Panjwani submits, are in consonance with the fundamental duty to show compassion towards the living creatures as enshrined in Article 51(A) (g) of the Constitution. Mr.Raj Panjwani has further submitted that the ABC Rules fall under Entry 17-List III of the Constitution, and in case of any conflict between two provisions, the endeavour of this

Court would be to adopt an harmonious construction so that either of the two conflicting provisions is not invalidated.

43. Mr.Panjwani, the learned Amicus Curae has contended that the ABC Rules have been framed to achieve the objects of the PCA Act, viz. to prevent the infliction of unnecessary pain and suffering by controlling the population of stray dogs, by preventing the spread of diseases from rabid or incurably ill or mortally wounded dogs and regulating the nuisance that may be caused from such category of stray dogs, and therefore encroachment if any on any other subject of population control of stray dogs or public health would be merely incidental to achieve the object of the PCA Act.

44. It is the contention of Mr.Panjwani that the statutory discretion to be exercised by the Municipal Commissioner under Section 191-BA of the BMC Act to destroy the stay dogs has to be exercised within well-reasoned reasonable parameters, as section 191-BA of the BMC Act confers discretion of the Municipal Commissioner by using the word "may". It is his contention that neither the State Legislature nor the Commissioner has laid down the parameters for the exercise of discretion under Section 191-BA of the BMC Act and in the absence of such parameters under the BMC Act, it cannot be stated that there is repugnancy

between Section 191-BA of the BMC Act and the ABC Rules-2001. According to him the ABC Rules having once covered the field of managing stray dogs the discretion of the BMC Commissioner would be guided and governed by the ABC Rules. Mr.Raj Panjwani has further submitted that the ABC Rules having come into force and become part of the PCA Act, the provisions of Section 191-BA of the BMC Act would impliedly stand modified to the extent provided for under the ABC Rules.

45. On the issue of feeding of stray dogs, the learned Amicus Curae Mr.Raj Panjwani has submitted that this Court in modification of its earlier orders may direct that the Municipal Commissioner should ensure strictly that there should be no feeding of stray dogs other than those that have been sterilized (in public places including beaches), and the Monitoring Committee, the organizations that perform the sterilization programme and its volunteers however shall be permitted to maintain the upkeep and health of such dogs.

46. The learned Senior Counsel Mr.Aspi Chinoy appearing on behalf of the Intervener - The Welfare of Stray Dogs, has submitted that the order of this Court dated 5th October, 1998 passed in Writ Petition No.1596/1998 (relating to the Municipal Corporation of Greater Mumbai - MCGM) has become final inter parties. He has submitted that by the aforesaid order dated 5th October,

1998 this Court had stipulated detailed/ comprehensive Guidelines for Dog Control and Management in Greater Mumbai, and the SLP (Civil) No.618/1999 filed by the MCGM in the Supreme Court challenging the said order dated 5th October, 1998 has been dismissed by the Hon'ble Supreme Court by an order dated 19th January, 1999, as withdrawn with liberty to file a review in this Court, and even the Review Petition (L) No.6 of 1999 filed by the MCGM in this Court has also been disposed of by this Court by an order dated 25th June, 1999 holding thereby that the order dated 5th October, 1998 does not call for any review/modification except clarification in respect of certain clauses, and therefore the order dated 5th October, 1998 has become final and the same is accordingly binding and operative inter parties i.e. qua the Municipal Corporation of Greater Mumbai.

47. Thereafter Mr.Chinoy, the learned Senior Counsel has contended that the Animal Birth Control (Dog) Rules-2001 (ABC Rules) have been issued/notified by the Central Government in exercise of power conferred by Section 38(1) of the Prevention of Cruelty to Animals Act-1960 (PCA Act), and the said Rules have been laid before the Parliament under Section 38A of the said Act. It is further submitted by the learned Senior Counsel that the said ABC (Dog) Rules have been made to carry out the purposes of the PCA Act to prevent the infliction of unnecessary pain or suffering on animals.

According to him the said ABC (Dog) Rules seek to prevent the pain or suffering involved in the enmass culling/killing of stray dogs by providing a holistic solution/ response to the stray dog situation/polulation. According to him the said Rules are in pari-materia with the said comprehensive Guidelines issued by this Court by an order dated 5th October, 1998.

48. Referring to Section 11(3) (b) of the PCA Act, the learned Senior Counsel Mr.Chinoy has submitted that the said Rules do not conflict with and are not ultra vires section 11(3) (b) of the PCA Act. Section 11(3) (b) does not mandate the killing of stray dogs. Referring and relying upon the decisions of the Apex Court in the case of **State of UP V/s.Babu Ram Upadhyay - AIR 1961 SC 751** and followed in **State of Tamil Nadu V/s.M/s.Hind Stone and Others - (1981) 2 SCC 205**, it is his contention that the Rules made under the statute must be treated for all purposes of construction or obligation exactly as if they were in the Act and are to be of the same effect as if contained in the Act and are to be judicially noticed for all purposes of construction or obligation. According to him the rules once notified must therefore be treated as if they are contained in the Act. Further, it is contended by Mr.Chinoy, the learned Senior Counsel that the Rules being a part of the PCA Act have to be read harmoniously with the other

provisions of the PCA Act including Section 11(3)(b) of the said Act, and accordingly, the stray dog population is to be curbed by the dog birth control program and only the incurably ill, mortally wounded and rabid dogs may be destroyed and not all the stray dogs.

49. With regard to the issue of repugnancy, Mr.Chinoy, the learned Sr.Counsel has also submitted that there is no repugnancy in the present case. According to him there is no repugnancy between the provisions of Section 191-BA of the Mumbai Municipal Corporation Act-1888 and the similar provisions of other Municipal Acts and the said ABC (Dog) Control Rules-2001 and the provisions of the PCA Act-1960. Further it is vehemently contended by Mr.Chinoy that none of the Municipal Acts mandate the mass killing of stray dogs, but they only confer a power/discretion to the Municipal Authorities to kill stray dogs in certain circumstances/situations. In support of his contention he has stated that it is evident from the fact that the Municipal Corporation had itself stopped the mass killing of stray dogs and adopted the dog birth control program in 1994, even before this Court's order dated 5th October, 1998. In this regard he has also referred to the MCGM Circular dated 25th March, 1994 whereby the MCGM had stopped the mass killing of stray dogs.

50. Mr.Chinoy has further contended that even if there

is repugnancy, the ABC (Dog) Rules 2001 would prevail. According to him the aforesaid 2001 Rules which are issued/notified by the Central Government and laid before Parliament, expressly provide that the said Rules will prevail over any Act or regulation which is more irksome to animals. On this issue he has further submitted that in the event of a conflict between the 2001 Rules and the provisions of the State Legislation i.e. Municipal Acts (viz. Section 191-BA) framed under List III, the 2001 Rules being a latter law made by Parliament, would prevail over the provisions of the Municipal Acts. In support of his submissions, referring and relying upon the decision of the Hon'ble Supreme Court in the case of **State of Tamil Nadu V/s.M/s.Hind Stone and Others - (1981) 2 SCC 205**, the learned Senior Counsel Mr.Chinoy has contended that statutory rules made pursuant to the power entrusted by Parliament are law made by Parliament within the meaning of Article 302 of the Constitution.

51. According to him, the fact that the State had obtained the President's assent for the introduction of Section 191-BA in 1975 (by section 13 of the Maharashtra Act 51 of 1975) does not alter the above position. Referring to Article 254 (2) of the Constitution, the learned Senior Counsel Mr.Chinoy has submitted that the said Article 254 (2) applies only to an earlier law made by Parliament or an existing law with respect to that

matter, and therefore, the 2001 Rules being a later law made by Parliament would in the event of repugnancy, prevail over the said sections.

52. Mr.Chinoy, the learned Senior Counsel has thereafter submitted that the killing of stray dogs which was followed by the BMC/MCGM for a number of years/decades, as a means of controlling the stray dog population and eliminating human rabies deaths, was never successful, and such a mass killing, in fact increased birth rates and no reduction of stray population. The learned Counsel has further contended that the MCGM has killed 4,49,568 stray dogs between 1984-1994, and despite the killing of such a large numbers of stray dogs, the human rabies deaths in Mumbai did not reduce and averaged at around 50 per year for the period 1988-1993. Referring to the figures of expenditure incurred by the MCGM in the mass killing of stray dogs, Mr.Chinoy, the learned Sr.Counsel has submitted that in a period of five years alone ie.from 1988-1993 the MCGM had expended an amount of Rs.1,67,65,497/- in the mass killing of stray dogs. It is the contention of Mr.Chinoy that the MCGM itself has expressly admitted that killing of stray dogs itself has not resulted in controlling the stray dog population, in their Circular No.HO/38755/C dated 25.3.1994 which interalia states "Hitherto this department adopted a system of catching and killing of stray dogs to control

their population as a part of our measure to control the dreaded disease "rabies" and for the last many years now we killed about 45,000 stray dogs every year and inspite of killing so many dogs every year, we have not been able to bring down their population in greater Bombay. This is because of their high birth rate. Further, referring to the reports of the W.H.O. regarding dog population management and rabies control, the learned Senior Counsel Mr.Chinoy has contended that studies have unequivocally established the fact that killing of dogs is an ineffective measure to control the stray dog population and the only effective and proven method is sterilization coupled with returning of the dogs to their localities. Referring to the Circular of the MCGM dated 25th March, 1994 the learned Senior Counsel Mr.Chinoy has submitted that in fact, as has been recorded in the said Circular, the MCGM itself has abandoned the policy of mass killing of stray dogs, (as a method of controlling the stray dog population), and started a dog sterilization programme which has been implemented by th MCGM itself between 1994-1998 albeit in an unscientific and ineffective manner.

53. Mr.Chinoy, the learned Senior Counsel has vehemently contended that post the judgment in the first Writ Petition in 1998, the MCGM has failed to properly implement and to provide proper and adequate infrastructure required to implement the Guidelnies,

which is evident from the fact that for the entire city of Mumbai, the MCGM has provided for only four dog vans to catch stray dogs for sterilization purpose, out of which three had broken down, leaving only one dog van available for the entire city. Referring to the affidavit dated 9th March, 2007 filed by the MCGM in Writ Petition (L) No.1432 of 2004, the learned Senior Counsel has contended that, in the said affidavit the MCGM has confirmed that although the total amount allocated by the State to it for the sterilization programme since 2001-02 till 2006-07 was Rs.6,42,61,000/- so far no payment has been made to the NGO's for the sterilization programme, and that the MCGM has began disbursement to the NGO's for the first time only in 2007-2008 pursuant to the orders/directions made by this Court. Referring to the application under the Right to Information Act made by one Prerna Vaswani, the learned Senior Counsel Mr.Chinoy has submitted that it has been disclosed by the MCGM, that till 2007, it has spent only about 1.77% of the total budget allocation i.e.Rs.11,38,616/- on the Sterilization Programme, and even of this amount, nothing has been paid to the NGO's participating in the Programme. According to Mr.Chinoy, despite the failure of the MCGM to duly and effectively implement the dog birth control scheme, the Interveners and other NGO's participating in the programme have managed to carry out the sterilization programme and have sterilized more than 1,00,483 stray dogs during the

period 1998-2008. According to him, the Interveners alone have sterilized more than 21,719 dogs since the inception of the scheme, and that during the period 1998-2006 when admittedly no amounts had been disbursed to the NGO's by the MCGM the participating NGO's have sterilized more than 68,831 stray dogs. It is the contention of Mr.Chinoy, the learned Senior Counsel, that during this period even the average human rabies deaths have fallen by half. Referring to an information furnished by the MCGM in response to an application under the Right to Information Act preferred by the CEO of the Intervener, Mr.Chinoy has submitted that even the figures given by the MCGM also show that human rabies deaths have gone down considerably since 1989.

54. Referring to the orders/directions given by this Court, Mr.Chinoy, the learned Sr.Counsel appearing for the Intervener- The Welfare of Stray Dogs, has submitted that the MCGM is now paying the NGO's for the sterilization and this has, and will result in increasing the number of sterilizations and achieving the desired results at a much faster pace. Thereafter referring to an affidavit filed by the MCGM dated 24th August, 2008, the learned Sr.Counsel Mr.Chinoy has further contended that, by the said affidavit the MCGM itself has acknowledged the success of the scheme, categorically stating in the said affidavit as under:-

"The recent dog census done in October, 2007 has revealed that in the City of Mumbai there are 26900 pet dogs and 70182 stray dogs. In the year 2007, 13152 dogs were sterilized. As the Municipal Corporation has started paying sterilization and vaccination charges to the NGO's there is an increase in the number of sterilization. .... If we proceed with this rate, it is expected that within two to two-and-half years most of the city dogs will be sterilized."

55. It is the submission of Mr.Chinoy that the sterilization programme actually benefits, as it achieves the objectives of bringing down the stray dog population and eliminating human rabies deaths.

56. The learned Counsel Mr.Gurumurthy appearing on behalf of Intervenors - People For Animals, Mumbai and All India Animal Welfare Association, has submitted that it is the case of the Petitioners that the ABC program has failed to control the growth in dog population and the dog menace. The incidence of dog bites and rabies have increased and it is further their case that the ABC (Dog) Rules 2001 is opposed to the various local Acts and PCA Act 1960 and ultravires Art.21 of the Constitution.

57. According to him the present case is the case of

intolerance, apathy and gross neglect on the part of the humans. This intolerance is not only towards the stray dogs but also to other animals and birds like cats, pigeons, monkeys and cattle. These animals are seen as a nuisance and various arguments are raised to justify the same. These animals are shot, maimed, poisoned, run over by speeding vehicles and burnt to death. People who take care of these animals are opposed tooth and nail and harassed and in some cases even beaten. Animal and bird lovers are not permitted to feed these birds and animals either within the society or in public places. Rules and regulations prohibiting feeding of birds and animals are made both by the Society and the Corporation and every attempt is being made to eliminate these birds and animals. Mr.Gurumurthy has submitted that indifference and gross neglect on these birds and animals has created this problem. According to him human population in the cities is growing at a rapid pace and the cities are bursting at their seams and humans are encroaching upon every inch of open space available, and to house human beings and to provide them better infrastructure trees are cut, forests, lakes and mangroves are destroyed and these birds and animals are rendered homeless and pushed on the roads, and so they have no food to eat, no clean water to drink and no place to live with the result they have become a nuisance to the human beings. They live on foot paths, sleep under parked vehicles and survive by eating

garbage and drinking dirty and contaminated water. According to him though it is moral, ethical and legal duty of humans to protect these animals and show compassion on them, humans have chosen to ignore the same, and instead of adopting a humane solution to solve the problem, an attempt is being made to revive killing by projecting these animals as a threat to humans.

58. Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors has further submitted that, so far as the Respondents are concerned it is their contention that since the system of indiscriminate destruction of stray dogs to minimize the incidence of rabies and control the dog population did not succeed, the Guidelines for Dog Control and Management were framed by the High Court of Mumbai by its order dated 5th October, 1998 and the ABC (Dog) Rules 2001 were made. Referring to clause (c) of Section III of the 1998 Guidelines for Dog Control and Management States that the stray dogs shall be sterilized and immunized by active participation of animal welfare organizations/private individuals with adequate financial and infrastructure support from the Municipal Corporation of Greater Mumbai. Referring to clause (2) of Rule 6 of the ABC (Dog) Rules 2001 Mr.Gurumurthy has submitted that the said rule casts an obligation on Municipal Corporation or the local authority to sterilize and immunize the stret dogs with the

participation of animal welfare organizations, private individuals and the local authority, it is expedient to control the street dog population. Both the aforesaid Guidelines and Rules interalia seek participation of private individuals (public) in controlling the street dog population. According to him if the citizen or the public fails or neglects to or does not participate in controlling the street dog population, then he does not have any right to comment/complain about the said dogs. Instead of participating in controlling the street dog population both the Municipal Corporation and the Public have been creating impediments and opposing and harassing the NGO's and their volunteers in their work, and as such, they do not have any right to complain about the said dogs. Mr.Gurumurthy has further submitted that so far as the Petitioners are concerned, they have not stated in their petition that they have participated in the ABC program meant for controlling the street dog population and therefore they do not have any right to seek any relief from this Court and as such, all the petitions deserve to be dismissed on this count itself.

59. The learned Counsel Mr.Gurumurthy appearing on behalf of the Intervenors has further submitted that the impugned judgment dated January 7, 2003 of the Goa Bench passed by their Lordships: the Hon'ble Mr.Justice D.G.Deshpande and the Hon'ble Mr.Justice P.V.Hardas has

failed to consider the ABC (Dog) Rules, 2001, Article 51(A) (g) of the Constitution of India, the order dated 6th December, 1992 passed by the Delhi High Court on killing of Stray Dogs in Suit No.1246/1992 in the case of Smt.Maneka Gandhi V/s Municipal Corporation of Delhi & Another, and the judgment of Andhra Pradesh High Court passed in the Writ Petition No.18669/1994 in the case of J.Gopalan V/s.Municipal Commissioner of Hyderabad and Others.

60. Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors has contended that the Petitioners have not stated in their petition that they have participated in the ABC program meant for controlling the street dog population, and that they have not substantiated their claim by facts and figures, except for a bald statement and annexing some newspapers reports of dog bites etc. Mr.Gurumurthy has further submitted that even the Petitioners have not produced any material to show how was the ABC Program implemented, what was the money spent on it etc., and that the Petitioners have also not produced any material in the form of a census report to show as to what was the population of street dogs at the beginning of the ABC Program, how many street dogs were neutered and what was the street dog population at the time of filing the Petition, and therefore in the absence of such material it would not be fair and just to contend that the ABC

program has failed.

61. Thereafter, Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors has contended that though in the order of passed by this Court dated 5.10.1998 in W.P.No.1596/1998 certain Guidelines for Dog Control & Management were framed, the BMC did not comply with most of them. He has contended that even most of the obligations cast upon the BMC under the Animal Birth Control (Dog) Rules 2001 have not been complied with by the BMC, and till date the BMC has failed to comply with sub-clauses b, d, & f of Clause (1) of Rule 6 of the said Rules. It is the contention of Mr.Gurumurthy that BMC has failed and neglected to comply with clause (3) of Rule 6 of the said Rules and the BMC has not even reimbursed the NGO's with the cost of sterilization till March-2007. According to him whatever sterilization work the NGO's have did, did it with the grant received from the Animal Welfare Board and the donations received from its patrons. It is the contention of Mr.Gurumurthy that whatever money that was allocated/budgeted for the said purpose remained unutilized till 2007 and lapsed and it was sent back to the treasury. Further, it is contended by Mr.Gurumurthy that the NGO's and their volunteers have faced still opposition and harassment from the general public; some of the volunteers were even beaten by the public, and despite all this, the NGO's have done a laudable work resulting into lot of

awareness among the public about this program. He has submitted that many people like Doctors, Professors, Lawyers, Chartered Accountants, Actors, Models, Housewives etc. are involved in this work and therefore it is incorrect to say that the ABC program has failed. It is his submission that due to total non-co-operative attitude of the BMC and the public, the ABC program has not achieved the desired result.

62. He has vehemently submitted that though the dogs belong to the family of wolves, they are basically domestic animals and cannot be categorized as wild and cannot be regarded as a threat to humans. He has submitted that the dogs live with humans and are normally friendly with humans, they do not harm humans unless they are harmed, provoked or teased. According to him the only threat to humans is from rabies resulting from untreated dog bites, for which vaccines are available in Govt. Hospitals at a subsidized rates. It is his submission that only if a person neglects to take treatment, he puts himself under the risk of contracting rabies for which he himself is responsible. According to him the ABC (Dog) Rules 2001 which lays emphasis on "rabies control" than on "killing", by adopting a multi pronged strategy of sterilization, immunization and adoption of strays and by educating and sensitizing the public through the media about the measures adopted by the Government to control the spread

of rabies, have been made to counter the aforesaid threat to humans. Referring to Clause 2 of Rule 6 of the said Rules, Mr.Gurumurthy has submitted that the said rules speak for seeking participation of Animal Welfare Organizations, private individuals and local authority for the same, however, if a citizen/public do not participate in the ABC program meant for controlling the street dog population, then they do not have any right to complain about the said dogs, especially when they have been instead of participating in the ABC program, are opposing and harassing the people who have been doing this work.

63. Mr.Gurumurthy has further submitted that the provisions of sub-section (3) of Section 11 of the PCA Act, 1960 and the relevant provisions of various Municipal Acts and other enactments should not be read in isolation but should be read in consonance with the ABC (Dog) Rules 2001 keeping in view the Articles 48A and 51A(g) of the Constitution of India, and if it is so read, the only conclusion that one will arrive at is that **"only incurably ill and mortally wounded dogs can be destroyed"**.

64. Referring to Section 11(3) of the PCA Act, 1960 Mr.Gurumurthy has submitted that the provisions of sub-section 3 of Section 11 of the aforesaid Act only states what acts of a person shall constitute an offence

of "treating animal cruelly" and what act shall not. According to him it does not permit/provide for killing/destruction. Referring to the provisions of clause (b) of sub-section (3) of Section 11 of the aforesaid Act which deals with stray dogs, Mr.Gurumurthy has submitted that the said provision of clause (b) speaks only of the method/manner of killing/desctuction of stray dogs, but it does not permit/provide for killing/destruction. According to him it is only section 13 of the PCA Act 1960 which permits/provides for destruction of stray dogs and that too only of suffering animals to relieve them from pain and suffering.

65. Referring to Section 191-BA of the Bombay Municipal Corporation Act, 1888, Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors has further submitted that clause (4) of the aforesaid Sectin 191-BA casts a mandatory obligation on the Commissioner to destroy rabid dogs, whereas the provisions of clause (2) of the said section 191-BA which deal with dogs that are a source of nuisance are only discretionary. Mr.Gurumurthy has therefore submitted that under both the aforesaid Acts, viz.PCA Act-1960 and the Bombay Municipal Corporation Act-1888 the concerned Authorities are obliged to destry only suffering animals/dogs.

66. Dealing with the issue of applicability of the PCA Act-1960, the ABC (Dog) Rules-2001 and Section 191-BA of the BMC Act-1888, Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors has contended that the PCA Act-1960 was passed on 26th December, 1960 to prevent the unnecessary infliction of pain or suffering on animals, whereas Section 191-BA of the BMC Act-1888 was introduced in 1975 after obtaining the President's assent to deal with nuisance by dogs. According to Mr.Gurumurthy though both the aforesaid Acts viz.PCA Act-1960 & the BMC Act-1888 deal with dogs they occupied different fields till the ABC (Dog) Rules-2001 were framed, and there was no repugnancy between both the aforesaid Acts till ABC (Dog) Rules-2001 came into existence, and the repugnancy arose between them only after the ABC (Dog) Rules-2001 came into existence and as per Article 254(1) of the Constitution, the ABC (Dog) Rules-2001 shall prevail over Section 191-BA of the BMC Act-1888.

67. It is the further submission of Mr.Gurumurthy, the learned Counsel appearing on behalf of the Intervenors that the ABC (Dog) Rules-2001 cannot be said to be ultravires the Constitution. He has submitted that the ABC (Dog) Rules-2001 have been framed in exercise of powers conferred by sub-sections (1) and (2) of Section 38 of the PCA Act-1960 keeping in mind Articles 21, 48A and 51A(g) of the Constitution. The said Rules restrict

the power to kill to only those mentioned in Rule 9 of the said Rules. According to him the ABC (Dog) Rules-2001 have been framed not only in the interest of and for the welfare of animals but also in the interest of and for the welfare of human beings. It is his submission that the ABC (Dog) Rules not only aim in creating a safe environment for the general public by controlling the growth in dog population and minimizing the incidence of rabies by sterilizing and immunizing the stray dogs through the ABC program, but it also seeks to achieve the Constitutional goal enshrined in Article 48A and Article 51(g) of the Constitution, by ensuring that the fundamental duties are complied with by both the State and the citizens, and as such, according to Mr.Gurumurthy the aforesaid ABC (Dog) Rules-2001 cannot be said to be ultra vires the Constitution. It is the contention of Mr.Gurumurthy that the Constitution not only gives rights to a citizen but also imposes certain duties, and if the citizen does not care for the duties then he does not deserve the rights. Referring to the aforesaid Article 48A of the Constitution which states that the State shall endeavour to interalia protect and improve the environment; Article 51A(g) of the Constitution which interalia casts a fundamental duty on every citizen to have compassion for living creates; and clause (2) of Rule 6 of the ABC (Dog) Rules-2001 which interalia seeks participation of individuals in controlling the street dog population,

Mr.Gurumurthy has submitted that if a citizen fails or neglects to or does not participate in ABC program which is mainly meant for his benefit and in his interest, then he does not have any right to say that his right is infringed.

68. Mr.Gurumurthy has once again vehemently submitted that the provisions of sub-section (3) of Section 11 of the PCA Act-1960 and the other relevant provisions of the various Municipal Acts and other enactments, if read in consonance with the ABC (Dog) Rules-2001 keeping in view the Articles 48A and 51A(g) of the Constitution of India, does not permit killing/destruction of all stray dogs. It is therefore the contention of Mr.Gurumurthy that resort cannot be had to the said provisions to kill/destroy all stray dogs. According to him killing of all stray dogs, except incurably ill and mortally wounded dogs as mentioned in Rule 9 of the ABC (Dog) Rules-2001 is prohibited.

69. Lastly Mr.Gurumurthy has submitted that it is the submission on behalf of the Respondents that the ABC program is the best solution to the entire problem and it should be implemented in accordance with the ABC (Dog) Rules 2001 on a war footing. According to him, Corporates, Housing Societies and the public should be directed to participate and assist the NGO's and the Municipal Corporation in implementing the ABC Program.

It is his contention that the public should be restrained from opposing and harassing all those who are involved in the ABC program. Further the Municipal Corporation should be directed and allowed to set up sterilization centers wherever required and all objections to it should not be entertained. According to him more and more NGO's should be roped in to implement the ABC program and the advanced catching techniques like darting and sterilization techniques like viz.Minimal Invasive Surgery (Laparoscopy) which is already used by the Thane Municipal Sterilization Center should be adopted and all NGO's should be provided with the same. Wide publicity through the print and electronic media should also be given to the ABC program, and no further petitions in this regard should be entertained.

70. The learned Senior Counsel Mr.K.K.Singhvi, appearing on behalf of the Mumbai Municipal Corporation has submitted that the Commissioner has the power to abate the nuisance of dogs under the provisions of Sec.191-BA of the BMC Act, 1888 which interalia gives discretion to the Commissioner to destroy stray dogs or unclaimed dogs. The learned Counsel has further submitted that the aforesaid power conferred u/s.191 BA of the BMC Act is not in any way diluted by the provisions of the Prevention of Cruelty Act, 1960 (for short PCA Act), but on the contrary, they are expressly

saved by sub-section (3) of Section 11 of the PCA Act. The said sub-section begins with a non obstante clause and states that nothing contained in section 11 (1) of PCA Act will apply to the matters contained therein. In other words, if a person destroys dogs in a lethal chamber, as provided by clause (b) or if the Commissioner destroys dogs under the provisions of the BMC Act, it will not amount to cruelty and will not be an offence punishable under the PCA Act.

71. It is the submission the learned Senior Counsel Mr.Singhvi that, if the parent Act cannot take away the Municipal Commissioner's powers under the provisions of the BMC Act regarding destruction of dogs, certainly, the Animal Birth Control (Dog) Rules 2001 (in short ABC (Dog) Rules 2001), which is a subordinate legislation cannot impinge upon the Commissioner's powers under the BMC Act, and therefore the ABC Rules cannot prevail over the BMC Act, particularly Section 191 BA. Moreover, the learned Senior Counsel has submitted that, in case of conflict, the provisions of Section 191 BA of the BMC Act will prevail over the provisions of ABC Rules so far as abating the nuisance of dogs and their destruction is concerned.

72. It is further submission fo the learned Sr. Counsel Mr.Singhvi that the ABC Rules are ultra vires the provisions of Section 38 of the PCA Act since

Section 38 does not empower the Central Government to frame rules for birth control of dogs. According to him, neither the ABC Rules carries out the purpose of the PCA Act as envisaged by sub-section (1) of Section 38, nor does it relate to any of the matters mentioned in sub-section (2) of Section 38.

73. Mr.Singhvi, the learned Senior Counsel thereafter submitted that so far as the questions referred by the Hon'ble Division Bench for consideration of the Hon'ble Full Bench are concerned, the answers to the same so far as the Municipal Corporation is concerned, would be positive for the question No.1 and negative for question No.1, in the sense, Mr.Singhvi has submitted that so far as the question No.1 is concerned, the resort can be had to the provisions of Section 191-BA of the BMC Act to abate the nuisance caused by dogs in view of the provisions of sub-section (3) of Section 11 of the PCA Act 1960, and so far as question No.2 is concerned the killing of dogs cannot be totally prohibited in view of the provisions contained in Section 11(3) of the PCA Act 1960 read with Section 191-BA of the BMC Act 1888.

74. Mr.Singhvi, the learned Sr.Counsel has thereafter vehemently submitted that, assuming without admitting that ABC Rules are intra-vires the PCA Act and are in conflict with Section 191-BA of the BMC Act, then also the provisions of Section 191-BA of the BMC Act will

prevail over the ABC Rules, because the PCA Act under which ABC Rules were framed, came into force in the year 1960 whereas Section 191-BA of the BMC Act was enacted by the Maharashtra Legislature by Maharashtra Act number 51 of 1975, and the said Maharashtra Act, having received the assent of the President on the 17th October 1975 came into force on 1st November, 1975 and thus under Article 254(2) of the Constitution, Section 191-BA of the BMC Act would prevail in the State of Maharashtra over the PCA Act and the ABC Rules made there under.

75. In support of his submissions, the learned Sr.Counsel Mr.K.K.Singhvi, has referred to and relied upon the following cases:

(1) AIR 1970 SC 237 - U.P.Electric Supply Co.Ltd V/s.V.R.K.Shukla and others, wherein, the relevant observations of the Hon'ble Supreme Court in Paragraph No.9 read as under:-

"Competence of the State Legislature to enact Section 6-R (2) is not denied. Act 1 of 1957 received the assent of the President and by virtue of Article 254(2) of the Constitution Section 6-R (2) of the U.P.Act prevails, notwithstanding any prior law made by the Parliament. The provisions of the U.P.Act including Section 6-R (2) therefore apply in determining the rights and obligations of the parties in respect of retrenchment compensation. The observations to the contrary made by this Court in Rohtak & Hissar Districts Electric Supply Co.Ltd.V/s.State of U.P. 1966-2 Lab LJ 330 (AIR 1966 SC 1471) which primarily raised a dispute relating to the validity of certain model standing orders proceeded upon a concession made at the Bar,

and cannot be regarded as decision. Since the relevant provisions of the two Acts on the matter in controversy in these groups of appeals are not materially different, we do not think it necessary in this case to refer the question to a larger Bench."

(2) AIR 1979 SC 898 - M.Karunanidhi V/s.Union of India, wherein, the relevant observations of the Hon'ble Supreme Court in Paragraph No.8 of the Judgment read as under:

"It would be seen that so far as clause (1) of Article 254 is concerned, it clearly lays down that where there is a direct collision between a provision of a law made by the State and that made by Parliament with respect to one of the matters, enumerated in the Concurrent List, then, subject to the provisions of clause (2), the State law would be void to the extent of the repugnancy. This naturally means that where both the State and Parliament occupy the field contemplated by the Concurrent List then the Act passed by Parliament being prior in point of time will prevail and consequently the State Act will have to yield to the Central Act. In fact, the scheme of the Constitution is a scientific and equitable distribution of legislative powers between Parliament and the State Legislatures. First, regarding the matters contained in List I, i.e.the union List to the Seventh Schedule, Parliament alone is empowered to legislate and the State Legislatures have no authority to make any law in respect of the Entries contained in List I. Secondly, so far as the Concurrent List is concerned, both Parliament and the State Legislatures are entitled to legislate in regard to any of the Entries appearing therein, but that is subject to the condition laid down by Article 254 (1) discussed above. Thirdly, so far as the matters in List II, i.e. the State List are concerned, the State Legislatures alone are competent to legislate on them and only under certain conditions Parliament can do so. It is, therefore obvious that in such matters repugnancy may result from the following circumstances:-

(1) Where the provisions of a Central Act and a State Act in the concurrent List are fully

inconsistent and are absolutely irreconcilable, the Central Act will prevail and the State Act will become void in view of the repugnancy.

(2) Where however, a law passed by the State comes into collision with a law passed by Parliament on an Entry in the Concurrent List, the State Act shall prevail to the extent of the repugnancy and the provisions of the Central Act would become void provided the State Act has been passed in accordance with clause (2) of Article 254.

(3) Where a law passed by the State Legislature while being substantially within the scope of the entries in the State List entrenches upon any of the Entries in the Central List the constitutionality of the law may be upheld by invoking the doctrine of pith and substance if on an analysis of the provisions of the Act it appears that by and large the law falls within the four corners of the State List and entrenchment, if any, is purely incidental or inconsequential.

4. Where, however, a law made by the State Legislature on a subject covered by the Concurrent List is inconsistent with and repugnant to a previous law made by Parliament, then such a law can be protected by obtaining the assent of the President under Article 254 (2) of the Constitution. The result of obtaining the assent of the President would be that so far as the State Act is concerned, it will prevail in the State and overrule the provisions of the Central Act in their applicability to the State only. Such a state of affairs will exist only until Parliament may at any time make a law adding to, or amending, varying or repealing the law made by the State Legislature under the proviso to Article 254.

So far as the present State Act is concerned, we are called upon to consider the various shades of the constitutional validity of the same under Article 254 (2) of the Constitution.

**(3) AIR 1983 SC 150 - T.Barai V/s.Henry Ah Hoe and Another.** In Paragrapy 15 of the Judgment, the Supreme Court has observed as under:-

There is no doubt or difficulty as to the law applicable. Article 254 of the Constitution makes provision firstly, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254 (1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State Act only to the extent of inconsistency between the two and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to Clause (2). The proviso to Article 254 (2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law either directly or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together, e.g., where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed. In all such cases, the law made by Parliament shall prevail over the State law under Article 254 (1). That being so, when Parliament stepped in and enacted the Central Amendment Act, it being a later

law made by Parliament, "with respect to the same matter", the West Bengal Amendment Act stood impliedly repealed.

(4) AIR 1987 SC 1960 - The Krishna Dist.Co-op.Marketing Society Ltd. Vijayawada V/s.N.V.Purnachandra Rao & Ors., wherein the relevant observations of the Hon'ble Supreme Court in Paragraph Nos.8, 9, 10 & 11 read as under:-

8. .... It is true that the State Act is a later Act and it has received the assent of the President but the question is whether there is any such repugnancy between the two laws as to make the provisions of the Central Act relating to retrenchment ineffective in the State of Andhra Pradesh. It is seen that the State Act does not contain any express provision making provisions relating to retrenchment in the Central Act ineffective insofar as Andhra Pradesh is concerned. We shall then have to consider whether there is any implied repugnancy between the two laws. Chapter VA of the Central Act which is the earlier law deals with cases arising out of lay-off and retrenchment. Section 25J of the Central Act deals with the effect of the provisions of the Chapter V-A on other laws inconsistent with that Chapter. Sub-section (2) of Section 25J is quite emphatic about the supremacy of the provisions relating to the rights and liabilities arising out of lay-off and retrenchment. These are special provisions and they do not apply to all kinds of termination of services. Section 40 of the State Act deals generally with termination of service which may be the result of misconduct, closure, transfer of establishment etc. If there is a conflict between the special provisions contained in an earlier law dealing with retrenchment and the general provisions contained in a later law generally dealing with terminations of service, the existence of repugnancy between the two laws cannot be easily presumed.

9. .... The State Legislature has not done so in this case. Section 40 of the State Act deals with terminations of service generally. In the above situation we cannot agree with the

contention based on Art.254(2) of the Constitution since it is not made out that there is any implied repugnancy between the Central law and the State law.

10. The result of the above discussion is that if the employees are 'workmen' and the management is an 'industry' as defined in the Central Act and the action taken by the management amounts to 'retrenchment' then the rights and liabilities of the parties are governed by the provisions of Chapter V-A of the Central Act and the said rights and liabilities may be adjudicated upon and enforced in proceedings before the authorities under S.41(1) and S.41(3) of the State Act.

11. We may incidentally observe that the Central Act itself should be suitably amended making it possible to an individual workman to seek redress in an appropriate forum regarding illegal termination of service which may take the form of dismissal, discharge, retrenchment etc. or modification of punishment imposed in a domestic enquiry. An amendment of the Central Act introducing such provisions will make the law simpler and also will reduce the delay in the adjudication of industrial disputes. . . . . The nation remembers with gratitude the services rendered by the former Labour Appellate Tribunal which was manned by some of our eminent Judges by evolving great legal principles in the field of labour law, in particular with regard to domestic enquiry, bonus, gratuity, fair wages, industrial adjudication etc. The Industrial Disputes (Appellate Tribunal) Act, 1950 which provided for an all-India appellate body with powers to hear appeals against the orders and awards of Industrial Tribunals and Labour Courts in India was repealed in haste. If it had continued by now the labour jurisprudence would have developed perhaps on much more satisfactory lines than what it is today. There is a great need today to revive and to bring into existence an all-India Labour Appellate Tribunal with powers to hear appeals against the decisions of all labour Courts, Industrial Tribunals and even of authorities constituted under several labour laws enacted by the States so that a body of uniform and sound principles of Labour law may be evolved for the benefit of both industry and labour throughout India. Such an appellate authority can become a very efficient body on account of specialisation. There is a demand for the revival of such an appellate body even from some workers' organisations. This suggestion is worth considering. All this we are saying because we

sincerely feel that the Central Act passed forty years ago needs a second look and requires a comprehensive amendment.

**(5) AIR 1999 SC 443 - M.P.Shikshah Congress and Others V/s.R.P.F. Commissioner, Jabalpur and Others,** wherein, in Paragraph Nos.11 & 12 the relevant observations of the Hon'ble Supreme Court read as under:-

11. Before Cl.(2) of Art.254 is attracted, there must be a repugnancy between any provision of a State law and any provision of an earlier existing law made by Parliament. In the present case, when the Madhya Pradesh Act 20 of 1978 was enacted, there was no repugnancy between the Madhya Pradesh Act 20 of 1978 and the Employees' Provident Fund and Miscellaneous Provisions Act of 1952 already enacted by Parliament. The Parliamentary Act did not apply to educational institutions. The State Act dealt with salaries and other ancillary matters governing certain educational institutions. Therefore, there was no repugnancy between the earlier Parliamentary legislation and the late State Legislation. There was no question, therefore, of the State Act prevailing over the Parliamentary Act of 1952. In fact, quite clearly the Central Act did not apply to educational institutions either in the State of Madhya Pradesh or anywhere else.

12. Secondly, as the preamble and other provisions of the State Act 20 of 1978 show, the primary purpose of the State Act was to make provisions for regulating the payment of salaries to teachers and other employees of aided non-Government Schools. The Act did not even provide for any scheme for setting up a provident fund. The act incidentally required that the institutinal contribution to any existing Provident Fund Scheme should be paid into the institutional fund set up under the said Act. Looking to the pith and substance of the State Act of 1978 also, it cannot be said that it in any way made provisions which were repugnant to the Employees' Provident Fund and Miscellaneous Provisions Act, 1952.

**(6) AIR 1990 SC 2072 - Vijay Kumar Sharma and Others**

V/s.State of Karnataka and Others, wherein the relevant observations of the Hon'ble Supreme Court in Paragraph No.54 of the Judgment read as under:-

54. The doctrine of predominant purpose of Acquisition Act (21 of 1976) as discussed by my learned brothers is to achieve the objective of preventing the flagrant and blatant misuse or abuse of the contract carriages as stage carriages by eliminating that class of private carriers from all Karnataka roads. I am in complete agreement with it. It is a laudable object to subserve public purpose. But the operation of its incidental or ancillary provisions, ie. Ss.14(1) and 20(3) to the primary or predominant purpose is nailed by the altered situation, viz., making the law under the Act, 59 of 1988. It is already held that Art.254 applies only to repugnancy arising between an existing or subsequent Union law and State law on any one or more subjects in the Concurrent List III of Seventh Schedule to the Constitution. The inconsistency arising between laws on the other two Lists i.e.List I and II, of Seventh Schedule to the Constitution has been taken care of by the opening non-obstanti clause of Art.246(1) of the Constitution which gives Supremacy of List I over List II. Laws made by Parliament in its residuary jurisdiction will be governed by the same provision because Art.248 is to be read with Entry 97 of List I. Same is the position under Art.252 of the Constitution. Once Parliament has made a law under that Article on a matter in State List, the Legislature of those States on whose resolution the law was passed by Parliament or which subsequently adopt it ceased to have a power to make a law relating to that matter, and, therefore, there is no question of retaining any legislative competence to make law on that matter. Same should be the position under Art.253 of the Constitution. The position under temporary measures are, therefore, dealt with by Art.251 that in case of inconsistency between the Union and State law, the former shall prevail and the latter will be only 'inoperative' but not 'null and void'. Under Arts.252 and 253, the loss of legislative power of the States is complete and, therefore, the States can no longer make any law on a subject on which Parliament has made a law and, therefore, their existing laws and any laws that they may venture to make in future will be null and void and for that matter Art.254(1) cannot be invoked. But that is not the case with

matter enumerated in the Concurrent List. The State Legislature did not surrender its power or jurisdiction. The Parliament with a view to lay down general principles makes law or amends the existing law. The State Legislature still may feel that its local conditions may demand amendment or modification of the Central law. Their reserve power is Art.254(2). If the Parliament expressly repeals the repugnant law made under Art.254(2) different considerations may arise for which no final pronouncement is needed here. It is already found that Ss.14(1) and 20(3) of the Acquisition Act (21 of 1976) became void. But after making the Act 59 of 1988, the power of the State Legislature under Art.254(2) is not exhausted and is still available to be invoked from time to time. Though, there is opposite school of juristic thought, in my considered view the interpretation I have put up will subserve the animation of the founding fathers of the Constitution; the Constitutional Scheme and purpose envisioned by Art.254. Therefore, after the Act has come into force, the State Legislature has its reserve power under Art.254(2) to make law. But unless it again enacts law and reserves it for consideration and obtains the assent of the President afresh, there is no prohibition for the petitioners to make applications for the grant of contract carriage permits under the Act and consideration and grant or refusal thereof according to law by the concerned Regional Transport Authority. It is, therefore, made clear that this order does not preclude the Karnataka State Legislature to make afresh the law similar to Ss.14(1) and 20(3) of the Acquisition Act with appropriate phraseology and to obtain the assent of the President. The authorities have misconstrued the effect of the Act.

(7) In W.P.No.1172 of 1987 HC (Bom.) Security Guard Board for Greater Bombay & Thane District V/s.Shri.V.Sinha, Regional Labour Commissioiner (Central) Bombay & Ors. it was held that as Maharashtra Private Security Guards Act 1981 was a specialized legislation, it could prevail over Contract Labour (Abolition & Regulation) Act, 1970, being general legislation.

(8) In W.P.No.1891 of 1989 HC (Bom) Security Guards Board for Greater Bombay and Thane District & Others V/s.Regional Provident Fund Commissioners case, both the State Legislation and Central Legislation arose from Concurrent List, hence, after the special assent of the President under Article 254(2) of the Constitution of India, the State Legislation was held to prevail over the Central Legislation.

76. According to Mr.K.K.Singhvi, the learned Senior Counsel appearing on behalf of the Mumbai Municipal Corporation, the contention that the ABC Rules 2001 having been framed after the enactment of the Maharashtra Act 51 of 1975 which enacted Section 191-BA of the BMC Act, the ABC Rules 2001 will prevail over Section 191-BA of the BMC Act, is erroneous and fallacious because if the parent act namely the PCA Act 1960 does not prevail over Section 191-BA of the BMC Act a fortiori the subordinate legislation namely the ABC Rules 2001 cannot prevail over Section 191-BA of the BMC Act. Moreover, according to the learned Sr.Counsel, even the contention that the Rules made under Section 38 of the PCA Act become part of the Act and must be construed as a law enacted by Parliament within the meaning of proviso to clause (2) of Article 254 of the Constitution, is also erroneous and fallacious because

the Rule made under a law enacted by Parliament cannot be elevated to the status of a law enacted by the Parliament.

77. Mr.Singhvi, the learned Senior Counsel has further submitted that the reliance placed by learned Sr.Counsel Mr.Aspi Chinoy in the case of **State of Tamil Nadu V/s.Hind Stone and others - 1981 (2) SCC 205** is misconceived. According to him, the said case did not consider the provisions of Article 254 of the Constitution, but was concerned with Articles 301 and 302 of the Constitution. The language used in Article 301 & 302 is quite different from language used in Article 254, in the sense, in Article 302 the language is "**Parliament may by law impose such restrictions**", whereas in Article 254 (2) proviso, the language used is "**nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matters, including a law, adding to, amending, verifying or repealing the law so made by Legislature of the State**". Mr.Singhvi therefore submits that the proviso to Article 254 (2) talks of law enacted by Parliament as against law enacted by the State Legislature, whereas under Article 302 of the Constitution restriction may be imposed on freedom of trade commerce or intercourse by Parliament by law which may include subordinate Legislation. (Emphasis supplied).

78. It is the submission of the learned Senior Counsel Mr.Singhvi that, under Article 302 of the Constitution of India it is possible to contend that restrictions on trade etc. can be imposed by a Parliament by enacting a law as well as by the Rules made under the enacted law, however, Article 254(2) proviso which talks of conflict between the law enacted by the Parliament and the law enacted by the Legislature cannot be construed to mean that the law enacted by the Parliament will also include the subordinate legislation framed under the Parent Act. Referring to the case of State of Tamil Nadu (supra), the learned Senior Counsel Mr.Singhvi has pointed out the observations of the Supreme Court whereby the Hon'ble Supreme Court has held that the statutory rules made pursuant to the power entrusted by Parliament was a law made by Parliament within the meaning of Article 302 of the Constitution and thus the case of State of Tamil Nadu must be restricted to the interpretation of Article 302 of the Constitution and cannot be relied upon for interpreting Article 254 (2) proviso to the Constitution. Referring to the case of Sarva Sharmik Sanghatana V/s. State of Maharashtra & Ors., 2008 (1) SCC 494, Mr.Singhvi has further submitted that it is the settled law that a case is an authority for what it decides and not that may logically follow from it. In the aforesaid case, the Hon'ble Supreme Court agreed with the observations made by the House of Lords in Quinn V/s. Leathem 1901 AC 495. The Supreme Court has

further held that the ratio of any decision must be understood in the background of the facts of that case and a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

79. Thereafter, the learned senior counsel Mr. Singhavi has further submitted that the contention raised by the learned Advocate appearing for the Animal Welfare Organizations that ABC Rules 2001, must be treated as part of the PCA Act and if there is any conflict between Section 191(BA) of the BMC Act and the ABC rules, the ABC rules must prevail is also erroneous and fallacious because;

(a) If Section 11(3) (b) and (c) of the PCA Act expressly provide that the provisions of Section 191(BA) of the BMC Act will prevail over whatever is contained in Section 11(1) of the PCA Act and if that be so, the subordinate legislation framed under Section 38 of the PCA Act can never prevail over Section 191(BA) of the BMC Act.

(b) It is well settled law that the rules made under the Act are subordinate to the Act and cannot be elevated to the status of the parent Act, even if the statute provides that the Rules will be treated as if enacted in the Act. To elaborate his

contention, he relied upon following rulings of the Hon'ble Supreme Court (1) Chief Inspector of Mines and Anr., V/s.Karam Chand Thapar Etc, AIR 1961 SC 838, (2) State of Kerala V/s.K.M.Charia Abdulla & Co., AIR 1965 SC 1585; (3) State of Mysore V/s. H. Sanjaviah, AIR 1967 SC 1189.

80. Referring and relying upon the judgment in the case of General Officer Commanding-in-Chief & Anr., V/s. Dr.Subhash Chandra Yadav, AIR 1988 SC 876, the learned Senior counsel Mr.Singhvi strenuously submitted that in spite of the provisions that any rules framed under the Act shall have the effect as if enacted in the Act, the rule must fulfill the conditions. Firstly, it must conform to the provisions of the statute under which it is framed and secondly, it must also come within the scope and purview of the rulemaking power of the authority framing the rule. If either of these two conditions is not fulfilled, the rules so framed would be void.

81. The learned Senior Counsel Mr.Singhvi thereafter submitted that the contention raised that Section 191-BA of the BMC Act is ultra vires Article 51A (g) of the Constitution is also untenable and fallacious. According to him Section 191-BA of the BMC Act is in consonance with Article 51 A(g) of the Constitution, since it avoids cruelty to dogs by providing that only

ribid dogs may be killed to relieve them of unnecessary suffering. Similarly it gives discretion to the Municipal Commissioner to kill dogs which are a source of nuisance and it is submitted that said killing is done in a lethal chamber. It is the contention of Mr.Singhvi that Article 51A(g) finds place in part IV-A of the Constitution containing Fundamental Duties of citizens. This article expects every citizen to inter alia have compassion for living creatures. This is a duty imposed upon a citizen and no consequences have been spelt out for committing breach of this duty. According to him Article 51-A does not in any way restrict the power of the legislature to make laws within its competence and therefore the legislation made by a competent Legislature as in the case of 191-BA of the BMC Act, cannot be said to be ultra vires Article 51A(g). Thereafter he has submitted that the fundamental rights contained in Part III of the Constitution imposed a restriction on the Legislature not to make laws which are inconsistent with the Fundamental Rights contained in Part III of the Constitution. According to him Article 13(2) in that regard specifically provides that the State (including Legislature) shall not make any law which takes away or abridges the rights conferred by Part III of the Constitution and any law made in contravention of that clause to the extent of that contravention be void, and such is not the case in respect of the Article 51A(g)

which consists of duties imposed on citizens under Part IV-A of the Constitution.

82. Moreover, it is submitted by the learned Senior Counsel Mr.Singhvi appearing on behalf of the Mumbai Municipal Corporation, that the contention that the order of the Division Bench of this Court dated 5th October, 1998 passed in Writ Petition No.1596 of 1998 has been confirmed by the Hon'ble Supreme Court by its order dated 29th January, 1999 passed in SLP (Civil) 618 of 1999 since the said SLP was withdrawn and dismissed, is also untenable. According to Mr.Singhvi it has now been settled by the Hon'ble Supreme Court in the case of **Kunhayammand V/s.State of Kerala - AIR 2000 SC 2587**, that an order refusing Special Leave to Appeal may be non speaking order or a speaking one, and in either case it does not attract the doctrine of merger. He has further submitted that an order refusing Special Leave to Appeal does not stand substituted in place of the order under challenge, and all that it means is that the Court was not inclined to exercise its discretion, so as to allow the Appeal being filed.

83. Ms.Geeta Shastri, appearing on behalf of the State of Maharashtra has submitted that in Writ Petition No.1432 of 2004 the Petitioner has prayed for quashing and setting aside and declaring as unconstitutional Section 11 (3) of the Prevention of Cruelty to Animal

Act, 1960 and Section 191 (BA) (2) of Mumbai Municipal Corporation Act, 1988 on the ground that they are violatives of article 14 and 21 of the constitution of India and also Section 48(b) and 51(a) (g) of the Constitution of India. In the said petition the Petitioner has also stated that there is no distinction between the stray dogs and stray dogs infected by rabbies. Referring to the Writ Petition No.1596 of 1998 in which by an order dated 5.10.1998 the Court has laid down guidelines in respect of controlling and managing dogs, the learned Counsel Ms.Geeta Shastri has submitted that in the said Writ Petition, the Government has filed an affidavit of Mr.Mahadeo Govindrao Wakodikar, Senior Administrative Officer in the office of the Regional Joint Commissioner of Animal Husbandry, Mumbai Region, dated 19th May, 2005 contending that assumption of the Petitioner that the word "person" which occurs in Articles 14 and 21 of the Constitution of India would include animals particularly the stray dogs is a misconception on the part of the Petitioner as by no stretch of imagination animal can be said to be brought on par with 'person' or said to be included in the category of 'person' as laid down under Articles 14 & 21 of the Constitution of India. Referring to Section 191-BA(2) of the Mumbai Municipal Corporation Act, 1988 Ms.Geeta Shastri has submitted that the said act has been enacted with a specific purpose by the Legislature and their intention is not to discriminate between stray

dog and the pet dogs but to secure interest of the human beings and protect them from the menace of the stray dogs as the pet dogs are already taken care of by their Masters.

84. Ms.Geeta Shastri then referred to the order dated 20th April, 2007 passed in Writ Petition No.1423 of 2004 whereby this Court had directed the BMC to set up Monitoring Committee for the purpose of monitoring stray dogs and had also directed the State Government to identify the land outside the city of Mumbai for the purpose of setting up the dogs shelter home. She has submitted that in pursuance of the aforesaid order of this Court dated 20.04.2007, the Government of Maharashtra by its affidavit of Principal Secretary, Urban Development Department, dated 20th June, 2007 filed in Writ Petition No.1432 of 2004 has stated that two plots; one at Tembhode, Taluka Palghar Dist Thane and another at Kondhale, Taluka Wada, Dist Thane have been identified and even the possession thereof has also been taken over by the Greater Mumbai Municipal Corporation on 26.9.2007, and the Government in Revenue & Forests Department has already taken decision to allot the aforesaid two plots to the Municipal Corporation of Greater Mumbai on occupancy price.

85. Referring to the affidavit filed by the Deputy Secretary, Urban Development Department, Government of

Maharashtra dated 13th April, 2007 Ms. Geeta Shastri has submitted that approximately 50000 cases of dog bite were recorded each year, out of which 20 persons expire each year, and therefore, it is necessary not to totally prohibit the killing of the stray dogs. She has submitted that the menace of the stray dogs is beyond control as these dogs are found in large number in various places i.e. places of worship, in playground, garden, beaches etc., and these dogs run after pedestrians, bicycles and children. She has further submitted that such dogs pose many problems for human habitation and/or at public places. According to her the stray dogs pose a very serious problem because the person affected by dog bite has to take 14 injections all of which are to be given in stomach without any break. She has submitted that the agony and sufferings of the victim of violent and ferocious rabid affected dogs ends in the form of death of the victim. She has further submitted that in spite of sterilisation being carried out the cases of stray dog bite are on rise, and therefore compassion and love for the animals should not be stretched to such an extent so as to endanger the human life, and therefore in the interest of human beings, steps are necessary to be taken to cull the stray dogs as per the provisions laid down in Section 191 BA (2) of the Mumbai Municipal Corporation Act. She has submitted that the aforesaid provision was made by the Legislature in the interest of citizens who are entitled to lead a

safe and healthy life with dignity and peace. Thereafter she referred to one article wherein it was mentioned that the Maharashtra State Human Rights Commission had written a letter to the Greater Mumbai Municipal Corporation that it was the statutory obligation on the Municipal Corporation to destroy all stray and unclaimed dogs, so that the human life should not be endangered. She has further submitted that the population of stray dogs has gone up, and those favouring retention of stray dogs on road ignore the fact of putting citizens to the risk of total illness and physical and psychological trauma and expenses.

86. According to Ms.Geeta Shastri, the Animal Birth Control Programme of vaccination of adult animal is largely ineffective in the absence of priming dose for puppies. She has submitted that it is very difficult to recatch dogs for annual re-vaccination as they become wary of dog catcher. She has further submitted that since dogs' ear marking cannot be seen from distance and do not indicate date of vaccination, no specific programme can be ensured, and hence the public is lulled by animal birth control proponents in false and potentially fatal belief that stray dogs once vaccinated will not transmit rabbies.

87. Ms.Geeta Shastri has further submitted that the sterilization of dogs results in hormonal imbalance

making dogs irritable with increased tendency to bite and chase. According to her the release of captured dogs in the same area from where they were caught is impossible, and the inevitable release of stray dogs to strange area results in frighten and aggressive behaviour and increased dog bite cases. Hence, according to Ms.Geeta Shastri, the three components of animal birth control programme that of vaccination, sterilisation and return to same street have ill effects. She has also submitted that the escalation of numbers of stray dogs on roads can be reduced only by capturing and then either sheltering or eliminating the stray dogs. According to her there is resentment among public about misuse of funds to release stray dogs once caught at the expense of tax payers. She has further submitted that if animal lovers are concerned about well being of stray dogs, they should raise their own funds to provide permanent shelter to the stray dogs and they should also make arrangement for adoption of dogs once caught, and as such, the stray dogs should not be allowed to wander on public roads.

88. Ms.Geeta Shasti has further submitted that the Prevention of Cruelty to Animals Act, 1960 is not a superseding Act to any other Acts pertaining to the welfare of dogs/ animals, and therefore it can be believed that the provisions pertaining to the dogs in Section 191 BA of the Mumbai Municipal Corporation Act,

Section 336 of City of Nagpur Corporation Act-1948 and Section 293 of Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 are enforceable since it has legal sanctity, which authorises the Municipal Commissioner for destruction of dogs after fulfillment and satisfaction of the conditions mentioned therein. According to her the destruction of dogs in lethal chambers or by such other prescribed methods and extermination or destructions of dogs under authority of law for time being in force, will not amount to treating animals in cruel manner under Section 11(3)(b) and (c) of the Prevention of Cruelty to Animals Act, 1960 and hence the powers of Mumbai Municipal Corporation Act under the provisions of Section 191 BA of the said Act are no way affected while exercising power of culling of dogs for reasons set out therein. Ms.Geeta Shastri has further submitted that Rule 13 of the Animal Birth Control (Dogs) Rules-2001 is inconsistent with the provisions contained under Section 11 (3)(c) of the Prevention of Cruelty to Animals Act-1960, and therefore, the provisions contained under Section 191 BA of the Mumbai Municipal Corporation Act shall prevail over the provisions of Rule 13 of the Animal Birth Control (Dogs) Rules-2001, and therefore the Municipal Commissioner of the Greater Mumbai Municipal Corporation be permitted to exercise his power under Section 191 BA of the said Act for destruction of stray dogs on satisfaction and fulfillment of the

conditions laid down in the said section.

89. The learned Counsel Mr.A.V.Anturkar, so far as Writ Petition No.8120 of 2007 is concerned, has submitted that it will not be correct to say that the Municipal Commissioner under section 191-BA of the MMC Act ( and similar Authorities under the Municipal Laws) have absolute discretion to destroy dogs. According to him it will also be not correct to say that the Municipal Corporation is completely exempted from the provisions of Prevention of Cruelty to Animals Act-1960. It is his contention that as per the provisions of Section 11(3) (b) of the PCA Act only the provisions of Section 11 are not applicable to Municipal Corporation and that to only in respect of the two aspects viz. destructions of stray dogs in lethal chambers, or by such other method as may be prescribed.

90. It is vehemently contended by the learned Counsel Mr.Anturkar that except the aforesaid two ways of destruction of dogs mentioned in Section 13(3) (b) of the PCA Act, it is not open for the Municipal Corporation to make recourse to any other mode such as Municipal Corporation cannot destroy dogs by starvation.

91. The learned Counsel has further contended that even if the provisions of Section 11(3) (c) are taken into consideration, the expression "authority of any law"

used in that section, would only exempt Municipal Corporation from the provisions of Section 11 and not from the entire PCA Act. According to Mr. Anturkar, the expression "authority of any law" has to be interpreted so as to mean Section 3 of the PCA Act and article 51A (g) of the Constitution of India. The learned Counsel has further submitted that the discretion given to the Municipal Commissioner under Section 191-BA of the BMC Act has to be exercised by taking into consideration the provisions of Section 3 of the PCA Act and Article 51A (g) of the Constitution of India, and once it is so done, then the decision to destroy the stray dogs would be legal and cannot be interfered with provided the method of destruction of the dogs is one mentioned in section 11(3) (b) of the PCA Act, viz. destruction in lethal chambers or destruction by any other prescribed method. The learned Counsel Mr. Anturkar has further submitted that except these factors, the discretion of the Municipal Commissioner cannot be controlled by any other method such as the ABC Rules under the PCA Act or by discretion given by the High Court under Article 226 of the Constitution of India. According to him, once the statute has given the discretion to an authority, it is that authority alone which has to take the decision, and it is not open even for this Court to give certain directions, which would control the exercise of such discretion by the statutory authority. In support of his contention has has submitted that in the past

whenever such directions are given by the High Court, the Hon'ble Supreme Court has deprecated that and has set aside those directions. According to him the direction given by this Court that the dogs caught from a particular area have to be released back in the same area is not the direction that could be given under Article 226 of the Constitution, and therefore, that direction is required to be recalled.

92. Thereafter, Mr. Anturkar, the learned Counsel has submitted that even the provision of the ABC Rules which provides that the dogs caught from a particular area have to be released back in the same area, is not a valid provision because ABC Rules being sub-ordinate legislation will not prevail over statutory law viz. MMC Act, and that Article 254 of the Constitution provides for a situation when there is a conflict between law made by the State Legislature and law made by Parliament then the law made by Parliament will prevail over law made by State Legislature. According to him the expression "law made by" would mean statute law and would not include the sub-ordinate legislation made under the statute law and therefore, the ABC Rules will not prevail over MMC Act. Further it is the submission of Mr. Anturkar that Section 191-BA is introduced by Maharashtra Amendment Act No. LI of 1975 which is given approval by the Hon'ble President of India, and therefore, in case of any conflict between

the MMC Act and PCA Act, MMC Act would prevail.

93. Mr. Anturkar has further submitted that the Municipal Corporation which catches dogs, although is not the owner, is, for the time being in possession or custody of the animal, and therefore, would be covered by the expression "owner" under Section 2(f) of the PCA Act, and as such, action of the Municipal Corporation of releasing the dog again in the very same locality would amount to cruelty within the meaning of Section 11(1) (h) of the PCA Act, and if any rule under the ABC Rules permits this, then that rule is contrary to the parent legislation and therefore the rule is illegal and bad in law.

94. Inviting our attention to Section 3 of the PCA Act, Mr. Anturkar has contended that even if it is assumed that the Municipal Corporation is not the owner of the stray dogs, when the Municipal Corporation catches the dogs, Municipal Corporation is the person having the care or charge of the animal in that eventuality, irrespective of the fact whether the Municipal Corporation is the owner of the dogs or not, it would become person having the care or charge of the dogs. According to him releasing the dogs again in any locality would be contrary to Section 3 of the PCA Act, and if the Rules of ABC Rules permit that, the Rules are illegal.

95. It is further submitted by Mr. Anturkar that for destruction of dogs, the Municipal Corporation is concerned with the category of dogs which are ferrous and about which complaints are received by the Municipal Corporation, According to him, it is only when the nuisance is caused by the dogs, the Municipal Corporation will come into the picture and will catch the dogs. According to him, after considering all the factors if the Municipal Commissioner comes to the conclusion that within the limited resources available he is not in a position to feed the dogs permanently and that the dogs cannot be released back in the society or in the locality, then the legislature has kept one way open for such Municipal Commissioner and that way is the provision of section 11(3) (b) of the PCA Act. Mr. Anturkar has further submitted that if the Municipal Commissioner after considering all the factors takes a policy decision to destroy stray dogs and if such an action is challenged and if the Municipal Commissioner brings material to show that in the decision making process he has considered all the factors, then it is not open for this Court to substitute the decision of the Municipal Commissioner or to issue any direction which would have the effect of controlling his discretion.

96. It is the submission of Mr. Anturkar that the

discretion available with the Municipal Commissioner under Municipal Laws is not controled and cannot be whittled down by ABC Rules, and thus the Municipal Commissioner has absolute discretion to take such decision in any given case as he may deem fit, irrespective of any restriction under ABC Rules. However, Mr.Anturkar further submits that such a discretion given to the Municipal Commissioner is not completely uncontrolled, but it is subject to the provisions of Section 3 of the PCA Act. Thereafter, Mr.Anturkar has submitted that under Article 226 this Court should not give any direction which would interfere with the Municipal Commissioner's discretion.

#### **CONSIDERATION**

97. Basically both the above questions arise for consideration, based on the effect of ABC Rules, vis-a-vis the provisions of Bombay Municipal Corporation Act, Maharashtra Municipalities Act and Goa Municipalities Act. To put it in other words, whether the ABC Rules prevail over the provisions of the aforesaid Bombay Municipal Corporation Act, Maharashtra Municipalities Act and Goa Municipalities Act or vice-versa?

98. It is important to take note of Article 51A(g) of the Constitution of India, which imposes Constitutional duty on every citizen of India to show compassion to all living creatures.

99. Stray dogs being homeless/ abandoned are especially deserving the compassion from Society and killing of stray dogs, merely because they are ownerless would amount to lack of compassion, would therefore violate Article 51A(g).

100. Similarly, totally prohibiting euthanasia of all stray dogs would pose threat to right to life of citizens, will lead to violation of Article 21 of the Constitution of India.

101. ABC Rules would balance the well-being of human beings with the compassion required to be shown to the stray dogs as per Article 51A(g).

102. The ABC Rules seek to balance the right to life of citizens under Article 21 of the Constitution of India and their duty to show compassion to all living creatures including stray dogs under Article 51A (g) of the Constitution of India.

103. Dog bites in the State of Goa in the year 2003 based on a survey conducted by the Department of

Preventive and Social Medicine and supported by WHO, reports that 76% of dog bites during the earlier was due to pet dogs and 24% by stray dogs.

104. The above figures clearly establish that effective implementation of ABC Rules in the State of Goa has reduced stray dog bites substantially. As far as State of Goa is concerned, Mr.Kantak, the learned Advocate General of State of Goa, categorically stated that ABC rules will prevail over the provisions of Goa Municipalities Act. He also submitted that in the State of Goa, ABC Rules are being effectively implemented to reduce the stray dog population and to minimise the rabies death and dog-bites.

105. The statutory discretion to be exercised by the Bombay Municipal Commissioner under Section 191BA of the BMC Act, to kill the stray dogs has to be exercised within the reasonable parameters as Section 191BA confers discretion on the Municipal Commissioner by using the word "may".

106. It is clear that Section 191BA of BMC Act, does not lay down any parameters for exercising the discretionary powers of Municipal Commissioner.

107. Merely in the absence of any parameters for exercise of discretionary powers under Section 191BA of

the BMC Act, need not necessarily lead to a conclusion that ABC Rules are repugnant.

108. It is important to note that neither the Bombay Municipal Corporation Act, nor the Goa Municipalities Act, casts any mandatory obligation of mass killing of stray dogs but they only confer discretion to kill stray dogs to the Municipal Commissioner.

109. Circular dated 25th March, 1994 issued by the Bombay Municipal Corporation, mentions that it stopped mass killing of stray dogs and adopted the dog birth control program in the year 1994.

110. The Hon'ble Supreme Court in the case of **State of Tamil Nadu V/s.M/s.Hind Stone & Others - (1981) 2 SCC 205**, has clearly held that statutory rules made pursuant to the power conferred by Parliament, would be law made by Parliament.

111. ABC Rules 2001 were brought into force much after Section 191BA of the BMC Act came into force, hence even if ABC Rules were to be in conflict with Section 191BA of the BMC Act, the ABC Rules would prevail, as the same is part of Prevention of Cruelty Act and brought in subsequent to Section 191BA of the BMC Act.

112. The Bombay Municipal Corporation had spent

Rs.1,67,65,497/- in mass killing of stray dogs during the period 1988-1993. Thereafter, the Corporation realised the futility of the same and admitted it in it's circular dated 25.3.1994 as follows:-

"Hitherto this department adopted a system of catching and killing of stray dogs to control their population as a part of our measure to control the dreaded disease "rabies" and for the last many years now we have killed about 45000 stray dogs every year and inspite of killing so many dogs every year, we have not been able to bring down their population in Greater Bombay".

113. Therefore, from 1994 the Corporation adopted sterilization programme with a full vigour, which showed a very positive result.

114. During the period 1998-2006, 100,483 dogs have been sterilized which also resulted in substantial reduction in number of dog-bites as well as death due to rabies.

115. The affidavit of Bombay Municipal Corporation dated 24.8.2008 shows that in census conducted in 2007, in the city of Mumbai there are 26,900 pet dogs and 70182 stray dogs. The said affidavit also mentions that in view of the vigorous sterilization programme, within two and half years most of the city dogs will be sterilized. Dr.J.G.Thanekar, the Executive Health Officer of the Public Health Department of the Municipal

Corporation of Greater Mumbai, in his letter dated 28.02.2007 written to Shri.Abodh Aras, in response to his application under the Right to Information Act, has given the information about the Dog Bites recorded in Mumbai from 2000 to 2006, and the number of human rabies deaths yearwise from 2000 to 2006, which is as follows:-

Year	Dog Bite Cases Recorded in Mumbai	Human Rabies Deaths Recorded in Mumbai
2000	61,377	19
2001	53,051	21
2002	52,840	25
2003	50,729	28
2004	51,311	16
2005	43,980	27
2006	45,183	21

. The aforesaid information given by the Executive Health Officer of the Public Health Department of Municipal Corporation of Greater Mumbai, shows that from 2000 to 2006, yearwise, there is comparative decrease in the Dog Bite cases and Human Rabies Deaths in Mumbai.

From the above, it is apparent that effective sterilization reduces the stray dog population as well as dog-bite instances, and death rate due to rabies also has come down.

116. ABC Rules not only aim in creating a safe environment for the general public by controlling the growth in dog population and minimising the incidences of rabies by sterilizing and immunizing the stray dogs through ABC programme, but it seeks to achieve the goal under Article 51A (g) of the Constitution of India also.

117. It is difficult to agree with the submission of Mr.Anturkar that once discretion is conferred on the Municipal Commissioner under Section 191BA of the BMC Act, the same cannot be controlled by PCA Act or ABC Rules. There never be any absolute discretion and the discretion is always subject to control as sought to be done by ABC Rules, otherwise it would lead to a very chaotic situation.

118. Similarly, it is difficult to agree with Mr.Anturkar that sterilized dogs should not be released in the same area. They are released in the same area since dogs get used to a particular area, therefore they are released in the same area. Over and above, areawise sterilization can be effectively implemented and dog population can be successfully controlled, if the sterilized dogs are released in the same area.

119. Another important aspect to be noted is that PCA Act being a special Act dealing with prevention of pain and suffering of animals, will prevail over the general

Municipal Laws.

120. Prevention of Cruelty to Animals Act-1960 and Rules made thereunder form an exhaustive legislative scheme for the prevention of cruelty to animals. The said Act was enacted to give effect to the recommendations of the Committee which was appointed by the Central Government to investigate and suggest measures for prevention of cruelty to animals. The Statement of Objects and Reasons of the said Act also state that apart from declaring certain type of acts as offences, the Act also provides for establishment of Animal Welfare Board for promoting measures of animal welfare. Section 3 of the Act provides for Constitutional mandate under Article 51A(g) and casts a duty upon every person having charge of an animal to take all reasonable measures to ensure the well being of such animal and to prevent the infliction upon such animal of unnecessary pain or suffering. The provisions of Section 9 of the said Act provides for the functions of the Animal Welfare Board of India, and sub-clause (f) thereof states that the Board shall take all such steps as the Board may think fit to ensure that unwanted animals are destroyed by local authorities , whenever it is necessary to do so either instantaneously or after being rendered insensible to pain or suffering.

121. The ABC Rules have been framed by the Central

Government in exercise of its powers under Section 38(1) and (2) of the Prevention of Cruelty to Animals Act. Section 38(2) (ea) of the PCA Act provides for making of rules by the Central Government in the matters of the other methods of destruction of stray dogs referred to in clause (b) of sub-section 3 of Section 11. The rules enacted under Section 38 of the PCA Act lay down a scientific and holistic scheme to reduce dog population by sterilization and immunization of stray dogs by participation of animal welfare organizations, private individuals and local authorities, and the scheme formulated under these Rules is not intended to jeopardize human life but at the same time to treat animals with care, compassion and in a humane manner so as to achieve a gradual reduction and stabilization in the population of stray dogs on a long term basis. These rules are based on the guidelines formulated by this Court in Writ Petition No.1596/1998 and are in conformity with the "Guidelines for Dog Population Management" published by World Health Organization (WHO) and WSPA in 1990. Rule 3(3) states that street dogs shall be sterilized and immunized by participation of animal welfare organizations, private individuals and the local authority. Rule 7 of the ABC (Dog) Rules lays down a detailed and comprehensive procedure for the capturing/sterilisation/ immunization /release of dogs, and Rule 9 thereof deals with euthanasia of Street Dogs, which reads as under:-

"Incurably ill and mortally wounded dogs as diagnosed by a qualified veterinarian appointed by the Committee shall be euthanised during specific hours in a humane manner by administering sodium pentathol for adult dogs and Thiopental / intraperitoneal for puppies by a qualified veterinarian or euthanised in any other humane manner approved by the Animal Welfare Board of India. No dog shall be euthanised in the presence of another dog. The person responsible for euthanizing shall make sure that the animal is dead before disposal".

122. Rule 10 of the said ABC (Dog) Rules provides for control/ management of furious or dumb rabid dogs. Under the composite Central Legislative Scheme, stray dogs can be destroyed only under Rule 9 and Rule 10 of the Rules, and the Rules are an integral part of the Act to secure the prevention of cruelty to animals. Section 11 (3)(b) of the Principal Act (PCA Act) only states that it is not an offence for destruction of stray dogs in lethal chambers or by such other methods as may be prescribed, however, the circumstances in which the destruction of stray dogs is to be effected is prescribed in Rule 9 and Rule 10 of the ABC (Dog) Rules 2001.

123. There is no conflict at all between the Rules and the Act. The Rules have been formulated under Section 38(1) and (2) of the PCA Act, interalia to carry out the purposes of the Act. Further these rules have been laid before the Parliament and have obtained the approval of the Parliament and in such circumstances, under the Central Legislative Scheme, the stray dogs can be destroyed only if they are incurably ill, mortally wounded or rabid.

124. Under Section 9(f) of the PCA Act, the Board shall take all such steps as the Board may think fit to ensure that unwanted animals are destroyed by local authority whenever it is necessary to do so. The words "whenever it is necessary to do so" relates to the circumstances in which the Board should perform its function envisaged under Section 9(f) of the Act, and such circumstances are prescribed under Rules 9 & 10 of the ABC (Dog) Rules 2001. Thus Rules 9 & 10 prescribe the circumstances when it is necessary to destroy unwanted animals. Looked at from any angle, the Act and the Rules form a composite Legislative Scheme for prevention of cruelty to animals and under these composite legislative scheme stray dogs can be destroyed only in the situations mentioned in Rule 9 & 10 of the Rules. The ABC Rules are an integral part of the Central Act, and are not mere executive instructions. The ABC Rules made under the Act have to undergo the rigors of legislative

sanction under Section 38A which mandates legislative approval to every Rule made by the Government. The Rules made by the Central Government have to be laid before Parliament and if both the Houses agree for the same then the Rules can have the effect of part of the statute as the Principal Act itself. In the case of **Express Newspapers V/s.UOI - AIR 1958 SC 578**, the Hon'ble Supreme Court in paragraph 235 has observed as under:-

"The rule was framed by the Central Government by virtue of the authority vested in under Section 20 of the Act and was a piece of delegated legislation which if the rules were laid before both the Houses of Parliament in accordance with Section 20(3) of the Act acquired the force of law. After the publication of these rules, they became a part of the Act itself and any decision thereafter reached by the Wage Board by a majority as prescribed therein was therefore lawful and could not be impeached in the manner suggested."

125. Article 254(2) of the Constitution has no application in the present case. The BMC Act has primacy over the Central Act by virtue of Article 254(2) of the Constitution of India is factually and legally

wrong. The Presidential assent obtained in respect of Maharashtra Act 51 of 1975 was under Article 200 of the Constitution of India and not under Article 254(2), and therefore the argument about repugnancy under Article 254(2) fails. The assent was not obtained under Article 254, hence the primacy argument under Article 254(2) cannot be raised at all.

126. The scope of Article 254(2) is well defined and the law in respect of interpretation of assent of the President under Article 254(2) is well settled. For Article 254(2) to apply the State law must receive the Presidential assent under Article 254(2) after a specific proposal for assent outlining the areas of repugnancy is made, however there is no such proposal in the present case. If a matter falls outside the proposal which has been given to the President for assent then even if the assent is received in respect of the entire Act, the primacy of the State law would be only with regard to the matter covered in the proposal. The Constitution Bench of the Apex Court in the case of **Kaiser-I-Hind Pvt.Ltd. and another V/s.National Textile Corporation (Maharashtra North) Ltd. and Others - (2002) 8 SCC 182**, has laid down the parameters for consideration of President's assent and has considered whether a President's assent would give a blanket overruling of all the Central laws. The relevant observations of the Apex Court in Paragraph 20 of the

judgment are as under:-

20. .... Proposal by the State pointing out repugnancy between the State law and of the law enacted by the Parliament is sine qua non for 'consideration and assent'. If there is no proposal no question of 'consideration' or 'assent' arises. For finding out whether 'assent' given by the President is restricted or unrestricted, the letter or the proposal made by the State Government for obtaining 'assent' is required to be looked into."

In the instant case there was no such proposal by the State to the President pointing out any repugnancy.

127. In any case, the question of application of Article 254(2) does not arise at all as the BMC Act is not a law which pertains to a matter in the Concurrent List but is in respect of "local government" which falls in Entry 5 of the List II. The Apex Court in the case of **Bar Council of India V/s.Board of Management Dayanand College - (2007) 2 SCC 202**, has laid down that it is only when the law made by the State Legislature falls in the Concurrent List, the question of application of Article 254(2) arises. Even on this count the submission of Mr.Singhvi cannot be accepted. It is also a settled law that when there is a conflict between Central Legislation and State Legislation, the Central

Legislation will prevail.

128. In the present case harmonious construction has to be adopted vis-a-vis the Central Legislative Scheme and the local legislation being the BMC Act. The argument made by the learned Senior Counsel on behalf of the Bombay Municipal Corporation that there is a conflict between the Central Act and the BMC Act, is misconceived. Under the well settled principles of interpretation the first rule to be applied is the principle of harmonious construction and see that both the Central Legislative Scheme and the BMC Act can co-exist. The State Legislation has to be construed and read in the light of the Central Legislative Scheme which occupies the field in relation to the prevention of cruelty to animals. The Central Act and the Rules made thereunder prescribe the situations and the circumstances under which stray dogs can be exterminated, and the discretion which is conferred by the proviso to Section 191-BA(2) of the BMC Act has to be exercised in the circumstances and the situations mentioned in Rules 9 & 10 of the ABC (Dog) Rules-2001, and if such a construction is adopted there is no conflict whatsoever between the Central Act and the State Act. The harmonious construction is not only a principle of interpretation of statutes but it is a duty cast on the Courts. The Privy Council's judgment in the case of **Citizen Insurance Company of Canada V/s. William**

**Parsons - 1881 LR 7 AC 96**, the following observations of the Privy Council are very relevant:-

"In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist; and in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers which they contain, and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand."

129. The Federal Court in the case of **Governor General in Council V/s. Province of Madras - 1945 FCR 179**, the same duty of reconciling apparently conflicting provisions was also reiterated by the Federal Court. The relevant observations of the Federal Court in the aforesaid decision at page 191 are as under:-

"But it appears to them that it is right first to consider whether a fair reconciliation cannot be effected by giving to the language of the Federal Legislative List a meaning which, if less wide than it might in another context bear, is yet one that can properly be given to it, and equally giving to the language of the Provincial Legislative List a meaning which it can properly bear."

130. When a harmonious construction of statutes is possible, the argument of regugnancy cannot be allowed

to be raised at all. In the present case, the correct construction of the Central and State statutes would be that the power of the Commissioner under proviso to Section 191-BA(2) of the BMC Act can be exercised only in the circumstances mentioned in Rule 9 and 10 of ABC (Dog) Rules 2001, which will be the most reasonable view and most harmonious construction of the Central and the State Acts.

131. The words used in the proviso to Section 191-BA (2) of BMC Act are "The Commissioner may cause the dogs to be destroyed". Therefore laying more stress on the word "may", the aforesaid proviso confers a discretionary power on the Commissioner, which has to be exercised in accordance with certain parameters. This discretion granted to the Commissioner is not an unbridled discretion or an absolute power, but such a discretion has to be exercised by the Commissioner keeping in view the situations and circumstances under Rules 9 & 10 of the ABC (Dog) Rules 2001. It is only when the dogs are incurably ill, mortally wounded or rabid, the Commissioner should use his powers under Section 191-BA (2) to destroy such dogs, and if such a construction is adopted there would be no case of repugnancy or conflict at all.

132. In any case the Central Act occupies the field. The Prevention of Cruelty to Animals Act, 1960 and the

Rules made thereunder are a comprehensive scheme for prevention of cruelty to animals. It is a complete code and covers the field in respect of the subject "Prevention of Cruelty to Animals" under Entry 17 of List III. It is well settled that a State Legislation which is in conflict with the Central Act has to yield to the primacy of the Central Legislation under Article 254(1) of the Constitution of India. In the present case, the intention of the Parliament is clear that the Central Legislation should cover the field in respect of the subject of Prevention of Cruelty to Animals, and in these circumstances, any contrary State Legislation has to be read down to give effect to the Central Legislation.

133. The Constitution Bench decision of the Apex Court in the case of **Tikkaramji V/s.State of UP - AIR 1956 SC 676**, has approved the dictum of **Issac J.in 1926 37 CLR 467**, and held that "The conclusive test is whether the legislature evinces an intention to cover the whole field", and it was further held that "the Conclusive test to determine was whether a competent legislature expressly or implicitly evinces its intention to cover the whole field". It is clear that the Prevention of Cruelty to Animals Act-1960 and the Rules made thereunder is a comprehensive legal scheme for the purposes of the prevention of cruelty to animals and as such a Central Legislative Scheme will have primacy over

any contradicting State Law, and as such, in these circumstances, the discretion conferred by proviso to Section 191-BA (2) of the BMC Act cannot override the Central Legislation but has to read subject to the provisions of the Central Legislative Scheme.

134. For the purposes of Article 254 of the Constitution of India the Rules framed under the law enacted by Parliament is as much a law as the Principal Law itself which is apparent from Rule 13 of the ABC Rules also. Therefore the Act and the Rules form a composite legislative scheme. The Hon'ble Supreme Court in the case of **Express Newspapers - AIR 1958 SC 578 and 1995 (Supp) 2 SCC 348 (supra)**, has held that for the purposes of Article 254 also the Rules made under the Central Act are as much part of law as the principal Act itself. Another decision of the Apex Court in the case **State of Jammu & Kashmir V/s.M.S.Farooqi - (1972) 1 SCC 872**, the Constitution Bench of the Supreme Court has held that the All India Services (Discipline and Appeal) Rules which was made under the Central Act was in conflict with the State of Jammu & Kashmir Government Servants (Prevention of Corruption) Act 1962 and therefore held that the State Act had to be read down so as to give effect to the Rules. In the said case the State of Jammu & Kashmir Government Servants (Prevention of Corruption) Act 1962 had provided for additional punishment which had not been provided in the Discipline

and Appeal Rules. The Apex Court therefore held that since the Rules which were framed under the Central Act did not contain any such punishment, and therefore, both the statutes could not go together, and as such the State Act has to be read down to give primacy to the All India Services (Discipline and Appeal) Rules. The Apex Court in the case of **State of Tamil Nadu V/s.Aadhiyaman Educational & Research Institute - (1995) 4 SCC 104**, has held that for the purposes of Article 254, Central Legislation would include subordinate legislation made under the Central law, and the same would form part of the parent Act itself.

135. Mr.Singhvi, the learned Senior Counsel's contention that ABC Rules are sub-ordinate legislation hence the same cannot override Section 191BA of BMC Act, cannot be sustained in law, in the light of various judgments of the Hon'ble Supreme Court, especially (a) **Express Newspapers Case - AIR 1958 SC 578**, (b) **State of Tamil Nadu V/s.M/s.Hind Stone and Others - (1981) 2 SCC 205**, (c) **State of Tamil Nadu V/s.Andhiyaman Educational & Research Institute - 1995 (4) SCC 104**, wherein in no uncertain terms it is held that such rules after being laid before the Parliament, becomes part of the parent Act. There is no dispute that in the instant case the ABC Rules have been laid before the Parliament. The principle that the ABC Rules forms part of the PCA Act, is reiterated expressly in Rule 13 of ABC Rules.

136. In any event important aspect to be noted is that BMC Act has been enacted by the State Legislature under Entry 5 of List-II - "local government". Hence, Article 254(2) of the Constitution of India will have no application as Section 191BA has not been enacted by State Legislature under Concurrent List III of Seventh Schedule to the Constitution of India. The above legal position has been clearly enunciated by the Hon'ble Supreme Court in the case of **Bar Council of India V/s.Board of Management Dayanand College - (2007) 2 SCC 202.**

137. Another important aspect to be noted is that the Prevention of Cruelty to Animals Act, 1960 and the Rules framed thereunder are a comprehensive scheme for prevention of cruelty to animals. The above falls under "Prevention of Cruelty to Animals" under Entry 17 of List-III. It is a well settled position in law that if a State Legislation is in conflict with the Central Act, then it has to yield to the primacy of central legislation under Article 254 (1) of the Constitution of India.

138. From the xerox copy of the assent obtained by the State of Maharashtra from the President of India with regard to Maharashtra Act 51 of 1975, as produced by the learned Solicitor General of India, it is explicit that

the assent was obtained under Article 200 and not under Article 254(2) of the Constitution of India. Over and above, while obtaining the assent of the President of India, no repugnancy was pointed, which is very essential. Hence the primacy of Section 191BA of the BMC Act, cannot be raised under Article 254(2) of the Constitution of India.

139. In any event, by adopting the principle of harmonious construction, the Municipal Commissioner can exercise his discretion to kill stray dogs under Section 191BA of BMC Act, subject to ABC Rules. In that process neither Section 191BA nor ABC Rules are rendered ineffective or redundant.

140. To put it in other words, the Municipal Commissioner can exercise his power under Section 191BA to kill stray dogs which are rabid, incurably ill and mortally wounded as per the procedure laid down in ABC Rules.

141. All the animal activists are in clear agreement that even perennially violent dog can be included in the category of "incurably ill" category, since such violent dogs pose danger to human beings.

142. In the light of the above discussion, both the questions are answered in the negative.

143. The above Petitions be placed before the concerned Division Bench for appropriate orders.

(DR.S.RADHAKRISHNAN, J.)

Per D.B.Bhosale, J. :-

144. I have carefully read the Judgment proposed by my senior colleague Dr.S.Radhakrishnan, J. He has elaborately dealt with the facts, arguments advanced by learned counsel and relevant provisions of law. Hence, I consider it unnecessary to reproduce the facts including the arguments advanced on behalf of the parties.

144.1 I find it difficult to concur with some of the reasoning and conclusions arrived at by my brother Dr.S.Radhakrishnan, J. However, I respectfully agree with the following findings recorded by him.

(a) That neither the Mumbai Municipal Corporation Act, 1888 (for short, "MMC Act")

nor the Goa Municipalities Act, 1968 (Act No.7 of 1969) (for short, "GM Act"), casts any mandatory obligation of mass killing of stray dogs, but they only confer discretion to the Municipal Commissioner to kill stray dogs.

(b) Discretion granted to the Commissioner is not an unbridled discretion or an absolute power to destroy stray dogs.

(c) Section 191BA of MMC Act does not lay down any parameters for exercising the discretionary power of the Municipal Commissioner.

(d) There is no conflict at all between the ABC Rules and the Act of 1960 and between MMC Act and the Act of 1960 and if there is conflict between the MMC Act and the Act of 1960/ABC Rules, the Central Legislative Scheme will have primacy over the MMC Act.

(e) In the present case, harmonious construction has to be adopted vis-a-vis the central legislative scheme and the local legislation being MMC Act and see that both can co-exist.

145. I find it difficult to concur with the opinion of Dr.S.Radhakrishnan, J. that the Act of 1960 and the ABC Rules prescribe the circumstances and situation under which stray dogs can be put to sleep or exterminated and the discretion which is conferred by the proviso to section 191BA (2) of MMC Act (or Section 278A of GM Act and section 293 of Maharashtra Councils, Nagar Panchayats and Industrial Townships Act,1965, hereinafter referred to "the Municipalities Act"), has to be exercised in the circumstances mentioned in rules 9 and 10 of the ABC Rules. In other words, according to brother Dr.S.Radhakrishnan,J., under the central legislative scheme, the stray dogs can be destroyed only if they are incurably ill including perennially violent, mortally wounded or rabid. As I am finding it difficult to agree with the above opinion expressed by my senior colleague Dr.S.Radhakrishnan,J., I proceed to record my separate opinion.

146. The Prevention of Cruelty to Animals Act, 1890, (11 of 1890),(for short, "the Act of 1890") was enacted in order to prevent cruelty to animals. In the course of administering this Act, many deficiencies were found, and as a result of which the Government of India appointed a Committee to

investigate and suggest measures for the prevention of cruelty to animals and to put the law on sound footing. The Committee did find the Act of 1890 had restricted scope as it was applicable only to urban areas within municipal limits and that the term 'animal' was defined only to cover domestic or captured animal and that there was no provision for prevention of cruelty to animals other than domestic and captured animals. The said Committee accordingly suggested its replacement by a more comprehensive Act.

147. To give effect to the recommendations of the Committee, the Prevention of Cruelty to Animals Bill was introduced in the Parliament, which contained, besides, declaring certain type of cruelty to animals to be offences and providing necessary penalties for such offences and making some of the more serious of them cognizable. The Bill also contained the establishment of an Animal Welfare Board with the object of promoting measures for animal welfare. It also contained the recommendation for the establishment of a Committee to control experimentation on animals in order to prevent cruelty to animals during experimentation and the provisions for licensing and regulating the training and performance of animals for the purpose of any entertainment to which the public are

admitted through sale of tickets. Accordingly, Act 59 of 1960 was enacted and it received the assent of the President on 26th December, 1960. It came on the Statute book as "The Prevention of Cruelty to Animals Act, 1960 (59 of 1960) (for short, "the Act of 1960"). The Act of 1960 was amended by the Prevention of Cruelty to Animals (Amendment) Act, 1982. The main objective of the Act of 1960 is to prevent the infliction of unnecessary pain or suffering on animals.

148. The Act of 1960 is divided into six Chapters, consisting of 41 sections. Chapter I contains three sections including definitions. Clause (a) of Section 2 defines "animal" to mean any living creature other than a human being. This definition is pari materia with the definition of the term "animal" under Section 47 of the Indian Penal Code. Clause (c) defines "captive animals"; clause (d) defines "domestic animals"; clause (e) defines "Local authority" and clause (f) defines "owner" which means not only the owner but also any other person for the time being in possession or custody of the animal, whether with or without consent of the owner. Apart from the other definitions,, clause (h) of Section 2 defines the term "prescribed" which means prescribed by rules made under the Act of 1960.

148.1 Chapter II consists of Sections 4 to 10 and they deal with establishment of Animal Welfare Board of India (for short, "the Board"), its constitution, term of office and conditions of service of members of the Board, appointment of a Secretary and other employees of the Board, functions of the Board and its power to make regulations. Clause (b) of Section 2 defines "Board" which means the Board established under Section 4, and as reconstituted from time to time under Section 5A. Section 4 in this Chapter provides for establishment of Animal Welfare Board of India for the promotion of animal welfare generally and for the purpose of protecting animals from being subjected to unnecessary pain or suffering, in particular. The Board under this Chapter is a body corporate having perpetual succession and a common seal with power, subject to the provisions of the Act of 1960, to acquire, hold and dispose of property and may by its name sue and be sued. The main functions of the Board appears to be to keep the law in force in India for the prevention of cruelty to animals under constant study and advise the Government on the amendments to be undertaken in any such law from time to time. It also has one of its functions to advise the Central Government on the making of rules under

this Act with a view to preventing unnecessary pain or suffering to animals generally.

148.2 Clause (f) of Section 9 of the Act of 1960, which provides for functions of the Board, states that the Board shall take all such steps as it may think fit to ensure that "unwanted animals" are destroyed by local authorities, whenever it is necessary to do so, either instantaneously or after being rendered insensible to pain or suffering. The Board is also conferred with the power to make regulations as it may think fit for the administration of its affairs and for carrying out its functions.

148.3 Chapter III consists of three sections, that is, Sections 11 to 13. Clauses (a) to (o) of Section 11 prescribe the acts of cruelty to animals and it provides punishment for treating animals with cruelty. Clause (l) of sub-section (1) of Section 11 provides that if "any person" mutilates any animal or kills any animal, including stray dogs, by using the method of strychnine injections in the heart or in any other unnecessarily cruel manner; he shall be punishable, in the case of a first offence, with fine and, in the case of a second or subsequent offence committed within three years of the previous offence, with fine or with

imprisonment for a term which may extend to three months, or with both. Though the term "person", as occurred in sub-section (1) of Section 11, is not defined, it shall also include the authority of any law, such as Municipal Councils/Corporations for committing the acts under sub-section (1) or for exercising the powers under clauses (a) to (e) of sub-section (3).

148.4 Sub-section (2) of Section 11 states that an owner of animal shall be deemed to have committed an offence if he has failed to exercise reasonable care and supervision with a view to the prevention of offence under sub-section (1) of Section 11.

148.5 Sub-section (3) of Section 11 states that nothing in this section shall apply to the acts enumerated in clauses (a) to (e) of this sub-section. Clauses (b) and (c) of sub-section (3) state that nothing in Section 11 shall apply to the destruction of stray dogs in lethal chambers or by such other methods as may be prescribed, and to the extermination or destruction of any animal under the authority of any law for the time being in force.

148.6 Chapters IV and V contain the provisions regarding experimentation on animals and performing

animals. Chapter VI has miscellaneous provisions contained in Sections 28 to 41. Section 38 in this Chapter provides for the power of the Central Government to make rules to carry out the purposes of this Act. It further provides, that in particular, and without prejudice to the generality of the provisions in the Act of 1960, the Central Government has power to make rules providing for all or any of the matters mentioned in clauses (a) to (1) of sub-section (2) of Section 38.

148.7 Clause (ea) of sub-section (2) of Section 38 empowers the Central Government to make rules providing for the other methods of destruction of stray dogs referred to in clause (b) of sub-section (3) of Section 11 of the Act of 1960. No rules, however, are made under this clause (ea) of sub-section (2) of Section 38 so far. Clause (1) of this section further empowers the Central Government to make rules providing for "any other matter which has to be, or may be prescribed", thereby, further empowering the Central Government to add other matter/s for making rules. Clauses (e), (ea) and (ja) seem to have been inserted by exercising the powers under clause (1) of sub-section (2) of Section 38 by Act of 26 of 1982 with effect from 30th July, 1982. Sub-section (3) of Section 38 provides for punishment to any

person, who contravenes or abets the contravention of any rules made under this section, which may extend to one hundred rupees, or with imprisonment for a term which may extend to three months, or with both. Under Section 38A, the Rules made by the Central Government and the Regulations made by the Board require to be laid before each House of Parliament before they are given effect in modified form or are given no effect, as the case may be.

149. The Act of 1960 was introduced with an objective to prevent the infliction of unnecessary pain or suffering on animals and the Board has been constituted with all the powers for carrying out its objectives. While conferring powers on the Board the Legislature has not forgotten to confer upon them the power to take all such steps as it may think fit to ensure that "unwanted animals" are destroyed by "Local Authorities" whenever it is necessary to do so, either instantaneously or after being rendered insensible to pain or suffering. The words "wherever it is necessary to do so" employed in this provision, in my view, confer discretionary powers on the Board. Similarly while making the act of mutilation or killing of any animal including stray dogs by using the method of strychnine injections in the heart or any other unnecessary cruel manner, an offence and making it

punishable under sub-section (1) of Section 11 the Legislature has also not forgotten in allowing the destruction of stray dogs in lethal chambers or by such other methods as may be prescribed, notwithstanding anything contained in sub-sections (1) and (2) of Section 11. Similarly the extermination or destruction of any animal under the authority of any law for the time being in force is also allowed under sub-section (3) of Section 11 notwithstanding anything contained in sub-sections (1) and (2) of that section. The Legislature has further conferred the power on the Central Government to make rules and on the Board to make regulations providing for the other methods of destruction of stray dogs referred to in clause (b) of sub-section (3) of Section 11.

150. Thus, the scheme of the Act, insofar as dogs are concerned, clearly shows that destruction of unwanted/stray dogs in lethal chambers or by such other methods as may be prescribed, whenever it is necessary to do so, would not constitute cruelty to animals or an offence under Section 11(1) of the Act of 1960. The sole objective of the Act of 1960 is to prevent the infliction of unnecessary pain or suffering on animals. In this case, we need to consider as to which dogs, Local Authorities can destroy, whether all or only the categories carved

out by the Animal Birth Control (Dogs) Rules, 2001 (for short, "ABC Rules").

151. That takes us to consider the Animal Birth Control (Dogs) Rules, 2001 (for short, "ABC Rules"). The draft rules were published as required under sub-section (1) of Section 38 of the Act of 1960 vide Ministry of Culture notification dated November 2, 2001 in the Gazette of India, Extraordinary, Part II, Section 3, sub-section (i) dated November 2, 2001 and the objections and suggestions were invited and after having considered the same, in exercise of the powers conferred upon by sub-section (1) (2) of Section 38 of the Act of 1960, the Central Government made these rules and brought them into force vide notification dated 24th November, 2001. These rules are based on the guidelines formulated by the Division Bench of this Court in Writ Petition No.1596 of 1998 and are in conformity with the "Guidelines for Dog Population Management" published by World Health Organisation (WHO) and WSPA in 1990.

151.1 ABC Rules contain 13 Rules. Rule 3 provides for classification of dogs and their sterilization. Dogs are classified as pet dogs and street dogs. So far as pet dogs are concerned, a responsibility

is put on the owner for the controlled breeding, immunization, sterilization and licensing in accordance with these rules and the law for the time being in force within a specified local area. Sub-rule (3) of rule 3 provides that the street dogs shall be sterilized and immunized by participation of animal welfare organizations, private individuals and the local authority. Rule 4 deals with formation of committee for monitoring sterilization and immunization programmes. The committee is responsible for planning and management of dog control programme in accordance with these rules.

152. Rule 5 of ABC Rules provides for the functions of the committee appointed under these rules. It would be advantageous to reproduce the relevant portion of the said rule which reads thus:-

"5. Functions of the Committee: The committee constituted under rule 4 shall be responsible for planning and management of dog control programme in accordance with these rules. The committee may:

(a) issue instructions for catching, transportation, sheltering, sterilisation, vaccination, treatment and release of sterilized vaccinated or treated dogs.

(b) authorize veterinary doctor to decide

on case to case basis the need to put to sleep critically ill or fatally injured or rabid dogs in a painless method by using sodium pentathol. Any other method is strictly prohibited.

(c) xxx    xxxx    xxx

(d) xxx    xxxx    xxx

(e) xxx    xxxx    xxx

(f) take such steps for monitoring the dog bite cases to ascertain the reasons of dog bite, the area where it took place and whether it was from a stray or a pet dog.

(g) xxx    xxxx    xxx

152.1 A careful perusal of this rule shows that the main function of the committee is to issue instructions for catching, transportation, sheltering, sterilisation, vaccination, treatment and release of "sterilized vaccinated or treated dogs". It also provides that the dogs caught for the purpose of vaccination, the veterinary doctor to decide on case to case basis the need to put to sleep "critically ill" or "fatally injured" or "rabid" dogs in a painless method by using sodium pentathol. Any other method to put to sleep is "strictly prohibited" under rule (b) of rule 5.

152.2 Under Rule 6 Local Authorities are obligated to provide for establishment of a sufficient number of dog pounds including animal kennels/shelters

which may be managed by animal welfare organizations. The local authorities are also supposed to provide for an ambulance-cum-clinical van as mobile centre for "sterilisation and immunization". Sub-rule (2) of rule 6 provides that "if" the Municipal Corporation or the local authority thinks it expedient to control street dog population, it shall be incumbent upon them to sterilize and immunize street dogs with the participation of animal welfare organizations, private individuals and the local authority. Sub rule (3) provides that the animal welfare organizations shall be reimbursed the expenses of sterilization/immunization at a rate to be fixed by the Committee on fortnightly basis based on the number of sterilization/immunization done. It is thus clear that the main objective is to promote sterilization/immunization programme to control street dogs population.

153. Rule 7 of the ABC Rules provides for capturing/sterilization/immunization/release of the captured dogs which shall be based on specific complaints for which the local authority in consultation with the Monitoring Committee, is expected to set up a dog control cell to receive complaints about dog nuisance, dog bites and information about rabid dogs. Capturing of dogs is

also based on receipt of specific complaints about dog nuisance or dog bites. Same shall be attended on priority basis, irrespective of the area from which the complaint comes. The rule further provides as to what steps need to be taken on receipt of such complaint including recording of a complaint in a register to be maintained for permanent record. Sub-rule (2) of rule 7 provides constitution of dog capturing squads. It would be relevant to reproduce sub-rules 3 and 6 of rule 7.

(3) On receipt of specific complaint or for capturing dogs in normal course the dog squad will visit the concerned area, capture the dogs identified by the complaint in case of complaint oriented capturing and other dogs in case of general capturing. All the dogs caught will be tagged for identification purposes and to ensure that the dogs are released in the same area after sterilization and vaccination. Only stipulated number of dogs, according to the Animal Birth Control Programme target, shall be caught by the van. A record of dogs captured shall be maintained in a register, mentioning therein the name of the area/locality, date and time of capture, names of persons in the dogs squad on that particular day and details about dogs captured such as number of male dogs, number of female dogs, number of puppies etc."

"(6) The captured dogs shall be brought to the dog kennels/dog pounds managed by the Animal Welfare Organisations (AWOs). On reaching the dog pounds all the dogs shall be examined by the veterinarians and healthy and sick dogs should be segregated. Sick dogs should be given proper treatment in the hospitals run by

Society for Prevention of Cruelty to Animals (SPCA)/other institutions and only after they are treated they should be sterilized and vaccinated. The dogs will be sterilized/vaccinated under the supervision of the veterinarians of the hospital run by the Society for Prevention of Cruelty to Animals (SPCA), Animal Welfare Organization or other dog shelters. After necessary period of follow up, the dogs shall be released at the same place or locality from where they were captured and the date, time and place of their release shall be recorded. The representative of Animal Welfare Organizations (AWOs) shall accompany the dog squad at the time of release also".

153.1 Sub-rule (3) read with rules 5 and 6, thus, show that the object of capturing dogs in normal course and releasing them after sterilization and vaccination is meant for controlling the dogs population. Sub rule (6) provides that while doing so veterinarians are expected to examine the captured dogs and segregate sick dogs for proper treatment and only after they are treated they need to be sterilized and vaccinated and thereafter released at the same place or locality from where they were captured. Though this rule provides for capturing of dogs on specific complaint of nuisance or dog bite, it does not state as to what steps should be taken to avoid nuisance of any particular dog. This provision simply states the procedure that needs to be followed for capturing such dog and releasing it after sterilization and

vaccination.

154. Rule 8 provides for identification and recording of sterilized and immunised dogs. Rules 9 and 10 provide for euthanasia of street dogs and furious or dumb rabid dogs. Rules 9 and 10 read thus;

"9. Euthanasia of Street Dogs: Incurably ill and mortally wounded dogs as diagnosed by a qualified veterinarian appointed by the committee shall be euthanised during specified hours in a humane manner by administering sodium pentathol for adult dogs and Thiopental Introperitoneal for puppies by a qualified veterinarian or euthanised in any other humane manner approved by Animal Welfare Board of India. No dog shall be euthanised in the presence of another dog. The person responsible for euthanising shall make sure that the animal is dead, before disposal.

10. Furious or dumb rabid dogs: (1) On the receipt of complaints from the public to the Dog Control Cell of the Local Authority or on its own, the dog squad of the Local Authority would catch such dogs, suspected to be rabid.

(2) The caught dog would then be taken to the pound where it would be isolated in an isolation ward.

(3) The suspected rabid dog would then be subjected to inspection by a panel of two persons i.e.

(i) a veterinary surgeon appointed by the Local Authority and

(ii) a representative from an Animal Welfare Organization

(4) If the dog is found to have a high

probability of having rabies it would be isolated till it dies a natural death. Death normally occurs within 10 days of contracting rabies. Premature killings of suspected rabid dogs therefore prevents the true incidence of rabies from being known and appropriate action being taken.

(5) If the dog is found not to have rabies but some other disease it would be handed over to the AWOs who will take the necessary action to cure and rehabilitate the dog. "

154.1 From bare perusal of Rules 9 and 10, it is clear that only three categories of the dogs, namely, incurably ill, mortally wounded and rabid, are allowed to be eliminated in the manner it is provided under these rules. There is no dispute that violent dogs are also covered in the category of incurably ill and such dogs are allowed to be eliminated after following the due procedure prescribed under these rules.

155. Rules 11 and 12 provide for disposal of carcasses and guidelines for breeders, whereas rule 13 provides for application of rules where local bye-laws etc. exist. It says that if there is in force any Act, rule, regulation or bye-law made under any law for the time being in force by the State or the Local Authority in respect of any of the matters for which provision is made in these rules, such rule, regulation or bye-law shall to

the extent to which it contains provisions less irksome to the animal than those contained in these rules, shall prevail; and it contains provisions more irksome to the animal than those contained in these rules, be of no effect. In short, rule 13 provides that if there is any inconsistency between the ABC rules and any Act, rule, regulation or bye-law, made under any law, the ABC Rules shall prevail.

156. Thus, the scheme of the ABC Rules and more particularly Rules 5,6,7,9 and 10 show that not "only on receipt of the complaints about nuisance or dog bites" but "even otherwise" the committee is responsible for planning and management of the dog control programme and to issue instructions for capturing dogs for sterilization/vaccination of the dogs and releasing the sterilized/vaccinated and treated dogs. In this process, the authorized veterinary doctor can decide on case to case basis the need to put to sleep incurably ill or mortally wounded and rabid dogs in painless method by using sodium pentathol. Insofar as the dogs other than the three categories of the dogs, namely, critically ill, mortally wounded and rabid, the Committee is authorised/empowered to implement dog birth control programme in accordance with the ABC rules. The Legislature while drafting the rules

and more particularly rule 5(b) has made its intention clear that while allowing to put a dog to sleep only by the method prescribed and has made it further clear that any other method is "strictly prohibited". Such expression has not been employed in rules 9 and 10 which deal with euthanasia of street dogs and furious and dumb rabid dogs. The rules do not specifically state that putting dogs other than the categories of the dogs reflected in rules 9 and 10 to sleep is "strictly prohibited".

157. The conjoint reading of rules 7,9, and 10 would show that in the process of examination of every captured dog by veterinarians for the purpose of vaccination and sterilization, if found to be incurably ill, mortally wounded or rabid, such dogs need not be treated and they may be put to sleep in human manner. In short, time, energy and money need not be spent treating such dogs and they can be put to sleep. Rules 9 and 10 do not prohibit putting any other stray/unwanted dog to sleep in human manner. As a matter of fact these rules do not deal with the power of municipal authorities or the Board to destroy stray/unwanted dogs, nor do these rules either control or dilute the power of the Municipal Authorities to destroy stray dogs which is conferred upon them under sections 9(f) and 11(3)(b)(c) of the Act of 1960.

158. Section 9 and 11 (3)(b) empower the Board/Local Authority to destroy unwanted/stray dogs in lethal chamber or by such other method as may be prescribed. This power conferred upon the Board and Local Authority under the provisions of the Act of 1960, as observed earlier, is not curtailed by the ABC Rules. The ABC Rules only deal with birth control programme of the dogs and not the power of the Board or the Local Authority to eliminate dogs as provided for under Section 9(f) and Section 11(3)(b) of the Act, 1960. Undoubtedly, the ABC Rules provide for euthanasia of street dogs belonging to aforementioned three categories, but only when veterinarian comes across such dogs captured while implementing dog control programme. The words "wherever it is necessary to do so" employed in this provision, in my view, confer discretionary powers on the Board. The submission that these words in section 9(f) relate to only the circumstances prescribed under Rules 9 and 10 of the ABC Rules must be rejected. These words clearly suggest and confer discretion on the Board to decide and take steps to destroy unwanted/stray dogs. I do not suggest that every stray dog is allowed to be killed under Section 11(3)(b) of the Act of 1960. The power has been conferred upon the Board/Local Authority to exercise its discretion

and decide as to which stray dog is unwanted and needs to be put to sleep. as proved for under Section 9(f) and 13(3) of the Act of 1960. This power conferred on these authorities under the Act of 1960 is unfettered and cannot be said to have been withdrawn or curtailed by introducing the ABC Rules. The objective of the ABC Rules is to control street dogs population and it provides the measures/procedures to implement the dog control programme.

159. Let us now turn to the relevant provisions dealing with dogs in different municipal statutes. Goa Municipalities Act, 1968 (Act No.7 of 1969), (for short, "GM Act"), the Mumbai Municipal Corporation Act, 1888,(for short "MMC Act") and the Maharashtra Municipalities Act (for short, "MM Act") contain similar provisions as to dogs. Section 278 of GM Act contains the provisions as to dogs. Section 278 reads thus:

"278. Provision as to dogs.

(1) A Council may by public notice require that every dog while in the street and not being led by some person shall be muzzled in such a way as to allow the dog freely to breathe and to drink, while effectually preventing it from biting.

(2) When a notice under sub-section (1) has been issued, the Chief Officer may

take possession of any dog found wandering unmuzzled in any public street or place and may either detain such dog until its owner has within three clear days claimed it, provided a proper muzzle for it and paid all the expenses of its detention or may, subject to the provisions of sub-sections (3) and (4) cause it to be sold or destroyed.

(3) When a dog which has been detained under sub-section (2) is wearing a collar with the owner's name and address thereon, or a number ticket or any other mark by which the owner of the dog can be identified, such dog shall not be destroyed until a letter stating the fact that it has been so detained has been sent to the said address and the dog has remained unclaimed for three clear days.

(4) Any dog which is not claimed within the period specified in sub-section (3), or any dog the owner of which has failed to comply with the provision of sub-section (2) within the specified period therein, may be sold or destroyed by the Chief Officer after having been detained for the period of three days specified in sub-section (3);

Provided that any dog which is found to be rabid may be destroyed at any time.

(5) The Chief Officer may at any time destroy, or cause to be destroyed, or confine or cause to be confined, for such period as he may consider necessary, any dog or other animal suffering from rabies or bitten by any dog or other animal suffering or suspected as aforesaid.

(6) All expenses incurred by the Chief Officer under this section may be recovered from the owner of any dog which has been taken possession of or detained in the same manner as an amount due on account of property tax.

(7) No damages shall be payable in respect of any dog destroyed or otherwise disposed of under this section."

159.1 A plain reading of this section makes it clear that the Chief Officer of the Municipality is having a "discretion" either to sell or destroy any dog if the conditions prescribed therein are not complied with by the owner of any dog besides having an unfettered power to destroy any dog which is found to be rabid.

159.2 I find similar provision in MMC Act contained in Section 191-BA, which reads thus:

"191-BA. Control and other provisions as to dogs.- (1) If any dogs are found or reported to be a source of nuisance to the residents of any building or locality, the Commissioner or any person duly authorised by him may enter any premises for the purposes of seizing such dogs.

(2) Any dog so seized shall be kept in the municipal kennel and if any person, within three days from the date of such seizure, satisfies the Commissioner that he is the owner or person in charge of such dog, the Commissioner may order it to be delivered to such person on payment of the tax, if any due and the costs incurred by the Commissioner by reason of its detention and on such person giving an undertaking that the dog will thereafter be kept in accordance with the conditions of the licence and will not be a source of nuisance to the residents of the building or locality:

Provided that, if, within the said three days, no person satisfies the Commissioner that he is the owner or person in charge of the dog and pays the tax and the costs or gives the undertaking aforesaid, the Commissioner may cause the dog to be destroyed.

(3) If a stray dog has bitten any person the Commissioner may order it to be detained in the municipal kennel for its incubation period, if it is so desired by the person who has been bitten by that dog, and no charge shall be recovered from any person for such detention. If a licenced dog, which has bitten any person, is brought to the municipal kennel, the Commissioner may order it to be detained therein for its incubation period, if so desired by the owner or person in charge of such dog or the person who has been bitten by that dog, on payment of detention charges not exceeding Rs.2/- per day as may be determined by the Commissioner.

(4) If any dog detained under sub-section (2) or (3) is after examination found to be suffering from rabies, the Commissioner shall order it to be destroyed forthwith.

(5) No damage shall be payable in respect of any dog destroyed under this section."

160. The relevant provision contained in Section 293 of the Maharashtra Councils, Nagar Panchayats and Industrial Townships Act, 1965 (for short, "the Municipalities Act") is pari materia with the provisions in GM Act and hence we do not quote the same.

161. The provisions contained in Section 191-BA were inserted in 1975 by Maharashtra Act No.LI of 1975. This Act, made by the Legislature of the State of Maharashtra, received the assent of the President of India on 17.10.1975 and it was published in the Maharashtra Government Gazette on

the 24th October, 1975.

162. Section 191-BA of MMC Act confers powers upon the Local Authority to capture dogs. Sub-sections (1) and (2) of Section 191-BA specifically provide that if any dogs are found or reported to be a source of "nuisance" to the residents of any building or locality, the Commissioner or any person duly authorised by him may enter any premises for the purposes of seizing such dogs. After having seized such dogs, the Municipal Authority is expected to keep the dogs in municipal kennel and if any person, within three days from the date of such seizure, satisfies the Commissioner that he is the owner or person in charge of such dog, the Commissioner may order it to be delivered to such person on payment of the tax, if any, due and the costs incurred by the Commissioner by reason of its detention and on such person giving an undertaking that the dogs will thereafter be kept in accordance with the conditions of the licence and will not be a source of nuisance to the residents of building or locality. However, if, within the said three days, no person satisfies the Commissioner that he is the owner or person in charge of the dog, as aforementioned, the Commissioner "may" cause the dog to be destroyed.

163. A plain reading of section 191BA makes it clear that it is only if any dog is found or reported to be a source of nuisance to the residents of any building or locality, the Commissioner or any person authorised by him has power to capture such dog and in the event such dog is found to be ownerless, it confers further power upon the Commissioner to take a decision to destroy such dog. There is no mandate that every such dog must be destroyed. Similarly, the term "nuisance" means public nuisance and not a private nuisance.

163.1 Sub-section (3) of Section 191-BA deals with stray and pet dogs. If a stray or licenced dog bites any person the Commissioner may order it to be detained in the municipal kennel for its incubation period, if it is so desired by the owner or a person who has been bitten by that dog. If any dog detained under sub- sections (2) or (3) is after examination found to be suffering from rabies, the Commissioner "shall" order it to be destroyed forthwith. The Legislature has used the expressions "may" and "shall" in sub-section (2) and sub-section (3) respectively, thereby, making its intent clear that under sub-sections (1) and sub-section (2) if any dog is captured, having found or reported to be a source of nuisance, the

Commissioner has a discretion to decide whether to destroy such dog or not, whereas, in the event the dog is found to be suffering from rabies, the Commissioner has all the powers to put such dog to sleep forthwith.

164. Mr Singhvi, learned senior counsel for the Mumbai Municipal Corporation, submitted that though the word "may" is used in sub-section (2) of Section 191-BA, it should be treated as mandatory, conferring the power upon the Commissioner to destroy all captured stray dogs. In other words, he submitted that the Municipal Corporation has power to cause destruction of every dog captured, if it remains unclaimed for a period of three days.

165. It is true that the word "may" is capable of meaning "must" or "shall" in the light of context and where a discretion is conferred upon a public authority coupled with an obligation, the word "may", which denotes discretion, needs to be construed to mean command. (See, **Rangaswami Textile Commissioner Vs Sagar Textiles Mills (P) Ltd, 1977 (2) SCC 578**). It is equally true, that the word "may" is primarily permissive and only in certain circumstances, it is treated as mandatory. It is used to give a discretion to courts/public authority. The word "may" in sub-section (2) of

Section 191-BA, in my view, is not mandatory but directory in nature. It simply confers a discretion upon the authority to exercise its power. The scheme of Section 191-BA itself make it clear. In sub-section (3) thereof, the word "shall" is used by the Legislature conferring untrammelled powers on the Commissioner to destroy rabid dogs. Where the Legislature uses two words "may" and "shall" in two different parts of the same provision, prima facie, it would appear that the Legislature manifested its intention to make one part directory and another mandatory. Insofar as Section 191-BA is concerned, I have no hesitation to hold that the Legislature by using the word "may" in sub-section (2) and "shall" in sub-section (4) of Section 191-BA has conferred "discretion" upon a public authority to decide whether to destroy captured dog.

166. The expression "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion

may properly operate.(See **Corpus Juris Secodum, Vol.27, Page 289 as referred in P.Ramanatha Aiyar's Advanced Law Lexicon**). Discretion, undoubtedly, means judicial discretion and not whim, caprice or fancy of a Judge or an authority, which is empowered to exercise the same. It does not empower a man to do what he likes but what he ought to do. It is governed by the rule of law and must not be arbitrary,vague and fanciful.(See, **AIR 1967 SC 1427,1434**). In other words, when any thing is left to any person, to be done according to his to his discretion, the law intends it must be done with sound discretion, and according to law, when it is applied to public functionaries.

166.1 The Supreme Court in **Bangalore Medical Trust V B.S.Muddappa, (1991) 4 SCC 54** has observed thus:

"Discretion is an effective tool in administration. It provides an option to the authority concerned to adopt one or the other alternative. But a better, proper and legal exercise of discretion is one where the authority examines the fact, is aware of law and then decides objectively and rationally what serves the interest better. When a statute either provides guidance or rules or regulations are framed for exercise of discretion then the action should be in accordance with it. Even where statutes are silent and only power is conferred to act in one or the other manner, the Authority cannot act whimsically or arbitrarily. It should be guided by reasonableness and fairness. The legislature never intends its authorities to abuse the law or use it

unfairly. Where the law requires an authority to act or decide, if it appears to it necessary or if he is of opinion that a particular act should be done then it is implicit that it should be done objectively, fairly and reasonably. In a democratic set up the people or community being sovereign the exercise of discretion must be guided by the inherent philosophy that the exerciser of discretion is accountable for his action. It is to be tested on anvil of rule of law and fairness or justice particularly if competing interests of members of society is involved. Decisions affecting public interest or the necessity of doing it in the light of guidance provided by the Act and rules may not require intimation to person affected yet the exercise of discretion is vitiated if the action is bereft of rationality, lacks objective and purposive approach. Public interest or general good or social betterment have no doubt priority over private or individual interest but it must not be a pretext to justify the arbitrary or illegal exercise of power. It must withstand scrutiny of the legislative standard provided by the statute itself. The authority exercising discretion must not appear to be impervious to legislative directions. The action or decision must not only be reached reasonably and intelligibly but it must be related to the purpose for which power is exercised. No one howsoever high can arrogate to himself or assume without any authorisation express or implied in law a discretion to ignore the rules and deviate from rationality by adopting a strained or distorted interpretation as it renders the action ultra vires and bad in law."

166.2 Similarly, in Sarika Shivprakash Sharma Vs. State of Maharashtra, (1995) 1 Mah L J 799 has observed that "though the word 'discretion' literally means and denotes an uncontrolled power of disposal, yet, in law, the meaning given to this word appears to be a power to decide within the limits allowed by positive rules of law, as to the

punishments, remedies or costs. Discretion has to be exercised within the four corners of the conscience; it has to be just and proper. It cannot clothe the person with arbitrary, capricious or unrestrained power. It essentially is bounded by the rules and principles of law."

166.3 It is thus clear that the discretion conferred upon the Commissioner under Section 191-BA to destroy the dogs is not uncontrolled power of destruction of the dog. The Commissioner should exercise the discretion within the four corners of the conscience and it has to be just and proper. The Commissioner cannot indiscriminately decide to destroy all the dogs, captured on receipt of the complaint or having found to be a source of nuisance to the residents of any building or locality and remained to be claimed by the owners.

164. Sub-section (1) of Section 191-BA speaks about nuisance to the residents of any building or locality and not about nuisance to an individual resident of any building or locality. The expression nuisance used in this sub-section, means public nuisance. Of course, public nuisance would also, in a given case, would mean nuisance to an individual as a member of public. A conjoint reading of sub-sections (2) and (3) would show that

Municipal Commissioner "may" decide to destroy an unclaimed dog only. The dog claimed by any owner cannot be destroyed and the only power conferred, in such a case, is to release the dog on conditions enumerated under sub-rule (2) and after following the due procedure under sub-section (3) of Section 191-BA. Sub-sections (3) and (4) of Section 191-BA, thus, mandate to kill the dog suffering from rabies whereas if the dogs are found or reported to be a source of nuisance, there is no such mandate to kill such dog. In short, sub-sections (1) and (2) of Section 191-BA does not confer a power on the Municipal Authority to enter any building or locality and indiscriminately capture all the dogs and keep them in the municipal kennel and then after waiting for three days kill all the dogs which are not claimed by the owner or person in charge of such dogs. It is only the dogs which are found or reported to be a source of nuisance to the residents of any building or locality, the Commissioner is conferred with the power to capture and then follow the procedure as contemplated under Section 191-BA.

165. The word "nuisance" includes any act, omission, place or thing which causes or is likely to cause injury, danger, annoyance or offence to the sense of sight, smell or hearing, or

disturbance to rest or sleep or which is or may be dangerous to life or injurious to health or property. (See **P. Ramanatha Aiyer's Advanced Law Lexicon**). The Supreme Court in State of M.P. Vs. Kedia Leather and Liquor Ltd and others, 2003(7) SCC 389 has observed, the term "nuisance" as used in law is not a term capable of exact definition and it has been pointed out by Halsbury's Laws of England that; "even in the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisance or whether they do not rather fall under other divisions of law of tort". "Nuisance" is an inconvenience which materially interferes with the ordinary physical comfort of human existence and does not capable of precise definition. The word "nuisance", though not defined, it can be inferred from the context that what is meant therein is the actionable nuisance which is recognised in common law. Nuisance, as understood in law, is broadly divided into two classes - public nuisance and private nuisance. The remedies for private nuisance are different with which we are not concerned in these petitions.

165.1 As per the Black's Law Dictionary, (Eight Edition), public nuisance means "an unreasonable interference with a right common to general public,

such as a condition dangerous to health, offensive to community moral standards, or unlawfully obstructing the public in the free use of public property." An actionable case of nuisance means anything which is likely to cause injury, dangerous to life or injurious to health or offence to the sense of sight, smell or hearing which is dangerous to life or injurious to health of public at large. In other words, public nuisance, in the context of dog menace, means anything which endangers to life or injurious to health of public at large. It is true that no hard-and-fast rule can be laid down as to the circumstances or the acts or the omissions which would constitute nuisance and every case is required to be decided on its own peculiar facts as to whether the nuisance, complained of, constitutes public nuisance.

166. For instance, an actionable nuisance of dogs could be such that it is likely to cause injury, danger to life or to health and not only the noise/sound pollution. Dog barking is common, whether it is by stray or by pet dog. It may or may not cause nuisance but, undoubtedly, such nuisance cannot lead to destruction of the dog. Freedom from noise or sound pollution may be indispensable, but in a city like Mumbai one cannot expect it beyond particular limit. The noise of

traffic, whether vehicular or rail or air, it is a constant source of nuisance to almost 80-90 percent of the population in a city like Mumbai. Though it is a right of every citizen to have freedom from noise or sound pollution, it is impossible to enjoy such right in a city like Mumbai. Dog barking in the night, which, in no case could be continuous, could or could not be called a permanent source of nuisance. No hard and fast rules can be laid down or neither a straight jacket formula could be provided to infer whether a particular act amounts to nuisance or annoyance. It depends upon the facts of each case. But in any case on the basis of dogs barking in the night, the Commissioner cannot go to the extent of exercising his discretion to destroy such dog. It is common knowledge that some dogs have inherent habit of chasing running objects, including vehicles and human beings, which sometimes result into very serious accidents or biting cases. There are instances where dogs in a particular locality/street invariably chase every two wheeler which have resulted into fatal accidents. Those dogs may not harm the local persons or pedestrians. But such nuisance of the dogs cannot be ignored and will have to be treated as public nuisance causing injury or danger to human life. Whether dog causes nuisance or not?; what is the extent of actionable nuisance?; what

is the remedy for such public nuisance?;etc. are the questions, which should be left to the discretion of municipal authorities to take appropriate decision. Courts cannot dictate as to what action should be taken by the concerned authority in every individual case.

166.1 It is pertinent to note that the ABC Rules are silent about nuisance of the dogs which are released after sterilization and vaccination. This further supports the contention that the powers conferred upon the authorities including the local authority under ABC Rules and the powers conferred upon the very same authorities either under Sections 11(3), 9(f) or under the provisions of Section 191-BA of MMC Rules, are independent and distinct. The objective of the ABC Rules is only to control dog population whereas the objective of Section 9(f), 11(3) of the Act of 1960 and Section 191-BA of the MMC Act, is to take remedial action in case of dog nuisance including destruction of such dogs by following the procedure contemplated under these provisions. The provisions contained in Section 191-BA and/or the similar provision under other similar statutes are not diluted by the ABC Rules. These provisions, as a matter of fact, are consistent with the provisions contained in Section 9(f) and Section 11(3) of the Act of 1960.

However, the discretion conferred to put stray dogs to sleep required to be exercised judicially and not by whim, caprice or fancy of an authority which is empowered to exercise such discretion. The discretion must be guided by the inherent philosophy that the exerciser of the discretion is accountable for his action and it is to be tested to anvil of rule of law and fairness or justice.

167. Solicitor General of India, submitted that the ABC Rules are integral part of the Act of 1960 and as provided for in section 38-A thereof, the ABC Rules were laid before both the Houses of Parliament and hence they acquire the force of law. (See **Express Newspapers Vs. UOI, AIR 1958 SC 578** and **P.Kasilingum Vs. P.S.G College of Technology, (1995) Suppl. 2 SCC 348, Para-20, and Tikaramji Vs State of UP, 1956 SCR 393**). He submitted, the ABC Rules lay down a scientific and holistic scheme to reduce dog population by sterilization and immunization of stray dogs by participation of Animal Welfare Organisations and others. He then submitted that these rules are not intended to jeopardize human life but at the same time to treat animals with care, compassion and in a human manner so as to achieve a gradual reduction and stabilization in the population of stray dogs on a long term basis. I do find myself in agreement

with the learned Solicitor General of India. I have already observed that the objective of the ABC Rules and the Act of 1960 and the provisions in MMC Act is distinct. The objective of the Act of 1960 and the provisions in MMC Act is not to control dog population.

168. I also find agree with the submission of the learned Solicitor General of India that there is no conflict between the ABC Rules and the Act of 1960. However, we do not agree with his submission that there is conflict between the ABC Rules and the provisions contained in Section 191BA of BMC Act. In my view, the ABC Rules do not control or dilute the powers conferred on the Board and Municipal Authorities under Section 9(f) and Section 11(3) of the ABC Rules. The power conferred on the municipal authorities under these sections and the power conferred under section 191BA are consistent and are not conflicting. Looking to the scheme of the Act of 1960 and the ABC Rules, we are unable to agree with the submission that the stray dogs can be destroyed only in the circumstances and the situations mentioned in Rules 9 and 10 of the ABC Rules.

169. As observed by us earlier, the destruction of incurably ill, mortally wounded and rabid dogs

is allowed under Rules 9 and 10 only in the process of examination of every captured dogs by veterinarians for the purpose of vaccination and sterilization. Rule 7 and more particularly sub-rules (3) and (6) thereof show that the object of capturing dogs in normal course and releasing them after sterilization and vaccination is meant for controlling dogs population. Sub-rule (6) provides that while doing so the veterinarians are expected to examine the captured dogs and segregate sick dog for proper treatment and only after they are treated they need to be sterilized and vaccinated and thereafter released at the same place or locality from where they were captured. The concerned authority is not expected to waste their time and energy in treating incurably ill, mortally wounded or rabid dogs. In my view, the dogs which are healthy and are not nuisance to the public, Local Authorities and the board, can implement the Animal Birth Control programm, namely, vaccination and sterilization of such dogs, as contemplated under the ABC Rules and release them in the same localities. Local Authorities are not expected to kill such dogs. The scheme of the ABC Rules clearly shows that capturing of dogs under these Rules is meant for sterilization and vaccination of healthy dogs. In this process if dogs are found to be incurably ill, mortally

wounded or rabid, they need not be treated and they can be destroyed as provided for under Rules 9 and 10 of the ABC Rules. This power has absolutely no connection with the power conferred on Local Authorities under section 11(3) and upon the Board under section 9(f) of the Act of 1960. In the circumstances, the submission that stray dogs can be destroyed only in the circumstances and the situations mentioned in Rules 9 and 10 of the ABC Rules, must be rejected.

170. The harmonious construction has to be adopted vis-a-vis the Act of 1960, the Central Legislative Scheme and the MMC Act. There is no conflict between the ABC Rules and the Act of 1960. Similarly there is no conflict between the MMC Act and the Act of 1960. The provisions in both these statutes, that is section 9(f) and 11(3) in the Act of 1960 and Section 191-BA of the MMC Act, are consistent. These provisions confer powers upon municipal authorities and the Board to exercise discretion and decide whether to destroy unwanted/stray dogs in lethal chamber or in the manner as may be prescribed under the Rules. As observed earlier, the discretion conferred requires to be exercised judicially and not by whims, caprice or fancy of the authority which is empowered to exercise such discretion. As we do

not find conflict between the provisions of the Act of 1960 and the ABC Rules, we also do not find conflict between the MMC Act and the ABC Rules. The submission that the correct construction of the Act of 1960 and the MMC Act would be that the power of the Commissioner under the proviso to Section 191-BA (2) can be exercised only in the circumstances and situations mentioned in Rules 9 and 10, will have to be rejected outright. The most reasonable view and the harmonious construction of both these statutes, as is done by us in the foregoing paragraphs, will have to be adopted. In short, it will have to be held that while implementing the dogs control scheme, if a veterinarian comes across dogs which are incurably ill, mortally wounded or rabid, he should not waste his time and energy in treating such dogs and is allowed to put them to sleep. This does not mean that the dogs, other than these categories, cannot be put to sleep which is otherwise allowed under the provisions of Section 11(3) of the Act of 1960 and Section 191-BA of the MMC Act. In my opinion, the harmonious construction is not the one, as submitted by the learned Solicitor General of India, that the Commissioner can exercise discretion under section 191-BA of the MMC Act only in the circumstances mentioned under rules 9 and 10 of the ABC Rules, but the harmonious construction,

in my view, is that the Commissioner has a power to exercise a discretion conferred on him even in respect of the dogs other than the dogs covered by Rules 9 and 10 of the ABC Rules, subject to the observations made by us in the foregoing paragraphs in this part of the judgment. In other words, dogs which are found or reported to be a source of nuisance to the public and if the nuisance is such, as stated by us in the foregoing paragraphs of the judgment, the Commissioner has a power to exercise discretion to destroy such dog/s as provided for under section 191BA of the MMC Act.

171. In the light of the above discussions, I hold that resort can be had to the provisions of sub-section (3) of Section 11 of the Act of 1960 and the relevant provisions of the MMC Act, the GM Act and the Maharashtra Municipalities Act, subject to the observations made in the foregoing paragraphs of the Judgment in respect of the expressions "nuisance" and "discretion". In my opinion, section 11(3) of the Act of 1960 does not contemplate killing of "all" stray dogs in lethal chambers or by such other methods as may be prescribed. Both the questions referred to us by the Honourable Chief Justice are answered accordingly.

(D.B.Bhosale,J.)

172. I fully concur and endorse the Judgment of my learned Brother D.B.Bhosale J.

(SMT.V.K.TAHILRAMANI,J.)

(SMT.V.K.TAHILRAMANI,J.) (D.B.BHOSALE,J.) (DR.S.RADHAKRISHNAN,J.)

173. After pronouncement of the judgment, Mr.Zal Andhyarujina, the learned Counsel for one of the Interveners has prayed for stay of our judgment for a period of six weeks from today. Having regard to the facts and circumstances of the case, our judgment stands stayed for a period of six weeks.

(SMT.V.K.TAHILRAMANI,J.) (D.B.BHOSALE,J.) (DR.S.RADHAKRISHNAN,J.)