DIGITAL SUPREME COURT REPORTS

The Official Law Report
Fortnightly

2024 | Volume 1 | Part 2

Citation Style: [Year] Volume No. S.C.R. Page no.

Digitally Published by
Supreme Court of India

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Supreme Court of India

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Sarfaraz Alam

v.

Union of India & Ors.

(Criminal Appeal No. 45 of 2024)

04 January 2024

[M. M. Sundresh* and Aravind Kumar, JJ.]

Issue for Consideration

Validity of the detention order passed by the respondents; Detenue's right to make a representation, the communication regarding the same if to be made both orally and in writing.

Headnotes

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – Constitution of India – Article 22(5) – Detention order – Validity – Detenue's right of making a representation – Communication thereof if to be made both orally and in writing – Appellant *inter alia* pleaded that the detenue was not informed/communicated regarding his right to make a representation against the detention order:

Held: The first part of Article 22(5) involves the bounden duty and obligation on the part of the authorities in not only serving the grounds of detention as soon as the case may be, after due service of the detention order and communication of the grounds of detention along with the documents relied upon in the language which he understands, but also for the purpose of affording him the earliest opportunity of making a representation questioning the detention order – The second part is with respect to his right of making the representation – For exercising such a right, a detenue has to necessarily have adequate knowledge of the very basis of detention order – A detenue has to be informed that he has a right to make a representation – Such a communication of his right can either be oral or in writing – In a case where a detenue is not in a position to understand the language, a mere verbal explanation would not suffice – However, in a case where a detenue receives the ground of detention in the language known to him which contains a clear statement over his right to make

* Author

a representation, there is no need for informing verbally once again – Such an exercise, however, would be required when the grounds of detention do not indicate so – In the present case, the grounds of detention forming the basis of the satisfaction of the detaining authority were made known to the detenue and were attempted to be served at the earliest point of time i.e., on the very next day after his detention – No error in the procedure adopted by the respondents as due compliance was made to translate all documents in Bengali apart from persuading the detenue to receive them – In addition, the panchnama was signed by the independent witnesses – The detenue also read the grounds of detention and the relevant documents and therefore was well aware of his right to make a representation – The detenue is not entitled to any relief as he not only suppressed the facts as proved in his refusal to receive the grounds of detention, apart from reading them in detail, but also approached the Court with unclean hands – It is a deliberate ploy adopted by the detenue to secure favourable orders from the Court – A perusal of the panchnama clearly indicates the adequacy of his knowledge in English, as he has not only signed the document in English but also made his objection with respect to receipt of the grounds of detention – No ground to interfere with the impugned order passed by the High Court. [Paras 10-12, 14, 16 and 19]

Constitution of India – Article 22(5) – Duty and obligation on the part of the authorities – Right of the detenue of making the representation – Difference between the background facts leading to detention order and the grounds of detention – Discussed.

Case Law Cited

Lallubhai Jogibhai Patel v. Union of India, **[1981] 2 SCR 352: (1981) 2 SCC 427;** *State of Bombay v. Atma Ram Shridhar Vaidya*, **[1951] SCR 167: AIR 1951 SC 157;** *Harikisan v. State of Maharashtra* **[1962] Suppl. SCR 918: AIR 1962 SC 911 – relied on.**

State Legal Aid Committee, J&K v. State of J&K, **[2004] 5 Suppl. SCR 1090: (2005) 9 SCC 667;** *Kamleshkumar Ishwardas Patel v. Union of India* **[1995] 3 SCR 279: (1995) 4 SCC 51;** *Thahira Haris v. Govt. of Karnataka* **[2009] 5 SCR 941: (2009) 11 SCC 438 – referred to.**

List of Acts

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974; Constitution of India.

List of Keywords

Detention order; Grounds of detention; Refusal to receive grounds of detention; Communication of detenue's right of making the representation.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 45 of 2024.

From the Judgment and Order dated 06.10.2023 of the High Court at Calcutta in WPA(H) No.68 of 2023.

Appearances for Parties

P. Vishwanath Shetty, R. Basant, Sr. Advs., M/s. Ahmadi Law Offices, Shariq Ahmed, Talha Abdul Rahman, Tariq Ahmed, Ismail Zabiulla, Akshay Sahay, Vibhav Chaturvedi, Advs. for the Appellant.

K.M. Nataraj, A.S.G., Mukesh Kumar Maroria, Vanshaja Shukla, Rajat Nair, Shailesh Madiyal, Vatsal Joshi, Anuj Srinivas Udupa, Padmesh Mishra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

M. M. Sundresh, J.

1. Leave granted.

2. Heard the learned senior counsel appearing for the appellant and the learned Additional Solicitor General for the respondents. We have perused the pleadings, documents and judgments. The present appeal is at the behest of the brother-in-law of the detenue, who is challenging the validity of the detention order and aggrieved at the refusal of the High Court of Calcutta to set aside the order of detention passed by the respondents.

FACTUAL BACKGROUND

3. On receiving information pertaining to a consignment containing gold and foreign currencies, escaping the watchful eyes of the customs department, four persons were apprehended. On eliciting further information from them, a search was conducted yielding huge quantity of gold, along with the recovery of foreign currencies of various denominations. As a consequence, the detenue was arrested, followed by a detention order passed by the detaining authority in exercise of the powers conferred under Section 3 of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as **"COFEPOSA Act"**). Prior to the said order he obtained an order of bail.

4. The detention order was passed against the detenue on 05.09.2023 after which he was subsequently detained on 19.09.2023 from his home, in the presence of his family members. Following the heels of the said order, the respondents made an endeavor to serve the grounds of detention along with the relevant documents on the very next day i.e., 20.09.2023 with due translation in the Bengali language. The detenue who was in a correctional home steadfastly refused to receive them despite persuasive attempts made by the Respondents. A *panchnama* was prepared, and before its due execution another abortive attempt was made to make him receive the grounds of detention, along with the relevant documents. The detenue reiterated his earlier stand, however, a facility was extended to him to read the documents in its entirety. The *panchnama* was signed not only by two independent witnesses but the detenue as well. Interestingly, the detenue after signing the *panchnama* in the English language has proceeded further to write "*I have refused to receive any document*", leading to the obvious inference that his so called ignorance of English was only an afterthought.

5. Two more attempts were made by the respondents to serve the documents along with the grounds of detention. After refusing to receive the same on the second occasion i.e., on 03.10.2023 it was finally received by him on 10.10.2023. Interestingly, the detenue, through the appellant, filed the Writ Petition on 03.10.2023 *inter alia* contending that the respondents have not served the grounds of detention. The Division Bench of the High Court of Calcutta dismissed the Writ Petition *inter alia* holding that it was the detenue himself

who had refused to receive the grounds of detention, a fact clearly indicated and proved through the *panchnama.*

SUBMISSIONS OF THE APPELLANT

6. Learned senior counsel appearing for the appellant submitted that it is incorrect to state that the detenue has refused to receive the grounds of detention. In any case the detenue has not been informed or communicated regarding his right to make a representation against the detention order. Both functions are mutually reinforcing as mandatory under Article 22(5) of the Constitution of India, 1950.

7. Not all the relevant materials have been served on the detenue, such as the telephonic conversation between the detenue and others. The grounds of detention could have been served on the family members of the detenue even on the first occasion. There ought to have been an affidavit on the refusal of the detenue pertaining to the grounds of detention, by the official concerned. So also, on the question of the contents having been read over to him and being read by him. An order of detention being an exception, if two views are possible, the one in favor of the detenue should find favor with the Court. To reinforce the aforesaid submissions, learned senior counsel have placed reliance on the following decisions of this Court,

- **State Legal Aid Committee, J&K v. State of J&K, (2005) 9 SCC 667**
- **Kamleshkumar Ishwardas Patel v. Union of India, (1995) 4 SCC 51**
- **Thahira Haris v. Govt. of Karnataka, (2009) 11 SCC 438**

SUBMISSIONS OF THE RESPONDENTS

8. Repelling the contentions of the appellant, the learned Additional Solicitor General appearing for the respondents submitted that due procedure has been followed and ample opportunities were provided. The translated version of the grounds of detention along with the relevant documents were attempted to be served upon the detenue on the very next day after his detention in due compliance of Section 3 of the COFEPOSA Act. A *panchnama* was drawn in the presence of two independent witnesses to cover the incident of detenu's refusal in accepting the ground of detention as per the extant principles of law. The *panchnama* bears the signature of the detenue with a

remark "*I have refused to receive any document*", this sufficiently indicates that twin test enshrined in Article 22(5) of the Constitution of India was duly complied with. Even in the grounds of detention there are adequate averments clearly indicating detenue's right to make representation to the named authorities. The contention raised is only an afterthought and therefore the present appeal deserves to be dismissed.

9. Despite refusal of the detenue on the first occasion in receiving the grounds of detention, a second attempt was made on 03.10.2023, and ultimately on 10.10.2023, the detenue received the ground of detention with all the relevant documents. These chronological events amply suggest the conduct of the detenue in evading to receive the grounds of detention.

DISCUSSION

10. Article 22(5) of the Constitution of India can broadly be divided into two parts. Of these two parts there lies an underlying duty and obligation on the part of the authorities in not only serving the grounds of detention as soon as the case may be, after due service of the detention order and communication of the grounds of detention along with the documents relied upon in the language which he understands, but also for the purpose of affording him the earliest opportunity of making a representation questioning the detention order.

11. Therefore, the first part involves the bounden duty of the authorities in serving the grounds of detention containing such grounds which weighed in the mind of the detaining authority in passing the detention order. In doing so, adequate care has to be taken in communicating the grounds of detention and serving the relevant documents in the language understandable to the detenue. The second part is with respect to his right of making the representation. For exercising such a right, a detenue has to necessarily have adequate knowledge of the very basis of detention order. There is a subtle difference between the background facts leading to detention order and the grounds of detention. While the background facts are not required in detail, the grounds of detention which determine the detention order ought to be found in the grounds supplied to the detenue. In other words, the knowledge of the detenue is to the subjective satisfaction of a detaining authority discernible from the grounds supplied to him. It is only thereafter that a detenue could be in a

better position to take a decision as to whether he should challenge the detention order in the manner known to law. This includes his decision to make a representation to various authorities including the detaining officer. Therefore, an effective knowledge *qua* a detenue is of utmost importance.

12. On the second aspect, a detenue has to be informed that he has a right to make a representation. Such a communication of his right can either be oral or in writing. This right assumes importance as a detenue in a given case may well be a literate, semi-literate or illiterate person. Therefore, it becomes a cardinal duty on the part of the authority that serves the grounds of detention to inform a detenue of his right to make a representation.

13. While the aforesaid two rights and duties form two separate parts of Article 22(5) of the Constitution of India, they do overlap despite being mutually reinforcing. Though they travel on different channels, their waters merge at the destination. This is for the due compliance of Article 22(5). The entire objective is to extend knowledge to the detenue leading to a representation on his decision to question the detention order. Such a right is an inalienable right under scheme of the Constitution of India, available to the detenue, corresponding to the duty of the serving authority.

14. Having reiterated the said principle of law, the question for consideration is '*to what extent a communication can be made both orally and in writing*'. In a case where a detenue is not in a position to understand the language, a mere verbal explanation would not suffice. Similarly, where a detenue consciously declines to receive the grounds of detention, he has to be informed about his right to make a representation. In such a scenario, the question as to whether the grounds of detention contained a statement that a detenue has got a right to make a representation to named authorities or not, pales into insignificance. This is for the reason that a detenue despite refusing to receive the grounds of detention might still change his mind and receive them if duly informed of his right to challenge a detention order by way of a representation. We may clarify, in a case where a detenue receives the ground of detention in the language known to him which contains a clear statement over his right to make a representation, there is no need for informing verbally once again. Such an exercise, however, would be required when the grounds of detention do not indicate so.

15. We would like to reinforce our position on the aforesaid exposition of law by placing reliance on the following decisions of this Court:

- **Lallubhai Jogibhai Patel v. Union of India**, **(1981) 2 SCC 427**

  "20.…**"Communicate" is a strong word. It means that sufficient knowledge of the basic facts constituting the "grounds" should be imparted effectively and fully to the detenu in writing in a language which he understands. The whole purpose of communicating the "ground" to the detenu is to enable him to make a purposeful and effective representation. If the "grounds" are only verbally explained to the detenu and nothing in writing is left with him, in a language which he understands, then that purpose is not served, and the constitutional mandate in Article 22(5) is infringed**. If any authority is needed on this point, which is so obvious from Article 22(5), reference may be made to the decisions of this Court in *Harikisan* v. *State of Maharashtra* [1962 Supp 2 SCR 918 : AIR 1962 SC 911 : (1962) 1 Cri LJ 797] and *Hadibandhu Das* v. *District Magistrate* [(1969) 1 SCR 227 : AIR 1969 SC 43 : 1969 Cri LJ 274]."

  (emphasis supplied)

- **State of Bombay v. Atma Ram Shridhar Vaidya**, **AIR 1951 SC 157**

  "10.…The question has to be approached from another point of view also. As mentioned above, **the object of furnishing grounds for the order of detention is to enable the detenu to make a representation i.e. to give him an opportunity to put forth his objections against the order of detention. Moreover, "the earliest opportunity" has to be given to him to do that. While the grounds of detention are thus the main factors on which the subjective decision of the Government is based, other materials on which the conclusions in the grounds are founded could and should equally be conveyed to the detained person to enable him to make out his objections against the order. To put it**

in other words, the detaining authority has made its decision and passed its order. The detained person is then given an opportunity to urge his objections which in cases of preventive detention comes always at a later stage. The grounds may have been considered sufficient by the Government to pass its judgment. **But to enable the detained person to make his representation against the order, further details may be furnished to him. In our opinion, this appears to be the true measure of the procedural rights of the detained person under Art. 22(5)**.

××× ××× ×××

12…The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds i.e., materials on which the detention order was made. In our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes is quite different. As already pointed out, for the first, the test is whether it is sufficient to satisfy the authority. For the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity.

13. The argument advanced on behalf of the respondent mixes up the two rights given under Art. 22(5) and converts it into one indivisible right. We are unable to read Art. 22(5) in that way. **As pointed out above, the two rights are connected by the word "and". Furthermore, the use of the words "as soon as may be" with the obligation to furnish the grounds of the order of detention, and the fixing of another time limit, viz., the earliest opportunity, for making the representation, makes the two rights distinct. The second right, as it is a right of objection, has to depend first on the service of the**

grounds on which the conclusion i.e. satisfaction of the Government about the necessity of making the order, is based. To that extent and that extent alone, the two are connected. But when grounds which have a rational connection with the ends mentioned in S. 3 of the Act are supplied, the first condition is satisfied. If the grounds are not sufficient to enable the detenu to make a representation, the detenu can rely on his second right and if he likes may ask for particulars which will enable him to make the representation. On an infringement of either of these two rights the detained person has a right to approach the Court and complain that there has been an infringement of his fundamental right and even if the infringement of the second part of the right under Art. 22(5) is established he is bound to be released by the Court. To treat the two rights mentioned in Art. 22(5) as one is neither proper according to the language used, nor according to the purpose for which the rights are given.

××× ××× ×××

16. This detailed examination shows that preventive detention is not by itself considered an infringement of any of the fundamental rights mentioned in Part III of the Constitution. This is, of course, subject to the limitations prescribed in clause (5) of Art. 22. That clause, as noticed above, requires two things to be done for the person against whom the order is made. By reason of the fact that cl. (5) forms part of Part III of the Constitution, its provisions have the same force and sanctity as any other provision relating to fundamental rights. **As the clause prescribes two requirements, the time factor in each case is necessarily left fluid. While there is the duty on the part of the detaining authority to furnish grounds and the duty to give the detained person the earliest opportunity to make a representation which obligations, as shown above, are correlated, there exists no express provision contemplating a second communication from the detaining authority to the person detained. This is because in several cases a**

second communication may not be necessary at all. The only thing which emerges from the discussion is that while the authorities must discharge the duty in furnishing grounds for the order of detention "as soon as may be" and also provide "the earliest opportunity to the detained person to make the representation", the number of communications from the detaining authority to the detenu may be one or more and they may be made at intervals, provided the two parts of the aforesaid duty are discharged in accordance with the wording of cl. (5). So long as the later communications do not make out a new ground, their contents are no infringement of the two procedural rights of the detenu mentioned in the clause. They may consist of a narration of facts or particulars relating to the grounds already supplied. But in doing so, the time factor in respect of the second duty, viz., to give the detained person the earliest opportunity to make a representation, cannot be overlooked. That appears to us to be the result of cl. (5) of Art. 22."

(emphasis supplied)

- **Harikisan v. State of Maharashtra**, **AIR 1962 SC 911**

"7. It has not been found by the High Court that the appellant knew enough English to understand the grounds of his detention. The High Court has only stated that "he has studied up to 7th Hindi standard, which is equivalent to 3rd English standard". The High Court negatived the contention raised on behalf of the appellant not on the ground that the appellant knew enough English, to understand the case against him, but on the ground, as already indicated, that the service upon him of the Order and grounds of detention in English was enough communication to him to enable him to make his representation. We must, therefore, proceed on the assumption that the appellant did not know enough English to understand the grounds, contained in many paragraphs as indicated above in order to be able effectively to make his representation against the Order of Detention. **The learned Attorney-General**

has tried to answer this contention in several ways. He has first contended that when the Constitution speaks of communicating the grounds of detention to the detenue, it means communication in the official language, which continues to be English; secondly, the communication need not be in writing and the translation and explanation in Hindi offered by the Inspector of Police, while serving the order of detention and the grounds, would be enough compliance with the requirements of the law and the Constitution; and thirdly, that it was not necessary in the circumstances of the case to supply the grounds in Hindi. In our opinion, this was not sufficient compliance in this case with the requirements of the Constitution, as laid down in cl. (5) of Art. 22. To a person, who is not conversant with the English language, service of the Order and the grounds of detention in English, with their oral translation or explanation by the police officer serving them does not fulfil the requirements of the law. As has been explained by this Court in the case of The State of Bombay v. Atma Ram Sridhar, 1951 SCR 167 : (AIR 1951 SC 157), cl. (5) of Art. 22 requires that the grounds of his detention should be made available to the detenue as soon as may be, and that the earliest opportunity of making a representation against the Order should also be afforded to him. In order that the detenue should have that opportunity, it is not sufficient that he has been physically delivered the means of knowledge with which to make his representation. In order that the detenue should be in a position effectively to make his representation against the Order, he should have knowledge of the grounds of detention, which are in the nature of the charge against him setting out the kinds of prejudicial acts which the authorities attribute to him. Communication, in this context, must therefore, mean imparting to the detenue sufficient knowledge of all the grounds on which the Order of Detention is based. In this case the grounds are several & are based on numerous

> **speeches said to have been made by the appellant himself on different occasions and different dates. Naturally, therefore, any oral translation or explanation given by the police officer serving those on the detenue would not amount to communicating the grounds. Communication, in this context, must mean bringing home to the detenue effective knowledge of the facts and circumstances on which the Order of Detention is based**."
>
> (emphasis supplied)

16. On facts, we find that the detenue is not entitled to any relief as he has not only suppressed the facts as proved in his refusal to receive the grounds of detention, apart from reading them in detail, but has also approached the Court with unclean hands. It seems to us that it is a deliberate ploy adopted by the detenue to secure favourable orders from the Court. A perusal of the *panchnama* clearly indicates the adequacy of his knowledge in English, as he has not only signed the document in English but also made his objection with respect to receipt of the grounds of detention. We find no error in the procedure adopted by the respondents as due compliance was made to translate all documents in Bengali apart from persuading the detenue to receive them. In addition, the *panchnama* was signed by the independent witnesses. The detenue also read the grounds of detention and the relevant documents. Therefore, he was well aware of his right to make a representation.

17. As discussed, the grounds of detention forming the basis of the satisfaction of the detaining authority, were made known to the detenue. He cannot seek all the facts, including access to the telephonic conversation relied on, especially when he did not exercise his right to make the representation. It is pertinent to mention that we are only dealing with the validity of the detention order and not a regular criminal case against the accused.

18. The other grounds raised also do not merit any acceptance, in the light of our earlier discussion. We also find that the grounds of detention were attempted to be served on the detenue at the earliest point of time – i.e. on the very next day after his detention.

19. For the foregoing reasons, we find no ground to interfere with the impugned order passed by the High Court of Calcutta. The appeal stands dismissed. Pending application(s), if any, stand(s) disposed of.

Headnotes prepared by: Divya Pandey

Result of the case: Appeal dismissed.

[2024] 1 S.C.R. 281 : 2024 INSC 17

S.V. Samudram

v.

State of Karnataka & Anr

(Civil Appeal No. 8067 of 2019)

04 January 2024

[Abhay S. Oka and Sanjay Karol*, JJ.]

Issue for Consideration

The Civil Judge modified the award passed by the Arbitrator reducing the amount awarded as also interest thereupon, i.e., Rs.14,68,239/- @ 18% to only 25% of the tender amount which equals to Rs.3,71,564/- and the interest percentage thereon was reduced to 9%. Whether the modification of the arbitral award as carried out by the Civil Judge as confirmed by the High Court, was justified within law.

Headnotes

Arbitration and Conciliation Act, 1996 – s. 34 – The award passed by the Arbitrator was modified by the Civil Judge and the Respondents were directed to pay Rs.3,71,564 (25% of tender amount) along with Rs.10,000/- as costs towards the arbitration @ 9% interest – Propriety:

Held: It is settled that any court u/s. 34 would have no jurisdiction to modify the arbitral award, which at best, given the same to be in conflict with the grounds specified u/s. 34 would be wholly unsustainable in law – Also, the Arbitrator's view, generally is considered to be binding upon the parties unless it is set aside on certain specified grounds – In the instant case, award passed on 18.02.2003 was prior to the amendment brought in Section 34 by virtue of the Arbitration and Conciliation (Amendment) Act, 2015 – Prior to the Amending Act, it was open for the Court to examine the award as to whether it was in conflict with, (a) public policy of India; (b) induced or affected by fraud; (c) corruption; and (d) any violation of the provisions of s.75 and s.81 of the Act – In the given situation, the only provision under which the award could have been assailed was for it to have been in conflict with the public policy of India – A perusal of the judgment and order of the Civil Judge does not reflect fidelity to the text of the statute – Nowhere does

* Author

it stand explained, as to, under which ground(s) mentioned u/s. 34 of the Act, did the Court find sufficient reason to intervene – In fact, quite opposite thereto, the Court undertook a re-appreciation of the matter, and upon its own view of the evidence, modified the order – None of the reasons recorded allude to the award being contrary to the public policy of India, which would enable the court to look into the merits of the award – The award passed by the Arbitrator in which he has not only referred to and considered the materials on record in their entirety but also, after due application of mind, assigned reasons for arriving at this conclusion, either rejecting, accepting or reducing the claim set out by the Claimant-Appellant – The view taken by the Arbitrator is a plausible view and could not have been substituted for its own by the Court – Thus, the modification of the arbitral award by the Civil Judge does not stand scrutiny, and must be set aside. [Paras 28, 29, 30, 31, 33]

Arbitration and Conciliation Act, 1996 – s. 37 – The High Court upheld the modification of the arbitral award by the Civil Judge u/s. 37 of the Act – Propriety:

Held: The Single Judge of the High Court, similar to the Civil Judge u/s. 34, appears to have not concerned themselves with the contours of s.37 of the Act – The Court u/s. 37 had only three options:- (a) Confirming the award of the Arbitrator; (b) Setting aside the award as modified u/s. 34; and (c) Rejecting the application(s) u/s. 34 and 37 – The single Judge has examined the reasoning adopted by the Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is "perverse and contrary to the public policy" – However, it appears that such a holding on part of the Judge is without giving reasons therefor – It has not been discussed as to what the evidence was before the single Judge to arrive at such conclusion – In the absence of compliance with the well laid out parameters and contours of both s.34 and s.37 of the Act, the impugned judgments are set aside – Consequently, the award dated 18.02.2003 of the Arbitrator is restored. [Paras 39, 42, 43, 47]

Case Law Cited

National Highways Authority of India v. M. Hakeen and Another **(2021) 9 SCC 1;** *Dakshin Haryana Bijli Vitran Nigam Limited v. Navigant Technologies Private Limited* **[2021] 1 SCR 1135: (2021) 7 SCC 657;** *Associate*

Builders v. DDA **[2014] 13 SCR 895: (2015) 3 SCC 49;***Ssangyong Engineering and Construction Company Limited v. National Highways Authority of India* **(2019) 15 SCC 131: [2019] 7 SCR 522;** *MMTC Ltd. v. Vedanta Ltd* **[2019] 3 SCR 1023: (2019) 4 SCC 163;** *UHL Power Company Ltd v. State of Himachal Pradesh* **[2022] 1 SCR 1: (2022) 4 SCC 116;** *Hyder Consulting (UK) Ltd. v. State of Orissa* **[2014] 14 SCR 1029:(2015) 2 SCC 189 – relied on.**

Larsen Air Conditioning and Refrigration Company v. Union of India & Others **[2023] 11 SCR 86: 2023 SCC On Line 982;** *Dyna Technologies Private Limited v. Crompton Greaves Limited* **[2019] 15 SCR 295: (2019) 20 SCC 1;** *Konkan Railway Corpn. Ltd. v. Chenab Bridge Project* **[2023] 11 SCR 215: (2023) 9 SCC 85;** *Delhi Airport Metro Express Private Limited v. Delhi Metro Rail Corporation Limited* **(2022) 1 SCC 131;** *DDA v. R.S Sharma* **[2008] 12 SCR 785: (2008) 13 SCC 80;** *Indian Oil Corpn. Ltd. v. Shree Ganesh Petroleum* **(2022) 4 SCC 463;** *J.G Engineers (P) Ltd. v. UOI* **[2011] 8 SCR 486: (2011) 5 SCC 758 – referred to.**

List of Acts

Arbitration and Conciliation Act, 1996 [Prior to Arbitration and Conciliation (Amendment) Act, 2015].

List of Keywords

Arbitration; Examination of award by the Court; Conflict with the public policy; Modification of arbitral award.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8067 of 2019.

From the Judgment and Order dated 07.02.2017 of the High Court of Karnataka Circuit Bench at Dharwad in MFA No.24507 of 2010.

Appearances for Parties

Anil Kaushik, Abhishek Mishra, Mrs. Shashi Sharma, Rajat Rana, Ms. Anju Kaushik, Ms. Arunima Dwivedi, Advs. for the Appellant.

Avishkar Singhvi, AAG, V. N. Raghupathy, Manendra Pal Gupta, Vivek Kumar Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol J.

1. The issue arising for consideration in this Civil Appeal, which lays challenge to a judgment and order dated 7th February, 2017 passed by the High Court of Karnataka (Dharwad Bench) in MFA No. 24507 of 2010 (AA) under Section 37(1) of the Arbitration and Conciliation Act, 1996[1], is whether the High Court was justified in confirming the orderdated 22nd April, 2010 under Section 34 of the Arbitration & Conciliation Act, 1996 passed by the Senior Civil Judge,Sirsi, in Civil Misc. No. 08/2003, whereby the award passed by the learned Arbitrator was modified and the amount awarded was reduced.

FACTS

2. As borne out from the judgments rendered by the Courts below, the facts, are:-

2.1 Mr. S.V.Samudram[2] is a registered Class II Civil Engineering Contractor and had secured a contract from the Karnataka State Public Works Department to construct the office and residence of the Chief Conservator of Forests at Sirsi for an amount of Rs. 14.86 Lakhs.

2.2 The said contract was entered into between the parties on 29th January, 1990 with the stipulation that the possession of the construction site would be handed over to the Claimant-Appellant on 8thMarch, 1990 and the work allotted was to be completedon or before 6thMay 1992 i.e., 18 months from the date of the agreement excluding the monsoon season.

2.3 It is undisputed that the work as allotted could not be completed by the Claimant-Appellant, for which,he held the authorities of the State responsible as they allegedly did not clear his bills, repeatedly at every stage and also due to delays caused by change of site and in delivery of material for such construction.

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1 A&C Act, for short.

2 Hereinafter, the Claimant-Appellant

2.4 For settlement and adjudication of disputes, the parties to the contract resorted to the arbitral mechanism and resultantly, inArbitration Petition dated 31stMay, 2002, Mr. S.K Angadi, Chief Engineer (Retd.) stood appointed as the Arbitrator on 30thJuly, 2002.

PROCEEDINGS BEFORE THE LEARNED ARBITRATOR

3. Pursuant thereto, the Claimant-Appellant herein filed his claim before the learned Arbitrator totalling to Rs.18,06,439/- along with an interest payable thereupon @ 18% per annum, payable from 9thMarch, 1994 till date of payment.

4. Having heard both sides, the three primary issues identified were:-

(a) inordinate delay in handing over of site for performance of contract;

(b) non-supply of working drawings and designs; and

(c) delay in supply of materials.

5. For each of these issues, the learned Arbitrator, upon examination of the evidence before him found the Respondents liable. A *précis* of the reasoning adopted, is as under:-

S.No.	Point of Consideration	Reasoning
1	Delay in handing over the entire site for total performance of the contract.	1) Non handling over the entire site in time is one of the reasons which resulted in non-completion of the work within the stipulated time of 18 months. There is a delay of 9 months in handing over possession of complete site. Possession of office building was handed over on 07.03.1990 Possession of quarters building was handed over on December 1990.

2	Delay in supply of working drawings, designs, etc.	1) Drawing showing typical excavation plan for footings, details of columns were issued to claimant during September 1990, with adelay of 6 months 2) The drawing of R28 was not supplied by April 1991 but on 1st July 1991. There was a delay of 3 months. 3) Drawing showing the details of 1st floor slab of the office of the Conservator of Forest was found to be prepared by 13.10.1992 but supplied on 01.11.1992 i.e. after expiration of contract on 06.05.1992. 4) The drawings with details of lintel beams, roof beams, slab, etc of quarters was prepared by 05.10.1991 & supplied on 15.10.1991 but the changed site for construction was handed over to claimant on 14.02.1991.
3	In the matter of delay in supply of materials	On study of documentary evidence, he found adequate steel & cement required for the work was not supplied by the respondent in time.

6. As such, against a total of 11 claims, amounts were awarded against 9 claims. The summary of the award is extracted as under:-

SUMMARY OF THE AWARD

S.No.	Description of Claim	Amount of Claim	Award Amount
1	Payment on loss of Oh. and incidentals	Rs. 83,300/-	Rs. 83,300/-
2	Payment on loss of Profit	Rs. 83,300/-	Rs. 83,300/-
3	Payment on Idle labour	Rs. 1,77,300/-	Rs. 1,77,300/-
4	Payment on idle machinery	Rs.98,500/-	Rejected
5	Payment of extra expenses on procurement of water at the changed site of work	Rs.24,000/-	Rejected

6	Payment of extra expenses on shuttering, centring, fabrication done earlier subsequently dismantled.	Rs.15,800/-	Rs.15,800/-
7	Payment on revised rates on the work executed beyond the originally stipulated time	Rs.11,33,000/-	Rs.9,67,300/-
8	Payment on refund of freek rates recovered in work bills	Rs.33,469/-	Rs.33,469/-
9	Payment on refund of security deposit	Rs.57,770/-	Rs.57,770/-
10	Payment of interest, pre arbitration, *pendentelite* and future interest	@18% p.a. on all amounts due from claim No.1 to 9 from, 09.03.94 till the date of payment	Payment of interest @ 18% p.a. on all amounts due from 09.3.94 till the date of payment
11	Cost of Arbitration	Rs.1,00,000/-	Rs.50,000/-

PROCEEDINGS UNDER SECTION 34 OF THE A&C ACT

7. Assailing the same, the Respondent preferred a petition under Section 34 of the A&C Act in which the learned Civil Judge, Sirsi, found 2 points to be arising for his consideration which he recorded as: –

> "1. Whether the petitioner made out the proper grounds that the award passed by the arbitrator is not supported by sound reasonings and it is in arbitrary nature and it is liable to be set aside?
>
> 2. What order?"

8. The award passed by the learned Arbitrator was modified and the Respondents were directed to pay Rs.3,71,564 (25% of tender amount) along with Rs.10,000/- as costs towards the arbitration @ 9% interest. The reasons supplied for such modification, as they come forth upon a perusal of the judgement are:-

8.1 The change in site of the residential quarters was barely at the distance of 200m from the earlier site. Even if there was a change in site, the work of constructing the office building could have begun as there was no change in that regard but he had

not even started excavation in order to lay down a foundation. Therefore, the question of loss of payment to the labourers and materials collected for construction, does not arise and the losses allegedly suffered by the Claimant-Appellant were "only at his imagination".

8.2 On the machinery being idle, it was not explained as to how many days the same was idle. It is "for his whims and fancies the petitioner is claiming as if he has sustained loss".

8.3 So far as the claim for water facilities, the contention of the Respondents has been accepted that per the agreement, the Claimant-Appellant was to look after the same and therefore, Respondents would not be liable therefor.

8.4 Since it is the Claimant-Appellant who did not complete the construction in time, he could not make a claim for the rates for the year 1989–90 and cannot claim interest thereupon.

8.5 No evidence to lend support to the contention of the Claimant-Appellant that there was a delay in supplying the material. On which material being supplied, was there a delay, is unexplained. Counter allegation, instead is that even after clearing all bills, the Claimant-Appellant had not picked up speed on the work. All the correspondence is only to escape payment of penalty.

8.6 The only delay is of handing over of the site of the residential house. The same was done on 7th March, 1990. The Claimant-Appellant has not explained that despite such handing over of possession by August 1990, no excavation work for the foundation had commenced.

8.7 For the changes in design, it is observed that since the changes were minor it does not require any extra payment. The same would only be payable if there was duplication of work/removal of earlier construction as per the alteration.

8.8 The cost of arbitration being awarded at Rs.50,000/- is "at exorbitant rate."Even if the argument of delay and laches on part of the Department is accepted, "it cannot be ruled out that the Department always in right path" and the extent of the same cannot be accepted.

8.9 It was also observed that there was a justification for the learned Arbitrator to award an amount which is almost equal to the amount of tender, that too on such a high rate of interest which causes an undue encumbrance on the exchequer.

8.10 The remaining critical observations stand dealt with subsequently.

PROCEEDINGS UNDER SECTION 37 OF THE A&C ACT

9. The High Court, vide its judgement under challenge before us, has confirmed the modification of the arbitral award as has been done by the learned Civil Judge, Sirsi, dismissing the application on part of the Claimant-Appellant.

9.1 It has been observed that the primary dispute is in respect of claim No. 7 which is the grant of revised rates of the escalated cost of work. The High Court has held that the view of the Arbitrator that the Department is solely responsible for the breach of the contract, cannot be accepted as the shift in venue was only in respect of the residential quarters and not for the office complex.

9.2 The estimation of cost is based on the tender notification relating to the year 1989-90. Costs in the year 1992 could not be expected to have risen hundred percent as claimed. Nothing is reflected on record to show, what precluded the Claimant-Appellant from commencing the work of the office building. It is on this ground that the claim of escalation of the Claimant-Appellant be allowed by the learned Arbitrator, has been termed as perverse and contrary to the public policy.

9.3 Findings of delay being solely on account of the Department, cannot be countenanced and the quantification of damages in respect thereto is unreasonable. “It would be a case of misconduct on the part of the arbitrator amenable to Section 34 of the Act”

9.4 Claim No. 3 in respect of idle labour being allowed to the tune of Rs.1,77,300/- “shocks the conscience of the court.” It is so because there was no basis for the labour to be idle.

9.5 The award of Rs.50,000/-towards cost of arbitration is excessive. It was further observed that escalation of costs cannot be granted on “assumptions and presumptions” and, therefore, awarding

the claims, that too almost equal to the tender amount, cannot be sustained.

10. The learned Civil Judge, Sirsi, to restate, modified the award passed by the learned Arbitrator reducing the amount awarded as also interest thereupon, i.e., Rs.14,68,239/- @ 18% to only 25% of the tender amount which equals to Rs.3,71,564/- and the interest percentage thereon was reduced to 9%. This was found to be justified by the learned Single Judge.

CONSIDERATION AND CONCLUSION

11. It is in this background, that we are required to consider whether the modification of the arbitral award as carried out by the learned Civil Judge as confirmed by the High Court, was justified within law?

12. It would be useful to examine the expositions of this Court on the scope to interfere with arbitral awards under Sections 34 & 37 of the A&C Act.

13. The Judgment and Order of the learned Civil Judge was dated 22nd April 2010.

14. The position as to whether an arbitral award can be modified in the proceedings initiated under Sections 34/37 of the A&C Act is no longer *res integra*. While noting the provisions, more specifically, Section 34(4) of the A&C Act; the decisions rendered by this Court, including the principles of international law enunciated in several decisions recorded in the treatise "Redfern and Hunter on International Arbitration, 6th Edition", this Court in **National Highways Authority of India v. M. Hakeen and Another**[3]**,** categorically held that any court under Section 34 would have no jurisdiction to modify the arbitral award, which at best, given the same to be in conflict with the grounds specified under Section 34 would be wholly unsustainable in law. The Court categorically observed that any attempt to "modify an award" under Section 34 would amount to "crossing the *Lakshman Rekha*".

15. On the exact same issue we may also note another opinion rendered by this Court in **Dakshin Haryana Bijli Vitran Nigam Limited** v. **Navigant Technologies Private Limited**[4] in the following terms:-

3 (2021) 9 SCC 1 (2-JudgeBench)

4 (2021) 7 SCC 657 (2-Judge Bench)

> **"44.** In law, where the court sets aside the award passed by the majority members of the Tribunal, the underlying disputes would require to be decided afresh in an appropriate proceeding. Under Section 34 of the Arbitration Act, the court may either dismiss the objections filed, and uphold the award, or set aside the award if the grounds contained in sub-sections (2) and (2-A) are made out. There is no power to modify an arbitral award. In *McDermott International Inc.* v. *Burn Standard Co. Ltd.* [*McDermott International Inc.* v. *Burn Standard Co. Ltd*., (2006) 11 SCC 181] , this Court held as under : (SCC p. 208, para 52)
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> "*52*. The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it."
>
> (Emphasis Supplied)

16. The principle stands reiterated as late as 2023 in **Larsen Air Conditioning and Refrigration Company**v.**Union of India & Others**[5].

17. We may notice certain principles to be considered in adjudication of challenges to arbitration proceedings of this nature. It is a settled principle of law that arbitral proceedings are *per se* not comparable to judicial proceedings before the Court (**Dyna Technologies Private Limited** v**. Crompton Greaves Limited**[6]). The Arbitrator's view, generally is considered to be binding upon the parties unless it is

5 2023 SCC OnLine 982 (2-Judge Bench)

6 (2019) 20 SCC 1 (3-Judge Bench)

set aside on certain specified grounds. In the very same decision taking note of the opinion as is in "Russel on Arbitration", reiterated the need for the Court to look at the substance of the findings, rather than its form, stood reiterated and the need for adopting an approach of reading the award in a fair and just manner, and not in what is termed as "an unduly literal way". All that is required is as to whether the reasons borne out are intelligible or not for adequacy of reasons cannot stand in the way of making the award to be intelligibly readable.

18. Emphasizingly, it is reiterated that if the view taken by the Arbitrator is a plausible view, no interference on the specified grounds is warranted (**Konkan Railway Corpn. Ltd.** v**. Chenab Bridge Project** [7]**).**

19. It is also a settled principle of law that an award passed by a technical expert is not meant to be scrutinised in the same manner as is the one prepared by a legally trained mind (**Delhi Airport Metro Express Private Limited** v. **Delhi Metro Rail Corporation Limited**[8]).

20. We are dealing with an award passed on 18th February, 2003, prior to the amendment brought in Section 34 by virtue of the Arbitration and Conciliation (Amendment) Act, 2015. For the purpose of ready reference the relevant portion of the amended and the unamended provisions are extracted as under :-

> "**Prior to 2015 Amendment**
>
> **34. Application for setting aside arbitral award. -**
>
> (1) Recourse to a court against an arbitral awärd may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
>
> (2) An arbitral award may be set aside by the court only if-
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> …
>
> (v) the composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot

7 (2023) 9 SCC 85 (Three Judge Bench)

8 (2022) 1 SCC 131 (Two Judges Bench)

derogate, or, failing such agreement, was not in accordance with this Part; or

(b) the court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81.

(Emphasis supplied)

Post 2015 Amendment

34. Application for setting aside arbitral award.—(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if—

…

(*b*) the Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[*Explanation 1*.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.]

[(2-A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.]"

21. In so far as the state of the law prior to such Amendment is concerned, the situation stands encapsulated by this Court, in **DDA** v. **R.S Sharma**[9] where the grounds whereby courts may intervene against arbitral award, were listed.

22. Observations of this Court in **Associate Builders** v. **DDA**[10] are also of note. It was held:

> **"15.** This section in conjunction with Section 5 makes it clear that an arbitration award that is governed by Part I of the Arbitration and Conciliation Act, 1996 can be set aside only on grounds mentioned under Sections 34(2) and (3), and not otherwise. Section 5 reads as follows:
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> "**5. *Extent of judicial intervention***.—Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."

9 (2008) 13 SCC 80 (2 Judge Bench)

10 (2015) 3 SCC 49 (2 Judge Bench)

> **16.** It is important to note that the 1996 Act was enacted to replace the 1940 Arbitration Act in order to provide for an arbitral procedure which is fair, efficient and capable of meeting the needs of arbitration; also to provide that the tribunal gives reasons for an arbitral award; to ensure that the tribunal remains within the limits of its jurisdiction; and to minimise the supervisory roles of courts in the arbitral process.
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> **17.** It will be seen that none of the grounds contained in sub-section (2)(*a*) of Section 34 deal with the merits of the decision rendered by an arbitral award. It is only when we come to the award being in conflict with the public policy of India that the merits of an arbitral award are to be looked into under certain specified circumstances."
>
> (Emphasis Supplied)

23. As it is evident from the extracted provisions, as above that prior to the Amending Act, it was open for the Court to examine the award as to whether it was in conflict with, (a) public policy of India; (b) induced or affected by fraud; (c) corruption; and (d) any violation of the provisions of Section 75 and 81 of the A&C Act.

24. In the instant case, the only provision under which the award could have been assailed was for it to have been in conflict with the public policy of India. This concept has been elaborately considered by this Court in **Associate Builders**(supra)**; Ssangyong Engineering and Construction Company Limited** v. **National Highways Authority of India**[11],in the following terms:-

25. In **Associate Builders** (supra) the Court observed-

> **"19.** When it came to construing the expression "the public policy of India" contained in Section 34(2)(*b*)(*ii*) of the Arbitration Act, 1996, this Court in *ONGC Ltd.* v. *Saw Pipes Ltd.* [(2003) 5 SCC 705 : AIR 2003 SC 2629] held: (SCC pp. 727-28 & 744-45, paras 31 & 74)
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> "*31*. Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given

11 (2019) 15 SCC 131 (Two Judges Bench)

a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in *Renusagar case* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644] it is required to be held that the award could be set aside if it is patently illegal. The result would be—award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

(Emphasis supplied)

26. **Ssangyong Engineering**(supra) followed the observations of **Associate Builders** (supra). To efficiently encapsulate the extent thereof particularly in the context of Indian awards, we may refer only to para 37 where it has been held:-

> **"37.** Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2-A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount

> to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality."

27. The position in **Associate Builders**(supra) was recently summarised as hereinbelow recorded by **Indian Oil Corpn. Ltd.** v. **Shree Ganesh Petroleum**[12]

> **"42.** In *Associate Builders*, this Court held that an award could be said to be against the public policy of India in, inter alia, the following circumstances:
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> **42.1.** When an award is, on its face, in patent violation of a statutory provision.
>
> **42.2.** When the arbitrator/Arbitral Tribunal has failed to adopt a judicial approach in deciding the dispute.
>
> **42.3.** When an award is in violation of the principles of natural justice.
>
> **42.4.** When an award is unreasonable or perverse.
>
> **42.5.** When an award is patently illegal, which would include an award in patent contravention of any substantive law of India or in patent breach of the 1996 Act.
>
> **42.6.** When an award is contrary to the interest of India, or against justice or morality, in the sense that it shocks the conscience of the Court."

JUDGMENT PASSED UNDER SECTION 34 A&C ACT

28. A perusal of the judgment and order of the learned Civil Judge, in the considered view of this Court, does not reflect fidelity to the text of the statute. Nowhere does it stand explained, as to, under which ground(s) mentioned under Section 34 of the A&C Act, did the Court find sufficient reason to intervene. In fact, quite opposite thereto, the Court undertook a re-appreciation of the matter, and upon its own view of the evidence, modified the order.

12 (2022) 4 SCC 463 (2-Judge Bench)

29. As the above extracted judgment shows, merits of the award are only to be gone into, if the award is demonstrated to be contrary to the public policy of India. The reasons recorded by the learned Civil Judge for modifying the arbitral award, as reflected from a perusal thereof, have been recorded in an earlier section of the judgment. None of those reasons even so much as allude to the award being contrary to the public policy of India, which would enable the court to look into the merits of the award.

30. We have carefully perused the award passed by the Arbitrator in which he has not only referred to and considered the materials on record in their entirety but also, after due application of mind, assigned reasons for arriving at this conclusion, either rejecting, accepting or reducing the claim set out by the Claimant-Appellant. Noticeably, during the arbitral proceedings none of the parties raised any objection to the Arbitrator adjudicating the dispute, be it on any ground, including bias. Each one of the claims stands separately considered and dealt with.

31. We find that the view taken by the Arbitrator is a plausible view and could not have been substituted for its own by the Court.

32. The reasons assigned by the Court under Section 34 of the A &C Act, to our mind, are totally extraneous to the controversy, to the *lis* between the parties and not borne out from the record. In fact, they are mutually contradictory.

32.1 In awarding an amount of 25% of the tender amount (incorrectly recorded as "over the tender amount" in some parts of the judgment of the learned Civil Judge, Sirsi) in favour of the Claimant-Appellant, the Court has *ipso facto* accepted that the Claimant-Appellant had not breached the terms of the contract. In fact, the Court appears to have accepted the Claimant's contention of delay in handing over the site drawings and supply of materials. The Court while noticing the change in the drawings, resorted to, a misadventure by observing that the changes in the drawings were "only minor" in the dimension of beam which as we find the Court have contradicted itself by recording the same to have been "noticed as essential in the execution of the contract". The Court, in our considered view had no business to state that the Claimant is claiming the amount is from the pocket of the concerned engineer or his property.

"…Whether the claimant is claiming the such amount is from the pocket of concerned Engineers or from his property, whey should so much amount be paid from exchequer amount, it is heavily cast on the tax payer, that has to be consider by the court…"

32.2 Further observations as we extract hereunder, justifying the interference in the award, in our considered opinion, are totally scandalous: -

"…Admittedly the arbitrator who is retired Engineer after retirement there will be no holding on the department, when the claimant is going to benefit so much amount there will be benefit to the arbitrator…"

32.3 The Court imputed its personal knowledge in assigning reasons by observing :-

"…Even in this case also if the report of the arbitrator is accepted as it is, it is heavy burden on the exchequer not on the department…"

32.4 The reasoning given by the Court in interfering with the award which is extracted immediately hereafter, in our view, is preposterous: -

"…It is the common sense and the general observation, whenever the work is entrusted to any contractor to put up the construction what they do is, they use to start excavation to lay a foundation. It is not the case of the 2nd opponent regarding digging at original spot or laying any foundation for construction of the residential house. So, under such circumstances the alleged loss pleaded by the opponent No.2 is only at his imagination."

32.5 For it is no business of the Court to consider the burden on the exchequer. All that is required by the Court is to see as to whether the contracting parties have agreed to bind themselves to the terms with the only supervisory jurisdiction of the Court to consider breach thereof, in the light of the grounds specified under Section 34.

32.6 To our mind, the court lost sight of the fact that the civil contract was composite in nature that is having contracted both of

the building of the office and residence together. In these circumstances, the contractor could not have commenced work of part of the project when the complete site and the drawings were not handed over to him. In the absence of the parties have agreed otherwise, work could not have commenced. Hence, observation of the court, advisory in nature, for the contractor to have commenced the work for one part of the contract is unwarranted and uncalled for, in fact perverse.

32.7 The other observation that there was a delay on the part of the contractor in completing the work or speeding up the work does not reflect in the record. They are nothing short of mere conjectures. This is more so in view of the absence of invocation of the arbitration clause or initiation of the proceedings thereunder on the part of the Respondent against the contractor as also not raising any counter claims for adjudication by the Arbitrator.

32.8 Accounting for the legal position, the court could have at best set aside the award and could not modify the same.

32.9 We also notice the learned Arbitrator, to have accepted the contention of the Claimant-Appellant that there was a delay in supply of drawings, which in turn caused delay in placing the orders for steel and other such requirements. The Civil Judge had disagreed therewith on a mere reference to "Ex. R 38 to 95" showing prompt supply. There is no discussion whatsoever. Another instance is noteworthy. It was observed that the question of idleness of the labour does not arise if there was another building to be constructed, and therefore, such claim cannot be paid. This is a clear instance of the court supplanting its view in place of the Arbitrator, which is not a permissible exercise, and is completely de-hors to the jurisdiction under Section 34.

33. As such, the modification of the arbitral award by the learned Civil Judge, Sirsi, does not stand scrutiny, and must be set aside.

JUDGMENT UNDER SECTION 37 A&C ACT

34. Moving further, we now consider the judgment impugned before us, i.e., the order of the High Court upholding such modification, under the jurisdiction of Section 37 of the A&C Act.

35. It has been observed by this Court in ***MMTC Ltd.*** v. ***Vedanta Ltd.***[13]

> **"14.** As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision. Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."
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> (Emphasis Supplied)

36. This view has been referred to with approval by a bench of three learned Judges in **UHL Power Company Ltd v. State of Himachal Pradesh**[14]**.**In respect of Section 37, this court observed:-

> **"16.** As it is, the jurisdiction conferred on courts under Section 34 of the Arbitration Act is fairly narrow, when it comes to the scope of an appeal under Section 37 of the Arbitration Act, the jurisdiction of an appellate court in examining an order, setting aside or refusing to set aside an award, is all the more circumscribed."

37. This Court has not lost sight of the fact that, as a consequence to our discussion as aforesaid, holding that the judgment and order under Section 34 of the A&C Act does not stand judicial scrutiny, an independent evaluation of the impugned judgment may not be required in view of the holding referred to supra in **MMTC Ltd**. However, we proceed to examine the same.

38. We may also notice that the circumscribed nature of the exercise of power under Sections 34 and 37 i.e., interference with an arbitral award, is clearly demonstrated by legislative intent. The Arbitration Act of 1940 had a provision (Section 15) which allowed for a court

13 (2019) 4 SCC 163(2 Judge Bench)

14 (2022) 4 SCC 116(3-Judge Bench)

to interfere in awards, however, under the current legislation, that provision has been omitted.[15]

39. The learned Single Judge, similar to the learned Civil Judge under Section 34, appears to have not concerned themselves with the contours of Section 37 of the A&C Act. The impugned judgment reads like a judgment rendered by an appellate court, for whom re-examination of merits is open to be taken as the course of action.

40. We find the Court to have held the award to be perverse and contrary to public policy. The basis for such a finding being the delay on the part of the contractor in completion of the work which "could have been avoided". Significantly, as we have observed earlier such a finding is not backed by any material on record.

41. What appears to have weighed with the court is that the factoring of the cost escalation between the years 1989-90 and 1992 by 100% was exaggerated. But then equally, there is no justification in granting lump sum escalation by 25% of the contract value. Well, this cannot be a reason to modify the award for the parties are governed by the terms and conditions and the price escalation stood justified by the petitioner based on cogent and reliable material as was so counted by the Arbitrator in partly accepting and/or rejecting the claims.

42. In our considered opinion, the court while confirming the modification of the award committed the very same mistake which the Court under Section 34 of the A&C Act, made.

The Court under Section 37 had only three options:-

(a) Confirming the award of the Arbitrator;

(b) Setting aside the award as modified under Section 34; and

(c) Rejecting the application(s) under Section 34 and 37.

43. The learned single Judge has examined the reasoning adopted by the learned Arbitrator in respect of certain claims (claims 3 and 7, particularly) and held that allowing a claim for escalation of cost, was without satisfactory material having been placed on record and is "perverse and contrary to the public policy". However, it appears

15 Larsen Air Conditioning and Refrigration Company v. Union of India and Others 2023 SCC OnLine 982 (2-Judge Bench)

that such a holding on part of the Judge is without giving reasons therefor. It has not been discussed as to what the evidence was before the learned single Judge to arrive at such conclusion. This is of course, entirely without reference to the scope delineated by various judgements of this Court as also, the statutory scheme of the A & C Act.

44. Having referred to **J.G Engineers (P)Ltd.** v. **UOI**[16]and more particularly para 27 thereof, it has been held that the award passed by the learned Arbitrator is "patently illegal, unreasonable, contrary to public policy." There is no reason forthcoming as to how the holding of the learned Arbitrator flies in the face of public policy.

ON INTEREST

45. On the issue of interest, we notice that the Arbitrator has awarded interest @ 18% p.a., w.e.f. 09 March 1994 which stood reduced to 9%. The transaction being commercial in nature, we see no reason as to why the claimant could not be entitled to interest in terms of the rate quantified by the Arbitrator which includes the period of pre-arbitration, *pendantelite* and future. We notice this Court to have stated in **Hyder Consulting (UK) Ltd.** v. **State of Orissa**[17]**,** through S.A. Bobde, J. (as His Lordship then was) speaking for the majority as under:

> **"4.** Clause (*a*) of sub-section (7) provides that where an award is made for the payment of money, the Arbitral Tribunal may include interest in the sum for which the award is made. In plain terms, this provision confers a power upon the Arbitral Tribunal while making an award for payment of money, to include interest in the sum for which the award is made on either the whole or any part of the money and for the whole or any part of the period for the entire pre-award period between the date on which the cause of action arose and the date on which the award is made... The significant words occurring in clause (*a*) of sub-section (7) of Section 31 of the Act are "*the sum for which the award is made*". On a plain reading, this expression refers to the *total amount* or *sum* for the

16 (2011) 5 SCC 758 (2 Judge Bench)

17 (2015) 2 SCC 189 (3-Judge Bench)

payment for which the award is made. Parliament has not added a qualification like "principal" to the word "sum", and therefore, the word "sum" here simply means "a particular amount of money". In Section 31(7), this particular amount of money may include interest from the date of cause of action to the date of the award.

… ….

7. Thus, when used as a noun, as it seems to have been used in this provision, the word "sum" simply means "an amount of money"; whatever it may include — "principal" and "interest" or one of the two. Once the meaning of the word "sum" is clear, the same meaning must be ascribed to the word in clause (*b*) of sub-section (7) of Section 31 of the Act, where it provides that a *sum* directed to be paid by an arbitral award "*shall … carry interest* …" from the date of the award to the date of the payment i.e. post-award. In other words, what clause (*b*) of sub-section (7) of Section 31 of the Act directs is that the "sum", which is directed to be paid by the award, whether inclusive or exclusive of interest, shall carry interest at the rate of eighteen per cent per annum for the post-award period, unless otherwise ordered.

…

9. The purpose of enacting this provision is clear, namely, to encourage early payment of the awarded sum and to discourage the usual delay, which accompanies the execution of the award in the same manner as if it were a decree of the court vide Section 36 of the Act."

(Emphasis Supplied)

46. Keeping in view the aforesaid observations of this Court, it cannot be doubted that the Claimant-Appellant is entitled to interest. We find that the learned Arbitrator, as hitherto observed, has awarded 18% interest and the same stood reduced by the Courts below to 9% without any legal basis therefor. In exercise of our powers under Article 142, we deem it appropriate to, in order to ensure substantial justice,*inter se* the parties, of awarding interest @ 9 % p.a. from the date of award *pendantelite* and future, till date of payment.

CONCLUSION

47. In the absence of compliance with the well laid out parameters and contours of both Section 34 and Section 37 of the A&C Act, the impugned judgement(s)referred to in Para 1 (supra) are required to be set aside. Consequently, the award dated 18thFebruary 2003 of the learned Arbitrator is restored, for any challenge thereto has failed.

48. The appeal is allowed with a direction to the State of Karnataka to expeditiously pay the amount. No costs.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 306 : 2024 INSC 21

Pradeep Kumar

v.

State of Haryana

(Criminal Appeal No. 1338 of 2010)

05 January 2024

[B. R. Gavai and Pamidighantam Sri Narasimha*, JJ.]

Issue for Consideration

In a case based only on circumstantial evidence, conviction of the appellant u/s.302 read with s.34, Penal Code, 1860 for murder and sentence to rigorous imprisonment for life, if justified.

Headnotes

Evidence – Circumstantial evidence – Case of the prosecution based only on circumstantial evidence – Conviction of the appellant u/s.302 read with s.34, IPC – Propriety:

Held: Versions of the three witnesses (PW-10, PW-11 and 12) are improbable and contradictory – The weapons recovered by the IO and the ones seen by the witnesses are only sticks – However, the deceased had suffered an incise wound which according to the doctor, PW-14 who conducted the post-mortem, was caused by a sharp-edged weapon – Prosecution did not recover any sharp-edged weapon – In fact, there is no mention about a sharp-edged weapon at all – FSL report states that the "pant" sent to them for examination was one dirty blue "terikot pant" – However, as per the recovery memo a "jeans pant" was recovered from the Appellant – Additionally, the FSL report states that the blood on the sticks, blood-stained pants and the blood group of the deceased is the same "O+" – This is not an indication of the guilt – Moreover, nothing of these recoveries took place in the presence of an independent witness – Thus, there is a yawning gap between the charge against the Appellant and the evidence adduced – The circumstances do not establish the guilt of the Appellant at all – In a case based on circumstantial evidence, the facts must be consistent with the hypothesis of the guilt of the accused, in the present case the evidence adduced gives rise to doubts, improbabilities and inconsistencies – Prosecution did not

* Author

establish its case beyond reasonable doubt – Judgment of the High Court and the Trial Court set aside – Appellant acquitted. [Paras 25, 26, 29-32]

Case Law Cited

Pritinder Singh @ Lovely v. The State of Punjab **[2023] 10 S.C.R. 1033: (2023) 7 SCC 727;** *Sharad Birdhichand Sarda v. State of Maharashtra* **[1985] 1 SCR 88:(1984) 4 SCC 116 – relied on.**

List of Acts

Penal Code, 1860.

List of Keywords

Circumstantial evidence; Murder; Case not established beyond reasonable doubt; Acquittal.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.1338 of 2010.

From the Judgment and Order dated 05.09.2009 of the High Court of Punjab & Haryana at Chandigarh in CRLA No.805-DB of 2007.

Appearances for Parties

Pranab Kumar Mullick, Mrs. Soma Mullick, Anil Rana, Ms. Banani Sikdar, Sebat Kumar Deuria, Sagar Kundu, Rohit Rana, Ajay Solanki, Advs. for the Appellant.

Ajay Bansal, A.A.G., Gaurav Yadava, Samar Vijay Singh, Keshav Mittal, Ms. Sabarni Som, Ms. Veena Bansal, Saurav Jindal, Sanjay Yadav, Nikilesh Ramachandran, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. The sole appellant herein was tried along with another accused for the murder of one Samsher Singh and convicted under Section 302 read with Section 34 of the Indian Penal Code, 1860 for murder

and sentenced to rigorous imprisonment for life by the Trial Court[1]. In appeal, the High Court of Punjab & Haryana[2] by the judgment impugned herein dismissed the appeal and confirmed the conviction and sentence. Thus, the present appeal.

2. The case of the prosecution is that while the Assistant Sub-Inspector Balbir Singh, later examined as PW-21 was with other police officials on duty at Deyod Kheri Village, Jind-bypass road, Kaithal, on 11.04.2004, the complainant-Sunil Kumar Bhura (later examined as PW-20) met him and got his statement (EX.PY) recorded. The statement had that he is a resident of Nehru Garden Colony, Kaithal and the deceased-Shamsher Singh is related to him, being son of his paternal aunt. PW-20 was in business of real estate and was living in Adarsh Nagar, Kaithal. The previous day, that is on 10.04.2004, when PW-20 was in the office of the deceased along with one Balwant Singh (PW-18), the deceased received a call on his mobile phone at about 9.15 PM. A little thereafter, that is about 9.30 PM, the deceased received another phone call. After conversing on the mobile phone, the deceased informed them that he has to go to Gole Market and left on his motorcycle. The complainant and Balwant Singh also left the shop of the deceased. In the morning, the deceased's wife informed PW-20 that the deceased had not returned the previous night. On receiving the said information, PW-20 and PW-18 reached the house of the deceased and thereafter went on a search for the deceased.

3. When PW-20 got the information that a dead body was found lying, he along with PW-18 and one Mr. Naresh (PW-13) reached the spot and saw that the deceased lying there, with his throat having knotted with some cloth, and the right eye being badly injured. They also noticed some injuries on the head of the deceased. The motorcycle of the deceased was parked by the side. While Naresh and PW-18 remained at the spot, PW-20 had come to inform the police about the incident and his statement was thus recorded and read over to him by the investigating officer (PW-21) with his endorsement at Ex. PW-21/1. After the FIR was registered, PW-24 took over the investigation and recorded the statements of witnesses.

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1 The Additional Sessions Judge Kaithal in Sessions Case No. 43 of 2004 dated 31.08.2007.

2 In Criminal Appeal No. 805-DB 2007 dated 05.09.2009.

4. During the investigation, the police recorded the statement of Rajesh, later examined as PW-11 and Jogi Ram later examined as PW-12. The statement and deposition of these two persons assumed importance as their evidence was relied on by the Trial Court as well as the Appellate Court.

5. The statement of Rajesh (PW-11) was that on 10.04.2004 while he was driving from Chandigarh to Hisar, about half a kilometre before Karnal bypass his vehicle got punctured. As he was changing the wheel, he saw four young people on motorcycle coming from eastern side and they had to slow down because of the Karnal bypass. At that time, he saw the accused were carrying dandas and one of the boy's clothes were stained with blood. Being suspicious he noted the registration number of the motorcycle being HR 08 E 4962. This witness also says that he read about the murder of the deceased in the newspaper two days later, i.e. on 12.04.2004 and while he was returning back to Chandigarh on 13.04.2004, he saw a police vehicle standing at the Karnal bypass Chowk with some police officials and the accused. He stopped his vehicle and informed the police about the occurrence on 10.04.2004. The prosecution thus relied on this person in support of the case as a witness to have last seen the deceased with the accused.

6. Similarly, PW-12 made a statement to the police. His version is that he is a resident of Sector 19/1 Huda, Kaithal and on 10.04.2004, he was taking an evening walk on Kaithal Road T-Point near Huda Road/Street. About 9.45-10 pm, while urinating by the roadside, he saw a motorcycle ridden by 3 young boys of about 20-21 years of age holding dandas in their hands. He recognised the appellant and when he started coughing, that is while urinating, the 3 boys drove away towards Karnal Road. His statement was recorded by the police on 12.04.2004.

7. The police also recorded the statement of one Dilbag Singh, later examined as PW-16 who recorded his version of having seen the deceased in the company of the accused at the same spot.

8. It is the case of the prosecution that on 17.04.2004, the Appellant (A-1), Sumit Gupta (A-2), Anil & Jaswinder surrendered before the investigating officer through Ex-Sarpanch of village Geong, Balbir Singh (PW-10) to whom the accused made an extra-judicial confession. Pursuant to the surrender, the prosecution says that

disclosure statements of A-1, A-2, Anil & Jaswinder were recorded, and certain recoveries were also made.

9. Upon completion of investigation, charge sheet was filed. It may be mentioned at this stage that prosecution of Anil and Jaswinder was separated from this case after they were declared to be juveniles. Thus, only the Appellant and Sumit Gupta (A-2) stood trial. Before the Trial Court, the prosecution examined 24 witnesses and marked certain exhibits. The defence on the other hand examined 3 witnesses as DW 1, 2 and 3.

10. The Trial Court having noticed that there are no eyewitnesses and that the case of the prosecution is based only on circumstantial evidence, copiously referred to the statements of each witness, but rested its decision only on the evidence of PW-10, 11 & 12 and certain recoveries and the FSL Report. The reasoning, which is in two paragraphs is extracted herein below for ready reference:

> *"In the present case, the chain of circumstances is interwoven which has been corroborative through the testimony of PW-11 Rajesh and PW-12 Jogi Ram who have last seen accused Sumit Gupta and accused Pradeep Kumar with Shamsher Singh deceased. Extra Judicial confession has been made before Ex. Sarpanch Balbir Singh. Motive is also proved through cheques which have been issued by accused Sumit Gupta in the name of Shamsher Singh (deceased) from which accused Sumit Gupta has taken a loan of Rs. 29,000/- and failed to return back that money in time. There is recovery of Mobile Phone of accused Sumit Gupta and Shamsher Singh vide recovery memo Ex. PV. In FSL report Ex. PRR/1 blood group of deceased Shamsher Singh is cited to be 'O' group. In the 'danda' recovered from accused vide recovery memo Ex. PQQ, blood group 'O' tallies. Similarly, on the pant worn by the accused Pardeep Kumar recovered later, blood 'O' group has been found on the stains of pant vide recovery memo Ex. PJ. Hence, the prosecution case is also proved through scientific investigation also. Hence, these are chain of evidence so far complete, so as not to leave any reasonable ground for conclusion consistent with the guilt*

of the accused. The guilt of accused Sumit Gupta and accused Pardeep Kumar is proved to the fact that in all human probability act of murder has been committed by accused Sumit Gupta and Pardeep Kumar.

Hence, it is proved to the hilt that on 10.04.2004, at about 10 PM in the area of Dhand Road Deokheri turning accused Sumit Gupta and Pardeep Kumar in furtherance of their common intention caused death of deceased Shamsher Singh intentionally and committed offence punishable under Section 302 read with Section 34 IPC."

11. In appeal by the Appellant herein and accused No.2, Sumit Gupta, the High Court also relied on the evidence of PW-11 and 12. In fact, the High Court seemed to have accepted the submission of the defence that the evidence of Ex. Sarpanch, PW-10 is unreliable. However, without discussing the evidence of PW-10, the High Court observed that the evidence of PW-11 and PW-12 are sufficient to confirm the conviction and sentence imposed by the Trial Court.

12. We heard Mr. Pranab Kumar Mullick, learned counsel for the appellant who took us through his meticulously prepared written submissions and statements of relevant witness and the reasoning of the High Court.

13. As the case of the prosecution, as accepted by the Trial Court and High Court, is based on circumstantial evidence said to have been established by PW-10, 11 and 12, we will examine them in detail.

14. **PW-10** is an Ex. Sarpanch of the village Geong. His testimony is that on 17.04.2004, while he was in his house, the Appellant (A-1), Sumit (A-2), Anil and Jaswinder came to him and confessed about committing the murder of the deceased. He stated that Sumit Gupta (A-2) disclosed to him that he borrowed money from the deceased and as such there was pressure on him to return the money. When the deceased demanded the money on 10.04.2004, he was apprehensive of being insulted and therefore planned to kill the deceased with the help of other accused. For this purpose, he called the deceased to the T-Point at Kaithal, Dhand Road at 9.30 PM saying that he has arranged the repayment. By the time the deceased came there, other accused were already present at the spot, they all assaulted

the deceased with dandas, killed him and threw the dead body in the field near Shergha Road. This witness also stated that all other accused disclosed similar version. Himself being an Ex. Sarpanch, he has thereafter produced the accused before the SHO Police Station Kaithal.

15. Having considered the submissions of the appellant about contradictions in the statement of this witness (PW-10), the High Court concluded, *"even if we ignored the evidence of PW-10 before whom the appellants have made an extra judicial confession having committed the crime, there is more emphatic evidence led by the prosecution compelling this Court to believe that the appellants had committed the crime of murdering Shamsher Singh."* In other words, the High Court has not relied on the evidence of PW-10 as it found other sufficient evidence.

16. We have however independently examined the evidence of PW-10 and come to the conclusion that this witness is not trustworthy and this is evident from the following:

    a. This witness denied having met the deceased earlier *"I have never met Shamsher Singh earlier".* However, the complainant (PW-20) in his statement on 11.04.2004 says "*today we came to know that Malkhan, Prem Singh, Balbir Sarpanch met Shamsher on Dhand Road, Kaithal at about 10 PM."* The said statement is also recorded in the FIR and charge sheet, though he leaves doubt about this version in his deposition.

    b. Similarly, Balwant Singh (PW-18) in his deposition on 08.12.2006 states that, "*since Shamsher Singh did not reach back to home and hence his family members started searching for him. Malkhan, Prem Singh and Balbir Singh r/o Geong informed that Shamsher Singh was seen at Dhand Road, Kaithal*".

    c. Further, Balbir Singh, ASI (PW-21) also deposed about the deceased having met the Sarpanch. He says *"it is correct to state that Balbir Sarpanch, Malkhan and Prem Singh residents of Geong had met Shamsher Singh deceased on 10.04.2004 at 10 PM at Dhand Road, Kaithal, according to statements of PWs gathered at the spot that is Sunil and Balwant PWs."*

17. Apart from the above referred contradiction, yet another fact about the extra-judicial confession on 17.04.2004 is noteworthy. The statement of

the accused Sumit Gupta (A-2) in his Section 313 CrPC statement is that they were arrested on 11.04.2004 itself and not 17.04.2004. This statement gets corroborated by the deposition of Rajesh (PW-11), who stated *that; "Thereafter I read news in newspaper regarding murder on 12.04.2004. On 12.04.2004 I read in the newspaper regarding murder at Kaithal in the surrounding area in which I was changing the stepney. On 13.04.2004 in the morning, I was going to Chandigarh through Kaithal and I saw a police vehicle standing on Karnal by pass Chowk in the area of Kaithal. I saw police inspector along with 4/5 police officials and saw the same accused along with police. Then I stopped and told the police regarding occurrence on 10.04.2004. Police recorded my statement on the spot."* If the statement of PW-11 is to be accepted, which the prosecution wants us to believe, then the arrest had already taken place by 13.04.2004 and therefore the accused were seen in the presence of the police on that day. If this is true, then there is no doubt in our mind that the extra judicial confession on 17.04.2004 is false and unbelievable. The evidence of this witness that is PW-11 is strongly relied on by the prosecution. In fact, the Trial Court as well as the High Court proceeded on the basis of this witness's statement to convict and sentence the Appellant. This is perhaps the reason why the High Court did not consider it appropriate to rely on the evidence of PW-10 and proceeded to confirm conviction and sentence on the basis of other evidence. There are some other aspects which Mr. Mullick has relied on to cast a doubt about evidence of PW-10 but we are of the opinion that the above referred factors are sufficient to reject the version of PW-10.

18. **PW-11 –** His evidence is relied on by the Trial Court as well as the High Court. He is admittedly a chance witness. In fact, he chances the episode twice over, first on 10.04.2004 at about 10.30 PM when he was going from Chandigarh to Hisar. His version is that at about 1.5 kilometres near Karnal bypass, his car tyre got punctured and when he was putting the stepney, he saw four people on motorcycle armed with dandas. He noticed blood stain on the deceased's pant and also records the registration number of the motorcycle. Secondly, he again chances the police party standing with the accused on his way back to Chandigarh. He stops and gets the incidence of 10.04.2004 recorded by the Police.

19. This witness is completely unreliable. It is his own statement that he started from Chandigarh at 6 PM on 10.04.2004. The distance

between Chandigarh and the place of occurrence is about 120 kilometres and takes about 2 hours to cover the distance even by car. There is no explanation as to how he took more than four hours to reach the scene of offence. This uncertainty is compounded when he admits his ignorance about the person in whose name the car is registered. Further, upon being questioned about where he stayed in Chandigarh the night of 09.04.2004, his answer is simply that he does not remember the name of the lodge. He could not even remember the shops near by the lodge. It is rather surprising that this witness while engrossed in changing the wheel of his car at 10.30 PM manages to note the blood stains on the pant and also recorded the registration number of the motorcycle. There is nothing to indicate that he had a pen or a paper to readily note the registration number. His statement is to be contrasted with the version of Ram Kumar IO (PW-24) who stated that *"I did not see any arrangement of the light on the Karnal bypass road especially the alleged place where the car of Rajesh Kumar got punctured and he saw the accused while riding the motorcycle. It is correct that there is no light arrangement on the place of occurrence because it is an agriculture area."* We are not at all impressed with the evidence of PW-11. There are too many coincidences in his version and his story is improbable in the context of the facts and circumstances of the case. He is certainly an unreliable witness.

20. **PW-12 –** He is again a chance witness, relied on by the prosecution to prove the last seen theory. This witness is said to have gone out for an evening walk on Kaithal Road between 9.45 to 10 PM. While urinating by the roadside, he sees a motorcycle with three accused on it. He states that the accused moved away towards Karnal bypass, the moment he started coughing while urinating. He reports this incident two days later, that is on 12.04.2004 by going to Sadar Police Station, Kaithal. We will analyse his statement.

21. As per the statement of PW-12, he went on an evening walk between 9.45 to 10 PM, two Kilometres away from his house, particularly in an area which does not have streetlights. The multi-tasking of urinating, coughing, seeing the motorcycle, noting the blood stains clothes and recording the registration number happens simultaneously. There is no evidence as to the manner in which he had recorded the registration number. He is said to have studied only up to 6th class. How could he notice and also memorise the registration number having seen

it from a long distance. He himself says the motorcycle was at a distance. His version is highly improbable.

22. This witness says that the blood stained trouser and dandas in the hands of the accused caused suspicion and therefore, he recorded the number. However, that did not compel him to go to the police station. Instead, he reports the incident only on the 12.04.2004, that is two days later. Strangely, instead of reporting the incident to the police chowki which is next to his residence, he goes all the way to Sadar Police Station, Kaithal. We are of the opinion that the evidence of PW-12 does not inspire confidence at all.

23. **PW-16** – This is yet another witness relied on by the prosecution, however, the Trial and the High Court have not laid much emphasis. We will nevertheless examine the evidence of this witness. He is a witness who was on his way to Haridwar along with his Fufa (father's sister's husband). He is supposed to have seen the deceased sitting on a motorcycle along with A-2 at T-Point at Karnal bypass. After speaking to him for 2 to 3 minutes, he proceeded further. This witness reports this incident to the Police on 14.04.2004 when he comes back from Haridwar. His statement is similarly relied on by the prosecution in support of the last seen theory.

24. This witness is a relative of the deceased. The Fufa who was travelling with him is not examined. He does not even know the driver of the vehicle in which he travelled or its registration number, even though he went all the way to Haridwar and stayed there for two to three days. This witness describes the incidence of meeting the deceased and A-2 at a place where even PW-12 is supposed to have seen the deceased. Neither this witness spoke of PW-12, nor did PW-12 speak about this witness. Nothing much flows from the evidence of this witness, apart from his own version which is highly improbable and therefore unreliable.

25. Apart from the improbable and contradictory versions of the three witnesses, Mr. Mullick has also brought to our notice that the weapons recovered by the IO and the ones seen by the witnesses are only sticks. However, the deceased has suffered an incise wound which according to the doctor, PW-14 who conducted the post-mortem, is caused by a sharp-edged weapon. The prosecution has not recovered any sharp-edged weapon. In fact, there is no mention about a sharp-edged weapon at all.

26. The FSL report states that the "pant" sent to them for examination was one dirty blue "terikot pant". However, as per the recovery memo a "jeans pant" was recovered from the Appellant. Additionally, the FSL report states that the blood on the sticks, blood-stained pants and the blood group of the deceased is the same "O+". Mr. Mullick has rightly contended that this is not an indication of the guilt. Moreover, nothing of these recoveries took place in the presence of an independent witness. In fact, the IO (PW-24) has admitted that he did not try to join any private person before carrying out the recoveries.

27. Mr. Mullick has also made detailed submission with respect to place and time of the recovery of the body of the deceased and the alleged motive behind the crime. We are of the opinion that it is not necessary to examine those aspects in detail. Admittedly, there are no eyewitnesses, and the entire case of the prosecution depends upon circumstantial evidence.

28. In a recent decision, *Pritinder Singh* v. *State of Punjab*, (2023) 7 SCC 727, one of us (Justice Gavai) has taken note of the judgment in *Sharad Birdhichand Sarda* v. *State of Maharashtra*[3], (1984) 4 SCC 116 and observed:

> ***17**. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned "must or should" and*

3 "***153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793: 1973 SCC (Cri) 1033] where the following observations were made: (SCC p. 807, para 19)
"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions."
(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
(3) the circumstances should be of a conclusive nature and tendency,
(4) they should exclude every possible hypothesis except the one to be proved, and
(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
***154.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."*

not "may be" established. It has been held that there is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved". It has been held that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

***18**. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt. In the light of these guiding principles, we will have to consider the present case."*

In the background, we have analysed the evidence and the testimonies of the witnesses.

29. There is a yawning gap between the charge against the Appellant and the evidence that the prosecution has adduced. The circumstances do not establish the guilt of the Appellant at all. While the principle applicable to circumstantial evidence requires that the facts must be consistent with the hypothesis of the guilt of the accused, in the present case the evidence adduced gives rise to doubts, improbabilities and inconsistencies.

30. Having considered the matter in detail and having noted the various discrepancies and improbabilities, we are of the firm view that the prosecution has not established its case beyond reasonable doubt. The Appellant is entitled to be acquitted.

31. We, therefore, allow Criminal Appeal No. 1338 of 2010 and set aside the judgment of the High Court of Punjab and Haryana at Chandigarh in *Pradeep Kumar & Anr.* v. *State of Haryana* in Crl. Appeal No. 805-DB of 2007 dated 05.09.2009 and the judgment of the Court of

Additional Sessions Judge, Kaithal in Sessions Case No. 43 of 2004 dated 31.08.2007 convicting and sentencing the appellant under Section 302 read with Section 34 of the Indian Penal Code, 1860.

32. The Appellant is acquitted of all charges, and his bail bonds, if any, stand discharged.

33. Pending interlocutory applications, if any, stand disposed of in terms of the above order.

34. The parties shall bear their own costs.

Headnotes prepared by: Divya Pandey *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 319 : 2024 INSC 22

Gurdev Singh Bhalla

v.

State of Punjab & Ors

(Criminal Appeal No. 120 of 2024)

05 January 2024

[Vikram Nath* and Rajesh Bindal, JJ.]

Issue for Consideration

Whether the High Court was justified in dismissing the Revision filed by the appellant against the order of the Special Judge allowing the application u/s. 319 CrPC summoning the appellant along with three other officials of the Police Department.

Headnotes

Code of Criminal Procedure, 1973 – s. 319 – Power to proceed against other persons appearing to be guilty of offence – Case of misappropriation of paddy against father of the informant – Application u/s. 319 for summoning the appellant-Inspector investigating the crime and three other police officials – Allegation against them that they demanded money – Application allowed by the trial court – Said order upheld by the High Court – Interference with:

Held: Statement of the informant providing complete facts with respect to the conduct of the police officials immediately after surrender of his father – Statement consistent throughout the investigation and trial, and with the other witnesses-complainant's wife and his father giving the same details – Witnesses equivocally narrated the incidents that took place at different places regarding threats, demand of huge sum of money, torture of the father – In view thereof, there appears to be prima facie evidence on record to make it a triable case as against the appellant – Thus, the order passed by the High Court not interfered with. [Paras 8, 14]

Case Law Cited

Hardeep Singh vs. State of Punjab **2014(1) RCR 623 – followed.**

* Author

List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Prevention of Corruption Act, 1988.

List of Keywords

Summoning of the officials; Misappropriation; Investigation; Trial; Evidence; Witness; Sanction; Torture in custody; Conduct of police officials; Recording of statements; Police remand; Prima facie evidence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 120 of 2024.

From the Judgment and Order dated 23.03.2023 of the High Court of Punjab & Haryana at Chandigarh in CRR No.1751 of 2018.

Appearances for Parties

Gaurav Agarwal, Aman Singhania, Advs. for the Appellant.

Sunil Fernandes, AAG, Ms. Nupur Kumar, Ms. Priyansha Sharma, Ms. Muskan Nagpal, Ms. Diksha Dadu, Ms. Esshaa Miglani @ Pooja Dhingra, Advs. for the Respondents.

Applicant-in-person

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

Leave granted.

2. The challenge by means of this appeal is to an order dated 23rd March, 2023 passed by the High Court of Punjab and Haryana at Chandigarh whereby the Criminal Revision filed by the appellant against the order of the Special Judge, Bathinda dated 05.03.2018 allowing the application under Section 319 of the Code of Criminal Procedure, 1973[1]summoning the appellant along with three other officials of the Police Department has been dismissed.

1 Cr.P.C.

3. Relevant facts are as follows:

3.1 Punjab Agro Foodgrains Corporation Ltd., Bathinda, lodged a complaint on 18.12.2012 at Police Station, Phul, District Bathinda against one Devraj Miglani[2] which was registered as FIR No.91/2012 under Sections 406, 409, 420, 457, 380 of the Indian Penal Code, 1860[3] and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988[4] with the allegations that Devraj had misappropriated paddy worth Rs.4.18 crores. The investigation of the said FIR was transferred to the Vigilance Bureau, Bathinda on 2nd May, 2013 where the appellant was posted as an Inspector and he was assigned the task of investigating the said crime. The accused Devraj was arrested on 31.08.2013. He was granted police remand on 04.09.2013 for 2-3 days until 06.09.2013 and thereafter he was confined to judicial custody.

3.2 Puneet Kumar Miglani[5], the informant of the present case, happens to be the son of the accused Devraj. According to the informant of the present case on 06.09.2013 Head Constable Kikkar Singh approached Ms. Ritu, niece of the accused Devraj at her work place i.e. Bathinda branch of the SBI demanding a sum of Rs.50,000/- by handing over a slip which was said to have been written by the accused Devraj apparently mentioning that the holder of the slip may be provided the said amount. It is alleged that some conversation also took place between Devraj and his niece Ritu through the mobile phone of Head Constable Kikkar Singh. The informant Puneet Miglani came to know of the said demand by Kikkar Singh. He went to the Bank, took the slip in his possession and after recording some conversation between his wife and his father presented the same along with a complaint before the learned Magistrate.

3.3 Direction was issued to the local police to register and inquire into the said complaint. After due enquiry which was carried out by the Deputy Superintendent of Police Janak Singh, it

2 Devraj

3 IPC

4 PC Act

5 Puneet Miglani

was found that the allegation against the Head Constable Kikkar Singh were *prima facie* made out and accordingly a First Information Report[6] No.11 of 2013 was registered on 11.09.2013 at police station Vigilance Bureau, Bathinda under Sections 166, 383, 385 IPC and also under the provisions of the PC Act. During the investigation of the said FIR No.11/2013, the statementsof informant, wife of informant, Devraj and others were recorded. After completing the investigation, a police report under Section 173(2) Cr.P.C. was submitted on 16th January, 2014 against Head Constable Kikkar Singh only under Sections 166, 383, 385 IPC and Sections 7, 13(2) of the PC Act.

3.4 In the trial, the informant Puneet Miglani was first examined as PW1 on 26.05.2014.

3.5 29.09.2014 coincidentally happened to be the date in both the trials i.e. trial arising out of FIR No.91/2012 against Devraj and also the trial arising out of FIR No.11/2013 against Head Constable Kikkar Singh. The appellant proceeded to depose, supporting the prosecution case as also the investigation carried out by him against Devraj. On the said date in the trial against Head Constable Kikkar Singh, informant in that case Puneet Miglani gave further evidence as PW 1.On the said date he completed his examination-in-chief as also the cross-examination. Additionally, he kept an application under Section 319 Cr.P.C. ready for summoning the appellant and the three other police officials, and filed the same before the Court.

4. The Trial Court, vide order dated 08.09.2016 rejected the said application on the ground of lack of sanction under the PC Act as also Cr.P.C. The said order was challenged before the High Court successfully and the High Court, by order dated 23.01.2018, remanded the matter back to the Trial Court for passing a fresh order ignoring the issue of sanction. The High Court was of the view that no sanction was required. Pursuant to the remand, the Trial Court, by order dated 05.03.2018 allowed the application under Section 319 Cr.P.C. and summoned the four police officials, viz. (i) Janak

6 FIR

Singh, Dy.S.P., (ii) Gurdev Sigh Bhalla,, Inspector (appellant), (iii) H.C. Harjinder Singh and (iv) H.C. Rajwant Singh. The said order of 05.03.2018 was challenged by the appellant before the High Court primarily on the following grounds by way of criminal revision:

(i) The order of the Trial Court was not in accordance to the principles laid down by this Court in the case of **Hardeep Singhvs. State of Punjab**[7] for summoning under Section 319 Cr.P.C.;

(ii) It was a pressure tactic on the part of the informant Puneet Miglani to brow-beat the appellant as he had deposed against his father Devraj;

(iii) The informant Puneet Miglani was a convict in another case and, therefore, no reliance ought to have been placedon his statement; and lastly,

(iv) The order passed by the Trial Court was bad on merits as there was no evidence at all for passing the summoning order.

5. The High Court, as narrated earlier, by the impugned order dated 23rd March, 2023 dismissed the said revision.

6. It appears that before the High Court the main thrust of argument was regarding lack of sanction. Shri Gaurav Agarwal, learned counsel appearing for the appellant made the following submissions:

(i) The complaint dated 06.09.2013 did not contain any allegations against the appellant;

(ii) The complaint made on 06.09.2013 related to demand of Rs.50,000/- only. Subsequently, in the statement given on 29.09.2014, the allegation is that there was a demand of Rs.24 lakhs by the four officials which included one Deputy Superintendent of Police, Janak Singh, the appellant and two other Head Constables viz. Harjinder Singh and Rajwant Singh;

(iii) A new case was sought to be set up only in order to brow-beat the appellant as he had deposed against his father Devraj in the other case.;

7 2014(1) RCR 623

(iv) The Trial Court and the High Court have mainly confined the discussion with respect to sanction under Section 19 of the PC Act and Section 197 of the Cr.P.C. but have not examined the merits of the matter as to whether the principles and parameters laid down in the case of **Hardeep Singh** (supra) had been followed or whether the said ingredients were present before the Trial Court so as to justify the summoning order under Section 319 Cr.P.C.

7. On the other hand, Shri Sunil Fernandes, learned Addl.Advocate General, appearing for the State of Punjab and Ms.Eshaa Miglani-wife of the complainant, appearing in person on behalf of the complainant, were heard. According to them, the courts below had correctly appreciated the evidence on record. They also submitted that the appellant and other police officials had harassed and tortured not only Devraj while he was in custody but had also threatened and tortured the family members both mentally and physically in order to extract huge amount of money. Our attention was also drawn to the statements recorded under Section 161 Cr.P.C. during investigation as also before the Trial Court of the relevant witnesses. It was lastly prayed that the appeal be dismissed and the appellant and other police officials must face the trial for the crime committed by them.

8. Having considered the submissions and having perused the material on record, it is quite apparent that the informant Puneet Miglani, in his statement under section 161 Cr.P.C. recorded on 22.09.2013, had narrated complete facts with respect to the conduct of the police officials immediately after the surrender of his father on 30.08.2013 in the case registered against him for mis-appropriation. The consistent case right from that stage till the statement was recorded during the trial on a number of occasions, the informant has supported the statement under section 161 Cr.P.C. Even Devraj and Eshaa Miglani in their statements recorded during investigation on 15.10.2013 and 22.10.2013 respectively, have given the same details as narrated by the informant Puneet Miglani on 22.09.2013. Further their statements during trial also supports and is in line with their previous statement. All these witnesses have equivocally narrated the incidents that took place at different places regarding threats, demand of huge sum of money, torture of Devraj etc.

9. The complaint dated 06.09.2013, on the basis of which the FIR No.11/2013 was registered, related to the incident which happened

at the Bank where Ritu, niece of Devraj,was working Head Constable Kikkar Singh had gone there to collect Rs.50,000/- against a slip issued by Devraj. Since everything happened on the same day it is quite possible that the entire story from the time of surrender of Devraj could not have been mentioned but soon after that at the first instance the conduct of the appellant and the other police officials trying to extract money from Devraj and his family members was mentioned in detail by all the witnesses. According to them, the amount was being demanded for the following benefits to be extended: (i) firstly, not to physically torture Devraj; (ii) not to ask for further police remand; (iii) to help him get bail; and (iv) to give him good treatment during his custody. The statement of Ms.Eshaa Miglani as also Devraj recorded in the trial as PW-18 and PW-13 respectively have also supported the prosecution case regarding the demand of huge amount of money for extending all the benefits, as noted above.

10. The argument mainly advanced by the counsel for the appellant that the FIR mentioned only about Rs.50,000/- whereas subsequent story of Rs.24 lakhs had been set up only in order to brow-beat the appellant being annoyed with the appellant because he gave evidence against his father, may be difficult to accept.

11. Further argument of Mr.Agarwal that the informant moved the application under Section 319 Cr.P.C. on 29.09.2014 was a counter blast and with annoyance and vengeance as appellant had deposed against his father on the same day, has no legs to stand. It is factually incorrect. Informant PW 1 had given the same statement under Section 161 Cr.P.C. and also before the Trial Court on 26.05.2014 which was continued on 29.09.2014.

12. The argument advanced on behalf of the appellant with regard to brow-beating the appellant as he was the Investigating Officer against Devraj can be taken as a defence in the trial.

13. We have perused the statements under Section 161 Cr.P.C. as also the depositions of PW-1, PW-13 and PW-18. The parameters laid down in the Constitution Bench judgment in **Hardeep Singh** (supra) stand fully satisfied. We are refraining ourselves from commenting on the police report under Section 173(2) Cr.P.C. being submitted only charging Kikkar Singh to be sent for trial.

14. In view of the discussion made above, there appears to be *prima facie* evidence on record to make it a triable case as against the appellant. We, accordingly, are not inclined to interfere with the impugned order. Consequently, the appeal is dismissed.

15. We may also place on record the fact that we are not threadbare discussing the testimony of the witness during the trial as it may ultimately influence the Trial Court at a later stage. We, further, make it clear that any observations made in this order will not come in the way of the Trial Court in deciding the trial on its own merits on the basis of the evidence adduced before it, completely uninfluenced by this judgment.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeal dismissed

[2024] 1 S.C.R. 327 : 2024 INSC 26

All India Judges Association

v.

Union of India & Ors

(Writ Petition (Civil) No 643 of 2015)

04 January 2024

[Dr. Dhananjaya Y Chandrachud,* CJI, J. B. Pardiwala and Manoj Misra, JJ.]

Issue for Consideration

Allowances granted to judicial officers and retired judicial officers by the Second National Judicial Pay Commission (SNJPC).

Headnotes

Judiciary – District Judiciary – Recommendations by Second National Judicial Pay Commission (SNJPC) regarding various allowances for judicial officers and retired judicial officers – 21 allowances considered by SNJPC in its report:

Held: As regards House Building Advance (HBA), recommendation of SNJPC that HBA be available to judicial officers also for the purchase of a ready built house from private individuals subject to such safeguards as may be prescribed by the State Govt. in consultation with their respective High Courts – Modification accepted – Payment of Children Education Allowance as recommended, approved – Recommendation for discontinuation of City Compensatory Allowance and no recovery to be made, accepted – Recommendations w.r.t Concurrent Charges Allowance; payment of conveyance/transport allowance; Earned Leave Encashment; Electricity and Water Charges; Hill Area/Tough Location Allowance; Home Orderly/Domestic Help Allowance; Newspaper and Magazine Allowances; Risk Allowance; Robe Allowance; Special Pay for Administrative Work; Telephone Facility; Transfer Grant accepted –As regards Higher Qualification Allowance, the restrictive condition imposed by SNJPC in regard to non-extension of advance increments at the ACP stage, not accepted – Subject to this clarification, recommendations accepted – Further, out of the five components of house rent related allowances, two components-Furniture and Air Conditioner Allowance and Maintenance introduced for the first time – All the

* Author

components suggested are accepted – As regards, Leave Travel Concession/Home Travel Concession, recommendations are on a continuum and accepted, except for foreign travel to SAARC countries which shall be deleted – Substantive recommendations made w.r.t Medical Allowance/Facilities, accepted – As regards sumptuary allowance, recommendation for increase of 2.25 times based on the yardstick of annual inflation and increase of points in the consumer price index, accepted – Committee for Service Conditions of the District Judiciary (CSCDJ) be constituted in each High Court for overseeing the implementation of the recommendations of the SNJPC as approved – Composition, functions of the Committee and the issues to be considered, enumerated – States and Union Territories to act in terms of the directions expeditiously – Disbursements on account of arrears of salary, pension and allowances due and payable to judicial officers, retired judicial officers and family pensioners be computed and paid on or before 29.02.2024 – CSCDJs to monitor compliance and submit report on or before 07.04.2024. [Paras 20, 24, 27, 29, 32, 34, 37, 40, 43, 44, 46, 48, 50, 55, 65, 67, 69, 71, 74, 77, 79, 81, 83-87]

Judiciary – District Judiciary – Allowances for judicial officers, retired judicial officers – Objections raised that revision of rates/new allowances will result in an increased financial burden and expenditure; the rules governing the payment of allowances prescribed by each State for their own administrative establishment must be followed; and the benefits which are provided to judicial officers must be equivalent to those provided to other Government officers:

Held: Submissions urged on behalf of the States have been considered in several previous judgments of this Court – Judicial service is an integral and significant component of the functions of the State and contributes to the constitutional obligation to sustain the rule of law – State is duty bound to ensure that the conditions of service, both during the tenure of office and after retirement, are commensurate with the need to maintain dignified working conditions for serving judicial officers and in the post-retirement emoluments made available to former members of the judicial service – Members of the district judiciary are the first point of engagement for citizens who are confronted with the need for dispute resolution – The conditions in which judicial officers across

the country are required to work are arduous – The work of a judicial officer is not confined merely to the working hours rendered in the course of judicial duties in the court – That apart, members of the district judiciary have wide ranging administrative functions which take place beyond working hours, especially on week-ends – Further, there is a need to maintain uniformity in the service conditions of judicial officers across the country – Thus, the plea that rules of each State must govern pay and allowances, lacks substance – Judges are not comparable with the administrative executive – They discharge sovereign state functions and just like the Council of Ministers or the political executive and their service is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive, judges are distinct from judicial staff, and are thus comparable with the political executive and legislature – Wholly inappropriate to equate judicial service with the service of other officers of the State – The functions, duties, restrictions and restraints operating during and after service are entirely distinct for members of the judicial service – Plea of equivalence rejected yet again. [Paras 13, 17 and 18]

Case Law Cited

All India Judges Association v Union of India **[2002] 2 SCR 712 : (2002) 4 SCC 247;** *All India Judges Association v Union of India* **(2010) 14 SCC 720;** *All India Judges Association v. Union of India (II)* **[1993] 1 Suppl. SCR 749 : (1993) 4 SCC 288;** *State of Maharashtra v Tejwant Singh Sandhu* **SLP(C) 1041 of 2020;** *Bharat Kumar Shantilal Thakkar v State of Gujarat & Anr.* **[2014] 4 SCR 1147 : (2014) 15 SCC 305 – referred to.**

List of Acts

Constitution of India.

List of Keywords

District Judiciary; Second National Judicial Pay Commission; Allowances granted to judicial officers and retired judicial officers; Children Education Allowance; City Compensatory Allowance; Concurrent Charges Allowance; Conveyance/transport allowance; Earned Leave Encashment; Electricity and Water Charges; Hill Area/Tough Location Allowance; Home Orderly/Domestic Help Allowance; Newspaper and Magazine Allowances; Risk Allowance;

Robe Allowance; Special Pay for Administrative Work; Telephone Facility; Transfer Grant; Higher Qualification Allowance; House Rent Allowances; Furniture and Air Conditioner Allowance; Maintenance; Leave Travel Concession/Home Travel Concession; Medical Allowance/Facilities; Sumptuary Allowance, Committee for Service Conditions of the District Judiciary; Article 142.

Case Arising From

CIVIL ORIGINAL/INHERENT/EXTRA-ORDINARY APPELLATE JURISDICTION: Writ Petition (Civil) No.643 of 2015.

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

With

SLP (C) Nos.6471-6473 of 2020, 29232 of 2018 and Contempt Petition (C) Nos.711 of 2022, 36, 37, 38, 39, 40, 848 and 1338 of 2023 in Writ Petition (C) No.643 of 2015.

Appearances for Parties

K.Parameshwar (Amicus Curiae), Ms. Kanti, Ms. Arti Gupta, MV Mukunda, Chinmay Kalgaonkar, Advs.

K M Nataraj, A.S.G., Shailesh Madiyal, B.K. Satija, Dr. Hemant Gupta, Barun Kumar Sinha, Saurabh Mishra, Amit Anand Tiwari, A.A.Gs., K N Balgopal, Gurminder Singh, Adv. Gen./Sr. Advs., Lenin Singh Hijam, Adv. Gen, Kuldeep Parihar, D.A.G., Gourab Banerjee, Dr. Manish Singhvi, Wasim Quadri, Jaideep Gupta, Huzefa Ahmadi, Sunil Kumar, V. Giri, Sudhir Kumar Saxena, Sanjay Parikh, Sr. Advs., Ms. Mayuri Raghuvanshi, Vyom Raghuvanshi, Dhruv Sharma, VP Singh, Venkata Supreeth, Gopal Jha, Umesh Kumar Yadav, Deepak Prakash, V. N. Raghupathy, Manendra Pal Gupta, Varun Varma, Md. Apzal Ansari, Milind Kumar, Dr. Reeta Vasishta, Mohd Akhil, Mrs. Swarupama Chaturvedi, Rajan Kumar Chourasia, Ms. Sonali Jain, Chitvan Sinhal, Kartikaya Aggrawal, Abhishek Kumar Pandey, Raman Yadav, Arvind Kumar Sharma, Pashupathi Nath Razdan, Rushab Aggarwal, Sharath Nambiar, Astik Gupta, Vaibhav Sabharwal, Japnish Singh Bhatia, Mukesh Kumar Maroria, Anmol Chandan, Vatsal Joshi, Annirudh Sharma-II, Ishaan Sharma, Kanu Agarawal, Bhuvan Kapoor, Ms. Indira Bhakar, Mukesh Kumar Verma, Piyush Beriwal, Varun Chugh, Ms. Mrinal Elkar Mazumdar, Sarthak Karol, Harish Pandey, Apoorv Kurup, Shashwat Parihar, Mrs.

Priyadarshini Priya, Rajesh Singh Chauhan, Mahesh Thakur, Mrs. Geetanjali Bedi, Shivamm Sharrma, Ms. Preetika Dwivedi, Abhisek Mohanty, Gagan Gupta, Sudhanshu S. Choudhari, Ms. Rucha A. Pande, Manish M. Veeraragavan, Ms. Gautami Yadav, Ms. Pranjal Chapalgaonkar, Sandeep Sudhakar Deshmukh, Kunal Chatterji, Ms. Maitrayee Banerjee, Rohit Bansal, Ms. Kshitij Singh, Ms. Nidhi Mittal, Ms. Aparna Arun, Ms. Anchal, Akhil Hasija, Ms. Gauri Goburdhun, Ms. Kavita Jha, Rajeev Kumar Jha, Aditeya Bali, P. I. Jose, Anupam Mishra, James P. Thomas, Maibam Nabaghanashyam Singh, Amit Sharma, Sanjai Kumar Pathak, Arvind Kumar Tripathi, Mrs. Shashi Pathak, Nikhil Goel, Ms. Pragati Neekhra, Aditya Bhanu Neekhra, Aniket Patel, Anupam Raina, Sunando Raha, Nikhil Palli, Nishant Kumar, Krishnanand Pandeya, Dev Pratap Shahi, Raghavendra S. Srivatsa, T. G. Narayanan Nair, A. Radhakrishnan, Arjun Garg, Aakash Nandolia, Ms. Sagun Srivastava, Niranjan Sahu, Umakant Misra, Debabrata Dash, Abhijit Pattnaik, Ms. Apoorva Sharma, Ashok Mathur, Mukul Kumar, Ms. Enakshi Mukhopadhyay Siddhanta, Sovon Siddhanta, Saravanan A., J. Vasanthan, K.G. Kannan, Mukesh K. Giri, Mandaar Mukesh Giri, Santosh Krishnan, Ms. Deepshikha Sansanwal, Anil Shrivastav, Shuvodeep Roy, Kabir Shankar Bose, Saurabh Tripathi, Manish Kumar, Mahesh Kumar, Sumeer Sodhi, Nikhilesh Kumar, Ms. Jyoti Kumari, Ms. Devika Khanna, Mrs. V D Khanna, VMZ Chambers, Abhay Anil Anturkar, Dhruv Tank, Aniruddha Awalgaonkar, Ms. Surbhi Kapoor, Ms. Deepanwita Priyanka, Samar Vijay Singh, Ms. Payal Gupta, Shivang Jain, Ms. Nitikaa Guptha, Ms. Monica Anand Kumar, Ms. Sabarni Som, Ravi Bakshi, Sandeep Rana, Ms. M. Venmani, S. Gowthaman, Ms. Saima Firoze, Abhisar Thakral, Rajiv Shankar Dvivedi, Anando Mukherjee, Shwetank Singh, Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Abraham Mathew, Rebin Vincent Gralan, Sunny Choudhary, Sandeep Sharma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Raavi Sharma, Ms. Yamini Singh, Pukhrambam Ramesh Kumar, Karun Shrama, Ms. Rajkumari Divyasana, R. Rajaselvan, Avijit Mani Tripathi, Nirnimesh Dube, Ms. K. Enatoli Sema, Ms. Limayinla Jamir, Amit Kumar Singh, Ms. Chubalemla Chang, Prang Newmai, Shibashish Misra, Karan Sharma, Ajay Pal, Mohit Siwach, Sameer Abhyankar, Ms. Nishi Sangtani, Ms. Vani Vandana Chhetri, Ms. Zinnea Mehta, Naman Jain, Sabarish Subramanian, Ms. Devyani Gupta, Vishnu Unnikrishnan, C Kranthi Kumar, Naman Dwivedi, Danish Saifi, Ms. V Keerthana, Ms. Tanvi

Anand, Rajiv Kumar Choudhry, Sanjay Kumar Tyagi, Sudarshan Singh Rawat, Ashutosh Kumar Sharma, Ms. Saakshi Singh Rawat, S Sunil, Sunny Sachin Rawat, Parijat Sinha, Ms. Madhumita Bhattacharjee, Chirag M. Shroff, Aravindh S., Abbas, Ahantham Henry, Ahantham Rahen Singh, Mohan Singh, Kumar Mihir, Mrs. Anjani Aiyagari, T. V. Ratnam, Ankur Kashyap, Joydip Roy, Gopal Jha, Umesh Kumar Yadav, Shreyash Bhardwaj, Karthik S.D., Uday B. Dube, Deepak Prakash, Pawan Kr. Dabas, Kamal Singh Bisht, Raneev Dahiya, Nachiketa Vajpayee, Ms. Divyangna Malik, Ms. Merlyn J. Rachel, Ms. Vishnu Priya, Vardaan Kapoor, Rahul Lakhera, Rahul Suresh, Aviral Saxena, Piyush Thanvi, Mohammed Imran, Gautam Narayan, Ms. Asmita Singh, Harshit Goel, Sujay Jain, K.V. Vibu Prasad, Pukhrambam Ramesh Kumar, Ritwick Parikh, Karun Sharma, Ms. Rajkumari Divyasana, R. Rajaselvan, Gopal Jha, Umesh Kumar Yadav, Sravan Kumar Karanam, Santhosh Kumar Puppala, Ms. Shireesh Tyagi, Ms. Pranali Tayade Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

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* Ed. Note : Pagination is as per the original judgment.

1. By its orders dated 27 July 2022, 5 April 2023 and 19 May 2023, this Court has accepted the recommendations of the Second National Judicial Pay Commission[1], chaired by Justice P V Reddy, former Judge of this Court of India on the revision of pay and pension for judicial officers.

2. The abovementioned orders have delineated *inter alia* the history of the constitution of the SNJPC, and the principles underlying judicial pay, allowances and pensions. The contents of the earlier orders shall not be repeated here. This judgment pertains to the allowances which have been granted to judicial officers and retired judicial officers by the SNJPC. At this stage, it would be necessary to note that save and except for three allowances, where there was a modification, the allowances recommended by the First National Judicial Pay Commission known as the Shetty Commission were affirmed by this Court in **All India Judges Association** v **Union of India**[2]. Thereafter, all allowances which were recommended by the

1 "SNJPC"

2 (2002) 4 SCC 247

subsequent pay commission, namely the Judicial Pay Commission[3] called the Justice Padmanabhan Committee were accepted by this Court in its decision reported as **All India Judges Association** v **Union of India**[4].

3. Besides Mr K Parameshwar, *Amicus Curiae*, all the State governments and Union Territories have been given an opportunity to furnish their objections to the allowances, as proposed by the SNJPC. Objections have been filed on the record of this Court.

4. In the course of hearing, the following counsel have appeared on behalf of the States, or as the case may be, the Associations of Judges :

S. No.	Name of the counsel	Appearing for
1	Mr Gaurab Banerji, Sr. Adv.	AIJA
2	Mr. Jaideep Gupta, Sr. Adv	High Court at Calcutta
3	Mr Gopal Jha, Adv	All India Retired Judges Association
4	Ms Gautami Yadav, Adv	Maharashtra State Judges Association
5	Mr Sunny Choudhary	Madhya Pradesh
6	Mr Mukesh Kumar Verma	Andaman & Nicobar
7	MrJoydip Roy, Adv.	All India Judges Association
8	Ms Madhumita Bhattacharjee	West Bengal
9	Mr Sanjay Kumar Tyagi	Uttar Pradesh
10	Mr Shuvodeep Roy	Assam and Tripura
11	Mr. Ravi Shanker Jha	Bihar
12	Mr. Amit Anand Tiwari, AAG	Tamil Nadu
13	Mr. Sabarish Subramanian, Adv	Tamil Nadu
14	Mr. Karan Sharma, Adv.	Punjab
15	Dr Manish Singhvi, Sr, Adv	Rajasthan
16	Mr V N Raghupathy, Adv	Karnataka
17	Deepanwita Priyanka, Adv	Gujarat
18	Mr. Sriharsha Pichara, Adv	Telangana

3 "JPC"

4 (2010) 14 SCC 720

19	Mr Pukhrambam Ramesh Kumar	Manipur
20	Ms K Enatoli Sema	Nagaland
21	Ravi Bakshi, Adv	Himachal Pradesh
22	Mr Alim Anvar, Adv.	Kerala
23	Mr Amit Kumar, AAG	Meghalaya
24	Mr Ashutosh Kumar Sharma, Adv	Uttarakhand
25	Mr Deepak Prakash, Adv	Kerala Judicial Officers Association.

5. In addition, we have had the benefit of considering intervention applications by the State of Maharashtra.

6. The *Amicus Curiae* has tendered a note summarizing the position. The SNJPC considered a total of twenty-one allowances in its report. These allowances are tabulated below:

1.	House Building Advance	12.	House Rent Allowance a. Residential Quarters b. HRA c. Furniture & Air Conditioner Allowance d. Maintenance e. Guest House
2.	Children Education Allowance	13.	Leave Travel Concession/ Home Travel Concession
3.	City Compensatory Allowance	14.	14. Medical Allowance
4.	Concurrent Charge allowance	15.	Newspaper and Magazine Allowance
5.	Conveyance/Transport Allowance	16.	Risk Allowance
6.	Dearness Allowance	17.	Robe Allowance
7.	Earned leave encashment	18.	Special Pay for Administrative Work
8.	Electricity and water charges	19.	Sumptuary Allowance
9.	Higher Qualification	20.	Telephone Facility
10.	Hill area/ Tough Location Allowance	21.	Transfer Grant
11.	Home orderly/Domestic Help Allowance		

7. Among the allowances which have been recommended by the SNJPC, two new allowances are proposed while two additional components are introduced to an additional allowance, namely :

   (i) Children Education Allowance (Serial No 2 in the tabulation);

   (ii) A Furniture and Air conditioner allowance and maintenance as a part of the House Rent Allowance (Serial Nos 12C and 12D); and

   (iii) Risk Allowance (Serial No 16 of the tabulation).

8. The SNJPC has recommended that the City Compensatory Allowance (Serial No 3 of the above tabulation) should be discontinued. In respect of the Robe Allowance (Serial No 17), the SNJPC recommended that such a demand would not be entertained by the next JPC. Twelve out of the twenty-one allowances form the subject matter of a recommendation either by the Sixth or, as the case may be, Seventh Central Pay Commission either on the same or on revised rates.

9. At the outset, it needs to be clarified that since the SNJPC has proposed a revision of the existing rates as applicable, the States/ Union Territories shall continue to pay the allowances at the rates which were applicable in respect of each allowance where the SNJPC has recommended that the revised rates shall come into effect later than 1 January 2016.

Objections by the Union Government and State Governments:

10. Before we deal with each individual allowance, it would be necessary to record that, broadly speaking, the objections which have been raised by the States, Union Territories and the Union Government can be classified into three categories :

   (a) The revision of rates or, as the case may be, the new allowances will result in an increased financial burden and expenditure;

   (b) The rules governing the payment of allowances prescribed by each State for their own administrative establishment must be followed; and

   (c) the benefits which are provided to judicial officers must be equivalent to those provided to other Government officers.

11. The submissions urged on behalf of the States have been considered in several previous judgments of this Court, more specifically in relation to the recommendations of the SNJPC itself. On the aspect of the

increased financial burden and additional expenditure, this Court, in its judgment dated 5 April 2023, relied on the earlier decision in the **All India Judges Association**v.**Union of India (II)**[5] andheld that contentions regarding the financial implications of the directions are liable to be rejected when the directions stem from the obligation of the state. In other words, a plea of financial burden cannot be raised to resist mandatory duties of the state. Providing necessary service conditions for the effective discharge of judicial functions is one such duty. The observations in that regard are contained in paragraph 19 of the judgment dated 05 April 2023[6].

12. The same objection was dealt with in the subsequent judgment of this Court dated 19 May 2023 at paragraph 26.[7] The Court noted that the issue of financial burden has been examined in these very proceedings on at least three occasions and that this Court had earlier expressed the hope that it will not be re-agitated in view of *All India Judges Association vs Union of India (II)*[8].

13. Judicial service is an integral and significant component of the functions of the State and contributes to the constitutional obligation to sustain the rule of law. Judicial service is distinct in its characteristics and in terms of the responsibilities which are cast upon the officers of the District Judiciary to render objective dispensation of justice

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5 (1993) 4 SCC 288.

6 19. The directions of this court applying a uniform multiplier and the corresponding financial implications cannot be considered as excessive in view of the information extracted above. In ***All India Judges Association***v. ***Union of India (II)***, this court has earlier held that additional financial burden cannot be a ground for review:

> **"16.** The contention with regard to the financial burden likely to be imposed by the directions in question, is equally misconceived. **Firstly, the courts do from time to time hand down decisions which have financial implications and the Government is obligated to loosen its purse recurrently pursuant to such decisions. Secondly, when the duties are obligatory, no grievance can be heard that they cast financial burden. Thirdly, compared to the other plan and non-plan expenditure, we find that the financial burden caused on account of the said directions is negligible.** We should have thought that such plea was not raised to resist the discharge of the mandatory duties. The contention that the resources of all the States are not uniform has also to be rejected for the same reasons. The directions prescribe the minimum necessary service conditions and facilities for the proper administration of justice. We believe that the quality of justice administered and the caliber of the persons appointed to administer it are not of different grades in different States. Such contentions are ill-suited to the issues involved in the present case."
>
> (**emphasis supplied)**

7 26. The submission of the States that there is a paucity of financial resources must be examined from this aspect of the matter. The States and the Union have repeatedly stated that the burden on the financial resources of the States/Union due to the Report of the SNJPC is significant and therefore the Report cannot be implemented. Without the doctrine of inherent powers, any de-funding of the Judiciary cannot be repelled.

8 (1993) 4 SCC 288.

to citizens. The State is duty bound to ensure that the conditions of service, both during the tenure of office and after retirement, are commensurate with the need to maintain dignified working conditions for serving judicial officers and in the post-retirement emoluments made available to former members of the judicial service. Members of the district judiciary are the first point of engagement for citizens who are confronted with the need for dispute resolution. The conditions in which judicial officers across the country are required to work arearduous. The work of a judicial officer is not confined merely to the working hours rendered in the course of judicial duties in the court. Every judicial officer is required to work both before and after the court working hours. The judicial work of each day requires preparation before cases are called out. A judicial officer continues to work on cases which may have been dealt with in court, in terms of preparing the judgment and attending to other administrative aspects of the judicial record. That apart, members of the district judiciary have wide ranging administrative functions which take place beyond working hours, especially on week-ends including the discharge of numerous duties in relation to prison establishments, juvenile justice institutions, legal service camps and in general, work associated with the Legal Services Act 1987.

14. The work of a Judge cannot be assessed solely in terms of their duties during court working hours. The State is under an affirmative obligation to ensure dignified conditions of work for its judicial officers and it cannot raise the defense of an increase in financial burden or expenditure. Judicial officers spend the largest part of their working life in service of the institution. The nature of the office often renders the incumbent incapacitated in availing of opportunities for legal work which may otherwise be available to a member of the Bar. That furnishes an additional reason why post-retirement, it is necessary for the State to ensure that judicial officers are able to live in conditions of human dignity. It needs to be emphasized that providing for judges, both during their tenure and upon retirement, is correlated with the independence of the judiciary. Judicial independence, which is necessary to preserve the faith and confidence of common citizens in the rule of law, can be ensured and enhanced only so long as judges are able to lead their life with a sense of financial dignity. The conditions of service while a judge is in service must ensure a dignified existence. The post-retirement conditions of service have a crucial bearing on the dignity and independence of the office of a judge and how it is perceived by the society. If the service of

the judiciary is to be a viable career option so as to attract talent, conditions of service, both for working and retired officers, must offer security and dignity.

15. As we shall indicate in the course of this judgment, the allowances which have been provided by the SNJPC are basic allowances, most of which rank on the same scale as what has been made available to officers discharging executive functions in the AllIndia Services. It is a matter of grave concern that though officers in the other services have availed of a revision of their conditions of service as far back as 01 January 2016, similar issues pertaining to judicial officers are still awaiting a final decision eight years thereafter. Judges have retired from service. The family pensioners of those who have passed away are awaiting resolution as well.

16. The second objection which has been raised on behalf of the States is that the rules of the particular State must be followed in each instance. This has again been dealt with in the judgment of this Court dated 19 May 2023. The relevant extract is footnoted below.[9]

17. This Court has categorically held that there is a need to maintain uniformity in the service conditions of judicial officers across the country. Thus, the plea that rules of each State must govern pay and allowances, lacks substance.

18. The third objection as to the equivalence between judicial officers and other Government officers has been elaborately analyzed in paragraph 14[10] of the judgment dated 05 April 2023 and in

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9 22. India has a unified judiciary under the scheme of the Constitution. A unified judiciary necessarily entails that the service conditions of judges of one state are equivalent to similar posts of judges of other states. The purpose of this constitutional scheme is to ensure that the judicial system is uniform, effective and efficient in its functioning. Efficient functioning necessarily requires judges of caliber and capacity to be provided with the right incentives and promotion opportunities to maintain the high level of functioning of the judiciary.
23 This Court in *All India Judges Association* (II) has noted the position of law and observed that uniform designations and hierarchy, with uniform service conditions are unavoidable necessary consequences. It was held:
> "14. … ***Secondly, the judiciary in this country is a unified institution judicially though not administratively.Hence uniform designations and hierarchy, with uniform service conditions are unavoidable necessary consequences.*** …."

10 14. In view of the above discussion, the issue is whether there is any compelling need to reduce the quantum of increase proposed by applying a lower multiplier so as to marginally reduce the gap between entry level IAS officers (in Junior and Senior time scales) and Judicial Officers at the first two levels (Civil Judge, Junior and Senior Divisions). Such an exercise is not warranted for more than one reason. Firstly, the initial starting pay must be such as to offer an incentive to talented youngsters to join judicial service. Secondly, the application of a multiplier/ factor less than 2.81 would result in a deviation from the principle adopted by SNJPC that the extent of increase of pay of judicial officers must be commensurate with

paragraphs 24, 29[11] of the judgment dated 19 May 2023. Judges are

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the increase in the pay of High Court judges. This principle has been accepted by this Court by approving the recommendations of the SNJPC. Therefore, there is no valid reason to depart from the principle applied by JPC that the pay of judicial officers should be higher when compared to All India Service Officers of the corresponding rank. This principle has been approved by this Court in AIJA (2002)….. Thirdly, in **All India Judges Association (II)** v. **Union of India,** this court rejected the comparison of service conditions of the judiciary with that of the administrative executive:

> **"7.** It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there. We cannot however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the Legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. **The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally."**
>
> **(emphasis supplied)**

Fourthly, the argument that a uniform IoR would equate the district courts with constitutional courts is erroneous. A uniform multiplier is used for a uniform *increment* in pay and not for the purpose of uniform pay in itself. All Judges across the hierarchy of courts discharge the same essential function of adjudicating disputes impartially and independently. Thus, it would not be appropriate to apply graded IoR when SNJPC has chosen to uniformly apply the multiplier.

11 **24.** Separation of powers demands that the *officers* of the Judiciary be treated separately and distinct from the *staff* of the legislative and executive wings. **It must be remembered the judges are not employees of the State but are holders of public office who wield sovereign judicial power. In that sense, they are only comparable to members of the legislature and ministers in the executive. Parity, thus, cannot be claimed between *staff* of the legislative wing and executive wing with *officers* of the judicial wing. This Court in *All India Judges' Assn. (II) v. Union of India*, explained the distinction and held that *those who exercise the State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions.* Thus, there cannot be any objection that judicial officers receive pay which is not at par with executive staff.** In this context, it may also be remembered that Article 50 of the Constitution directs the State to take steps to separate the judiciary from the Executive.

29. This Court in its Review Order dated 05.04.2023 has explained this position in the following words:

> "*7. It is not necessary to repeat here what has been stated in the judgment under review while dealing with the same contentions raised there.* ***We cannot however, help observing that the failure to realize the distinction between the judicial service and the other services is at the bottom of the hostility displayed by the review petitioners to the directions given in the judgment. The judicial service is not service in the sense of 'employment'. The Judges are not employees. As members of the judiciary, they exercise the sovereign judicial power of the State. They***

not comparable with the administrative executive. They discharge sovereign state functions and just like the Council of Ministers or the political executive and their service is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive, judges are distinct from judicial staff, and are thus comparable with the political executive and legislature. It would be wholly inappropriate to equate judicial service with the service of other officers of the State. The functions, duties, restrictions and restraints operating during and after service are entirely distinct for members of the judicial service. Consequently, the plea of equivalence has been consistently rejected in the judgments of this Court. We affirmatively do so again.

Allowances recommended by the SNJPC

19. We will now deal with each of the allowances as recommended by the SNJPC.

1. House Building Advance (HBA)

20. At the outset, it needs to be noted that the HBA forms a subject matter of the recommendations of the Seventh CPC, FNJPC, JPC and now the SNJPC. The SNJPC has recommended that :

(i) HBA shall be made available to judicial officers in terms of the House Building Advance Rules, 2017; and

(ii) HBA shall be available to judicial officers also for the purchase of a ready built house from private individuals subject to such

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are holders of public offices in the same way as the members of the council of ministers and the members of the legislature. *When it is said that in a democracy such as ours, the executive, the legislature and the judiciary constitute the three pillars of the State, what is intended to be conveyed is that the three essential functions of the State are entrusted to the three organs of the State and each one of them in turn represents the authority of the State. However, those who exercise the State power are the Ministers, the Legislators and the Judges, and not the members of their staff who implement or assist in implementing their decisions. The council of ministers or the political executive is different from the secretarial staff or the administrative executive which carries out the decisions of the political executive. Similarly, the Legislators are different from the legislative staff. So also the Judges from the judicial staff. The parity is between the political executive, the Legislators and the Judges and not between the Judges and the administrative executive. In some democracies like the USA, members of some State judiciaries are elected as much as the members of the legislature and the heads of the State. The Judges, at whatever level they may be, represent the State and its authority unlike the administrative executive or the members of the other services. The members of the other services, therefore, cannot be placed on a par with the members of the judiciary, either constitutionally or functionally.*"

(emphasis supplied)

safeguards as may be prescribed by the State Government in consultation with their respective High Courts.

21. The Ministry of Housing and Urban Affairs, Government of India has issued an Office Memorandum[12] dated 9 November 2017 providing for the payment of HBA. The recommendations of the SNJPC are based on the terms of this OM. However para 2(v) of the OM of the Union Government contains the following stipulation :

> "5. Outright purchase of a new ready-built house flat from Housing Boards, Development Authorities and other statutory or semi-Government bodies and from registered builders i.e., registered private builders, architects house building societies, etc. but not from private individuals."

22. The above clause in the OM indicates that the HBA can be availed of for the outright purchase of a new or ready built house or flat from public bodies as well as from registered private builders, architects and societies but not from private individuals. The SNJPC, in the course of its recommendations has observed as follows :

> "6. The Commission having given its consideration to the same is of the view that the HBA advance to the Judicial Officers shall be in terms of HBA Rules, 2017. However, the expression "but not from private individual" in Clause 2(v) needs to be suitably modified. It is quite possible that an individual may have purchased the house from the institutions/societies mentioned in the O.M. and if he subsequently intends to sell it and a Judicial Officer is inclined to purchase it. In such an event, the HBA may not be available to the Judicial Officer if Clause 2(v) is strictly construed. Further, quite often the Government servants/ officials as well as Judicial Officers would prefer to have ready built house and mere fact that the seller is a private individual should not be a good reason to deny the HBA on the terms set out in the Rules. It may be noted from O.M. that from registered private builders, architects, house building societies etc. purchase by a private individual is allowed. There is no good reason for exclusion of purchase

12 "OM"

from private individuals. However, suitable safeguards to check any overestimation in the case of purchases from private individual can be evolved by the State Government in consultation with the High Court. "

23. The SNJPC has basically adopted the same financials as incorporated in the OM of the Union Government with the modification that the purchase from a private individual may also be permitted.

24. We are inclined to accept the modification particularly since the State Governments have been permitted to evolve suitable safeguards, to check any over estimation in case of a purchase from private individuals, in consultation with the High Court to ensure that there is not delay in implementation, we direct that the Committee constituted in terms of the directions issued in a later part of this judgment under the authority of every High Court shall sort out any difficulties which may arise in the implementation of the recommendations of the SNJPC as accepted by the present order.

25. We accordingly accept the recommendations of the SNJPC on the adoption of HBA.

2. Children Education Allowance (CEA)

26. The SNJPC has recommended the payment of the allowance with effect from academic year 2019-2020. The recommendation by the SNJPC on the payment of the CEA is in accordance with the recommendations of the Seventh CPC for Central Government employees which is in the following terms :

(a) Rs 2,250 per month as CEA and Rs 6,750 per month as hostel subsidy for two children up to Class 12;

(b) For children with special needs, the reimbursement would be at double the rate stated in (a);

(c) When the DA increases by 50%, the allowances and subsidy shall increase by 25%; and

(d) The rights of officers who are already receiving this benefit will not be adversely affected by the recommendation.

27. While arriving at the above rates for the CEA, the SNJPC has considered the fact that the judicial service has a pan India character.

In making the recommendation, the SNJPC has based the payment of the allowance of the CEA in terms of the OM dated 16 August 2017 of the Union Government in the Department of Personnel and Training. The payment of the allowance as recommended shall accordingly stand approved.

3. City Compensatory Allowance (CCA)

28. While recommending that the CCA be discontinued prospectively on the ground that it is not being paid to High Court or Supreme Court Judges after the Seventh CPC recommendations, the SNJPC has also directed that no recovery shall be effected on the amount already paid on account of the allowance.

29. We approve both the recommendation for discontinuation and the recommendation that no recovery shall be made.

4. Concurrent Charges Allowance

30. The SNJPC has observed that concurrent charge allowance is payable to officers who are required to hold full charge of the duties of equal or higher responsibilities in addition to the duties of their own post. The following recommendations were made by the FNJPC:

> "a) The charge allowance be paid to the Judicial Officer when he is placed in charge of another Court continuously beyond the period of 10 working days and if he performs appreciable judicial work of that Court;
>
> AND
>
> b) The charge allowance be paid to such Judicial Officer at 10% of the minimum of the time scale of the additional post held."

31. The SNJPC has made a similar recommendation for the payment of a like allowance where a judicial officer was placed in charge of another court continuously beyond a period of ten working days. The SNJPC was of the view that the Concurrent Charge Allowance with a ceiling @ 10% of the minimum of the scale of the additional post held beyond a period of ten working days is reasonable and does not require any upward revision. Moreover, it opined that with the

revision of pay, the quantum of allowance at the rate of 10% is an adequate sum. The SNJPC observed that the actual amount payable within the ceiling of 10% depends upon the number of days worked, the quantum of judicial work turned out and the administrative work handled. Moreover, as was being done earlier, the High Courts would decide the amount payable having regard to the relevant factors. The SNJPC, however, recommended that the parameter of "appreciable judicial work" of the FNJPCis vague and involves a cumbersome process. That criterion has accordingly been dispensed with. The summary of the recommendations of SNJPC in that regard is set out below:

"1. The concurrent charge allowance to be available maximum at the rate of 10% of the minimum of the scale of the additional post held beyond a period of ten working days.

2. No upward revision in the percentage of the Concurrent Charge allowance.

3. High Court to decide the Concurrent Charge allowance to be available to the Officer within the ceiling of 10% on the basis of the number of days worked, the quantum of judicial work turned out and the administrative work handled.

4. The criterion laid down by FNJPC be dispensed with and there shall not be any insistence on the performance of 'appreciable judicial work' of the Court concerned. "

32. The recommendations made by the SNJPC is accordingly accepted.

5. Conveyance/Transport Allowance (TP)

33. As regards Conveyance/Transport Allowance, the SNJPC made the following recommendations:

(a) The pool car service for various judicial officers, as recommended by FNJPC, must be dispensed with. However, if the officers wish, they can forgo the transport allowance and continue with the pool car service for a period of one year or so;

(b) The transport allowance at the rate of Rs 10,000 per month be given to those judicial officers who own the car so as to

cover the cost of maintenance and driver's salary and this will be increased to Rs 13,500 from 01.01.2021. The transport allowance would be payable at a reduced rate of Rs 4,000 per month in those States where there is an existing practice of allocating a driving-knowing office attendant/peon to the officer;

(c) In addition to the transport allowance, there should be a reimbursement of the cost of 100 litres of petrol/diesel in cities and 75 litres of petrol/diesel in other areas;

(d) After the recommendations of FNJPC, the following judicial functionaries were eligible for official vehicles, namely, Principal District Judge, Chief Judicial Magistrate/Chief Metropolitan Magistrate, Principal Judge of City Civil Court and Principal Judge of Small Causes Court. In addition to these functionaries, three more judicial functionaries would be eligible for official vehicles, namely, Director of the Judicial Academy/Judicial Training Institute, Principal Judge of the Family Courts and Secretary of the District Legal Services Authority. The High Courts were permitted to prune down the list depending upon the financial capacity of the State;

(e) The quantum of petrol/diesel for official cars would be raised to the actual consumption for official purposes as certified by the concerned official and supported by a log book, which would be maintained. The judicial officers using official cars may be permitted to use them for private purposes to the extent of 300 kms per month;

(f) The judicial officers shall be permitted to exhibit a sticker at their option on the lower left side of the windscreen with inscription 'Judge' printed in moderately sized letters; and

(g) Soft loan facilities to the extent of Rs ten lakhs at nominal interest for the purchase of car shall be extended to the judicial officers.

34. The report of the SNJPC in regard to the payment of conveyance/ transport allowance is accepted. All concerned authorities shall take steps for the purpose of implementing the recommendations.

6. Dearness Allowance

35. By its order dated 19 May 2023, this Court has accepted the recommendation of the SNJPC on dearness allowance.

7. Earned Leave Encashment

36. The SNJPC has recommended that the judicial officers be entitled to earned leave encashment in the following manner:

> "9. SUMMARY OF RECOMMENDATIONS
>
> 1. No enhancement in the maximum limit of 300 days leave encashment at the time of retirement.
>
> 2. A judicial officer shall be entitled to encash :
>
> (a) 10 days earned leave while availing LTC subject to maximum 60 days – 10 at a time upto six occasions during the entire service.
>
> (b) 30 days in a block of two years.
>
> (c) S.No.(a) and (b) shall be in addition to the right of the Judicial Officers to encashupto 300 days EL at the time of retirement.
>
> 3. In case of officers who have retired and while granting leave encashment at the time of retirement, the leave encashment availed during service stand adjusted shall be paid the amount of the so adjusted earned leave, at the time of retirement as explained in the example above, within a period of three months from the date of acceptance of the report."

37. The report submitted by the SNJPC in regard to the earned leave encashment is accepted.

8. Electricity and Water Charges

38. The SNJPC has made the following recommendations:

> "1. No change in the percentage of reimbursement. The 50% of reimbursement formula recommended by FNJPC and reiterated by the JPC shall continue.
>
> 2. The ceiling in terms of units of electricity and the quantity of water consumed shall be as follows:

Designation	Electricity Units	Water Quantity
District Judges	8000 units per annum	420 Kls per annum
Civil Judges	6000 units per annum	336 Kls per annum

3. Reimbursement of electricity and water charges shall be on the quarterly basis on production of proof of payment of the billed amount.

4. This allowance shall be available at the enhanced rates w.e.f. 01.01.2020."

39. The SNJPC duly considered the objections. While some High Courts suggested the continuance of the existing system of 50% reimbursement, others suggested reimbursement at 75%, while still others at 100%. The High Courts of Madhya Pradesh and Jharkhand suggested the fixation of a ceiling on the number of units. The Union of India and almost all States except Jharkhand and Kerala have accepted the recommendation of SNJPC. The State of Jharkhand recommended a ceiling of Rs 1,250 per month for electricity and water charges.

40. Having considered the recommendation, we are of the view that it should be accepted and it is ordered accordingly.

9. Higher Qualification Allowance

41. The SNJPC noted that for acquiring higher qualifications in law, specialized study of the subjects concerned is involved and the acquisition of such qualifications in the nature of a post graduate or doctoral degree will improve the quality of work of a judicial officer. The recommendations of the SNJPC are summarized below:

"1. The Judicial Officers shall be granted three advance increments for acquiring higher qualification i.e. post-graduation in law and one more advance increment if he acquires Doctorate in Law.

2. The advance increments once granted for post-graduation degree or Doctorate in law shall not be again granted if, in future, the officer acquires post graduate or Doctorate degree in any other subject.

3. The advance increments shall be available to the officer who had acquired the post-graduation degree or Doctorate either before recruitment or at any time subsequent thereto while in service.

4. The advance increments shall be granted from the date of initial recruitment, if the officer has already acquired the post-graduation degree or Doctorate and from the date of acquiring the post-graduation or Doctorate degree, if acquired after joining the service.

5. The advance increments shall be made available to the officers only and only if the higher qualification has been acquired through regular studies (full time or part time) and not through distant learning programmes.

6. The benefit of advance increments shall not be extended at the ACP stage (ACP I or II). However, the advance increment shall be available when the Officer is promoted from Civil Judge (Jr. Div.) to Civil Judge (Sr. Div.) and from Civil Judge (Sr. Div.) to District Judge cadre.

7. The advance increments shall be available in the District Judge Cadre from District Judge (Entry Level) to District Judge (Selection Grade) and from District Judge (Selection Grade) to District Judge (Super Time Scale).

8. The advance increments for all practical purposes shall be part of salary and Dearness Allowance shall be available on the same."

42. The recommendation made by the SNJPC that the benefit of advance increment shall not be extended at the ACP stage appears to be covered by the order of this Court dated 30 September 2022 in **State of Maharashtra** v **Tejwant Singh Sandhu**[13] where this Court held:

> "The short question which is posed for consideration of this Court is whether the judicial officers who have acquired the the degree of LL.M. are entitled to the benefit of an additional increment? It is the case on behalf of the State that once the concerned Judicial Officer is getting the benefit of ACP, is not entitled to the additional increment on acquiring the additional qualification of LL.M. The aforesaid cannot be accepted. The grant of ACP has nothing to do with the benefit of additional increment on acquiring

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theadditional qualification like LL.M. Even otherwise, the issue is squarely covered by the decision of this Court in *Bharat Kumar Shantilal Thakkar Vs. State of Gujarat & Anr.* (2014)15 SCC 305.

In view of the above, there is no substance in the present Special Leave Petition and the same deserves to be dismissed and is accordingly dismissed."

43. There is no justification for denying the benefit of advance increments at the ACP stage. The object and purpose of ACP is to prevent stagnation. On the other hand, the object and purpose of advance increments for acquiring higher qualifications is to improve judicial performance. Hence, the restrictive condition imposed by the SNJPC in regard to non-extension of advance increments at the ACP stage is not accepted. The advance increments for acquiring higher qualifications shall also be made available to officers who have acquired their degrees through distance learning programmes.

44. Subject to the above clarifications, the recommendation of the SNJPC is accepted.

10. Hill Area/Tough Location Allowance

45. The SNJPC has made the following recommendations:

"1. Hill Area/Tough Location Allowance @Rs.5000/- per month shall be paid to the Judicial Officers posted in hill areas/ tough locations.

2. More beneficial provision, if any, already applicable to the officials of the State/UT shall be extended to the Judicial officers.

3. In case of doubt, whether a particular area can be considered to be hilly or tough location area, decision of the High Court shall be followed in relation to the Judicial officers.

4. This allowance shall be available w.e.f. 01.01.2016."

46. The recommendation is accepted. All High Courts are directed to specify the areas classifiable as hill areas/tough locations within a period of two months from the date of this order.

11. Home Orderly/Domestic Help Allowance

47. The SNJPC has made the following recommendations:

"1. The Home-cum-office orderly allowance shall be available to the serving Judicial officers at the following rates :

District Judges : minimum wages for one unskilled worker in the concerned State/UT subject to minimum of Rs.10,000/- per month

Civil Judges : 60% of the minimum wages for one unskilled worker in the concerned State/UT subject to minimum of Rs.7,500/- per month.

2. Judicial officers getting higher allowance on this account by virtue of the orders issued by some States, they may continue to draw the same.

3. The allowance at the aforesaid rates shall be available to the Judicial Officers w.e.f. 01.01.2016 in States where they are getting the same prior to 01.01.2016 and in other cases, w.e.f. 01.01.2020.

4. The Judicial officers provided with Group D employee as an Attender/Peon/office subordinate for residential duties may exercise their option either to continue with the present system and forego the allowance that has been recommended or to claim the allowance instead of availing the services of the official Attender/Peon.

5(a). The payment of home orderly allowance should not result in discontinuance of practice, if any, of deputing the Office Peons/Attenders or other Group D employee during nights at the residences of (i) Magistrates who are called upon to attend the Judicial work at times during night times. (ii) the Office Peon/Attender or such other Group D employee deputed for night duty at the residence of Judicial officer living in the areas generally considered to be disturbed or security risk areas or outsourced security guards to be deployed in such areas and (iii) such personnel can also be deputed to the residence of Principal District Judge or equivalent rank officer having administrative responsibilities.

(b) The deployment of Peons/Attenders for such residential duties shall be subject to the availability of Group D/Class IV personnel and without detriment to Court related duties.

6. Drawing up a panel of Home Orderlies/residential attendants/sevaks appointed on consolidated salary equivalent to minimum wages and allotting them to the Judicial officers (as suggested by the Madras High Court) can be thought of as an alternative subject to the decision taken in this regard by the concerned High Court. However, in such a case, Home Orderly allowance cannot be claimed.

7a. Domestic Help Allowance to the pensioners and family pensioners shall be available at the following rates from 01.01.2016 :

Pensioner : Rs.9,000/- per month

Family pensioners : Rs.7,500/- per month

7b. This allowance shall stand increased by 30% on completion of five years from 01.01.2016 that is, w.e.f. 01.01.2021.

8. The allowance shall be drawn on the self certification of the Judicial Officer/Pensioner/Family Pensioner."

48. We accept the recommendations of the SNJPC.

12. House Rent Allowance and Residential Quarters

49. The allowance under the above head has the following components:

(a) Residential Quarters:

The SNJPC took note of the fact that there is a dearth of residential government quarters and that securing suitable accommodation has become an acute problem for judicial officers. The SNJPC made the following recommendations:

1. The State Governments should urgently take up construction of the residential quarters for the Judicial Officers and the progress of construction be monitored by this Court.

2. The Judicial Officer is to be provided accommodation or requisitioned private accommodation within one month of taking charge of the post.

3. If the Judicial Officer is not provided with the government accommodation or requisitioned private accommodation within one month, then the Judicial Officer may secure private accommodation and should be paid rent in the following terms:

    a. If the rent of the private accommodation is within the admissible house rent allowance mentioned below, no fixation of rent is required. But the concerned Judicial Officer has to certify the actual rent being paid.

    b. If the rent of the private accommodation is more than permissible house rent allowance, the rent shall be assessed by Principal District Judge with the assistance of PWD/R&B officials.

    c. If the difference between the permissible house rent allowance and the rent assessed is more than 15% and Principal District Judge may seek approval of High Court for payment of the said amount unless the officer is ready to pay the differential cost.

4. The minimum plinth area for the residential accommodation shall be 2500 sq. ft. for District Judge and 2000 sq. ft. for Civil Judge. However, The High Court administration have the discretion to sanction the design with higher plinth area.

(b) House Rent Allowance

The SNJPC noticed that different rates of HRA are prevalent in different cities. Taking all aspects into account, the SNJPC was of the view that the Central Government notified rates may be adopted by the States and made the following recommendations:

(i) Judicial officers who are allotted official quarters for residence shall not be entitled to HRA;

(ii) Judicial officers residing in their own houses, including the house of a parent or spouse, shall also be entitled for the recommended HRA with effect from 01.01.2016 after obtaining permission from the High Court to reside in their own house and judicial officers already residing in hired accommodation will be entitled to the recommended HRA with effect from 01.01.2020, subject to the actual rent paid within the said ceiling;

(iii) The Office of the Principal District Judge or equivalent shall pay rent directly to the landlord, in which case, the officer is not eligible to draw HRA; and

(iv) The SNJPC rates of HRA should be applicable to all Judicial Officers as per the notification dated 07.07.2017 which was issued after the VIIth Central Pay Commission (CPC) by the Central Government:

"	Rates of HRA/pm as % of basic pay
X	24%
Y	16%
Z	8%

However, the minimum rates prescribed are 5400/-, 3600/- and 1800/- respectively. And the rate will be changed in accordance with the change in Dearness Allowance in the following terms:

Classification of Cities	Rates of HRA/pm as % of basic pay	When DA crosses
X	27%	25%
	30%	50%
Y	18%	25%
	20%	50%
Z	9%	25%
	10%	50%

'Z' Category is unclassified at present and the High Court is at liberty to upgrade and add the cities in different classes."

(c) Furniture and Air Conditioner Allowance

The SNJPC was apprised of the fact that some furniture is provided to the judicial officers in certain places, but there is a lack of uniformity. The SNJPC made the following recommendations:

"4. Furniture grant of Rs.1.25 lakhs every five years shall be provided to the Judicial Officer subject to production of proof of purchase by the Judicial Officer. Household electrical appliances can also be purchased by availing of the said grant. The Officers having not less than two

years of service will also be eligible for this allowance. The option to purchase the furniture being used by the officer at the depreciated rate shall be available at the time of fresh grant or retirement.

4.1 Apart from the furniture grant, one air-conditioner shall be provided at the residence of every Judicial Officer once in every five years."

(d) Residential quarters - maintenance

In order to obviate the problems faced by judicial officers in securing services of electricians, plumber, carpenters, sanitary workers and masons and bearing in mind that the Public Works Department, which is in-charge of maintenance, does not have sufficient funds to carry out the work, the SNJPC recommended that an amount of Rs Ten lakhs be made available to each Principal District Judge on the basis of a proposal sent by the Registry of the High Court for the proper maintenance of the residential quarters and that the Government must sanction the amount proposed within two months from the date of the receipt of their proposal.

(e) Guest House/Transit Accommodation

The SNJPC has been in agreement with the suggestions made by the Associations that guest house facility should be provided exclusively for judicial officers bearing in mind the problem faced in securing accommodation in State guest houses. While the SNJPC was aware that it is not possible to construct guest houses in all districts, it emphasized the need to have a guest house-cum-transit accommodation at least in cities and major towns. In that regard, the following recommendations were made:

"17.2 The Commission does not expect that the Guest houses for the Judiciary should be constructed in all Dist. Headquarters irrespective of the size of the District. The travails of the Judicial Officers in securing suitable accommodation for stay is undeniable at least in the cities and major important towns. There is every need to construct Guest houses-cum-transit homes. One wing can be earmarked as a transit home where the transferred Officer can stay initially for a

> few weeks till s(he) finds residential accommodation – Official or private. The Guest house-cum-transit home facility is a long felt need of the Judicial Officers. The Commission recommends that the Guest houses/transit homes shall be constructed in a phased manner by the Governments concerned. The officials concerned shall act in coordination with the Registry of the High Court to identify the places. The details such as number and size of rooms and the amenities shall be finalized after mutual discussion. As regards the first phase of such construction, the State Governments/UTs may be directed to initiate action within a time frame of six months and necessary financial allocation has to be made for this purpose during the financial year 2020-21. Needless to say that after construction, the High Courts will issue necessary instructions regarding maintenance, minimal catering arrangement, rent to be charged etc."

Of the above five components of house rent related allowances, those at (c) (Furniture and Air Conditioner Allowance) and (d) (Maintenance) have been introduced for the first time. The other components form part of the service conditions of judicial officers.

50. We find reason and justification for the addition of the two components. All the components which have been suggested by the SNJPC are integral to the proper performance of the duties by judicial officers and are accordingly accepted.

13. Leave Travel Concession(LTC)/Home Travel Concession(HTC)

51. The FNJPC recommended that LTC should be provided once in a block of four years to any place in India. However, it laid down a threshold of a completion of five years of service before availing of LTC. The FNJPC also recommended that HTC be extended once in two years and the entitlement for the journey would be according to the rules of the respective States. The recommendation was accepted in 2002 by the decision in the **All India Judges Association** case by this Court.

52. The JPC, while reiterating these recommendations, proposed two modifications:

(i) A judicial officer may be permitted to avail of LTC on completion of two years of service and on completion of probation (thereby relaxing the requirement of five years of minimum service); and

(ii) The restriction on the availing of LTC in the last year of service was dispensed with.

53. While reiterating the recommendation for HTC, the JPC suggested an additional HTC if a judicial officer was subjected to two or more transfers in the same cadre from one end of the State to another for administrative reasons.

54. The SNJPC considered the views of the High Courts and of the Associations. On considering all aspects of the matter, the SNJPC made the following recommendations:

"i. Payment of one month's salary for not availing the LTC is unwarranted and it would defeat the objective of LTC.

ii. Encashment of 10 days earned leave while availing LTC (not HTC) (subject to the maximum of 60 days) can continue. The same will be in addition to encashment of 300 days at the time of retirement and 30 days in a block of two years.

iii(a). As regards frequency of LTC, the Judicial Officers may be permitted to avail one LTC and one HTC in a block of 3 years.

(b) As far as fresh recruits are concerned, the HTC shall be allowed 2 times in the first block of 3 years. However, the block of 3 years will commence on completion of the period prescribed for probation (not necessarily declared).

iv(a). The Judicial officers irrespective of their rank shall be allowed to travel by air and the reimbursement shall be made subject to the condition that the tickets have been purchased either directly from the Airlines or from the agents authorized, namely, Ashoka Travels, Balmer and Lawrie and IRCTC by the Central/State Government subject to further addition or deletion of the authorized agent by the Central/State Government.

(b) The other details such as class of travel, advance etc. shall be governed by the respective Rules/Orders of States/UTs.

v. The Judicial officers may be allowed to carry forward LTC anywhere in India beyond retirement for a period of one year.

vi. There is no justification for extending the LTC/HTC facility to the retired Judicial officers.

vii. As regards the foreign travel to SAARC countries, the District Judges and Senior Civil Judges may be allowed the said facility on two occasions in their service career and only economy class travel shall be allowed.

viii. The Judicial officers shall not be required to avail of earned leave only, for LTC/HTC purpose and they may be permitted to avail of casual leave as a prefix and suffix to the extent of two days."

55. LTC/HTC were components already provided for by the FNJPC and JPC. The recommendations of the SNJPC are on a continuum. We accept the recommendations, save and except for foreign travel to SAARC countries which shall be deleted.

14. Medical Allowance/Medical Facilities

56. The subject matter of the above allowance/facility has been duly considered in the earlier reports of the FNJPC and JPC.Before proceeding further, it would be appropriate to extract from the recommendations of the SNJPC in regard to medical allowances and medical facilities. The recommendations read as follows:

"1. Fixed medical allowance shall be payable @Rs.3,000/- p.m. to the serving Judicial Officers with effect from 01.01.2016.

2. Fixed medical allowance shall be payable @Rs.4,000/- to the pensioners and family pensioners with effect from 01.01.2016.

3. The spouse or other dependents of Judicial Officers drawing family pension shall also be eligible for medical facilities/reimbursement at par with the pensioners of the judiciary.

4(a) The necessity of reference from the Medical Officer of a Government hospital shall be dispensed with. Straightaway, the Judicial Officers including pensioners/ family pensioners shall be entitled to have consultations/ treatment in the Government notified/empanelled private hospitals/Pathological Labs and seek reimbursement by submitting the bills as per the usual procedure (which is now being followed).

4(b) In regard to Judicial Officers governed by DGEHS or CGHS, the existing procedure which is quite simple and systematic, can be followed.

4(c) The Principal District Judges or Registry of High Court [in respect of Principal District Judge] shall be empowered to address credit letters to the concerned hospitals where the Judicial Officer or Judicial Pensioner/Family Pensioner has been or to be admitted as inpatient.

4(d) For the Pensioners and Family Pensioners, a Medical Card on the lines of what is being issued in Delhi as shown in Appendix III shall be issued by the Principal District Judge.

4(e) The expenditure incurred towards inpatient treatment or for serious ailments requiring more or less continuous treatment shall be processed and sanctioned by the Principal District Judges or other authorized Officer of that rank or as the case may be by the Registry of the High Courts.

4(f) In the case of emergency, the Judicial Officer, serving & retired as well as the family pensioner can take treatment in any nearest private hospital – not necessarily, Government notified hospitals and seek reimbursement as per the usual procedure. If necessary, Credit letter shall be issued for this purpose.

5. On submission of the estimate given by the recognized/ empanelled hospital, 80% shall be sanctioned as advance, subject to preliminary scrutiny by the Principal District Judge or a District Judge of equivalent rank authorized by the Registry of the High Court. The balance shall be

reimbursed on certification by the designated Civil Surgeon or Official of the Directorate of Medical & Health Services as the case may be. If the Government approved rates are not available for any particular item, the certifying officer shall have due regard to the rates generally charged in the hospitals concerned. Though there needs to be scrutiny before sanctioning the payment in view of the tendency to exaggerate the estimates, the extent of disallowance shall be minimal and the reasons for disallowance shall be disclosed by the certifying authority. The bills sent by the District Judge for scrutiny of the designated Civil Surgeon/ Officer of Directorate shall be cleared within a maximum period of one month from the date of receipt.

6(a) The retired Judicial Officers and the family pensioners who have settled down in another State shall have the facility to claim medical reimbursement/advance from the State from which s(he) is drawing pension/family pension.

6(b) The cost of treatment including room charges/tests undergone in any Government/Government notified/ recognized hospitals/pathological labs in an emergency or otherwise shall be reimbursed to the serving officers on tour (official or private purpose) to another State or settled in another State after retirement even though it is not recognized hospital/lab in the State in which the officer is serving or had served.

7. The Registry of the High Court shall examine whether the notified/empanelled hospitals sufficiently cater to the needs of the Judicial Officers including the pensioners/ family pensioners and send proposals to the Government for notifying additional hospitals/pathological Labs to the extent it is considered necessary.

8. To avoid delays in processing and sanctioning the bills for want of funds, the Registry of High court shall take prompt action in addressing the Government for releasing additional funds and the Finance Department of the State shall take immediate action by way of making available the additional funds to the High Court on this account."

We analyze the recommendations of the SNJPC below.

Fixed Allowance

57. The SNJPC has justifiably increased the fixed medical allowance to Rs 3,000 per month for serving judicial officers and to Rs 4,000 per month to pensioners and family pensioners with effect from 01.01.2016. This recommendation was made in view of the fact that the FNJPC had recommended a fixed medical allowance of Rs 300 per month, which was increased by the JPC to Rs 1,000 per month for serving judicial officers. The JPC enhanced the medical allowance to Rs 1,500 per month for retired judicial officers and Rs 750 per month for family pensioners. The recommendation made by the SNJPC for uniformity in the medial allowance payable to pensioners and family pensioners is wholesome and is consistent with Article 14. Of the Constitution. There is no valid basis to distinguish between pensioners and family pensioners for the payment of a fixed medical allowance. Moreover, an increase of Rs 1,000 per month for pensioners as compared to serving judicial officers is also justified considering the fact that the pensioners as a class would need more medical attention with advancing years.

Medical Facilities and Reimbursement

58. The medical facilities to be provided to serving judicial officers, retired judicial officers and family pensioners differ from State to State. There are three broad models which are followed in the case of government servants:

    (a) Access to a health scheme like CGHS under which there are empaneled hospitals;

    (b) Access to government hospitals and thereafter upon following a procedure of reference; and

    (c) Cashless facilities pursuant to group insurance policies.

59. The FNJPC recommended that the judicial officers should also be given similar medical facilities as are being given to the members of the State legislature. It recommended that the State Government should notify the list of hospitals for medical treatment of judicial

officers and their families. A similar benefit was extended to retired judges. The FNJPC's recommendations were accepted by this Court in **All India Judges Association** v **Union of India**[14].

60. The JPC reiterated the recommendations of the FNJPC. Its recommendations were accepted in **All India Judges Association** v **Union of India**[15].

61. While noting the varying practices which are followed across the country, the SNJPC observed that while the CGHS and DGEHS are working well, difficulties are faced by judicial officers in several States where there is neither a proper empanelment of doctors, hospitals and labs nor is there an effective procedure for reimbursement of medical bills. It specifically noted the case of the State of Maharashtra where the earlier orders of this Court were not observed. The SNJPC further noted that in the absence of proper empanelment, referral by a Medical Officer of a government hospital is needed for treatment in private hospitals. The SNJPC has taken note of the grievance of the judicial officers while formulating its recommendations. The grievances which were projected by the judicial officers included the following:

> "1) Lack of adequate number of notified hospitals/pathological labs.
>
> 2) Non-availability of cashless treatment for in-hospital treatment even in case of serious ailments and emergency.
>
> 3) The Civil Surgeon or Directorate of Medical/Health services to whom the claims are referred to are enforcing unjustifiable cuts.
>
> 4) Delay in processing/passing the bills in case of high claims.
>
> 5) Insistence of Essentiality Certificate even for medicines purchased on the basis of the prescription issued by Registered Medical Practitioner or even the Consultant of the notified hospital.

14 (2002) 4 SCC 247

15 (2010) 14 SCC 720

6) Procedural problems being faced by the Judicial Officers who have settled down in other States after retirement.

7) Non-specification of premier hospitals of repute in other States for the purpose of availing reimbursable medical treatment in cases of serious ailments.

8) Non-extension of medical facilities to the family pensioners."

62. During the course of the hearing, the attention of this Court has been drawn to the situation in the State of Uttar Pradesh by members of the Association representing former judges. It has been submitted that the hospitals which have been empaneled by the State Government for the purpose of cashless facilities are providing sub-standard treatment. As a result, the cashless facilities cannot be availed of by the officers. It has been submitted that since a sufficiently large number of hospitals is empaneled under CGHS (nearly 300 hospitals in the State of Uttar Pradesh alone), the State Government may be directed to follow the hospitals which are empaneled for the purpose of CGHS so as to ensure that the quality of treatment which is extended to the judicial officers and retired judicial officers as well as family pensioners is of a requisite standard.

63. The primary concern which has been expressed by serving judicial officers and by retired officers is that the recommendations made by the SNJPC appear to lower the bench-mark or standard set by the FNJPC of entitling the judicial officers to the same medical facilities as those provided to members of the legislative assembly.

64. Mr K Parameshwar, *Amicus Curiae*, has submitted that this may not be an appropriate manner of reading the recommendations made by the SNJPC. According to him, the recommendations of the SNJPC should be read holistically and harmoniously with those of the FNJPC. Hence, the recommendations which were made by the FNJPC to have empaneled doctors, hospitals or labs and the recommendations to do away with the referral system must be viewed in addition to the standards which were set by SNJPC. We find force on the submission.

65. The substantive recommendations which are made by the SNJPC are accepted. In exercise of the jurisdiction under Article 142 of the Constitution, we institutionalize the process issuing the following directions in the segment of this judgment which follows.

15. Newspaper and Magazine Allowances

66. The following recommendations have been made by the SNJPC:

> "1. Reimbursement for newspaper and magazines shall be Rs.1000/- for District Judges (two newspapers and two magazines) and Rs.700/- for Civil Judges (two newspapers and one magazine).
>
> 2. The reimbursement shall be on half yearly basis from January to June and July to December, on the basis of self certification.
>
> 3. The allowance at the above mentioned rates shall be available from 01.01.2020.
>
> 4. More beneficial provision already in operation in any State shall continue."

67. The recommendations are accepted.

16. Risk Allowance

68. The SNJPC has considered it reasonable to grant risk allowance. The SNJPC has issued the following recommendations:

> "1. Risk allowance shall be made available to the Judicial Officers working in the States of Jammu & Kashmir and insurgency affected North East States at the same rate as is available to the Civilian Government officials working in those areas.
>
> 2. The allowance will be available w.e.f. 01.01.2020."

69. The recommendation is accepted.

17. Robe Allowance

70. The SNJPC has noted that the pay and facilities of judicial officers have considerably improved in view of the recommendations made by the Judicial Commissions. Hence, the situation which existed at the time when the FNJPC had examined the matter "no longer exists now". Hence, it was of the view that it would be appropriate if judicial officers do not raise such a demand. The Seventh CPC recommended a uniform allowance only to those employees who are required to wear a prescribed dress in the course of the discharge of their duties. However, having regard to the practice which was in

force for a considerable time and the essential nature of the robe as apparel for Judges, the SNJPC recommended a "modest increase of the allowance, with the hope that such demand for robe allowance will not be raised before the next Commission". Consequently, the SNJPC recommended that:

(i) An allowance of Rs 12,000 will be payable once in three years with effect from 01.01.2016; and

(ii) The demand for the robe allowance may not be raised before the next Commission.

71. We are inclined to accept and accordingly accept the above recommendations.

18. Special Pay for Administrative Work

72. The SNJPC noted that judicial officers in-charge of certain courts/ tribunals have administrative responsibilities for which extra time outside the court working hours has to be spent. This is especially so in the case of Principal District and Sessions Judges or other District Judges having similar responsibilities. The SNJPC noted that Principal District Judges in the districts and officers of equivalent ranks in the cities are required to inspect courts, monitor the progress of cases, assess the performance of officers, conduct discreet inquiries in vigilance cases, and send reports to the High Courts. The administrative work, as the SNJPC noted, is considerable and extra time has to be devoted both at the residence and office for carrying out such duties.

73. Bearing in mind the additional administrative duties which have to be discharged by judicial officers, the SNJPC made the following recommendations:

"1. Special Pay for Judicial officers doing administrative work shall be payable to :

a) Principal District and Sessions Judges : Rs.7000/- per month

b) Other District Judges including I Additional District Judges entrusted with administrative work who have to generally spend time beyond Court working hours : Rs. 3500/- per month.

c) District Judges presiding over Special Courts and Tribunals having independent administrative responsibilities : Rs.3500/- per month.

d) CJMs and Principal Senior, Junior Civil Judges and other Judicial Officers having administrative responsibilities being in charge of independent Courts with filing powers : Rs.2000/- per month.

2. The Special Pay shall be available w.e.f. 01.01.2019."

74. The SNJPC has adduced a sound rationale for the above recommendation. The recommendation is accordingly accepted.

19. Sumptuary Allowance

75. The SNJPC has made the following recommendations:

1. The sumptuary allowance shall be available to the Judicial Officers at the following rates :

District Judges	Rs. 7,800/- per month
Civil Judges (Sr. Div.)	Rs. 5,800/- per month
Civil Judges (Jr. Div.)	Rs. 3,800/- per month

2. The allowance shall be available w.e.f. 01.01.2016.

3. The following categories of Judicial Officers shall get Rs.1,000/- (One thousand) more by virtue of their status or the additional responsibilities they shoulder.

- Principal District Judge in-charge of administration in the Districts/Cities.
- District Judges in selection grade and super time-scale.
- Director of Judicial Academy/Judicial Training Institute/ Member Secretary, State Legal Services Authority.
- Chief Judicial Magistrate/Chief Metropolitan Magistrate.

4. No sumptuary allowance shall be payable to retired Judicial Officers.

76. The report of the SNJPC notes that the Seventh CPC recommended the abolition of sumptuary allowance while observing that expenditure on hospitality should be treated as office expenditure and that the Ministry of Finance shall lay down the ceilings for various levels. In that context, the SNJPC observed:

"5. The VII CPC recommended abolition of sumptuary allowance and observed that the expenditure on hospitality should be treated as office expenditure and the Ministry of Finance shall lay down the ceilings for various levels. Accepting the recommendation of CPC, the sumptuary/ entertainment allowance was abolished w.e.f. 30.06.2017. At the same time, by the Office Memorandum dated 22.09.2017, the Government of India (Department of Expenditure, Ministry of Finance) having observed that "the hospitality related expenditure is now to be incurred as office expenditure", conveyed the President's decision prescribing the ceiling of office expenditure on hospitality only for a few dignitaries and officials. The Table appended to the O.M. is as follows:

Sl.No.	Designation	Existing Rates of sumptuary/ Entertainment Allowance (Rs. per month)	Prescribed ceiling in respect of hospitality related office expenditure (Rs. per month)
1.	Chief Justice of India	20000/-	45000/-
2.	Judges of the Supreme Court and Chief Justice of High Courts	15000/-	34000/-
3.	Judges of the High Court	12000/-	27000/-
4.	Cabinet Secretary	10000/-	23000/-
5.	Training Establishments		
	Director or Head	3500/-	8000/-
	Course Directors	2500/-	5700/-
	Counsellors	2000/-	4500/-
6	Judicial Officers in Supreme Court Registry	At the same rate as they were getting in the parent office	Existing rates may be multiplied by a factor of 2.25"

77. The SNJPC rejected the demand of the Association in regard to the quantum of increase in sumptuary allowance and decided to adopt an increase of 2.25 times, broadly speaking, as the guiding principle to arrive at this conclusion, based on the yardstick of annual inflation and increase of points in the consumer price index.

The increase which has been granted by the SNJPC is reasonable and commends itself for acceptance. We accordingly accept the recommendation.

20. Telephone Facility

78. The following recommendations have been made by the SNJPC:

"1. The Judicial Officers shall be provided with the following telephone facilities:

i. Residential Telephone (Landline) :

(a) The landline telephone and broadband facility (by the same or different service providers) shall be provided at the residence of the Judicial Officers with the permitted user as follows :

District Judges : Rs.1500/- per month

Civil Judges : Rs.1000/- per month

inclusive of rent, calls (local and STD both) and internet use.

(b) At places where broadband facility is not available, the permissible user shall be :

District Judges : Rs.1000/- per month

Civil Judges : Rs.750/- per month

inclusive of rent and calls (local and STD both).

ii. Mobile Phone :

(a) The provision of mobile phone (handset) with internet shall be as follows:

District Judge : Rs.30,000/-

Civil Judges (Jr. & Sr. Divisions) : Rs.20,000/-

And the permissible user shall be :

District Judges : Rs.2000/- per month

Civil Judges : Rs.1500/- per month

inclusive of internet data package.

(b) At the request of the Judicial Officers, the mobile phone handset shall be replaced once in three years.

(c) The Judicial Officers shall be given option to retain the old mobile phone handset at a price to be determined as per the guidelines prescribed by the Registry of High Court.

(d) The existing facilities in so far as they are more beneficial by virtue of the order issued by some of the State Governments/UTs shall be continued notwithstanding the above recommendations.

iii. Office Telephone:

Regarding telephone connection to the office, the present arrangement shall continue."

79. The recommendation is reasonable and is accepted.

21. Transfer Grant

80. The summary of the recommendations of the SNJPC reads as follows:

"1. On transfer, the composite transfer grant shall be equivalent to one month's basic pay.

2. If the transfer is to a place at a distance of 20 kilometres or less or within the same city (if it involves actual change of residence), the transfer grant shall be 1/3 rd of the basic pay.

3. For the transportation of personal effects, the O.M. dated 13.07.2017 (annexed as Appendix I) issued by the Department of Expenditure; Government of India pursuant to the recommendations of VII CPC shall be applicable.

4. In case of transportation by road, the admissible amount shall be Rs.50/- per km. inclusive of labour charges for loading and unloading or the actual whichever is lower. The said amount shall be raised by 25% when the DA increases by 50%.

5. The recommendations will come into effect from 01.01.2016.

6. The Officers who have undergone transfer(s) after 01.01.2016 and their claims for transfer grant paid as per pre-revised pay scales, shall be paid the differential amount on the basis of revised pay w.e.f. 01.01.2016."

81. The above recommendations are reasonable and are accordingly accepted.

Institutionalization

82. We are of the considered view that a framework has to be set up under the auspices of every High Court for institutionalizing the implementation of the orders of this Court with respect to the service conditions of the district judiciary and for implementing the recommendations of the SNJPC, as approved. Institutionalizing the mechanism for enforcement and implementation will have several benefits which are set out below:

(a) The implementation of the orders of this Court will be streamlined. A Committee set up by this Court at the level of every High Court to act as a bridge between the High Court and the State Government will facilitate seamless implementation;

(b) Experience indicates that this Court is flooded with individual applications and grievances concerning pay and service conditions leading to multiplicity of proceedings and issues. This would be obviated by institutionalizing the process at the level of each High Court; and

(c) An institutionalized entity can act as a body for recording and archiving information and suggestions, maintaining a record of difficulties faced in implementation and generating an institutional memory which will facilitate a consultative framework for the next Pay Commission.

83. Bearing in mind the above benefits, we hereby direct the constitution of a Committee in each High Court for overseeing the implementation of the recommendations of the SNJPC as approved by this Court. The Committee shall be called the '**Committee for Service Conditions of the District Judiciary**[16]'. The composition of the Committee shall consist of the following:

16 "CSCDJ"

(i) Two Judges of the High Court to be nominated by the Chief Justice of which one should be a Judge who has previously served as a member of the district judiciary;

(ii) The Law Secretary/Legal Remembrancer;

(iii) The Registrar General of the High Court who shall serve as an *ex officio* Secretary of the Committee; and

(iv) A retired judicial officer in the cadre of District Judge to be nominated by the Chief Justice who shall act as a nodal officer for the day to day redressal of grievances.

84. The senior most Judge nominated by the Chief Justice shall be the Chairperson of the Committee. The Chairperson may co-opt officers of the State Government, including the Secretaries in the Departments of Home, Finance, Health, Personnel and Public Works, when issues concerning these departments are being deliberated upon and implemented. The Chairperson of the Committee may at their discretion co-opt the Accountant General to ensure due implementation of the recommendations of the SNJPC, as approved by this Court. The Committee would be at liberty to consult with the representatives of the Judges' Association or, as the case may be, the Retired Judges' Association in the State.

85. The principal functions of the CSCDJ shall be to :

(i) Oversee the proper implementation of the recommendations of the SNJPC, including pay, pension, allowances and all allied matters as approved by this Court by its orders;

(ii) Act as a single point nodal agency for the redressal of the grievances of the judicial officers, both serving and retired to secure the implementation of the recommendations of the SNJPC which have been approved by this Court;

(iii) Develop an institutional mechanism for recording and archiving institutional concerns pertaining to pay, pension and service conditions of the district judiciary which shall aid in the consultative framework for subsequent Pay Commissions constituted for judicial officers; and

(iv) Ensure that hospitals of a requisite standard with necessary facilities are empaneled for every district in consultation with the Secretary in the Health Department of the State Government.

The Collectors of the districts shall render all necessary assistance in ensuring that the process of empanelment is duly streamlined. The process of empanelment shall ensure that the hospitals which are empaneled have a demonstrable track record and possess requisite medical facilities required for affording medical treatment of the requisite quality and care. The Committee may also ensure the empanelment of institutions for the purpose of carrying out medical investigations. The Committee will prescribe the benchmarks for empanelment. The Committee shall ensure that where medical care of the requisite standard for specified ailments is not available in the district concerned, treatment in respect of those ailments may be availed of elsewhere in an empaneled hospital. The Committee would be at liberty to take incidental measures covering situations where officers who have served in the State are residing outside the State. In such a case, the Committee may consider empanelment of hospitals outside the State so as to facilitate the availing of medical facilities.

86. Each of the CSCDJs constituted under the auspices of the High Court shall consider the following:

(i) Formulating a Standard Operating Procedure (SOP) with specified timelines for claims and disbursal of allowances as approved by this Court, including the payment of arrears of salary and pension to judicial officers, pensioners and family pensioners; and

(ii) The SOP shall, *inter alia*, cover the following:

(a) The nodal agency for disbursement of allowances, arrears and other service and retiral benefits;

(b) Laying down a simplified and effective procedure for reimbursement and disbursement of claims;

(c) Providing contact details of the nodal agency at the district or State level;

(d) Publication of the SOP on the website of the High Court, together with the details of the nodal officer; and

(e) Maintenance of a database of retired Judges and family pensioners in the district judiciary with a process for periodical updating, at least on a quarterly basis.

87. All States and Union Territories shall now act in terms of the above directions expeditiously. Disbursements on account of arrears of salary, pension and allowances due and payable to judicial officers, retired judicial officers and family pensioners shall be computed and paid on or before **29 February 2024**. The CSCDJs institutionalized in terms of the directions issued earlier shall monitor compliance. Each Committee working under the auspices of the High Court shall submit its report to this Court on or before **7 April 2024** through the Registrar General of the High Court.

88. The CSCDJs shall also verify that the earlier orders of this Court in regard to the payment of arrears of salary and pension have been duly implemented.

Headnotes prepared by: Divya Pandey

Result of the case: Directions issued.

[2024] 1 S.C.R. 374 : 2024 INSC 28

Alagammal and Ors.

v.

Ganesan and Anr.

(Civil Appeal No. 8185 of 2009)

10 January 2024

[Vikram Nath and Ahsanuddin Amanullah*, JJ.]

Issue for Consideration

Whether the Agreement between the seller and the buyer discloses a fixed time-frame for making payment in full by the buyer that is, in terms of the recitals in the agreement for sale executed by the seller in favour of the buyer.

Headnotes

Specific Relief Act, 1963 – Specific performance of contract – Time, if essence of contract – Seller and the buyer entered into registered agreement to sell property on 22.11.1990 for a consideration of Rs.21,000/- - Advance payment of Rs. 3000/- received by the seller and the transaction was to be completed within six months – However, on 05.11.1997, seller executed a Sale Deed with regard to the property in question with the third person for a consideration of Rs.22,000/- - Thereafter, issuance of notice by the buyer to the seller calling upon the seller to execute the agreement – Subsequently, suit for specific performance of the Agreement, damages and for recovery of money with interest filed by the buyer against the seller – Dismissal of the suit – Appeal thereagainst allowed by the First Appellate Court, and upheld by the High Court – Correctness:

Held: Within six months there existed the onus of paying the entire balance amount by the buyer to the seller – From the payment of Rs.7,000/- out of Rs.21,000/-, as indicated in the notice sent by the buyer, it is clear that the buyer had not complied with their obligation under the Agreement within the six-month period and neither they offered to pay the remaining/balance amount before the expiry of the six-month period – Seller having accepted payment of Rs.1,000/- on 21.04.1997, after seller had executed a Sale Deed in favour of the third party, coupled with the fact that the forensic expert found

* Author

the two thumb-impressions purportedly acknowledging payment after the expiry of the time fixed not matching the fingerprints of seller is clearly indicative that time having not been extended, no enforceable right accrued to the buyer for getting relief under the 1963 Act – If the seller had accepted money from buyer after the expiry of the time-limit, which itself has not been conclusively proved during trial or even at the first or second appellate stages, the remedy available to the buyer was to seek recovery of money paid along with damages or interest to compensate such loss but suit for specific performance to execute the Sale Deed would not be available – Furthermore, though the third party was arrayed as a defendant in the suit, yet no relief seeking cancellation of his Sale Deed was sought for – Even if the case of later payments by the buyer to the seller is accepted, the same being at great intervals and there being no willingness shown by them to pay the remaining amount or getting the sale deed ascribed on necessary stamp paper and giving notice to the seller to execute the sale deed, it cannot be said that judged on the anvil of the conduct of parties, especially the seller, time would not remain the essence of the contract – Judgment of the High Court as also the First Appellate Court set aside and that of the trial court is restored. [Paras 24-26, 28-30]

Case Law Cited

K.S. Vidyanadam v Vairavan, **[1997] 1 SCR 993 : (1997) 3 SCC 1;** *Godhra Electricity Company Limited v State of Gujarat,* **[1975] 2 SCR 42 : (1975) 1 SCC 199 – referred to.**

Commissioners for Her Majesty's Revenue and Customs v Secret Hotels Limited (formerly Med Hotels Limited), **[2014] UKSC 16 – referred to.**

Books and Periodicals Cited

Sir Kim Lewison, *The Interpretation of Contracts, 7th Edition* **- refered to.**

List of Acts

Specific Relief Act, 1963

List of Keywords

Agreement for sale; Specific Relief; Specific performance; Time,

essence of contract; Consideration amount; Advance payment; Sale Deed; Legal notice; Suit for specific performance; Stamp papers; Forensic expert; Thumb-impressions; Fingerprints; Enforceable right; Remedy; Recovery of money; Damages; Interest; Compensate; Willingness; Conduct of parties.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.8185 of 2009.

From the Judgment and Order dated 28.04.2009 of the High Court of Madras in SA No.1127 of 2008.

Appearances for Parties

V. Prabhakar, Ms. E.R. Sumathy, Ms. Jyothi Parashar, N. J.Ramchandar, Advs. for the Appellants.

P. V. Yogeswaran, Ashish Kumar Upadhyay, Y. Lokesh, V. Kandha Prabhu, V. Sibi Kargil, Ms. Maitri Goal, Ms. Sonali Patra, Sachin Kumar Verma, Ms. Divya, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ahsanuddin Amanullah, J.

Heard learned counsel for the parties.

2. The present appeal is directed against the Final Judgment dated 28.04.2009 (hereinafter referred to as the "Impugned Judgment") passed by the Madurai Bench, Madras High Court (hereinafter referred to as "the High Court") dismissing a Second Appeal [S.A. (MD) No.1127 of 2008] filed by the appellants/original defendants.

BRIEF FACTS:

3. The appellants no.1, 2 and 3 entered into a registered Agreement of Sale (hereinafter referred to as the "Agreement") with the respondents on 22.11.1990 to sell the suit property for a consideration of Rs.21,000/-, against which Rs.3000/- had been received in advance. Further, six months' time was fixed for completion of the transaction. The appellants No.1, 2 & 3, in the meantime, had executed a Sale Deed with regard to the property in question with appellant no.7 on 05.11.1997 for a consideration of Rs.22,000/-. On 18.11.1997, the

respondents sent a Notice to the appellants calling upon them to execute the Agreement. This led to the respondents filing of Original Suit No.165 of 1998 before the Munsif, District Court, Dindigul against the appellants for specific performance of the Agreement, damages and for recovery of money with interest. The suit stood dismissed by the Principal District Munsif Judge, Dindigul by order dated 10.09.2000. An appeal bearing A.S. No.258 of 2008 filed by the respondents was allowed by the First Appellate Court, and the same has been upheld by the High Court by the Impugned Judgment dated 28.04.2009.

SUBMISSIONS BY THE APPELLANTS:

4. Learned counsel for the appellants submitted that as per the Agreement, the balance consideration amount of Rs. 18,000/- was to be paid within six months which was admittedly not done. He submitted that the so-called subsequent payments on 16.12.1990 of Rs.1,000/-; on 15.04.1991 of Rs.3,000/-, and; on 17.09.1991 of Rs.2,500/- though were not actually paid to the appellants and even without admitting the same and accepting it for the sake of argument, the same is incorrect as the fingerprint expert has found the thumb-impression of the appellant no.1 as not matching the admitted actual sample thumb-impression of the appellant no.1. and, thus, the very basis of holding that time was not the essence of the agreement gets washed away. It was submitted that the Agreement stipulated that if there was default on the part of the respondents, the advance paid would be forfeited, and the entitlement to obtain the Sale Deed and get possession free from all encumbrances would also end.

5. It was submitted that once the fingerprint has been disapproved of by an expert and such report has been brought before the First Appellate Court, the claim based on such a document on which forgery has been committed itself renders the whole transaction inadmissible in law on the well-settled principle that the respondents did not come before the Court with clean hands as the entire claim was based on a forged document.

6. It was submitted that the claim of the respondents to have paid Rs.3,000/- on 18.09.1992; Rs.1,800/- on 24.07.1996; Rs.1,300/- on 25.07.1996 and Rs.1,000/- on 29.07.1996 i.e., a total of Rs.20,425/-

and ultimately Rs.1,000/- on 21.04.1997 i.e., an excess of Rs. 425/- over the amount indicated in the Agreement, was false.

7. Learned counsel submitted that the endorsement(s) made not having been proved, it cannot be assumed that the respondents were ready and willing, or that they had, in fact, paid the excess amount.

8. It was contended that the Legal Notice sent on behalf of the respondents dated 18.11.1997 was clearly to get over the fatal lapses on their part and to give life to a dead cause i.e., revive the Agreement, which already stood incapable of being executed through Court due to efflux of time. On this issue, the contention was that readiness and willingness must be pleaded and proved which has not been done as is clear from the averments made in the plaint filed by the respondents. Thus, it was submitted that the trial court and even the First Appellate Court not recording any finding on the aspect of the readiness and willingness on the part of the respondents, the High Court's observation in the Impugned Judgement on readiness and willingness of the respondents is without basis.

9. Learned counsel submitted that readiness and willingness has to be specifically pleaded and proved as per Section 16(c) of the Specific Relief Act, 1963 (hereinafter referred to as the "1963 Act") and there cannot be any question of drawing inference. Thus, he submitted that the respondents were obliged to obtain stamp-paper and draw up the Sale Deed, of which there is no indication in the plaint. It was urged that this establishes that there was no readiness and willingness to comply with their obligations in terms of the Agreement.

10. Learned counsel submitted that the thumb-impression(s) in the endorsement(s) have neither matched nor been found to be identical as per the fingerprint expert's report which has been referred to in the judgment of the First Appellate Court.

11. Learned counsel submitted that as per the judgment rendered by the First Appellate Court and affirmed by the High Court, the last payment made and endorsed on 17.09.1991 has been accepted and thus three years from such date would be 16.09.1994 but the suit was instituted only on 23.03.1998, which is clearly barred by limitation.

12. It was submitted that the Trial Court had found that the endorsements were silent regarding extension of time, which finding has not been disturbed either by the First Appellate Court or the High Court and

looking at the issue from such angle, six months' time under the Agreement would expire on 21.05.1991 and a three-year limitation would end on 22.05.1994. On this, learned counsel submitted that the contention of the respondents that the limitation would start from the judgment rendered in Original Suit No.551 of 1992 dated 24.07.1996, filed by appellant no.1 for seeking possession and eviction of her husband and mother-in-law from the suit property, is not the correct legal perspective, as mere absence of possession would not have defeated the passing of title from the appellants in favour of the respondents by the execution of a Sale Deed. The object of the Agreement was only for conveying the title of the property in question.

13. Learned counsel submitted that neither Original Suit No.551 of 1992 nor the judgment rendered therein have been mentioned by the respondents in Original Suit No.165 of 1998 for computing the cause of action for filing suit in the year 1998 with regard to the Agreement, which was entered into in 1990. Further, it was urged that it was incumbent upon the respondents to have obtained the Sale Deed and possession through Court as set forth in the Default Clause in the Agreement and thus, the Legal Notice dated 18.11.1997 by the respondents would not extend the time as it had expired much before and such unilateral issuance of notice would not get over the legal bar of Article 54 of the Limitation Act, 1963 (hereinafter referred to as the "Act").

14. Learned counsel summed up arguments by contending that in any view of the matter, prior to filing of the suit, the property in question had already been sold under registered Sale Deed to the appellant no.7 and the suit for specific performance was required to be dismissed as the Sale Deed to appellant no.7 has not been challenged.

15. Learned counsel relied upon the decision of this Court in ***K.S. Vidyanadam v Vairavan*****, (1997) 3 SCC 1**, at Paragraphs 10, 11 and 13 for the proposition that Courts in India have consistently held that in the case of agreement of sale relating to immovable property, time is not the essence of the contract unless specifically provided to that effect, and the period of limitation prescribed by the Act for filing a suit was 3 years.

16. It was contended that in the aforesaid judgment, the terms of the agreement therein were identical to the instant Agreement, inasmuch as there was no reference to any tenant in the building and it was

stated that within six months, the plaintiff should purchase the stamp-papers and pay the balance consideration upon which the defendants shall execute the Sale Deed either in his name or the name(s) proposed by him before the Sub-Registrar. It was restated that there was no prior letter/notice from the plaintiffs (respondents) to the defendants (appellants) calling upon them to get the Sale Deed executed till the issuance of the Legal Notice dated 18.11.1997 i.e., after a gap of 6 ½ years, identical to the facts in ***K.S. Vidyanadam*** (*supra*).

SUBMISSIONS ON BEHALF OF THE RESPONDENTS:

17. In opposition to the appeal, learned counsel for the respondents submitted that on 23.03.1992, appellant no.1 had filed Original Suit No.551 of 1992 against her husband, mother-in-law, second wife of her husband and the son of the second wife, which was decreed. He submitted that appellants even after accepting Rs.425/- over and above the amount indicated in the Agreement and even after getting a decree for declaration and possession of the suit property in her favour on 24.07.1996, did not execute the Sale Deed due to which Legal Notice was sent to her on 18.11.1997. As no action was taken, the respondents were forced to file a suit on 23.03.1998 seeking specific performance.

18. Learned counsel submitted that the First Appellate Court had recorded that the Sale Deed executed by appellant no.1 in favour of appellant no.7 dated 05.11.1997 was not *bonafide* as the said sale was effected after getting an order for declaration and recovery of possession of the suit property in favour of appellant no.1 on 24.07.1996 in Original Suit No.551 of 1992.

19. Learned counsel submitted that the issue whether time is the essence of the contract i.e., the Agreement would depend also on the conduct of the parties and in the present case, when money was accepted by appellant no.1, much after the stipulated time, clearly the Agreement's validity so as to culminate in sale could not be said to have been extinguished, as by accepting money later, the time indicated for completion of the transaction by execution of Sale Deed had been relaxed.

20. It was contended that the actual intention of the parties was not only to execute the Sale Deed but also handover the possession

which is an implied term of every sale of immovable property and thus only when on 24.07.1996, the appellant concerned became capable of handing over possession, limitation would start from such date as otherwise even if the Sale Deed was executed in favour of the respondents, it would have been of no real consequence in the absence of possession being capable of hand over.

21. Learned counsel contended that the stand taken by the appellants, that the proposed sale was only for transfer of title and not possession, cannot be accepted since the sale of immovable property is always for the transfer of possession from the seller to the buyer in terms of Section 5 read with Section 54 of the Transfer of Property Act, 1882 (hereinafter referred to as the "TP Act"). Further, it was submitted that Section 55(f) of the TP Act contemplates duty of the seller to hand over possession of the property at the time of sale, and if the seller is not in possession of the property at the time of the agreement to sell or thereafter, it is a "material defect" in the property necessarily to be disclosed to the purchaser at the time of sale in accordance with Section 55(1)(a) of the TP Act. Thus, according to him, it is the obligation of the seller to hand over possession at the time of sale, as was stipulated in the Agreement.

22. On the question of whether time is of the essence in such a contract, it was contended that when a party is not in possession to hand over the same at the time of execution of an agreement for sale, then time would not be of the essence as the right to sue would accrue in favour of the person to whom the suit property is required to be sold only upon the vendor being in a position to hand over possession of the property to the buyer. It was further submitted that subsequent conduct of parties is also relevant for testing whether time is of the essence of the contract in question. It was submitted that in the present case, the acceptance of money much after the expiry of the six-month period by the appellant no.1 from the respondents leaves no doubt that time was not the essence and the time for performance of the Agreement would commence only after obtainment of physical possession by the appellants.

23. In support of his contentions, learned counsel relied upon the decision of this Court in ***Godhra Electricity Company Limited v State of***

***Gujarat*, (1975) 1 SCC 199**, the relevant paragraphs being 11 to 16; of the United Kingdom Supreme Court in ***The Commissioners for Her Majesty's Revenue and Customs v Secret Hotels2 Limited (formerly Med Hotels Limited)*, [2014] UKSC 16** dated 05.03.2014, the relevant being paragraph 33[1], and; ***The Interpretation of Contracts*, 7th Edition** by **Sir Kim Lewison,** the relevant being paragraph 3.189.

ANALYSIS, REASONING AND CONCLUSION:

24. Having considered the matter, this Court finds that the Judgment impugned cannot be sustained. The moot question revolves around whether the Agreement dated 22.11.1990 discloses a fixed time-frame for making payment in full by the respondents that is, in terms of the recitals in the agreement for sale executed by the appellant no.1 in favour of the respondents. The admitted position is that the time indicated in the Agreement was six months from 22.11.1990 i.e., till 21.05.1991 and as per the Legal Notice dated 18.11.1997 sent by the respondents to the appellants, only Rs.7000/- was paid within the time stipulated. Perusal of the Agreement reveals that the respondents had agreed to pay the appellants Rs.21,000/- for the property in question, out of which Rs.3,000/- was already paid as earnest money and the rest was to be paid within 6 months. The respondents were to purchase stamp papers at their expense and the appellants had to register the Sale Deed either in the name of the respondent no.1 or as proposed by him before the Sub-Registrar after paying the remaining/balance amount. If the appellants failed to register the Sale Deed, respondent no.1 had a right to deposit the balance of sale consideration in the Civil Court and get sale with possession effected through Court from the first party i.e., appellants no.1 to 3.

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1 '*33. In English law it is not permissible to take into account the subsequent behaviour or statements of the parties as an aid to interpreting their written agreement – see FL Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235. The subsequent behaviour or statements of the parties can, however, be relevant, for a number of other reasons. First, they may be invoked to support the contention that the written agreement was a sham – ie that it was not in fact intended to govern the parties' relationship at all. Secondly, they may be invoked in support of a claim for rectification of the written agreement. Thirdly, they may be relied on to support a claim that the written agreement was subsequently varied, or rescinded and replaced by a subsequent contract (agreed by words or conduct). Fourthly, they may be relied on to establish that the written agreement represented only part of the totality of the parties' contractual relationship.*'

25. At this juncture, the Court would indicate that within six months there existed the onus of paying the entire balance amount of Rs.18,000/- by the respondent no.1 to the appellant no.1. It is not the case of the respondents that they had even offered to pay the remaining/balance amount before the expiry of the six-month period. Thus, payment of Rs.3,000/- only out of Rs.21,000/- having been made, or at best Rs.7,000/- out of Rs.21,000/-, which is the amount indicated in the Legal Notice sent by the respondents to the appellants, the obvious import would be that the respondents had not complied with their obligation under the Agreement within the six-month period.

26. Pausing here, it is notable that the appellant no.1 having accepted payment of Rs.1,000/- on 21.04.1997 i.e., after appellant no.1 had executed a Sale Deed in favour of appellant no.7 on 05.11.1997, coupled with the fact that the forensic expert found the two thumb-impressions purportedly acknowledging payment after the expiry of the time fixed not matching the fingerprints of appellant no.1 is clearly indicative that time having not been extended, no enforceable right accrued to the respondents for getting relief under the 1963 Act. At the highest, if the appellant no.1 had accepted money from respondent no.1 after the expiry of the time-limit, which itself has not been conclusively proved during trial or even at the first or second appellate stages, the remedy available to the defendants was to seek recovery of such money(ies) paid along with damages or interest to compensate such loss but a suit for specific performance to execute the Sale Deed would not be available, in the prevalent facts and circumstances. In the present case, there is also no explanation, as to why, an excess amount of Rs.425/-, as claimed, was paid by respondent no.1 to the appellant no.1, when the respondents' specific stand is that due to the appellants not being in possession of the property so as to hand over possession to the respondents, delay was occasioned. The submission that no adverse effect could be saddled on the respondents as decree for declaration and recovery of possession was obtained by appellant no.1 in her favour only on 27.04.1996 is not acceptable for the reason that there is no averment that pursuant to such decree, she had also obtained possession through execution. Thus, the decree dated 27.04.1996 also remained only a decree on paper without actual possession to appellant no.1. The contention of the respondents becomes

self-contradictory especially with regard to cause of action having arisen after such decree in favour of the appellant no.1 since even at the time of filing the underlying suit, actual possession not being with appellant no.1, the Sale Deed could not have been executed.

27. Another important aspect that the Court is expected to consider is the fact that the appellant no.7 in whose favour there was a Sale Deed with regard to the suit premises, much prior to issuance of any Legal Notice and the institution of the suit in question and that no relief had been sought for cancellation of such Sale Deed, a suit for specific performance for execution of sale deed *qua* the very same property could not be maintained. The matter becomes worse for the respondents since such relief was also not sought even at the First Appeal stage nor at the Second Appeal stage, despite the law permitting and providing for such course of action. Even the Legal Notice dated 18.11.1997 has been issued after almost seven months from the alleged last payment of Rs.1.000/-, as claimed by the respondents to have been made on 21.04.1997.

28. Pertinently, though appellant no.7 was arrayed as a defendant in the suit, yet no relief seeking cancellation of his Sale Deed was sought for.

29. The ratio laid down in ***K.S. Vidyanadam*** *(supra)* which had a similar factual matrix squarely applies in the facts and circumstances of the present case, on the issue that time was the essence of contract and even if time is not the essence of the agreement, in the event that there is no reference of any existence of any tenant in the building and it is mentioned that within a period of six months, the plaintiffs should purchase the stamp paper and pay the balance consideration whereupon the defendants will execute the Sale Deed, there is not a single letter or notice from the plaintiffs to the defendants calling upon them to the tenant to vacate and get the Sale Deed executed within time. Further, the Legal Notice was issued after two and a half years from expiry of the time period in ***K.S. Vidyanadam*** (*supra*), whereas in the present case, the Legal Notice has been issued after more than six and a half years. The relevant paragraphs from ***K.S. Vidyanadam*** (*supra*) read as under:

> '***10.****It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically*

provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in Chand Rani v. Kamal Rani [(1993) 1 SCC 519]: (SCC p. 528, para 25)

> *"… it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?): (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract."*

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades — particularly after 1973 [It is a well-known fact that the steep rise in the price of oil following the 1973 Arab-Israeli war set in inflationary trends all over the world. Particularly affected were countries like who import bulk of their requirement of oil.]. In this case, the suit property is the house property situated in Madurai, which is one of

the major cities of Tamil Nadu. The suit agreement was in December 1978 and the six months' period specified therein for completing the sale expired with 15-6-1979. The suit notice was issued by the plaintiff only on 11-7-1981, i.e., more than two years after the expiry of six months' period. The question is what was the plaintiff doing in this interval of more than two years? The plaintiff says that he has been calling upon Defendants 1 to 3 to get the tenant vacated and execute the sale deed and that the defendants were postponing the same representing that the tenant is not vacating the building. The defendants have denied this story. According to them, the plaintiff never moved in the matter and never called upon them to execute the sale deed. The trial court has accepted the defendants' story whereas the High Court has accepted the plaintiff's story. Let us first consider whose story is more probable and acceptable. For this purpose, we may first turn to the terms of the agreement. In the agreement of sale, there is no reference to the existence of any tenant in the building. What it says is that within the period of six months, the plaintiff should purchase the stamp papers and pay the balance consideration whereupon the defendants will execute the sale deed and that prior to the registration of the sale deed, the defendants shall vacate and deliver possession of the suit house to the plaintiff. There is not a single letter or notice from the plaintiff to the defendants calling upon them to get the tenant vacated and get the sale deed executed until he issued the suit notice on 11-7-1981. It is not the plaintiff's case that within six months', he purchased the stamp papers and offered to pay the balance consideration. The defendants' case is that the tenant is their own relation, that he is ready to vacate at any point of time and that the very fact that the plaintiff has in his suit notice offered to purchase the house with the tenant itself shows that the story put forward by him is false. The tenant has been examined by the defendant as DW 2. He stated that soon after the agreement, he was searching for a house but could not secure one. Meanwhile (i.e., on the expiry of six months from the date of agreement),

he stated, the defendants told him that since the plaintiff has abandoned the agreement, he need not vacate. It is equally an admitted fact that between 15-12-1978 and 11-7-1981, the plaintiff has purchased two other properties. The defendants' consistent refrain has been that the prices of house properties in Madurai have been rising fast, that within the said interval of 2 1/2 years, the prices went up three times and that only because of the said circumstance has the plaintiff (who had earlier abandoned any idea of going forward with the purchase of the suit property) turned round and demanded specific performance. Having regard to the above circumstances and the oral evidence of the parties, we are inclined to accept the case put forward by Defendants 1 to 3. We reject the story put forward by the plaintiff that during the said period of 2 1/2 years, he has been repeatedly asking the defendants to get the tenant vacated and execute the sale deed and that they were asking for time on the ground that tenant was not vacating. The above finding means that from 15-12-1978 till 11-7-1981, i.e., for a period of more than 2 1/2 years, the plaintiff was sitting quiet without taking any steps to perform his part of the contract under the agreement though the agreement specified a period of six months within which he was expected to purchase stamp papers, tender the balance amount and call upon the defendants to execute the sale deed and deliver possession of the property. We are inclined to accept the defendants' case that the values of the house property in Madurai town were rising fast and this must have induced the plaintiff to wake up after 2 1/2 years and demand specific performance.

11. *Shri Sivasubramaniam cited the decision of the Madras High Court in S.V. Sankaralinga Nadar v. P.T.S. Ratnaswami Nadar [AIR 1952 Mad 389 : (1952) 1 MLJ 44] holding that mere rise in prices is no ground for denying the specific performance. With great respect, we are unable to agree if the said decision is understood as saying that the said factor is not at all to be taken into account while exercising the discretion vested in the court by law. We cannot be oblivious to the reality — and the reality*

is constant and continuous rise in the values of urban properties — fuelled by large-scale migration of people from rural areas to urban centres and by inflation. Take this very case. The plaintiff had agreed to pay the balance consideration, purchase the stamp papers and ask for the execution of sale deed and delivery of possession within six months. He did nothing of the sort. The agreement expressly provides that if the plaintiff fails in performing his part of the contract, the defendants are entitled to forfeit the earnest money of Rs 5000 and that if the defendants fail to perform their part of the contract, they are liable to pay double the said amount. Except paying the small amount of Rs 5000 (as against the total consideration of Rs 60,000) the plaintiff did nothing until he issued the suit notice 2 1/2 years after the agreement. Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties — evolved in times when prices and values were stable and inflation was unknown — requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so. The learned counsel for the plaintiff says that when the parties entered into the contract, they knew that prices are rising; hence, he says, rise in prices cannot be a ground for denying specific performance. May be, the parties knew of the said circumstance but they have also specified six months as the period within which the transaction should be completed. The said time-limit may not amount to making time the essence of the contract but it must yet have some meaning. Not for nothing could such time-limit would have been prescribed. Can it be stated as a rule of law or rule of prudence that where time is not made the essence of the contract, all stipulations of time provided in the contract have no significance or meaning or that they are as good as non-existent? All this only means that while exercising its discretion, the court should also bear in mind that when the parties prescribe certain time-limit(s) for taking steps by one or the other party, it must have some significance and that the said

time-limit(s) cannot be ignored altogether on the ground that time has not been made the essence of the contract (relating to immovable properties).

xxx

13. *In the case before us, it is not mere delay. It is a case of total inaction on the part of the plaintiff for 2 1/2 years in clear violation of the terms of agreement which required him to pay the balance, purchase the stamp papers and then ask for execution of sale deed within six months. Further, the delay is coupled with substantial rise in prices — according to the defendants, three times — between the date of agreement and the date of suit notice. The delay has brought about a situation where it would be inequitable to give the relief of specific performance to the plaintiff.*'

(Emphasis supplied)

30. The decisions relied upon by the respondents, relating to the conduct of parties are of no avail to them in the circumstances, as even if the case of later payments by the respondents to the appellants is accepted, the same being at great intervals and there being no willingness shown by them to pay the remaining amount or getting the Sale Deed ascribed on necessary stamp paper and giving notice to the appellants to execute the Sale Deed, it cannot be said that in the present case, judged on the anvil of the conduct of parties, especially the appellants, time would not remain the essence of the contract.

31. For reasons afore-noted, the Impugned Judgment of the High Court as also the judgment of the First Appellate Court stand set aside. The judgment/order of the Trial Court is revived and restored.

32. The appeal is allowed accordingly.

33. In the facts and circumstances, no order as to costs is proposed.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 390 : 2024 INSC 32

Dinesh Gupta

v.

The State of Uttar Pradesh & Anr.

(Criminal Appeal No(s). 214 of 2024)

11 January 2024

[Vikram Nath* and Rajesh Bindal,* JJ.]

Issue for Consideration

Despite the commercial nature of the dispute involved, criminal complaint was filed and an FIR was registered against the appellants. Whether, the High Court was justified in refusing to quash the FIR and the summoning order.

Headnotes

Administration of Justice – Abuse of process of law – Forum shopping – Financial transactions between parties based in New Delhi – On the basis of complaint filed by respondent-complainant, FIR was registered in Gautam Budh Nagar against three companies, appellants-promoters of the companies and other accused persons – Summons issued by Chief Judicial Magistrate, Gautam Budh Nagar – Appellants sought quashing of the FIR and the summoning order, petitions dismissed by High Court – Correctness:

Held: The registration of FIR at Noida despite companies in question having registered offices at Delhi shows a wishful forum shopping by the Complainant – Though the complainant had invested crores of rupees in equity of the companies based at Delhi, knowing well their place of business, yet their incomplete addresses showing them at Gautam Budh Nagar, was deliberately mentioned to falsely create jurisdiction in Gautam Budh Nagar which did not actually lie there – Also, though address of the respondent was mentioned to be of Noida, his residential address was not given – Order of CJM shows no application of mind, as no reasons were assigned – Magistrate did not take into consideration the address of the complainant and the accused companies as also the addresses of their Directors – Further, claim of the respondent that the appellants had induced the complainant to advance loan

* Author

and later on converted the loan into equity is false – It was a plain and simple transaction between the corporates – Even as per the complainant's case, the short-term loan was advanced in the year 2010 for a period of one year – However, when the same was not returned, no steps were taken by the complainant to recover the same until the FIR in question was registered on 29.07.2018 i.e. 8 years & 7 months later – Furthermore, on facts, the complainant concealed material facts which were within his knowledge at the time of filing of complaint as regards the merger of the companies – Entire factual matrix and the time lines clearly reflects that the complainant deliberately and unnecessarily caused substantial delay and was waiting for opportune moment for initiating false and frivolous litigation – Impugned order set aside – FIR and all subsequent proceedings qua the appellants, quashed – Costs of ₹25 lakhs imposed on the respondent. [Paras 38, 23, 25-28, 32, 34, 37 and 39]

Administration of Justice – Abuse of process of law – Misuse of criminal proceedings – Civil matter turned into criminal case – Practice deprecated – Unscrupulous litigants should not be allowed to go scot-free and be put to strict terms and conditions including costs – Litigation laced with concealment, falsehood, and forum hunting – State actions or conduct of government servants being party to such malicious litigation should be seriously reprimanded. [Paras 2, 38]

Case Law Cited

Randheer Singh v. The State of U.P. & others **2021 INSC 440: (2021) 14 SCC 626 – referred to.**

List of Acts

Penal Code, 1860, Code of Criminal Procedure, 1973.

List of Keywords

Commercial dispute; Abuse of process of law; Forum shopping/ hunting; Quashing of FIR; Unscrupulous litigants; Territorial jurisdiction; Inappropriate use of jurisdiction; Abuse of criminal justice system; Principles of fairness; Misuse of criminal proceedings; Concealment, Falsehood; Material facts concealed; Costs; Abuse of judicial remedies.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.214 of 2024

From the Judgment and Order dated 17.02.2022 of the High Court of Judicature at Allahabad in A482 No.29852 of 2021

With

Criminal Appeal No.215 of 2024

Appearances for Parties

Nakul Dewan, Kapil Sibal, Anjana Prakash, Vikas Singh, Sr. Advs., Harsh Sethi, Anant Nigam, Neil Chatterjee, Shantanu Parashar, Raghav Luthra, Nitin Bajaj, Shaurya Chaurasiya, Yash Saini, Avneesh Arputham, Mahesh Agarwal, Rishi Agrawala, Ms. Niyati Kohli, Pranjit Bhattacharya, Ms. Anju Prakash, Akhil Sachar, E. C. Agrawala, Saurabh Soni, Akshay Girish Ringe, Nikhil Kohli, Gaurav Gupta, Ms. Megha Mukerjee, Ms. Mannat Singh, Sanjeet Thakur, Ms. Deepika Kalia, Keshav Khandelwal, Garvesh Kabra, Mrs. Pooja Kabra, Ms. Shweta Yadav, Ahmer Shaikh, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J. & Rajesh Bindal, J.

1. Leave granted.

2. Unscrupulous litigants should not be allowed to go scot-free. They should be put to strict terms and conditions including costs. It is time to check with firmness such litigation initiated and laced with concealment, falsehood, and forum hunting. Even State actions or conduct of government servants being party to such malicious litigation should be seriously reprimanded. In the instant case, we find initiation of criminal proceedings before a forum which had no territorial jurisdiction by submitting incorrect facts and giving frivolous reasons to entertain such complaints. A closer look at the respondent's actions reveals more than just an inappropriate use of jurisdiction. The core issue of the dispute, which involves financial transactions and agreements, clearly places it in the realm of civil and commercial law. Yet, the respondent chose to pursue criminal

charges in a quest to abuse the criminal justice system with a motive to seek personal vengeance rather than seeking true justice. This unnecessary turning of a civil matter into a criminal case not only overburdens the criminal justice system but also violates the principles of fairness and right conduct in legal matters. The apparent misuse of criminal proceedings in this case not only damages trust in our legal system but also sets a harmful precedent if not addressed.

3. A common order[1] passed by the High Court[2] dismissing the petitions filed by the appellants seeking quashing of the summoning order[3] has been impugned in the present appeals.

FACTUAL MATRIX –

4. Karan Gambhir, who owns M/s D.D. Global Capital Pvt. Ltd. (hereinafter referred to as 'the Company') is the complainant in the FIR[4] which was registered against Sushil Gupta, Rajesh Gupta, Dinesh Gupta, Baljeet Singh & others. Three private limited companies had also been arrayed as accused i.e. BDR[5], Gulab Buildtech[6] and Verma Buildtech[7]. The individuals, namely, Sushil Gupta, Rajesh Gupta and Dinesh Gupta are stated to be the promoters of the aforesaid three companies.

5. Only two of the accused persons, i.e. Dinesh Gupta and Rajesh Gupta approached the High Court seeking quashing of the summoning order and the FIR. Nothing was pointed out at the time of hearing that any matter filed by any other accused is pending either in this Court or High Court.

6. It is alleged by the complainant that his company was induced to extend short-term loans of ₹ 5,16,00,000/- to Gulab Buildtech and ₹ 11,29,50,000/- to Verma Buildtech respectively. Later, the said loan was converted into debt equity allegedly promising high returns from real estate business to the complainant. The shares were allotted

1 Dated 17.02.2022 in Applications under Section 482 Cr.P.C. No(s).29852 of 2021 & 25990 of 2021

2 High Court of Judicature at Allahabad

3 Dated 15.02.2021 in Case No.2828 of 2021 (re-numbered as 4084 of 2021)

4 FIR No.1271 of 2018 dated 29.07.2018 registered at Gautam Budh Nagar Police Station, NOIDA

5 M/s BDR Builders and Developers Pvt. Ltd. (hereinafter referred to as 'BDR')

6 M/s Gulab Buildtech Pvt. Ltd. (hereinafter referred to as 'Gulab Buildtech')

7 M/s Verma Buildtech and Promoters Pvt. Ltd. (hereinafter referred to as 'Verma Buildtech')

at an exorbitant price. The complainant acquired 21% shareholding in Verma Buildtech, whereas, in Gulab Buildtech, the shareholding was to the tune of 4.53%. A share pledge agreement was forged, allegedly to have been executed in favour of Sushil Gupta, one of the accused (not before this Court). Some scheme of amalgamation was made by Gulab Buildtech and Verma Buildtech to amalgamate the aforesaid companies with BDR, as a result of which, the percentage of shareholding of the company reduced considerably. No notice was served on the company of the proposed amalgamation. The amalgamation was got approved from the Delhi High Court. The share certificates were allegedly never physically handed over to the complainant.

7. The complainant further alleged that when he asked the accused to return the loan with interest, initially time was sought stating that there is slump in the real estate market and thereafter, the accused started ignoring the complainant. That is when the complainant decided to take legal recourse against the accused. Prayer was made in the police complaint for registration of a case of cheating and forgery against the accused. While filing the complaint, the complainant had given his address as 'C/o A & A Earth Movers, D-9, Sector-2, Noida Sector-20, Gautam Budh Nagar, U.P.'

8. After investigation, the police found that a case was made out against the accused under Sections 420, 467 and 120-B of the IPC. A charge-sheet was filed on 29.12.2020. Accordingly, the Chief Judicial Magistrate, Gautam Budh Nagar, *vide* order dated 15.02.2021 took cognizance and issued summons to the accused.

9. The appellants filed petitions under Section 482 of the Cr.P.C. before the High Court seeking quashing of the FIR and the summoning order dated 15.02.2021. The petitions having been dismissed by the composite order passed by the High Court, the same are under challenge in the present appeals.

ARGUMENTS OF THE APPELLANTS –

10. Mr. Kapil Sibal, Mr. Nakul Dewan and Ms. Anjana Prakash, learned senior counsels for the appellants submitted that the complainant who owns the company invested a sum of ₹5,16,00,000/- in Gulab Buildtech and ₹11,29,50,000/- in Verma Buildtech by acquiring equity shares thereof. Prior to the investment, a resolution was passed by the company in the meeting of the Board of Directors held on

25.03.2011, approving investment of ₹11,29,50,000/- in the equity shares of Verma Buildtech. Similarly, by a resolution dated 26.08.2011, investment in the equity shares of ₹5,16,00,000/- was approved in Gulab Buildtech. Hence, the complainant's case that it was a short-term loan given by the company, was totally contrary to the record since a conscious decision had been taken by the company to make investments in the equity shares of Gulab Buildtech and Verma Buildtech. The above two resolutions are reproduced hereunder:

First Resolution:

> "AUTHORIZATION TO INVEST INTO THE EQUITY SHARES OF M/S VERMA BUILDTECH & PROMOTORS PRIVATE LTD.
>
> The Chairman apprised the Board of Directors of the Company about the benefit of investment into the equity shares of M/s Verma Buildtech & Promoters Private Ltd offered by way of private placement. The Directors discussed about the same at length and the following resolutions were passed.
>
> "RESOLVED THAT the company be and is herewith authorized to make an investment of Rupees Eleven Crore Twenty Nine Lacs and Fifty Thousand only (Rs.11,29,50,000/-) in pursuance of the provision of the companies Act, 1956."
>
> "RESOLVED FURTHER THAT Mr. Narender Kumar and Mr. Tarun Kumar Director of the company be and are hereby severally authorized to do the necessary act including the signing of the documents, deed and agreement and other necessary paper which are incidental and consequential to give effect to the above said resolution and collect the Share certificates."

Second Resolution:

> AUTHORIZATION TO INVEST INTO THE EQUITY SHARES OF M/S GULAB BUILDTECH PRIVATE LIMITED.
>
> The Chairman apprised the Board of Directors of the Company about the benefit of investment into the equity shares of M/S GULAB BUILDTECH PRIVATE LIMITED

offered by way of private placement. The Directors discussed about the same at length and the following resolutions were passed.

"RESOLVED THAT the company be and is herewith authorized to make an investment of Rupees Five Crores Sixteen Lacs only (Rs.5, 16,00,000/-) in pursuance of the provision of the companies Act, 1956."

"RESOLVED FURTHER THAT Mr. Narender Kumar and Mr. Tarun Kumar Director of the company be and are hereby severally authorized to do the necessary act including the signing of the documents, deed and agreement and other necessary paper which are incidental and consequential to give effect to the above said resolution and collect the Share certificates."

11. In 2012, when the petition[8] was filed seeking amalgamation of Gulab Buildtech and Verma Buildtech with BDR, the Delhi High Court, as per requirements, had issued notice to all the shareholders of the two companies on 09.07.2012. No objection was raised by the complainant or the company at that stage. On 20.02.2013, the scheme of amalgamation was approved by the Delhi High Court in terms of which the company became entitled to 3,74,280 shares of BDR. On 08.03.2013, a letter was written by Gulab Buildtech and Verma Buildtech to the complainant to surrender original share certificates of Gulab Buildtech and Verma Buildtech to facilitate issuance of new certificates.

12. Nearly one year after the amalgamation, on 31.01.2014, DD Global Capital Limited, the company of the complainant filed an application[9] before the Delhi High Court seeking recall of the order of amalgamation passed by the High Court as it was without any notice to the company. Other grounds were also raised in this application for recalling the order of amalgamation. The aforesaid application was dismissed by the High Court on 15.03.2016 by a detailed order

8 Company Petition No.287 of 2012

9 Company Application No.321 of 2014

dealing with all the issues raised. The order attained finality as the company did not challenge the same any further. In the aforesaid proceedings, a letter dated 08.10.2014, allegedly written by Sushil Gupta, one of the accused (not before this Court), claiming that the shares of the company with Verma Buildtech were pledged to him, was also placed on record. This issue was also dealt with by the High Court.

13. More than two years after the application filed by the company was dismissed by Delhi High Court, the instant complaint was filed with the police at Gautam Budh Nagar, on the basis of which FIR in question was registered on 29.07.2018.

14. It is the appellants' submission that a purely civil dispute with reference to financial transactions between corporates is sought to be given colour of a criminal case. Though the company does not have any connection whatsoever with Gautam Budh Nagar and all the transactions were held at New Delhi between the parties, which are based in New Delhi, yet the complaint was filed at Gautam Budh Nagar. Even the address of the complainant given in the complaint is 'C/o A & A Earth Movers, D-9, Sector-2, Noida Sector-20, Gautam Budh Nagar, U.P.' which neither belongs to the complainant nor his company. The aforesaid facts clearly establish that the idea was only to harass the appellants.

15. In fact, the dispute amongst the parties has already been referred to Arbitration by the Delhi High Court *vide* order dated 15.05.2019 and the company has already filed its claim before the sole Arbitrator.

16. The aforesaid facts clearly establish that no case was made out against the appellants. Further, there is no allegation pertaining to forging of any documents against them. It was a simple business transaction. Arm-twisting method to recover any dues cannot be permitted to be used. In support of the appellants' arguments, reliance was placed on the judgment of this Court in **Randheer Singh v. The State of U.P. & others[10].**

10 2021 INSC 440: (2021) 14 SCC 626.

17. It was submitted that there was total non-application of mind by the Trial court while passing summoning order, which is entirely non-speaking in nature. Even the High Court failed to consider the arguments raised by the appellants.

ARGUMENTS OF THE RESPONDENT – COMPLAINANT

18. On the other hand, Mr. Vikas Singh, learned senior counsel for the respondent-complainant, submitted that solely on persuasion of the accused, huge amount of short-term loan was advanced. Subsequently, shares were allotted, which were never handed over to the complainant. The companies whose shares were allotted, namely, Gulab Buildtech and Verma Buildtech were amalgamated with BDR. During the process of amalgamation, despite being a shareholder, the complainant was not issued any notice. As a result of amalgamation, the percentage of shareholding of the company was reduced considerably.

19. The letter conveying that the company had pledged its shares to Sushil Gupta shows that certain documents had been forged. He further referred to the order dated 20.02.2013 passed by the High Court in Co. Pet. No. 287 of 2012, showing that the accused persons are connected with each other. He also referred to the Balance Sheet of Gulab Buildtech and Verma Buildtech to show that the amount advanced by the complainant was shown in the column of 'current liabilities'. Indian Accounting Standards have been referred to show the meaning of 'current liabilities' which is in the form of short-term loan.

20. The argument is that the accused persons in connivance with each other have cheated the complainant for crores of rupees by making false promise of higher returns. There is no error in the order passed by the High Court. The appeals deserve to be dismissed.

FINDINGS –

21. We have heard learned counsel for the parties and perused the material on record.

22. On a complaint filed by the respondent no.2, FIR in question was registered on 29.07.2018. The address of the company D.D. Global was mentioned as 'C/o A & A Earth Movers, D-9, Sector-2, Noida Sector-20, Gautam Budh Nagar, U.P.' to be the present as well as the permanent address. This is the first misleading statement made

by the complainant. From a copy of the resolution passed by the DD Global dated 25.03.2011, it is evident that the registered office of the DD Global is located at F-1/9, Okhla Industrial Area, Phase-I, New Delhi. Even at the time of hearing, it remained undisputed that DD Global is not carrying on any business at Noida, nor has it rented the place mentioned above. Further, the firm 'A & A Earth Movers' whose c/o address has been given is not the sister concern of DD Global.

23. Similar was the case with reference to the accused nos. 2 & 3, namely, Rajesh Gupta and Dinesh Gupta, appellants before this Court. Their incomplete addresses have been mentioned reflecting them to be the residents of Sector 20, Gautam Budh Nagar. The position is same in the case of Gulab Buildtech and Verma Buildtech. Though the complainant had invested crores of rupees in equity of the aforesaid two companies based at New Delhi, knowing well their place of business, yet in those cases, incomplete addresses showing them at Sector 20, Gautam Budh Nagar, was deliberately mentioned. It is sufficiently clear that the idea was to falsely create jurisdiction in Gautam Budh Nagar which did not actually lie there.

24. The falsehood in the complaint, filed with reference to the addresses of the accused, was established at the time of filing of charge-sheet. Whereas in the FIR, the addresses of all the accused given were incomplete merely mentioning the address as 'Sector 20, Gautam Budh Nagar', in the charge-sheet addresses of not only the appellants, namely, Rajesh Gupta and Dinesh Gupta, were found to be 'D-393, New Friends Colony, New Delhi, even Sushil Gupta and Baljeet Singh were also found to be residents of New Delhi. The following are the addresses of the parties involved in the matter:

Sr. No.	**Party**	**Party Name**	**Address**
1.	Complainant	Karan Gambhir	N-56, Panchsheel Park, New Delhi, 110017.
2.	Supporting Witness	Sanjay Gambhir	N-56, Panchsheel Park, New Delhi, 110017.
3.	Supporting Witness	Tarun Kumar	65/21, New Rohtak Road, New Delhi-110005
4.	Complainant's Company	M/s DD Global Capital Ltd.	226, Basement Cabin Number 11, Right Side, Sant Nagar, East of Kailash, New Delhi, 110065.

5.	Accused No. 1	Sushil Gupta	D-247, IInd Floor, Defence Colony, New Delhi, 110024.
6.	Accused No. 2	Rajesh Gupta	3/41, Shanti Niketan, New Delhi, 110021.
7.	Accused No. 3	Dinesh Gupta	B-393, New Friends Colony, New Delhi, 110014.
8.	Accused No. 4	Baljeet Singh	B-363, New Friends Colony, New Delhi, 110014.
9.	Accused Company *(Later amalgamated in BDR Builders)*	M/s Gulab Buildtech Pvt. Ltd.	31, Jangpura Road Bhogal, Northeast, New Delhi, 110014.
10.	Accused Company *(Later amalgamated in BDR Builders)*	M/s Verma Buildtech and Promoters Pvt. Ltd.	R-6A, IInd Floor, Green Park Extension, South Delhi, New Delhi, 110016.
11.	Accused Company	M/s BDR Builders and Developers Pvt. Ltd.	C 43, Jangpura Extension, New Delhi, 110014.

25. Though address of Karan Gambhir who was signatory of the complaint on the basis of FIR in question registered, was mentioned to be of Noida, same as was given in the complaint. However, his residential address was not given. His parentage was also not mentioned. The second person shown in the chargesheet is a supporting witness, Sanjay Gambhir, who has shown his present and permanent address of 'P.S. Hauz Khas, N-58, Panchsheel Marg, New Delhi'. The same is the position with reference to Tarun Gambhir, who also is claimed to be a supporting witness. All other witnesses were officials who were involved in the investigation of the case.

26. The Chief Judicial Magistrate, Gautam Budh Nagar, *vide* order dated 15.02.2021 took cognizance thereof and issued summons to the accused. The order shows no application of mind, as no reasons have been assigned. The Magistrate also did not take into consideration the address of the complainant and the accused companies as also the addresses of their Directors. There was complete lack of application of mind while taking cognizance and issuing summons.

27. Coming to the allegation of the complainant being misled for advancing loan, which was later on converted into equity, the appellants placed on record two resolutions dated 25.03.2011 and 26.08.2011 passed by the company *vide* which decision was taken by the complainant to invest in the equity of Gulab Buildtech and Verma Buildtech to the tune of ₹5,16,00,000/- and ₹ 11,29,50,000/- respectively. The said resolutions passed by the complainant have not been denied. Hence, the claim that the appellants had induced the complainant to advance loan and later on converted the loan into equity, is totally false. It was rather a deliberate decision taken by the Board founded on above-mentioned company resolutions.

28. Further, it is apparent that the complainant had concealed material facts which were within his knowledge at the time of filing of complaint. These facts pertained to the complainant's knowledge of the merger of Gulab Buildtech and Verma Buildtech with BDR, details whereof are noted hereinafter.

29. A Company Petition No.287 of 2012 was filed in the High Court for merger of the Gulab Buildtech and Verma Buildtech with BDR. As required, due notice was issued to all the concerned stake holders including all the shareholders and creditors. The same was published in the newspapers also. The complainant neither raised any objection nor appeared before the High Court. After considering the material placed on record, the High Court allowed the merger application on 20.02.2013, as a result of which Gulab Buildtech and Verma Buildtech were merged into BDR. Nearly, one year thereafter on 31.01.2014, the complainant company filed a Company Application No. 321 of 2014 for recall of the order dated 20.02.2013. The grievance raised was that the order of merger was passed without notice to the company, which held substantial percentage of shares in both the companies. The aforesaid application was dismissed by the High Court *vide* order dated 15.03.2016. The same was not challenged by the company any further and, hence, attained finality.

30. It would be relevant to note that in the application filed for recall of the merger order by the complainant, it was nowhere mentioned that initially the complainant had advanced loan, which was later on converted into debt equity. It only mentioned that the complainant was a shareholder of the transferor company and as a result of merger

their percentage of shareholding and value of shares decreased. It was also nowhere pleaded in the application that the shares held by the company were mortgaged to Sushil Gupta by forging the documents. The new story of forging documents was built up in the complaint filed with the police only to give a criminal colour which actually was commercial in nature.

31. Not only this, despite dismissal of the application filed by the complainant for recall of the merger order by the High Court *vide* order dated 15.03.2016, in the complaint made to the police on 29.07.2018 i.e. more than two years and four months later, still the complainant did not furnish complete details thereof, especially the filing and dismissal of the application for recall of the merger order. Rather, it merely stated that he got the documents from the High Court which were filed along with the amalgamation application and came to know about certain facts therefrom but did not mention about the application filed for recall of the order of amalgamation and the result thereof. Non-disclosure of such relevant facts was a deliberate and mischievous attempt on the part of the complainant to maliciously initiate criminal proceedings for ulterior motives.

32. Most importantly, it needs to be noticed that it was a plain and simple transaction between the corporates. Even as per the complainant's case, the short-term loan was advanced in the year 2010 for a period of one year. However, when the same was not returned, no steps were taken by the complainant to recover the same until the FIR in question was registered on 29.07.2018 i.e. 8 years & 7 months later.

33. Further, the complainant came to know about the merger of the Gulab Buildtech and Verma Buildtech with BDR in the year 2013 itself. However, even after dismissal of the application filed for recall of the merger order passed by the High Court on 15.03.2016, no steps were taken to recover the amount, except getting the FIR registered more than two years later. All these facts clearly reflect upon the ill designs of the complainant.

34. The entire factual matrix and the time lines clearly reflects that the complainant deliberately and unnecessarily has caused substantial delay and had been waiting for opportune moment for initiating false and frivolous litigation.

35. Further, it has been noticed by the High Court in the impugned order that on an application filed by the appellants, an Arbitrator was appointed by the Delhi High Court *vide* order dated 15.05.2019 to settle the dispute amongst the parties and the said matter was still pending.

36. In view of the aforesaid discussion, we find that the FIR in question, if proceeded further, will result in absolute abuse of process of court. It is a clear case of malicious prosecution. Hence, the same is required to be quashed.

37. The appeals are accordingly allowed. The impugned order passed by the High Court is set aside. FIR No.1271 of 2018 dated 29.07.2018 registered with Gautam Budh Nagar Police Station, Noida, and all subsequent proceedings thereof qua the appellants are quashed.

38. Before parting with the judgement, we are reminded of the opening remarks. The respondent Karan Gambhir having misused the legal system by lodging false and frivolous complaint with non-disclosure of necessary facts must bear its costs. The registration of FIR at Noida despite having registered offices of companies in question at Delhi shows a wishful forum shopping by the Complainant, casting serious doubts on their bona fides. The Complainant had already sought remedy against amalgamation order before the High Court and the High Court had dismissed the same. However, Complainant chose to again use judicial mechanisms to raise his grievances. A criminal complaint was filed and FIR was registered against appellants despite the commercial nature of dispute. Such ill intended acts of abuse of power and of legal machinery seriously affect the public trust in judicial functioning. Thus, we find ourselves constrained to impose cost on Complainant with a view to curb others from such acts leading to abuse of judicial remedies.

39. Considering the above facts and circumstances of the case, we impose costs of ₹25 lakhs on the respondent Karan Gambhir to be deposited within four weeks from today with the Registry of this Court. Upon receipt of the said amount, the same will be transmitted in equal amount to the SCBA & SCAORA to be utilised for the development and benefit of their members.

Headnotes prepared by: Divya Pandey *Result of the case:* Appeals allowed.

[2024] 1 S.C.R. 404 : 2024 INSC 34

State of Haryana

v.

Mohd. Yunus & Ors.

(Criminal Appeal No(S).1307 of 2012)

12 January 2024

[M. M. Sundresh and Prashant Kumar Mishra*, JJ.]

Issue for Consideration

Whether the High Court was justified in convicting A1 only u/s. 323 while acquitting u/s. 302/34, and convicting and sentencing A2 u/s. 302 and 323 read with s. 34; and whether in trial u/s. 302 IPC, it is safe to convict on the basis of the statement of an untrustworthy witness.

Headnotes

Witnesses – Evidentiary value, when witness not trustworthy:

Held: For trial u/s. 302 IPC, if a witness is branded as untrustworthy having allegedly twisted the facts and made contrary statement, it is not safe to impose conviction on the basis of statement made by such witness – When there is an effort to falsely implicate one accused person, statement made by such an eyewitness cannot be relied without strong corroboration – On facts, on account of previous enmity between the parties, accused persons armed with weapons inflicted injuries resulting in death of one and injuries to the informant, his son and the other eye-witness – In appeal, A1 was convicted only u/s. 323 while acquitting u/s. s. 302/34, A2 was convicted and sentenced u/s. 302 and 323 read with s. 34, while A 4 was acquitted of charges and A3 died – Statement of witnesses-informant and other eye-witness were recorded twice, firstly, in the trial against A1, A2 and A3 and secondly, in the trial against A4 – Both the prosecution witnesses are disbelieved in the second trial since their statements were contradictory, the facts were twisted and improvements were made, thus, no reliance can be made upon such statement – Also the recovery of weapons from A1 and A2 was not proved – Thus, not safe to convict A2 for offence u/s. 302/34 IPC on the basis of statement of such

* Author

eyewitness – Judgment of the courts below convicting A2 for offence u/s. 302/34 set aside – However, conviction of A2 for the offence u/s. 323/34 not interfered with – Acquittal of A1 u/s. 302/34 upheld – Penal Code, 1860 – ss. 302/34, 323/34. [Paras 16 - 22]

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973

List of Keywords

Witnesses; Untrustworthy; Falsely implicate; Eyewitness; Corroboration; Previous enmity; Conviction; Acquittal; Contradictory; Recovery; Delay in registration of FIR; Sentence; Bail.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1307 of 2012.

From the Judgment and Order dated 26.10.2009 of the High Court of Punjab & Haryana at Chandigarh in CRLA No.437-DB of 2001.

With

Criminal Appeal No.1308 of 2012.

Appearances for Parties

P. N. Puri, Rahul Sharma, Mrs. Reeta Dewan Puri, Ravinder Pratap Singh, Manish Dhingra, Ayush Bhatia, Dr. Monika Gusain, Ashok Mathur, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

1. Four accused persons namely, Mohd. Yunus (A1), Mohd. Jamil (A2), Ghasita (A3) and Akhtar Hussain (A4) were sent for trial for the same incident which occurred on 09.01.1999 causing death of Akbar (deceased) and injuries to Deenu (PW-1), Ahmad (PW-2) and Harun. Initially, accused nos. 1, 2 and 3 were tried in Sessions Case No. 12 of 1999 arising from FIR No. 10 dated 09.01.1999 of Police Station Nuh, Haryana in which they were convicted for offences under Sections 302 and 323 read with Section 34 of the

Indian Penal Code, 1860[1] while acquitting them of the charge under Section 325 read with Section 34 of the IPC. During the pendency of the trial against first three accused, the prosecution moved an application under Section 319 of the Code of Criminal Procedure, 1973[2] which was allowed by the Trial Court on 02.11.1999. While the first trial was decided on 25.07.2001, when accused Akhtar Hussain was absconding, he was tried separately after he surrendered, and charge sheet was submitted on 01.04.2003. The trial against Akhtar Hussain in Sessions Case No. 112 of 1999 dated 29.08.2003 was decided on 05.10.2004 in which he was acquitted of the charges under Sections 302, 323, 325 read with Section 34 of the IPC.

2. Akhtar Hussain's (A4) acquittal was challenged before the High Court which came to be dismissed against which no further appeal has been preferred either by the complainant or by the State.

3. Under the impugned judgment in Criminal Appeal No. 1308 of 2012 the High Court has passed the common order disposing of Criminal Appeal No. 437-DB of 2001 and Criminal Revision No. 418 of 2005. The criminal appeal was preferred by Mohd. Yunus, Mohd. Jamil and Ghasita challenging their conviction by the Trial Court whereas criminal revision was preferred by the complainant-Deenu challenging the judgment of acquittal passed in favour of accused-Akhtar Hussain. The High Court dismissed the appeal qua accused-Ghasita and Mohd. Jamil whereas the appeal preferred by accused Mohd. Yunus was allowed in part acquitting him of the charges under Section 302 read with Section 34 of the IPC but maintained his conviction for offence under Section 323 read with Section 34 IPC and sentenced him for the period already undergone.

4. Ghasita (A3) has died during the pendency of this appeal. Resultantly, at present, out of the four accused persons, Mohd. Yunus (A1) stands convicted only under Section 323 of the IPC, Ghasita (A3) has died, and Akhtar Hussain (A4) is acquitted by the Trial Court and affirmed by the High Court against which there is no further appeal. Thus, out of four accused persons, only Mohd. Jamil (A2) stands convicted under Sections 302 and 323 read with Section 34 IPC.

1 For short 'IPC'

2 For short 'Cr.P.C.'

5. Criminal Appeal No. 1307 of 2012 has been preferred by the State challenging the judgment of the High Court acquitting Mohd. Yunus (A1) from the charges under Section 302 of the IPC while convicting him under Section 323 of the IPC.

6. The prosecution case, in brief, is that at about 09.10 p.m on 09.01.1999, the informant-Deenu (PW1) along with his brother Akbar (deceased) and Harun (son of PW1) were sitting together warming themselves in front of fire. When the deceased was going to his house, Ghasita (A3), his son Akhtar Hussain (A4) armed with Pharsa, Mohd. Jamil (A2) armed with Kulhari and Mohd. Yunus (A1) armed with lathi reached there to teach a lesson in connection with a fight broke between them a day before. As per the FIR, Ghasita (A3) and Akhtar Hussain (A4) gave Pharsa blows on the head of the deceased. Akhtar Hussain (A4) gave another blow whereas Jamil (A2) also inflicted injuries by Kulhari on the head of the deceased. When the deceased fell down Yunus (A1) gave lathi blows on the legs of the deceased and Ghasita (A3) gave another Pharsa blow over his head. When Ahmad (PW2) tried to rescue the deceased from the accused persons, Yunus (A1) gave lathi blows on the shoulder of Ahmad (PW2). Deenu (PW1) lodged the first information report.

7. During the investigation, Dr. M.S. Ranga (PW3) medically examined the deceased-Akbar and found the following injuries on his person:

> "(1) Incised wound 2.5 cm x 2 cm x bone deep placed over the scalp frontal region in the midline transversely with profuse bleeding.
>
> (2) Incised wound 4cm x 2mm x bone deep placed over the frontal region of the scalp profused bleeding placed just paralled and behind the injury no.1
>
> (3) Incised wound 1cm x 2cm placed over the frontal region of the scalp just lateral to injury no. 1 & 2 placed vertically with profused bleeding.
>
> (4) Incised wound 2cm x 1cm bone deep placed over the frontal region of the scalp just behind the injury no.3 anteroposteriorly."

PW-3 opined that the injuries are caused within six hours by using sharp edged weapons.

8. Ahmad (PW2) received two injuries over his right shoulder and right hip joint respectively. Both having been caused by blunt weapon within six hours. The deceased-Akbar succumbed to the injuries on 11.01.1999. Dr. Chander Kant (PW7) of Safdarjang Hospital, New Delhi conducted the post-mortem examination and found the following injuries:

> "1. One transversely placed stitched wound on right fronto temporal region. Total length 12 cm. Total number of stitches 12. on removal of the stitches the wound was partially surgical in nature.
>
> (a) One incised wound on right fronto region at the junction of frontal region with anterior aspect of right parietal region size 3 x 1.3 cm x bone deep. Margins were clean cut except at the places of stitched both angles acute.
>
> (b) One incised wound parallel to injury No.(a) size 2.1cm x 1.4 cm x bone deep, both margins clean cut except at the place of stitches.
>
> Underneath right fronto-parietal bones were in pieces in irregular shape and size, already removed in an area of 8 cms x 5 cms.
>
> 2. One incised wound vertically placed middle of fronto-parietal region 2.6 cms x 2 cm x bone deep.
>
> 3. Abrasion on back of left shoulder region size 4 cms x 3 cms.
>
> 4. Abrasions on occipital region left side size 2 cm x 1 cm .
>
> 5. Contusion left eye."

9. On 14.01.1999, Yunus (A1) and Jamil (A2) were arrested and a lathi was recovered from Mohd. Yunus (A1) whereas Kulhari was recovered from Mohd. Jamil (A2) . Ghasita (A3) was arrested on 22.01.1999 and blood stained Pharsa was recovered from him. Akhtar Hussain (A4) was found innocent by the police and was not sent for trial. However, he was summoned later under Section 319 Cr.P.C. There is no recovery against Akhtar Hussain (A4). Akhtar Hussain (A4) challenged the order of summoning before the High Court and the trial against him was stayed which commenced later on after dismissal of the criminal revision.

10. During the course of trial, the prosecution examined the complainant/ eye-witness-Deenu (PW-1), injured eye-witness- Ahmad (PW-2), Dr. M.S. Ranga (PW-3), Constable Sarwan Kumar (PW-4), Head Constable Sunil Dutt (PW-5), Constable Raj Kumar (PW-6), Dr. Chander Kant (PW-7), ASI Siri Niwas (PW-8), Head Constable Hari Kishan (PW-9) and SI Daya Nand (PW-10). However, listed prosecution witnesses namely, Harun, Abdul Rashid, Mozam Khan, Rati Mohd. And Fattu were gave up being unnecessary.

    In defence, accused appellants submitted certified copy of complaint made by Ghasita (A3) against deceased-Akbar, PW Harun and others for offences punishable under Sections 379, 380, 411, 406, 407, 452, 120-B, 506, 427 and 403 IPC for illegal cutting and removal of 13 trees belonging to the Panchayat. A copy of pedigree showing 4th degree relationship between prosecution witnesses namely, Deenu and Ahmad as well as certified copy of statement of Ghasita (A3) as prosecution witness in trial "State vs. Tundal etc." under Section 304 IPC were also submitted.

11. Upon their conviction by the Trial Court, Mohd. Yunus (A1), Mohd. Jamil (A2) and Ghasita (A3) preferred appeal before the High Court which was dismissed qua Mohd. Jamil (A2) and Ghasita (A3) whereas appeal preferred by Mohd. Jamil (A1) was allowed in part. In the separate trial, Akhtar Hussain (A4) was acquitted which was affirmed by the High Court against which there is no further appeal.

12. In the present Criminal Appeal No.1308 of 2012, we are required to consider the legality and validity of conviction imposed upon Jamil (A2) whereas in the Criminal Revision, the State has called in question Yunus (A1) acquittal under Section 302 IPC.

13. It was argued by the learned counsel for the appellant-Mohd. Jamil (A2) that the FIR is ante-timed and delayed; the conviction is based on the testimony of interested witnesses who are closely related to the deceased and the prosecution has failed to examine the independent witnesses namely, Harun and Deenu s/o Kalu. It is also argued that the presence of informant (PW-1) is doubtful considering the statement of Ahmad (PW-2) recorded under Section 161 Cr.P.C. in which he did not mention that Deenu (PW-1) was present at the spot; moreover, Deenu's clothes were not smeared with blood, although Deenu deposed in his statement that after the deceased

suffered injuries he lifted him in an injured condition and put him in the tractor. Learned counsel has referred to the omissions and contradictions in the statements of these witnesses.

14. On the contrary, learned counsel appearing for the State of Haryana would submit that conviction of Mohd. Jamil (A2) under Section 302 read with Section 34 IPC is born out from the evidence on record, which is unimpeachable, therefore, no interference is called for. Challenging the acquittal of Mohd. Yunus (A1) for offence under Section 302 read with Section 34 IPC (in Criminal Appeal No.1307/2012), learned counsel for the State of Haryana argued that the same set of evidence, which holds good for convicting Mohd. Jamil (A2) should have been given due weightage for upholding the conviction of Mohd. Yunus (A1) for the offence under Section 302 read with Section 34 IPC. According to him, the High Court ought not to have acquitted Mohd. Yunus (A1) of the charge under Section 302 read with Section 34 IPC.

15. We have heard learned counsel for the parties at length and perused the material available on record.

16. The High Court has rejected the argument qua delay in registration of FIR or that it is ante-time, and we see no reason to disagree with the High Court's finding on this aspect of the matter.

17. It is to be noticed that as per the first version of the incident narrated by the informant-Deenu in the FIR lodged by him, Ghasita (A3) gave a Pharsa blow on the head of the deceased and second blow was given by Akhtar Hussain (A4) by Pharsa over his head and third blow was given by Mohd. Jamil (A2) with Kulhari on his head and when the deceased fell down, Mohd. Yunus (A1) gave a lathi blow and Ghasita (A3) gave another blow over the head of the deceased. When Akhtar Hussain (A4) was sent for trial, Deenu was examined as PW-7 who maintained his statement that Mohd. Jamil (A2), Ghasita (A3) and Akhtar Hussain (A4) assaulted the deceased with Pharsa and Kulhari. Comparing the statement of the Deenu (PW-7) with the statement of Ahmad (PW-8), the Trial Court found major contradictions and disbelieved the statement of Deenu (PW-7) while acquitting Akhtar Hussain(A4) of the charges under Section 302 read with Section 34 IPC. It was also held in the said judgment of the Trial Court that PW-7 and PW-8 are interested witnesses and cannot be relied upon in the circumstances of the case. Further it

was noticed that PW-7 is changing his stand inasmuch as in his earlier statement dated 08.07.1999 he denied that Ghasita (A3) and Akhtar Hussain (A4) were armed with Pharsa which he stated in the trial against Akhtar Hussain (A4). The Trial Court was of the opinion that both the important witnesses namely, Deenu (PW-7) and Ahmad (PW-8) made improvements in their statements. Therefore, when the statements are contrary, facts are twisted and improvements are made, no reliance can be made upon such statement.

18. Although, appellant – Mohd. Jamil (A2) and Akhtar Hussain (A4) were tried separately and the statement of witnesses were recorded twice, firstly, in the trial against three accused persons (Mohd. Yunus (A1), Mohd. Jamil (A2) & Ghasita (A3)) and secondly, in the trial against Akhtar Hussain (A4), the fact remains that both the star witnesses of the prosecution namely Deenu (PW-7) and Ahmad (PW-8) are disbelieved in the second trial by clearly stating that their statements are contradictory, the facts are twisted and improvements are made. For trial under Section 302 IPC, if a witness is branded as untrustworthy having allegedly twisted the facts and made contrary statement, it is not safe to impose conviction on the basis of statement made by such witness. When there is an effort to falsely implicate one accused person, statement made by such an eyewitness cannot be relied without strong corroboration. Moreover, there is material on record proving previous enmity between the parties as mentioned in paragraph 25 of the trial court judgment.

19. It is important to notice that the Trial Court had recorded a finding that recovery of Lathi from Mohd. Yunus (A1) and Kulhari from Mohd. Jamil (A2) is not safe to rely upon, meaning thereby, the recovery has not been proved. The Trial Court found that the recovery of Pharsa from Ghasita (A3) is fully proved. However, the appeal preferred by Ghasita (A3) has already abated.

20. Summing up the quality of evidence available on record, we have found that recovery of Kulhari from Mohd. Jamil (A2) and Lathi from Mohd. Yunus (A1) has not been proved. The deceased had sustained four injuries over his head. There are allegations against Ghasita (A3) that he inflicted injuries over the head of the deceased on more than one occasion. The statement of eye-witness Deenu (PW-7) and Ahmad (PW-8) have not inspired confidence in the second trial against Akhtar Hussain (A4). The credibility of their evidence is

under serious doubt because of twisting of facts and improvements made. Therefore, for all these reasons it is not safe to convict the appellant- Mohd. Jamil (A2) for offence under Section 302 read with Section 34 IPC on the basis of statement of such eyewitness.

21. Accordingly, we set aside the impugned judgment of the High Court and the Trial Court convicting the appellant-Mohd. Jamil (A2) for offence under Section 302 read with Section 34 IPC. However, in view of the evidence on record conviction of appellant-Mohd. Jamil for the offence under Section 323 read with Section 34 IPC is not required to be interfered. Resultantly, Criminal Appeal No. 1308 of 2012 preferred by the appellant-Moh. Jamil (A2) is allowed in part setting aside his conviction under Section 302 read with Section 34 IPC and, at the same time, maintaining his conviction and sentence under Section 323 read with Section 34 IPC. The appellant-Mohd. Jamil (A2) has been sentenced to undergo rigorous imprisonment for six months for offence under Section 323 read with Section 34 IPC. As per the custody certificate, he has already undergone sentence for more than six months. Since, the appellant-Mohd. Jamil is on bail during the pendency of this appeal, his bail bonds are discharged.

22. Criminal Appeal No. 1307 of 2012 preferred by the State of Haryana challenging the acquittal of Mohd. Yunus (A1) under Section 302 read with section 34 IPC stands dismissed.

Headnotes prepared by: Nidhi Jain

Result of the case:
Criminal Appeal No. 1308 of 2012 partly allowed and Criminal Appeal No. 1307 of 2012 dismissed.

[2024] 1 S.C.R. 413 : 2024 INSC 47

Raja Gounder and Others

v.

M. Sengodan and Others

(Civil Appeal No. 600 of 2024)

19 January 2024

[M.M. Sundresh and S.V.N. Bhatti*, JJ.]

Issue for Consideration

A civil suit was filed by respondent Nos. 1 and 2 for partition and separate possession of plaint schedule properties. During the pendency of the suit, appellants were impleaded. The Trial Court recorded a categorical finding that appellant no.2 and respondent no.2 were not wives of MG, propositus of parties, and consequently, the status of the children through the extended family as coparceners was rejected. The issue for consideration is as to entitlement of share to the children of void or voidable marriage.

Headnotes

Partition – Partition and separate possession of plaint schedule properties – The Trial Court held that respondent No. 4 herein admittedly is the first and legally wedded wife of MG – Appellant No. 2 and respondent No. 2 did not produce evidence to prove the factum of the marriage with MG – The evidence adduced by the appellants or respondent Nos. 1 and 2, does not inspire the confidence of the Court to accord to them the status as wives of MG – The Trial Court records a categorical finding that appellant No. 2 and respondent No. 2 are not the wives of MG, and consequently, the status of the children through the extended family as coparceners was rejected – High Court accepted the view of the Trial Court – Propriety:

Held: A mere perusal of the preface to Ex. B-6, mortgage deed, would show that MG treated appellant No. 1, respondent No. 1 and respondent No. 3 as his sons – The document was executed for himself and on behalf of his minor sons – The statement was made by MG during the subsistence of his interest in the property mortgaged – The appellants also rely on the patta dated 27.04.1984 (Ex. B-3) standing in the name of MG and

* Author

his sons; the voters lists, viz., Exs. B-4 and B-5, to show that MG and his sons lived as a family – By applying ss.17 and 18 of the Evidence Act, it is convincing that MG made a statement describing appellant No. 1 and respondent No. 1 as his sons and treated as an admission by record – This statement satisfies the ingredients of s.18 of the Evidence Act – Further, in the absence of contrary evidence and withdrawal of admission or explained through admissible evidence, the admission in the mortgage deed, viz., Ex. B-6, coupled with the joint patta and voters lists, declares the status of appellant No. 1, respondent No. 1, along with respondent No. 3 as the sons of MG – At this juncture, the status derived through an admission in Ex. B-3 vis-à-vis appellant No.1 as a natural corollary could be extended to appellant No.3 as a child/daughter of MG – This is an inescapable consequential conclusion which the Court has to record – Once the status of the parties, other than respondent No. 3, is established as the extended family of the propositus, irrespective of whether the marriages of appellant No. 2 and respondent No. 2 with MG are void or voidable, denying the children of MG a share in the property of notional partitioned in favour of MG, is unsustainable in law and fact – Also, applying the principle laid down in *Revanasiddappa and another v. Mallikarjun and others* on entitlement of share to the children of void and voidable marriages, the judgments under appeal are set aside. [Paras 15.1, 16, 17, 18]

Evidence Act, 1872 – Admission:

Held: Admission is a conscious and deliberate act and not something that could be inferred – An admission could be a positive act of acknowledgement or confession – To constitute an admission, one of the requirements is a voluntary acknowledgement through a statement of the existence of certain facts during the judicial or quasi-judicial proceedings, which conclude as true or valid the allegations made in the proceedings or in the notice – The formal act of acknowledgement during the proceedings waives or dispenses with the production of evidence by the contesting party – The admission concedes, for the purpose of litigation, the proposition of fact claimed by the opponents as true – An admission is also the best evidence the opposite party can rely upon, and though inconclusive, is decisive of the matter unless successfully withdrawn or proved erroneous by the other side. [Para 13.1]

Case Law Cited

Revanasiddappa and another v. Mallikarjun and others **(2023) 10 SCC 1 – relied on.**

Gopal Das and another v. Sri Thakurji and others **AIR 1943 PC 83 – referred to.**

Nirmala v. Rukminibai **AIR 1994 Kar 247 – approved.**

List of Acts

Evidence Act, 1872 – ss. 17 and 18.

List of Keywords

Partition; Factum of marriage; Void or voidable marriage; Status of wife; Status of the children through the extended family; Coparceners; Admission by record; Entitlement of share to the children of void and voidable marriages; Preliminary decree of partition; Notional partition.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.600 of 2024.

From the Judgment and Order dated 26.09.2006 of the High Court of Judicature at Madras in AS No.929 of 1991.

Appearances for Parties

Ms. N. S. Nappinai, V. Balaji, A. Krishna Kumar, R. Mohan, Nizamuddin, C. Kannan, Rakesh K. Sharma, Advs. for the Appellants.

Vinodh Kanna B., K. K. S. Krishnaraj, T. R. B. Sivakumar, Ms. Shagufa Khan, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

S.V.N. Bhatti, J.

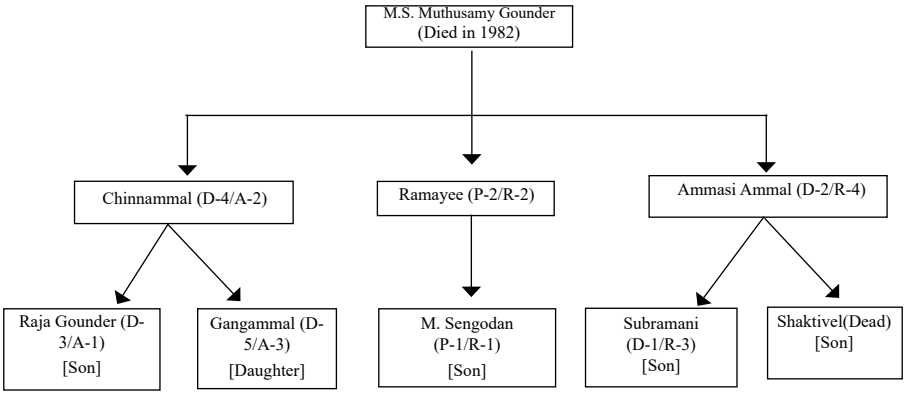
1. Leave granted.

2. The Defendant Nos. 3 to 5 in O.S. No. 357 of 1985 before the Court of the Subordinate Judge, Sankari, Coimbatore District, Tamil Nadu, are the Appellants in the Civil Appeal. The Appellants assail the judgment and decree of the Trial Court and the High Court of

Judicature at Madras, dismissing the suit filed by Respondent No. 1 and Respondent No. 2 for partition and separate possession of the plaint schedule properties.

I. FACTUAL BACKGROUND

3. A genealogy is prefaced to appreciate the relationship between the parties: -



4. Respondent Nos. 1 and 2 in this Civil Appeal were the Plaintiffs in O.S. No. 357 of 1985 before the Trial Court filed for partition and separate possession of plaint schedule properties. The plaint schedule consists of three items of agricultural land in Amani, Kliyanoor, Agraharam and Pallipayam villages of Tiruchengode Taluk. The suit was filed against Respondent Nos. 3 and 4 herein. During the pendency of the suit, the Appellants filed I.A. No. 1019 of 1987 and were impleaded by the Trial Court as Defendant Nos. 3, 4 and 5.

5. Muthusamy Gounder is the propositus of the parties to the suit and the claim for partition arose on his demise in the year 1982. The plaint averments are that Respondent No. 1 is the son of the propositus through Respondent No. 2/Ramayee. Respondent No. 3 is also the son of the propositus through Respondent No. 4/Ammasi Ammal. The marriage of Respondent No. 2 with the propositus is alleged to have happened in the early 1950s. It is averred in the plaint that Respondent Nos. 1 to 4 lived together and had a common kitchen during the lifetime of Muthusamy Gounder. Respondent Nos. 1 and 2 claim that a coparcenary/joint Hindu family existed, and Respondent Nos. 1 to 3 inherited the plaint schedule properties. The plaint schedule properties are treated as joint family/ancestral properties.

The demand of Respondent Nos. 1 and 2 through legal notice dated 21.06.1984 did not result in a reply from Respondent Nos. 3 and 4, or result in partition, the suit for partition of plaint schedule into three equal shares was filed and allot to Respondent Nos. 1 and 3, each one such share. The other share notionally allotted to Muthusamy Gounder, and since he died in 1982, is divided and allotted to Respondent Nos. 1 to 4 in accordance with law.

6. We have specifically referred to the share demanded by Respondent Nos. 1 and 2 in O.S. No. 357 of 1985 because the shares of the parties resulted in change with the impleadment of Appellants. Respondent Nos. 3 and 4 filed written statements denying the factum of marriage between Respondent No. 2 and Muthusamy Gounder, stating that Respondent No. 1 alone is a member of the Hindu Undivided Family (HUF) of Muthusamy Gounder.

6.1 As a natural result of the denial of marriage and relationship between Muthusamy Gounder and Respondent No. 2, the other averments in the plaint, namely, the existence of coparcenary and ancestral properties; the rights of Respondent Nos. 1 and 2 for partition, are specifically denied. The Appellants as Defendant Nos. 3 to 5 claimed that Appellant Nos. 1 and 3 are the son and daughter, respectively, of Muthusamy Gounder through Appellant No. 2/Chinnammal. The Appellants further averred that upon the demise of the propositus, the parties to the suit have inherited the plaint schedule properties as the legal heirs of the late Muthusamy Gounder. The Appellants and other legal heirs of Muthusamy Gounder were in joint possession and enjoyment of the plaint schedule properties. Therefore, the Appellants, along with other legal heirs/successors of Muthusamy Gounder, pray for partition of the coparcenary headed by Muthusamy Gounder. The Trial Court considered the following issues: -

1. Whether the Plaintiffs are entitled to the reliefs claimed in the suit?
2. Whether Defendant Nos. 1 to 5 are also entitled to shares as legal heirs of the deceased Muthusamy Gounder in his estate?
3. To what relief?

7. The oral evidence of PW1 to 3 and DW1 to 5 was adduced. Ex. A-1 to A-10 and Ex. B-1 to B-10 were marked by the parties.

8. The Trial Court examined the claim for partition from the perspective of the existence of a coparcenary/joint Hindu family and that the extended family of Muthusamy Gounder through Respondent No. 2 and Appellant No. 2 as wives of Muthusamy Gounder. In fine, the Trial Court examined the existence of coparcenary with Respondent Nos. 1 and 2 and Appellant No. 1, and the status of marriage of Respondent No. 2 and Appellant No. 2 with Muthusamy Gounder, and a coparcenary existed with the extended family members. The Trial Court held that Respondent No. 4 herein admittedly is the first and legally wedded wife of Muthusamy Gounder. Appellant No. 2 and Respondent No. 2 did not produce evidence to prove the factum of the marriage with Muthusamy Gounder. The evidence adduced by the Appellants or Respondent Nos. 1 and 2, does not inspire the confidence of the Court to accord to them the status as wives of Muthusamy Gounder. The Trial Court records a categorical finding that Appellant No. 2 and Respondent No. 2 are not the wives of Muthusamy Gounder, and consequently, the status of the children through the extended family as coparceners was rejected.

9. Appeal Nos. 394 and 929 of 1991 were filed before the High Court of Judicature at Madras by Respondent Nos. 1 and 2 and the Appellants herein. Through the impugned judgment, the appeals filed at the instance of extended family members of Muthusamy Gounder, stood dismissed. The High Court, in all particulars, accepted the view of the Trial Court on the status of marriage claimed by Appellant No. 2 and Respondent No. 2 as not established by the parties and the claim for partition on the footing of the existence of the coparcenary with the parties of the suit would not arise. The appeals stood dismissed by the common impugned judgment dated 26.09.2006.

9.1 Hence, the Civil Appeal at the instance of the Appellants in Appeal No. 929 of 1991.

II. SUBMISSIONS

We have heard the Counsel appearing for the parties.

10. Advocate N.S. Nappinai, appearing for the Appellants, accepting the findings of fact recorded by the Courts below on the status of Respondent No. 2 and Appellant No. 2 as part of the extended

family of Muthusamy Gounder, argues a substantive point *viz.,* both the Courts below fell in a serious flaw in not moulding the relief from admitted circumstances/evidence particularly when the suit filed is for partition and separate possession of the plaint schedule properties. It is argued that the Appellants and Respondent Nos. 1 and 2, assuming failed in establishing the status of a valid marriage of Appellant No. 2 and Respondent No. 2 with Muthusamy Gounder, still the entitlement of a share as sons/children of Muthusamy Gounder through the extended family of Muthusamy Gounder should have been considered. The documentary evidence shows that Muthusamy Gounder treated Appellant No. 1, Respondent No. 1 and Respondent No. 3 as his sons. Therefore, Appellant No. 1 and likewise Respondent No. 1 even are children of Muthusamy Gounder through a void or voidable marriage, still the children of Muthusamy Gounder through extended family are entitled to a share in the half share of Muthusamy Gounder in the schedule properties. The Counsel places reliance on ***Revanasiddappa and another v. Mallikarjun and others***[1], for the proposition that the children of Appellant No. 2 and Respondent No. 2 will be entitled to a share in the property, which would have been allotted to Muthusamy Gounder in the notional partition of plaint schedule properties. The Counsel places reliance on Ex. B-6, a registered mortgage deed dated 01.11.1976, executed by Muthusamy Gounder in favour of Karuppana Gounder and on Ex. B-3 dated 27.04.1984, a joint *patta* in favour of Muthusamy Gounder and all his three sons. The unrebutted documentary evidence in Exs. B-3 and B-6 constitute, *firstly*, an admission in the form of a substantive piece of evidence by Muthusamy Gounder on the status of Appellant No. 1 and Respondent No. 1 as his sons, coupled with corroborative documentary evidence in Ex. B-4 and B-5, electoral rolls. Respondent No. 3 claims through the common propositus, i.e., Muthusamy Gounder, and these admissions are valid in law on Respondent No. 3. This is the best evidence from none other than the common propositus. The Appellants and Respondent No. 1 are entitled to a share in the share allotted to Muthusamy Gounder. Therefore, the Counsel argues that given the settled legal position on the status of sons of Muthusamy Gounder through Appellant No. 2 and Respondent No. 2, a decree for partition though not as prayed for, is passed, but a preliminary decree of partition firstly on plaint schedule properties

1 (2023) 10 SCC 1

between Muthusamy Gounder and Respondent No. 3 is made, and a further decree, distributing the share of Muthusamy Gounder to Appellant Nos. 1 and 3 and Respondent Nos. 1 and 3 is rendered.

11. Advocate Vinodh Kanna B., appearing for Respondent Nos. 3 and 4, contends that the findings of fact recorded by the Courts below do not warrant reconsideration of evidence by this Court under Article 136 of the Constitution of India, and alternatively, the evidence is wanting on the status of Appellant Nos. 1 and 3 and Respondent No. 1 as the children of Muthusamy Gounder. The alternative argument now canvassed before the Supreme Court is not available in the circumstances of the case or from the material on record. The proof of status as children of Muthusamy Gounder is a condition precedent for applying the ratio of ***Revanasiddappa (supra),*** and there is no evidence on this crucial aspect to mould the relief. Therefore, the judgements impugned are sustainable in law and fact. He prays for the dismissal of the Civil Appeal.

III. ANALYSIS

12. We have perused the record and noted the rival contentions canvassed by the Counsel, briefly reiterated in this Civil Appeal, the claim for partition in the share notionally allotted to late Muthusamy Gounder is pressed for. Thus, it presupposes the Appellants do not press the claim as coparceners of the family of Muthusamy Gounder; however, from the material on record, they claim a share from the share as the children of Muthusamy Gounder. The claim for a share depends on the application and appreciation of Exs. B-3 to B-6.

13. Sections 17 and 18 of the Indian Evidence Act, 1872 ("the Act") defines "admission" and "admission by party to proceeding or his agent". Section 17 of the Act reads thus: -

> *"**17. Admission defined** admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."*

13.1 Admission is a conscious and deliberate act and not something that could be inferred. An admission could be a positive act of acknowledgement or confession. To constitute an admission, one of the requirements is a voluntary acknowledgement through

a statement of the existence of certain facts during the judicial or quasi-judicial proceedings, which conclude as true or valid the allegations made in the proceedings or in the notice. The formal act of acknowledgement during the proceedings waives or dispenses with the production of evidence by the contesting party. The admission concedes, for the purpose of litigation, the proposition of fact claimed by the opponents as true. An admission is also the best evidence the opposite party can rely upon, and though inconclusive, is decisive of the matter unless successfully withdrawn or proved erroneous by the other side.

13.2 The above being the position, pithily stated on what constitutes an admission, Section 17 of the Act does not come in aid to answer or appreciate the documentary evidence marked in the suit. Therefore, Section 17 has to be read along with Section 18 of the Act, which reads thus:-

> *"**18. Admission by party to proceeding or his agent.—**Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.*
>
> ***by suitor in representative character.—**Statements made by parties to suits suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.*
>
> *Statements made by —*
>
> ***(1) by party interested in subject-matter.—**persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or*
>
> ***(2) by person from whom interest derived.—**persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.."*

13.3 Section 18 of the Act deals with:

(i) admission by a party to a proceeding,

(ii) his agent,

(iii) by a suitor in a representative character,

(iv) statements made by a party in trusted subject matter,

(v) statements made by a person from whom interest is derived.

The qualifying circumstances to merit as admission are subject to satisfying the requirements.

14. The Privy Council in ***Gopal Das and another v. Sri Thakurji and others***[2]***,*** held that a statement made by a person is not only evidence against the person but is also evidence against those who claim through him. Section 18 of the Act lays down the conditions and the requirements satisfied for applying to a statement as an admission. We keep in our perspective Sections 17 and 18 of the Act while appreciating Exs. B-3 and B-6.

15. The Appellants rely on Exs. B-3 to B-6 to evidence that Muthusamy Gounder treated Appellant No. 1, Respondent No. 1 and Respondent No. 3 as his sons. Now let us examine whether these exhibits, *firstly*, contain an admission on the relevant fact in issue and *secondly*, whether they satisfy the requirements under Section 18 of the Act. Ex. B-6 is the registered mortgage deed dated 01.11.1976 executed by Muthusamy Gounder/propositus in favour of one Karuppana Gounder. Sy. No. 66 of Pallipayam, Agraharam Village was the mortgage deed executed by Muthusamy Gounder in favour of Karuppana Gounder. The mortgaged property is one of the items in the schedule in O.S. No. 357 of 1985. Muthusamy Gounder in Ex. B-6 stated as follows: -

> "Mortgage deed executed in favour of Karuppannna Gounder, son of…Vellaya Gounder, residing at Vaagaikkadu, Cusba Elandaikkuttai Village, Thiruchengodu Taluk, Salem District.

2 AIR 1943 PC 83

By Muthusamy Gounder (1) son of Sengoda Gounder, residing at Malagoundenpalayam, Kaliyanoor Ayan Village, - Do - Taluk, - Do - District, Guardian and father of the minors Subramani (2) Raja Gounder (3) and Sengodam (4), for himself and on behalf of the minors Nos. 2 ,3 and 4."

15.1 A mere perusal of the preface to Ex. B-6, mortgage deed, would show that Muthusamy Gounder treated Appellant No. 1, Respondent No. 1 and Respondent No. 3 as his sons. The document was executed for himself and on behalf of his minor sons. The statement is made by Muthusamy Gounder during the subsistence of his interest in the property mortgaged. Respondent No. 3 definitely claims through Muthusamy Gounder for the half share notionally partitioned in favour of Muthusamy Gounder. The Appellants also rely on the *patta* dated 27.04.1984 (Ex. B-3) standing in the name of Muthusamy Gounder and his sons; the voters lists, *viz.,* Exs. B-4 and B-5, to show that Muthusamy Gounder and his sons lived as a family. By applying Sections 17 and 18 of the Act, we are convinced that Muthusamy Gounder made a statement describing Appellant No. 1 and Respondent No. 1 as his sons and treated as an admission by record. This statement satisfies the ingredients of Section 18 of the Act. Further, in the absence of contrary evidence and withdrawal of admission or explained through admissible evidence, the admission in the mortgage deed, *viz.,* Ex. B-6, coupled with the joint *patta* and voters lists, declares the status of Appellant No. 1, Respondent No. 1, along with Respondent No. 3 as the sons of Muthusamy Gounder. At this juncture, we notice that the status derived through an admission in Ex. B-3 *vis-à-vis* Appellant No.1 as a natural corollary could be extended to Appellant No. 3 as a child/daughter of Muthusamy Gounder. This is an inescapable consequential conclusion which the Court has to record.

15.2 We make a useful reference to the judgement reported in ***Nirmala v. Rukminibai***[3]***.*** The Division Bench of the High Court of Karnataka considered a dispute nearer to the circumstances with the case on hand. The decision made in this case decided

3 AIR 1994 Kar 247

the status of inheritance of one Narayanarao among the children born out of his second marriage. The Plaintiffs were the first wife and daughter of Narayanarao, who filed a suit for possession of the suit properties in the estate of Narayanarao, which devolved on the Defendants, i.e., Narayanarao's second wife and children. The Trial Court decreed the suit in the Plaintiffs' favour, against which the Defendants filed an appeal before the High Court of Karnataka. The Defendants relied on Section 18 of the Act to point out Narayanarao's admission that he indeed treated the Defendants as his legally wedded wife and legitimate children. Accepting this argument, the High Court allowed the appeal holding that where the children from the first wife brought a suit for possession of their father's property disputing the second marriage of their father, the admission of their deceased father that the defendant, as his legally wedded wife, was binding on the Plaintiffs. We are in agreement with the High Court of Karnataka's consideration of the scope of the binding nature of admission by a common ancestor in a matter of inheritance under Section 18 of the Act.

16. We are of the view that the statement in Ex. B-6 is a clear admission of Muthusamy Gounder as to how he treated Appellant No. 1, Respondent No. 1 and Respondent No. 3 as his sons. Respondent No. 3 is claiming through Muthusamy Gounder, the common predecessor in interest; therefore, the admission is binding on Respondent No. 3 as well. Hence, by treating Appellant Nos. 1 and 3 and Respondent Nos. 1 and 3 as successors in the interest of Muthusamy Gounder, the shares are worked out. Once the status of the parties, other than Respondent No. 3, is established as the extended family of the propositus, irrespective of whether the marriages of Appellant No. 2 and Respondent No. 2 with Muthusamy Gounder are void or voidable, denying the children of Muthusamy Gounder a share in the property of notional partitioned in favour of Muthusamy Gounder, is unsustainable in law and fact. Appellant No. 3 claims to be the daughter of Muthusamy Gounder, and the law, as applicable to the separate share of Muthusamy Gounder, grants an equal share to the daughter along with the sons of Muthusamy Gounder.

17. The above discussion takes us to point out a common infirmity in the examination of issues by the Trial and the Appellate Courts. The suit is one for partition, and the shares are dependent upon the

nature of status and the time at which the partition is decreed. It is axiomatic that the shares fluctuate not only with the happening of events in the family but also with the circumstances established by the parties to the *lis.* In the present case, the claim as a coparcenary is unacceptable for want of evidence on the factum of the marriage of Muthusamy Gounder with Appellant No. 2 and Respondent No. 2; the courts below ought to have considered the relief from admitted circumstances on record. Hence, the argument of Respondent No. 3 that the status of Appellant Nos. 1 and 3; and Respondent No. 1 as the children of Muthusamy Gounder is without evidence is untenable and rejected accordingly. At this stage, it is apposite to refer to the conclusions laid down in ***Revanasiddappa (supra)***:-

> *"**81.** We now formulate our conclusions in the following terms:*
>
> ***81.1.** In terms of sub-section (1) of Section 16, a child of a marriage which is null and void under Section 11 is statutorily conferred with legitimacy irrespective of whether: (i) such a child is born before or after the commencement of the amending Act, 1976; (ii) a decree of nullity is granted in respect of that marriage under the Act and the marriage is held to be void otherwise than on a petition under the enactment;*
>
> ***81.2.** In terms of sub-section (2) of Section 16 where a voidable marriage has been annulled by a decree of nullity under Section 12, a child "begotten or conceived" before the decree has been made, is deemed to be their legitimate child notwithstanding the decree, if the child would have been legitimate to the parties to the marriage if a decree of dissolution had been passed instead of a decree of nullity;*
>
> ***81.3.** While conferring legitimacy in terms of sub-section (1) on a child born from a void marriage and under sub-section (2) to a child born from a voidable marriage which has been annulled, the legislature has stipulated in sub-section (3) of Section 16 that such a child will have rights to or in the property of the parents and not in the property of any other person;*

81.4. *While construing the provisions of Section 3(j) of the HSA, 1956 including the proviso, the legitimacy which is conferred by Section 16 of the HMA, 1955 on a child born from a void or, as the case may be, voidable marriage has to be read into the provisions of the HSA, 1956. In other words, a child who is legitimate under sub-section (1) or sub-section (2) of Section 16 of the HMA would, for the purposes of Section 3(j) of the HSA, 1956, fall within the ambit of the explanation "related by legitimate kinship" and cannot be regarded as an "illegitimate child" for the purposes of the proviso;*

81.5. *Section 6 of the HSA, 1956 continues to recognise the institution of a joint Hindu family governed by the Mitakshara law and the concepts of a coparcener, the acquisition of an interest as a coparcener by birth and rights in coparcenary property. By the substitution of Section 6, equal rights have been granted to daughters, in the same manner as sons as indicated by sub-section (1) of Section 6;*

81.6. *Section 6 of the HSA, 1956 provides for the devolution of interest in coparcenary property. Prior to the substitution of Section 6 with effect from 9-9-2005 by the amending Act of 2005, Section 6 stipulated the devolution of interest in a Mitakshara coparcenary property of a male Hindu by survivorship on the surviving members of the coparcenary. The exception to devolution by survivorship was where the deceased had left surviving a female relative specified in Class I of the Schedule or a male relative in Class I claiming through a female relative, in which event the interest of the deceased in a Mitakshara coparcenary property would devolve by testamentary or intestate succession and not by survivorship. In terms of sub-section (3) of Section 6 as amended, on a Hindu dying after the commencement of the amending Act of 2005 his interest in the property of a joint Hindu family governed by the Mitakshara law will devolve by testamentary or intestate succession, as the case may be, under the enactment and not by survivorship. As a consequence of the substitution of Section 6, the*

rule of devolution by testamentary or intestate succession of the interest of a deceased Hindu in the property of a joint Hindu family governed by Mitakshara law has been made the norm;

81.7. *Section 8 of the HSA, 1956 provides general rules of succession for the devolution of the property of a male Hindu dying intestate. Section 10 provides for the distribution of the property among heirs of Class I of the Schedule. Section 15 stipulates the general rules of succession in the case of female Hindus dying intestate. Section 16 provides for the order of succession and the distribution among heirs of a female Hindu;*

81.8. *While providing for the devolution of the interest of a Hindu in the property of a joint Hindu family governed by Mitakshara law, dying after the commencement of the amending Act of 2005 by testamentary or intestate succession, Section 6(3) lays down a legal fiction, namely, that "the coparcenary property shall be deemed to have been divided as if a partition had taken place". According to the Explanation, the interest of a Hindu Mitakshara coparcener is deemed to be the share in the property that would have been allotted to him if a partition of the property has taken place immediately before his death irrespective of whether or not he is entitled to claim partition;*

81.9. *For the purpose of ascertaining the interest of a deceased Hindu Mitakshara coparcener, the law mandates the assumption of a state of affairs immediately prior to the death of the coparcener, namely, a partition of the coparcenary property between the deceased and other members of the coparcenary. Once the share of the deceased in property that would have been allotted to him if a partition had taken place immediately before his death is ascertained, his heirs including the children who have been conferred with legitimacy under Section 16 of the HMA, 1955, will be entitled to their share in the property which would have been allotted to the deceased upon the notional partition, if it had taken place; and*

> ***81.10.*** *The provisions of the HSA, 1956 have to be harmonised with the mandate in Section 16(3) of the HMA, 1955 which indicates that a child who is conferred with legitimacy under sub-sections (1) and (2) will not be entitled to rights in or to the property of any person other than the parents. The property of the parent, where the parent had an interest in the property of a joint Hindu family governed under the Mitakshara law has to be ascertained in terms of the Explanation to sub-section (3), as interpreted above."*

18. By applying the above principle on the entitlement of share to the children of void or voidable marriages, the judgements under appeal are liable to be set aside and are accordingly set aside. We allow the appeal by passing a preliminary decree of partition for the plaint schedule properties, *firstly* between Respondent No. 3 and Muthusamy Gounder. *Secondly*, in the notionally partitioned share of Muthusamy Gounder, his children, i.e., Appellant Nos. 1 and 3, Respondent No. 1 and Respondent No. 3 are allotted equal shares.

19. Hence, a preliminary decree of partition, as indicated above, is passed. The appeal is allowed accordingly. No costs.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 429 : 2024 INSC 42

Shadakshari

v.

State of Karnataka & Anr.

(Criminal Appeal No.256 of 2024)

17 January 2024

[Abhay S. Oka and Ujjal Bhuyan*, JJ.]

Issue for Consideration

Whether sanction u/s. 197 Cr.P.C. is required to prosecute respondent No. 2 who faces accusation amongst others of creating fake documents by misusing his official position as a Village Accountant, thus a public servant. The competent authority has declined to grant sanction to prosecute. High Court has held that in the absence of such sanction, respondent No. 2 cannot be prosecuted and consequently has quashed the complaint as well as the chargesheet, giving liberty to the appellant to assail denial of sanction to prosecute respondent No. 2 in an appropriate proceeding, if so advised.

Headnotes

Code of Criminal Procedure, 1973 – s.197 – Sanction under – Appellant-complainant lodged an FIR alleging that respondent no.2 and another were irregularly creating documents of property in the name of dead person despite knowing the fact those were fake documents – The High Court observed that respondent no.2 was a public servant – The offence complained against him, as per prosecution, was committed while discharging his duties as a public servant – Sanction sought by the investigating officer was denied – Consequently, the High Court held that since sanction was refused, prosecution for criminal offence against public servant cannot continue – Propriety:

Held: It is settled that s.197 Cr.P.C. does not extend its protective cover to every act or omission of a public servant while in service – It is restricted to only those acts or omissions which are done by public servants in the discharge of official duties – The

* Author

question whether respondent No.2 was involved in fabricating official documents by misusing his official position as a public servant is a matter of trial – Certainly, a view can be taken that manufacturing of such documents or fabrication of records cannot be a part of the official duty of a public servant – If that be the position, the High Court was not justified in quashing the complaint as well as the chargesheet in its entirety, more so when there are two other accused persons besides respondent No.2 – There is another aspect of the matter – Respondent No.2 had unsuccessfully challenged the complaint in an earlier proceeding u/s. 482 Cr.P.C. – Though liberty was granted by the High Court to respondent No.2 to challenge any adverse report if filed subsequent to the lodging of the complaint, instead of confining the challenge to the chargesheet, respondent No.2 also assailed the complaint as well which he could not have done – The High Court erred in quashing the complaint as well as the chargesheet in its entirety. [Paras 23, 25]

Code of Criminal Procedure, 1973 – s. 197 – Ambit, scope and effect of:

Held: The object of such sanction for prosecution is to protect a public servant discharging official duties and functions from undue harassment by initiation of frivolous criminal proceedings. [Para 19]

Case Law Cited

State of Orissa Vs. Ganesh Chandra Jew, **[2004] 3 SCR 504:(2004) 8 SCC 40;** *D. Devaraja Vs. Obais Sanders Hussain*, **[2020] 6 SCR 453:(2020) 7 SCC 695 – relied on.**

A.Srinivasulu v. State Rep. by the Inspector of Police, **[2023] 10 SCR 11: 2023 SCC OnLine SC 900 – distinguished.**

Lalita Kumari Vs. Govt. of Uttar Pradesh, **[2013] 14 SCR 713:(2014) 2 SCC 1;** *Shambhoo Nath Misra Vs State of U.P.,* **[1997] 2 SCR 1139:(1997) 5 SCC 326 – referred to.**

List of Acts

Code of Criminal Procedure, 1973 – s. 197.

Shadakshari v. State of Karnataka & Anr.

List of Keywords

Public servant; Fabrication of record; Discharge of official duties; Sanction; Protective cover to act or omission by public servant.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 256 of 2024.

From the Judgment and Order dated 25.11.2020 of the High Court of Karnataka at Bengaluru in CRP No.4998 of 2020.

Appearances for Parties

C. B. Gururaj, Prakash Ranjan Nayak, Animesh Dubey, T. G. Ravi, Advs. for the Appellant.

D. L. Chidananda, Rahul Kaushik, Anil C Nishani, V Murnal, Krishna M Singh, Rajivkumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

Heard learned counsel for the parties.

2. Challenge made in this appeal is to the order dated 25.11.2020 passed by the High Court of Karnataka at Bengaluru in Criminal Petition No.4998 of 2020 (Sri. Mallikarjuna Vs. State of Karnataka) quashing the complaint dated 19.12.2016 lodged by the appellant; the chargesheet in C.C. No.116 of 2018 including the order dated 28.03.2018 passed therein by the learned Judicial Magistrate First Class, Belur.

3. Facts lie within a very narrow compass. The appellant as the complainant lodged a first information report dated 19.12.2016 (referred to as 'the complaint' in the impugned order) alleging that respondent No.2 and another were irregularly creating documents of property in the name of dead person despite knowing the fact that those were fake documents, such as, death certificate, family tree of the original successor of land of the appellant etc. for illegal gain. The said first information was received and registered by Haleebedu

Police Station, Belur as Crime No. 323/2016 under Sections 409, 419, 420, 423, 465, 466, 467, 468, 471 and 473 of the Indian Penal Code, 1860 (IPC) read with Section 149 and Section 34 thereof.

4. It may be mentioned that respondent No.2 is working as Village Accountant, Kirigdalu Circle in the district of Hassan, Karnataka State.

5. Respondent No.2 filed a petition under Section 482 of the Code of Criminal Procedure, 1973 (Cr.PC) for quashing of the said FIR before the High Court of Karnataka at Bengaluru ('High Court' for short). The same was registered as Criminal Petition No.9580 of 2017.

   5.1 The High Court in its order dated 05.01.2018 noted that the specific case of the appellant was that land admeasuring 1 acre 13 guntas in survey No.7/6 situated at Chattanahalli Village, Halebeedu Hobli, Belur Taluk, Hassan District belonged to the appellant and his family members. The same was given to accused No.1 for the purpose of cultivation. Accused No.1 in collusion with revenue officials including accused No.2 (respondent No.2 herein) created lot of fake documents in favour of respondent No.1. High Court vide the order dated 05.01.2018 observed that there were specific and serious allegations against respondent No.2 even as to creation of death certificate of a living person. It was observed that a reading of the FIR made out a case for investigation and that it was too premature to interfere with such FIR. Adverting to the case of *Lalita Kumari Vs. Govt. of Uttar Pradesh*, (2014) 2 SCC 1, the High Court did not interfere though granted liberty to respondent No.2 to seek his legal remedy in the event any adverse report was made.

6. Sub Inspector of Police, Haleebedu Police Station, who was the investigating officer submitted final report under Section 173 of the Cr.PC in the Court of the Additional Civil Judge (Junior Division) and Judicial Magistrate First Class, Belur on 20.03.2018 which was registered as chargesheet No.12/2018. The following persons have been named as accused in the chargesheet:

   i. Accused No.1 - Ramegowda

   ii. Accused No.2 - Mallikarjuna (respondent No.2)

   iii. Accused No.3 - Manjunath Aras

They have been charged under Sections 471, 468, 467, 465, 420, 409, 466 and 423 read with Section 34 of IPC. The chargesheet also mentions the names of thirty-one witnesses.

7. As per the chargesheet, the deceased husband of witness No.2 Somashekharappa had permitted his deceased younger brother Thumbegowda to use the subject land for cultivation about 40-50 years ago. After the death of Thumbegowda, his son i.e. accused No.1 was cultivating the subject land. During the year 1993, Somashekharappa died but accused No.1 in collusion with accused No. 2 (respondent No.2) created a fake certificate of death to the effect that Somashekharappa had died during the year 2010.In this fake document, father of the deceased Thumbegowda was mentioned as Somashekharappa instead of Sannasiddegowda. By creating such fake document, the accused sought to make illegal gain.

8. Respondent No.2 again approached the High Court by filing a petition under Section 482Cr.PC for quashing the complaint dated 19.12.2016 as well as the chargesheet and the order dated 28.03.2018 (what is the order dated 28.03.2018 has not been mentioned by respondent No.2). It may be mentioned that upon the chargesheet being filed in the court of the Additional Civil Judge (Junior Division) and Judicial Magistrate First Class, Belur, the same was registered as C.C. No.116 of 2018. The quash petition of respondent No.2 was registered as Criminal Petition No.4998 of 2020. The High Court observed that respondent No.2 was a public servant. The offence complained against him, as per the prosecution, was committed while discharging his duties as a public servant. Investigating officer had sought for sanction to prosecute respondent No.2 but sanction was denied. In such circumstances, High Court held that since sanction was refused, prosecution for criminal offence against a public servant cannot continue. Consequently, the complaint, the chargesheet as well as the order dated 28.03.2018 were set aside by the High Court *vide* the order dated 25.11.2020.

9. Aggrieved thereby, the complainant as the appellant has instituted the present proceeding.

10. This court by order dated 15.05.2023 granted permission to the appellant to file special leave petition. After condoning the delay, notice was issued.Thereafter, respondent No.2 filed counter affidavit. On perusal of the counter affidavit of the second respondent this

court in the proceedings held on 21.11.2023 noted that Annexure R-1 annexed to the said affidavit was a file noting recording the opinion of some officers that it was not a fit case to accord sanction under Section 197 Cr.PC to prosecute the second respondent. However, this Court noticed that there was no decision of the competent authority granting sanction. In such an eventuality, this Court directed the State to file an affidavit dealing with the aspect of sanction and to produce the relevant document.

11. Pursuant thereto respondent No. 1 i.e State of Karnataka has filed an affidavit. The affidavit says that the investigating officer had written to the Deputy Commissioner, Hassan, on 22.01.2018 seeking sanction to prosecute the village accountant Mallikarjun (Responsible No. 2). It is further seen that the Additional Deputy Commissioner, Hassan had informed the investigating officer vide letter dated 17.03.2018 that upon examination of the concerned file and considering the opinion of the legal advisor, sanction for prosecution of respondent No. 2 was not granted.

12. Learned counsel for the appellant submits that the High Court was not justified in quashing the complaint as well as the chargesheet and the related cognizance order. He submits that no sanction to prosecute was required *qua* respondent No. 2 as making of a fake document cannot be said to be carried out by respondent No. 2 in the discharge of his official duty. In support of his contention, he has placed reliance on the decision of this Court in *Shambhoo Nath Misra Vs State of U.P.,* (1997) 5 SCC 326.

13. Learned State counsel supports the contentions of the learned counsel for the appellant.

14. On the other hand, learned counsel for respondent No. 2 supports the order of the High Court and submits that the High Court had rightly quashed the complaint and the chargesheet. Without sanction to prosecute a public servant the latter cannot be prosecuted. This is a well-settled proposition and in this connection has placed reliance on a decision of this Court in *D. Devaraja Vs. Obais Sanders Hussain*, (2020) 7 SCC 695.

15. Submissions made by learned counsel for the parties have received the due consideration of this court.

16. The question for consideration in this appeal is whether sanction is required to prosecute respondent No. 2 who faces accusation amongst others of creating fake documents by misusing his official position as a Village Accountant, thus a public servant? The competent authority has declined to grant sanction to prosecute. High Court has held that in the absence of such sanction, respondent No. 2 cannot be prosecuted and consequently has quashed the complaint as well as the chargesheet, giving liberty to the appellant to assail denial of sanction to prosecute respondent No. 2 in an appropriate proceeding, if so advised.

17. Section 197 Cr.PC deals with prosecution of judges and public servants. Section 197 reads as under:

> "197. Prosecution of Judges and public servants:
>
> (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction (save as otherwise provided in the Lokpal and Lokayuktas Act, 2013) –
>
> (a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;
>
> (b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:
>
> [Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of Article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted.]

[Explanation — For the removal of doubts it is hereby declared that no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 166A, section 166B, section 354, section 354A, section 354B, section 354C, section 354D, section 370, section 375, section 376, section 376A, section 376AB, section 376C, section 376D, section 376DA, section 376DB or section 509 of the Indian Penal Code (45 of 1860).]

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of Sub-Section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

[(3A) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.]

[(3B) Notwithstanding anything to the contrary contained in this Code or any other law, it is hereby declared that any sanction accorded by the State Government or any cognizance taken by a Court upon such sanction, during the period commencing on the 20th day of August, 1991 and ending with the date immediately preceding the date on which the Code of Criminal Procedure (Amendment) Act, 1991, receives the assent of the President, with respect

> to an offence alleged to have been committed during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in the State, shall be invalid and it shall be competent for the Central Government in such matter to accord sanction and for the Court to take cognizance thereon.]
>
> (4) The Central Government or the State Government, as the case may be, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."

18. As per sub section (1) of Section 197 where any person who is or was a judge or magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no court shall take cognizance of such offence except with the previous sanction of the Central Government or the State Government, as the case may be.

19. The ambit, scope and effect of Section 197 Cr.PC has received considerable attention of this court. It is not necessary to advert to and dilate on all such decisions. Suffice it to say that the object of such sanction for prosecution is to protect a public servant discharging official duties and functions from undue harassment by initiation of frivolous criminal proceedings.

20. In *State of Orissa Vs. Ganesh Chandra Jew*, (2004) 8 SCC 40, this court explained the underlying concept of protection under Section 197 and held as follows:

> **"7.** The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on

the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty. If the answer to this question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

21. This aspect was also examined by this court in *Shambhu Nath Misra* (supra). Posing the question as to whether a public servant who allegedly commits the offence of fabrication of records or misappropriation of public funds can be said to have acted in the discharge of his official duties. Observing that it is not the official duty to fabricate records or to misappropriate public funds, this court held as under:

> "**5.** The question is when the public servant is alleged to have committed the offence of fabrication of record or misappropriation of public fund etc. can he be said to have acted in discharge of his official duties. It is not the official duty of the public servant to fabricate the false records and misappropriate the public funds etc. in furtherance of or in the discharge of his official duties. The official capacity only enables him to fabricate the record or misappropriate the public fund etc. It does not mean that it is integrally connected or inseparably interlinked with the crime committed in the course of the same transaction, as was believed by the learned Judge. Under these circumstances, we are of the opinion that the view expressed by the High Court as well as by the trial court on the question of sanction is clearly illegal and cannot be sustained."

22. Even in *D. Devaraja* (supra) relied upon by learned counsel for respondent No. 2, this court referred to *Ganesh Chandra Jew* (supra) and held as follows:

> "**35.** In *State of Orissa* v. *Ganesh Chandra Jew* [*State of Orissa* v. *Ganesh Chandra Jew*, (2004) 8 SCC 40 : 2004 SCC (Cri) 2104] this Court interpreted the use of the expression "*official duty*" to imply that the act or omission must have been done by the public servant in course of his service and that it should have been in discharge of his duty. Section 197 of the Code of Criminal Procedure does not extend its protective cover to every act or omission done by a public servant while in service. The scope of operation of the section is restricted to only those acts or omissions which are done by a public servant in discharge of official duty."

23. Thus, this court has been consistent in holding that Section 197 Cr.PC does not extend its protective cover to every act or omission of a public servant while in service. It is restricted to only those acts or omissions which are done by public servants in the discharge of official duties.

24. After the hearing was over, learned counsel for respondent No.2 circulated a judgment of this Court in *A. Srinivasulu Vs. State Rep. by the Inspector of Police,* 2023 SCC OnLine SC 900 in support of the contention that a public servant cannot be prosecuted without obtaining sanction under Section 197 of Cr.PC. We have carefully gone through the aforesaid decision rendered by a twoJudge Bench of this Court in *A. Srinivasulu*(supra). That was a case where seven persons were chargesheeted by the Central Bureau of Investigation (CBI) for allegedly committing offences under Section 120B read with Sections 420, 468, 471 along with Sections 468 and 193 IPC read with Sections 13 (2) and 13(1)(d) of the Prevention of Corruption Act, 1988 (for short 'P.C. Act, 1988'). Four of the accused persons being A-1, A-2, A-3 and A-4 were officials of Bharat Heavy Electricals Limited, a public sector undertaking and thus were public servants both under the IPC as well as under the P.C. Act, 1988. Accused No.1 had retired from service before filing of the chargesheet. Insofar accused Nos. 3 and 4, the competent authority had refused to grant sanction but granted the same in respect of accused No.1. It was in that context that this court considered the requirement of sanction under Section 197 Cr.P.C *qua* accused No.1 and observed that accused No.1 could not be prosecuted for committing the offence of criminal conspiracy when sanction for prosecuting accused Nos.3 and 4 with whom criminal conspiracy was alleged, was declined. This court held as follows:

> "**52**. It must be remembered that in this particular case, the FIR actually implicated only four persons, namely PW-16, A-3, A-4 and A-5. A-1 was not implicated in the FIR. It was only after a confession statement was made by PW-16 in the year 1998 that A-1 was roped in. The allegations against A-1 were that he got into a criminal conspiracy with the others to commit these offences. But the Management of BHEL refused to grant sanction for prosecuting A-3 and A-4, twice, on the ground that the decisions taken were in the realm of commercial wisdom

of the Company. **If according to the Management of the Company, the very same act of the co-conspirators fell in the realm of commercial wisdom, it is inconceivable that the act of A-1, as part of the criminal conspiracy, fell outside the discharge of his public duty, so as to disentitle him for protection under Section 197(1) of the Code."**

24.1 Admittedly, facts of the present case are clearly distinguishable from the facts of *A. Srinivasulu* (supra) and, therefore, the said decision cannot be applied to the facts of the present case.

25. The question whether respondent No.2 was involved in fabricating official documents by misusing his official position as a public servant is a matter of trial. Certainly, a view can be taken that manufacturing of such documents or fabrication of records cannot be a part of the official duty of a public servant. If that be the position, the High Court was not justified in quashing the complaint as well as the chargesheet in its entirety, more so when there are two other accused persons besides respondent No.2. There is another aspect of the matter. Respondent No.2 had unsuccessfully challenged the complaint in an earlier proceeding under Section 482 Cr.PC. Though liberty was granted by the High Court to respondent No.2 to challenge any adverse report if filed subsequent to the lodging of the complaint, instead of confining the challenge to the chargesheet, respondent No.2 also assailed the complaint as well which he could not have done.

26. That being the position, we are of the unhesitant view that the High Court had erred in quashing the complaint as well as the chargesheet in its entirety. Consequently, we set aside the order of the High Court dated 25.11.2020 passed in Criminal Petition No. 4998/2020. We make it clear that observations made in this judgment are only for the purpose of deciding the present challenge and should not be construed as our opinion on merit. That apart, all contentions are kept open.

27. Appeal is accordingly allowed. No costs.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal allowed.

[2024] 1 S.C.R. 442 : 2024 INSC 43

Sanjay Kundu

v.

Registrar General, High Court of Himachal Pradesh & Ors

(Special Leave Petition (Criminal) No 550-551 2024)

12 January 2024

[Dr Dhananjaya Y Chandrachud*, CJI, J B Pardiwala and Manoj Misra, JJ.]

Issue for Consideration

The proceedings before the High Court were initiated on an email from complainant, addressed to the Chief Justice of the High Court. The High Court *suo motu* registered a Criminal Writ Petition pursuant to the above email. The High Court directed that the petitioner herein, who is holding the post of DGP, and the SP, Kangra should be moved to any other post to ensure that a fair investigation takes place. The petitioner was neither impleaded in the proceedings nor was he heard before the above order was passed. On that ground, the petitioner challenged it in a Special Leave Petition before the Supreme Court.

Headnotes

Administration of Justice – Miscarriage of procedural justice – The principal grievance urged was that the petitioner was directly affected by the order of the High Court, but he was neither made a party to the proceedings nor was he furnished a notice of the proceedings – The Supreme Court permitted to file application for recall of the High Court's order (26.12.2023) – The High Court dismissed the application – SLP filed by the petitioner for recall of the order of the High Court:

Held: Earlier, when the Supreme Court permitted the petitioner to move an application for recall of the High Court's order, the directions of the High Court for transfer of the petitioner were stayed – The Court also stayed the order issued pursuant to the High Court's directions posting the petitioner as Principal Secretary (Ayush), Government of Himanchal Pradesh – However, the High Court

* Author

dismissed the recall application and directed the State to consider forming a Special Investigation Team consisting of IG level officers to coordinate the investigation in all the FIRs and to advise the government on providing effective security to the complainant and his family – In the instant case, the correct course of action for the High Court would have been to recall its ex parte order and to commence the proceedings afresh so as to furnish both the petitioner and the complainant and other affected parties including the SP, Kangra, an opportunity to place their perspectives before it – Instead, the High Court, while deciding the recall application, heavily relied on the status report submitted by the SP, Shimla – The impugned order suffers from a patent error of jurisdiction – The order was passed without compliance with the principles of justice, especially, the principle of *audi alteram partem* – The order dated 26.12.2023 had serious consequences, and it was passed without hearing the petitioner who stood to be affected by it – A post-decisional hearing of the kind conducted by the High Court lacks fresh and dispassionate application of mind to the merits of the recall application, and is for that very reason, likely to cause disquiet – Thus, the direction of the High Court directing the shifting out of the petitioner from the post of DGP is set aside – However, the directions of the High Court to consider constituting an SIT and grant of protection to the complainant and his family are not disturbed – Instead of and in place of the direction of the High Court requiring the State Government to consider constituting an SIT, the State is directed to do so – The SIT shall consist of IG level officers who shall not report to the petitioner for the purpose of the investigation. [Paras 33, 34, 36, 37]

List of Keywords

Administration of Justice; Principles of justice; Miscarriage of procedural justice; Error of jurisdiction; *Audi alteram partem.*

Case Arising From

EXTRAORDINARY APPELLATE JURISDICTION: Special Leave Petition (Criminal) Nos. 550-551 of 2024.

From the Judgment and Order dated 09.01.2024 of the High Court of Himachal Pradesh at Shimla in CRMP No.79 of 2024 and CRWP No.14 of 2023.

Appearances for Parties

Mukul Rohtagi, Sr. Adv., Gagan Gupta, Arkaj Kumar, Padmesh Mishra, Ms. Ranjeeta Rohatgi, Ms. Tanya Aggarwal, Rushab Aggarwal, Aakarsh Mishra, Advs. for the Petitioner.

Rahul Sharma, Ms. Rashmi Malhotra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

1. Application for impleadment is allowed. Mr Nishant Sharma, complainant, shall be added as a respondent to these proceedings. Mr Rahul Sharma, counsel appears along with Ms Rashmi Malhotra, counsel on behalf of the newly added respondent.

2. These proceedings emanate from an order of a Division Bench of the High Court of Himachal Pradesh dated 9 January 2024.

Criminal Writ Petition and proceedings before the High Court

3. The proceedings before the High Court were initiated on an email from Mr Nishant Kumar Sharma, addressed to the Chief Justice of the High Court through the Registrar General. The complainant alleged in his email, that he was facing threats emanating from two persons - "X", a former IPS officer and "Y", a practicing advocate.

4. According to his email, the complainant is a resident of Palampur, in District Kangra of Himachal Pradesh. His family conducts a hotel in Palampur. A relative of "Y" had invested in the company of the complainant. He alleges that "Y" has been pressurizing him and his father through "X"to sell their shares in their company. "Y" was stated to have threatened the company's auditors, and obstructed its functioning. The complainant alleged that he had escaped an assault on 25 August, 2023 in Gurugram. The allegation was that he was receiving phone calls from the office of the petitioner, who is the Director General of Police[1], Himachal Pradesh at the behest of Y. Allegedly, the complainant received a WhatsApp message from the SHO, Palampur stating that the petitioner wished to speak to him

1 "DGP".

and that he must call back on a particular phone number. When the complainant established contact, he was connected to the petitioner, who insisted that the complainant come to Shimla to meet him. The email detailed criminal complaints filed by him in Gurugram after an alleged attack on him, and subsequent instances of intimidation to compel him to withdraw them. No FIR was registered in respect of this complaint and a later complaint filed by the complainant in relation to an incident that transpired in Mcleodganj.

5. On 9 November 2023, the High Court suo motu registered a Criminal Writ Petition pursuant to the above email. The State of Himachal Pradesh, Superintendent of Police, Kangra and Superintendent of Police, Shimla were arrayed as respondents. On 10 November 2023, the High Court issued notice, directed the two SPs (Kangra and Shimla) to file status reports and appointed an *amicus curiae.*

6. Status reports were filed on 16 November 2023 before the High Court. The Advocate General assured the High Court that an FIR would be registered on the complaint lodged by the complainant on 28 October, 2023. On 16 November 2023, FIR No 55/2023 was registered by the Mcleodganj Police Station for offences punishable under Sections 341, 504 and 506 read with Section 34 of the Indian Penal Code[2], after the registration of the criminal writ petition before the High Court.

7. The status report submitted by the SP Kangra indicated that the complainant had addressed an email to her on 06 November 2023 stating that he had received a phone call intimating him that an FIR (No. 98/2023) had been registered against him at Shimla. The status report submitted by SP, Shimla, stated that the said FIR 98/2023, under Sections 299, 469, 499 and 505 of the IPC was registered on a complaint made by the petitioner to the SHO, Police Station East, District Shimla.

8. The status report of the SP Shimla indicated that there were telephonic conversations between the petitioner and the complainant. Moreover, on 27 October 2023 which is the date on which the incident is alleged to have taken place at Mcleodganj, there were 15 missed calls from the office land line numbers of the petitioner to the complainant. Shortly

2 "IPC".

after the complainant refused to come to Shimla at the instance of the petitioner, he was accosted by two persons at Mcleodganj who called upon him to withdraw the complaint at Gurugram. The status report found *prima facie* evidence of extortion, use of criminal force to constrain the complainant to settle a civil dispute between him and "Y" and abuse of the office of the petitioner, as DGP of Himachal Pradesh.

9. A subsequent status report filed by the SP Shimla stated that an Additional Superintendent of Police was placed in charge of investigating FIR No 55 of 2023 filed by the complainant, in place of the DSP. Another status report indicated that FIR No 350/2023 was registered on 27 November 2023 for offences under Sections 323, 506 read with Section 34 of the IPC at Police Station, Sector 9, Gurugram on the complaint lodged on 25 August 2023 by the complainant.

10. On 21 December 2023, the Advocate General, appearing on behalf of the State of Himachal Pradesh, submitted that the investigation was being carried out uninfluenced by the office of the DGP. The High Court flagged its concern at that stage in the following terms :

> "(i) there is material detected in the investigation, as pointed out in the status report of the respondent No.3, which showed that the Director General of Police had also been in continuous contact with Y, the alleged business partner of the complainant (with whom the complainant has disputes);
>
> (ii) the Director General of Police had put the complainant under surveillance;
>
> (iii) that Director General of Police also made missed calls on 27.10.2023 (the date of incident on Mcleodganj alleged by the complainant) to the complainant's mobile phone and also spoke to him on that day; and
>
> (iv) the Director General of Police had himself got registered an *FIR No.98/2023 dt. 4.11.2023* under Sections 299, 469, 499 and 505 IPC against the complainant."

11. The High Court observed that in the backdrop of the status report, the FIR registered at the behest of the petitioner, the surveillance of the complainant and communication between the petitioner and the complainant, the failure of the Police to act on the complaint was not explained by the SP, Kangra. It noted that the FIR was registered belatedly on 16 November 2023 only after the Court had entertained the Writ Petition. The High Court then proceeded to observe that the material collected by the SP, Shimla indicated *prima facie* that the Director General of Police:

    (i) Had been in touch with "Y", the alleged business partner of the complainant;

    (ii) Had made 15 missed calls in an effort to contact the complainant on 27 October 2023;

    (iii) Had spoken to the complainant on 27 October 2023 and after he refused to come to Shimla, the complainant was threatened in an incident at Mcleodganj;

    (iv) Placed the complainant under surveillance; and

    (v) Lodged FIR No 98/2023 on 4 November 2023 against the complainant.

12. The High Court observed that there is a real possibility that the investigation would not be carried on fairly. It accordingly directed that the petitioner, who is holding the post of DGP, and the SP, Kangra should be moved to any other post to ensure that a fair investigation takes place.

13. The petitioner was neither impleaded in the proceedings nor was he heard before the above order was passed. On that ground, the petitioner challenged it in a Special Leave Petition before this Court.

14. The principal grievance urged before this Court was that the petitioner was directly affected by the order of the High Court dated 26 December 2023, but he was neither made a party to the proceedings nor was he furnished a notice of the proceedings.

15. This Court permitted the petitioner to move an application for recall of the High Court's order dated 26 December 2023. The recall application was directed to be disposed of within a period of two weeks and until then, the directions of the High Court for transfer of the petitioner were stayed. This Court also stayed the order issued

pursuant to the High Court's directions posting the petitioner as Principal Secretary (Ayush), Government of Himanchal Pradesh.

16. This Court recorded that both petitioner and complainant had no objection if the investigation were to be transferred to the Central Bureau of Investigation[3] so as to obviate any allegation of interference at the behest of the petitioner.

The present Special Leave Petition:

17. The present SLP stems from the rejection of the petitioner's recall application mentioned above. The High Court has dismissed it and has directed the State Government to consider within a week, forming a Special Investigation Team[4] consisting of IG level officers to coordinate the investigation in all the FIRs and to advise the government on providing effective security to the complainant and his family.

18. By the impugned order, the High Court also rejected an application filed by the SP Kangra, to implead her and to recall its earlier order dated 26 December 2023 by which she was also directed to be moved out of the post. Though the State Government had implemented the order of the High Court against the petitioner, it has not been implemented against SP, Kangra yet.

19. Before the High Court, it was admitted on behalf of the petitioner that he had requested the complainant to come to Shimla. The case of the petitioner was that he was contacted by a senior advocate (referred to as "Y") who had a dispute in regard to business transactions with the complainant. Allegedly, the dispute had taken an ugly turn when scandalous allegations were made by the complainant against "Y", following which, on 9 October 2023, an email was addressed by "Y" to the petitioner to take action against the complainant. The petitioner admitted that in pursuance of the email, on 27 October 2023, he asked his Private Secretary to contact the complainant through his official land line. The petitioner states that he was informed that the complainant could not be reached despite repeated attempts. Eventually, on 27 October 2023, the complainant made a call to the petitioner and when he was requested to come to Shimla, he declined to do so on the ground that he was travelling out of India.

3 "CBI".

4 "SIT".

20. On the other hand, it is the complainant's case that "Y" has been using his connections so as to intimidate the complainant into selling his shares in his company. Having failed in the takeover bid, "Y" has resorted to threatening the complainant and his family, through the petitioner.

21. The High Court observed that while it could not decide on the rival contentions, the petitioner, who is a public servant, had overstepped his authority by intervening in what was clearly a private civil dispute. The High Court noted that the status report submitted by the SP Shimla indicated the continuing contact of "Y" with the petitioner between September and November 2023 and that the SHO, Palampur had approached the complainant requiring him to call up the land line number of the petitioner. The High Court observed that the petitioner had admitted in his recall application to having placed the hotel run by the complainant under surveillance for alleged drug running activities in September 2023.

22. The status report filed by the SP Shimla on 4 January 2023 alleged that the petitioner was intimidating in his conduct towards the Investigating Officer handling the case initiated by FIR No. 98/2023 filed at the instance of the petitioner against the complainant. The status report stated that the conduct of the petitioner raised suspicion about his role in the alleged offences against the complainant. When the petitioner was confronted with this status report of the SP, Shimla, the petitioner imputed mala fide intentions to the said officer.

23. Before proceeding further, it is necessary to note the submissions which have been urged by Mr. Mukul Rohatgi, senior counsel appearing for the petitioner in relation to the imputations against the SP, Shimla. A blast is alleged to have taken place on 18 July 2023 in Shimla resulting in the loss of two lives and injury to several others. The blast was investigated under the supervision of the SP Shimla who, according to the petitioner, sought to cover it up as an accidental blast of an LPG cylinder. The petitioner is stated to have addressed a communication to the Additional Secretary in the Union Ministry of Home Affairs requesting an investigation by the National Bomb Data Centre of the National Security Guard. In subsequent communications to the Chief Secretary on 10 August 2023 and 1 September 2023, the petitioner alleged negligence in the post-blast investigation by the SP Shimla and requisitioned the

NSG for investigation, suspecting the use of an IED including RDX which was allegedly detected at the site of the blast.

24. In this backdrop, the petitioner has alleged that the SP Shimla was on inimical terms arising out of his communications to the State Government in regard to SP Shimla's handling of the blast.

25. The Advocate General has opposed the plea of the petitioner for recalling the order and opposed the allegations levelled by the petitioner against the SP Shimla.

26. This court had noted in its previous order dated 3 January 2024, that counsel for both the complainant as well as the petitioner are agreeable to the transfer of the investigation to the CBI. The High Court noted that the Advocate General has opposed the transfer of the investigation. Bearing in mind the principles laid down by this court - that the power to transfer an investigation to an outside agency is to be exercised with circumspection - the High Court rejected the plea for transfer of the investigation to the CBI.

Analysis

27. The case has travelled to this Court once again arising out of the rejection of the application filed by the petitioner for recall of the earlier order of the High Court.

28. The consequence of the impugned order is that:

    (i) The earlier order of the High Court directing that the petitioner should be shifted out of the post of DGP, Himachal Pradesh stands revived;

    (ii) The State Government has been directed to consider forming a Special Investigation Team consisting of IG level officers to coordinate the investigation of all the FIRs; and

    (iii) The grant of protection to the complainant has been directed to be evaluated by the Government.

29. We have heard Mr Mukul Rohatgi, senior counsel appearing on behalf of the petitioner and Mr Rahul Sharma, counsel appearing on behalf of the newly added respondent-complainant.

30. At the outset, we must express our reservations about the manner in which the High Court took up the matter *ex parte* and issued directions transferring the petitioner out of the post of DGP in the first

instance. The proceedings were triggered by an email addressed by the complainant to the Chief Justice imputing allegations of the misuse of his official position as DGP against the petitioner. The allegations which were levelled by the complainant are that the petitioner, in his official capacity, intervened in a civil dispute and attempted to used his office to intimidate the complainant. The allegations are apparently serious and evidently formed the basis of the order that the High Court originally passed on 26 December 2023.

31. Based on the status reports filed in the proceedings before it, the High Court came to a *prima facie* conclusion that the investigation into the FIRs could not be conducted fairly with the petitioner at the helm as the DGP. The High Court thus directed that the petitioner be moved to other posts to ensure a fair investigation. In doing so the High court has assumed disciplinary jurisdiction over the petitioner. This was clearly impermissible. As a serving police officer, the petitioner is subject to the disciplinary control which is wielded over him in terms of the rules governing service. The High Court has improperly assumed those powers to itself without considering the chain of administrative control in the hierarchy of the service. The State Government shifted the petitioner as Principal Secretary (Ayush) in compliance with the directions of the High Court. The consequence of shifting out of an IPS officer has serious consequences. The order was passed without an opportunity to the petitioner to contest the allegations against him or to place his response before the Court. There was thus a manifest miscarriage of procedural justice.

32. By this Court's order dated 3 January 2024, the petitioner was relegated to the remedy of a recall application before the High Court since his grievance was the denial of an opportunity to be heard before the High Court, before it passed the order dated 26 December 2023.

33. The correct course of action for the High Court would have been to recall its *ex parte* order dated 26 December 2023 and to commence the proceedings afresh so as to furnish both the petitioner and the complainant and other affected parties including the SP, Kangra, an opportunity to place their perspectives before it. Instead, the High Court, while deciding the recall application, heavily relied on

the status report submitted by the SP, Shimla on 4 January 2024. The High Court has, in the course of its order, also relied on the earlier status reports which were referred to in its order dated 26 December 2023.

34. The impugned order suffers from a patent error of jurisdiction. The order was passed without compliance with the principles of justice, especially, the principle of *audi alteram partem.* The order dated 26 December 2023 had serious consequences, and it was passed without hearing the petitioner who stood to be affected by it. A post-decisional hearing of the kind conducted by the High Court lacks fresh and dispassionate application of mind to the merits of the recall application, and is for that very reason, likely to cause disquiet.

35. At this stage, we are desisting from expressing any opinion on the allegations which are made against the petitioner or, for that matter, the allegations that the petitioner has made against SP, Shimla. The SP Shimla is not present before this Court. It is, therefore, necessary to clarify that the submissions which have been made by the petitioner earlier, as recorded above, have not been commented upon in the course of this judgment.

36. The High Court has directed the State Government to consider constituting an SIT so that an objective and fair investigation can take place. The High Court has directed that the SIT shall consist of IG level officers who will probe all aspects of the matter including the FIRs which gave rise to the proceedings before it. Likewise, the High Court has directed that the State Government should consider granting adequate protection to the complainant and his family. We are not disturbing either of these two findings by the High Court.

37. However, it would be inappropriate to maintain the order of the High Court directing that the petitioner be shifted out of the post of DGP in pursuance of the earlier order dated 26 December 2023 which stands affirmed by the impugned order. The above direction of the High Court directing the shifting out of the petitioner from the post of DGP is set aside. The petitioner shall exercise no control whatsoever in respect of the investigation which is to be carried out by the Special Investigation Team. Instead of and in place of

the direction of the High Court requiring the State Government to consider constituting an SIT, we issue a direction to the State Government to do so. The SIT shall consist of IG level officers who shall not report to the petitioner for the purpose of the investigation. The State Government is directed to provide adequate security to the complainant and to the members of his family and to continue to do so based on its evaluation of the threat perception. We clarify that since the investigation is to be carried out by the SIT, we are not expressing any opinion on the merits of the allegations which shall be duly investigated in accordance with law.

38. The Special Leave Petitions are accordingly disposed of.

39. Pending applications, if any, stand disposed of.

Headnotes prepared by: Ankit Gyan *Result of the case: SLPs disposed of.*

[2024] 1 S.C.R. 454 : 2024 INSC 33

Delhi Development Authority

v.

Hello Home Education Society

(Civil Appeal Nos. 3659-3660 of 2023)

11 January 2024

[Vikram Nath* and Rajesh Bindal, JJ.]

Issue for Consideration

Mere notings and in-principle approvals, if confers a vested right; in view of the change in policy decision and the amended 1981 Rules that the allotment of land would be made through auction and also included those cases where allotment was yet to be made, if the High Court was justified in granting relief to the respondent society; and that the litigant who is not diligent, if could invoke the extraordinary jurisdiction of the High Court u/Art. 226 of the Constitution of India.

Headnotes

Administrative law – Policy decision – Change in policy – Mere notings and in-principle approvals, reliance upon to claim any right – Matter pertaining to allotment of land to respondent-Educational Society to establish School in Jasola area, wherein the Society secured an Essentiality Certificate and Sponsorship Letter for that area – Complaint by a resident of Vasant Kunj alleging that the Society was trying to get an illegal allotment of land in Vasant Kunj – In-principle approval of the Lieutenant Governor for Vasant Kunj – Thereafter, Institutional Allotment Committee made recommendation for allotment of land to the Society in Vasant Kunj, but no allotment letter issued – Meanwhile change in policy by the Development Authority that allotment of land to Educational Institutions to be made through auction and any further allotment would be covered by the policy decision – Writ petition by the Society seeking direction to the department to implement the decision already taken for allotment of plot to the Society for establishment of school in Vasant Kunj, at par with the other Education Society – Direction by the Single Judge to issue allotment letter – Division Bench upheld the order – Correctness:

* Author

Held: In-principle approval by the Lieutenant Governor for allotment of land in Vasant Kunj having been granted in 2003, there was no justification for the Society to file a writ petition in the year 2014 on the basis thereof – Essentiality Certificate and Sponsorship Letter were with respect to setting up an educational institution in Jasola Area – Said certificates and the requirements were area specific – Appellant could not be compelled to make an allotment where the essential and mandatory conditions were not fulfilled – Policy decision of 2003 and the 1981 Rules amended in 2006 clearly mentioned that allotment of land would be made through auction and also included those cases where allotment was yet to be made – Before the date of change in policy, there was no allotment of land in favour of the respondent – There was no challenge either to the policy decision or to the 1981 Rules – Merely seeking a Writ on the strength of the in-principle approval given by the Lieutenant Governor would not be maintainable in view of the change situation arisen much earlier to the filing of the writ petition – Furthermore, mere notings and in-principle approvals do not confer a vested right – Also, any allotment made contrary to the existing policy and rules, would not form basis of benefit being extended to another society as under law negative parity is not recognised or approved – Single Judge and Division Bench of the High Court erred while granting relief to the Society, thus, the impugned orders set aside – Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981. [Paras 18.1-18.4, 18.7, 18.9, 18.10, 19]

Delay/Laches – Inordinate delay in approaching the Court – Effect:

Held: Litigant who is not diligent cannot invoke the extraordinary jurisdiction of the High Court u/Art. 226 – On facts, in-principle approval having been granted on 24.03.2003, there was no justification for the Society to wait for 11 years to file a writ petition in the year 2014 on the basis of the said in-principle approval of the Lieutenant Governor – Society ought to have exercised due diligence and should have claimed its rights within a reasonable time from the date of said in- principle approval if the same was not being implemented and the allotment letter was not being issued – There is no justifiable or satisfactory explanation for the said period of inordinate delay of 11 years – Constitution of India – Art. 226. [Para 18.1]

Administrative Law – Policy decisions – Internal notings, if would confer any right or not:

Held: Until and unless the decision taken on file is converted into a final order to be communicated and duly served on the concerned party, no right accrues to the said party – Mere notings and in-principle approvals do not confer a vested right. [Para 18.7]

Case Law Cited

Bachhittar Singh vs State of Punjab **[1962] Suppl. SCR 713 : AIR 1963 SC 395;** *Sethi Auto Service Station vs DDA* **[2008] 14 SCR 598 : (2009) 1 SCC 180;** *Mahadeo vs Sovan Devi* **Civil Appeal No. 5876 of 2022 (decided on 30.08.2022);** *Howrah Municipal Corporation & Ors. Vs. Ganges Rope Co. Ltd. & Ors.* **[2003] 6 Suppl. SCR 1212 : (2004) 1 SCC 663;** *State of Orissa & Anr. vs. Laxmi Narayan Das (Dead) thr. LRs & Ors.* **2023 INSC 619 paras 23-34;** *Municipal Committee, Barwala, District Hisar, Haryana through its Secretary/President v. Jai Narayan and Company and Another* **(2022) SCC Online SC 376 – referred to.**

List of Acts

Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981; Delhi Development Authority (Disposal of Developed Nazul Land) Amendment Rules, 2006.

List of Keywords

Essentiality Certificate; Sponsorship Letter; Land Allotment Committee; Mis-conception; In-principle approval; Allotment of public land; Educational sites; Tender; Public Auction; Writ of Mandamus; Natural principle of justice; Change in policy; Doctrine of legitimate expectation; Retrospective effect; Vested right; Internal notings; Change in law; Policy decision; Negative parity; Public interest; Transparency; Inordinate delay; Ministerial act; Extraordinary jurisdiction; Article 226; Due diligence.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.3659-3660 of 2023.

From the Judgment and Order dated 12.11.2021 in LPA No.224 of 2019 and dated 22.02.2022 in RP No.15 of 2022 of the High Court of Delhi at New Delhi.

Appearances for Parties

Ms. Madhavi Divan, ASG, Nitin Mishra, Shreeyash U Lalit, Ms. Mitali Gupta, Ms. Anandrita, Ms. Akshita Goyal, Aditya Goyal, Ms. Apurva Gaur, Shubham Saigal, Advs. for the Appellant.

Abhishek Manu Singhvi, Sr. Adv., Dr. Vinod Kumar Tewari, Dilip Singh, Ms. Raj Lakshmiverma, Pramod Tiwari, Vivek Tiwari, Ms. Priyanka Dubey, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

1. These appeals by the Delhi Development Authority assail the correctness of the judgment and order dated 12.11.2021 passed by the High Court of Delhi in L.P.A. No.224 of 2019, whereby the appeal filed by the appellant was dismissed and the judgment of the learned Single Judge dated 15.11.2018 in Writ Petition (Civil) No.4459 of 2014 allowing the writ petition was confirmed. Further challenge is to an order dated 22.02.2022 passed in Review Petition No. 15 of 2022, by which the review petition was effectively dismissed except for a clarification that in the main judgement, in place of 'Jasola' with respect to the resolution of Institutional Allotment Committee[1] and the approval of Lieutenant Governor, the word 'Vasant Kunj' be read.

Brief facts:

2. Hello Home Educational Society[2] desired to establish a new Junior High School (Class I to Class VIII) in Jasola area, New Delhi. For the said purpose, the Society was required to obtain an Essentiality Certificate, Sponsorship Letter and also the necessary recommendation from the appropriate authority. On 27.12.2000, an Essentiality Certificate was issued by the Deputy Director of Education. Thereafter, on 08.01.2002, Sponsorship Letter was issued by the Estate Branch, Lucknow Road, Delhi for setting up the Middle School in Jasola, District South Zone. It is after the fulfilment of these two conditions that the Land Allotment Committee recommends for allotment of the land.

1 IAC

2 The Society

3. According to paragraph 4 of the Sponsorship Letter, the same was valid for five years and the allotment of land would be made subject to Essentiality Certificate being valid and only for the area recommended. It further provided that in case land is not available in that area, the Society could approach the Land Allotment Committee for fresh sponsorship in areas where the land is available.

4. Having obtained necessary permissions, the Society applied on 09.09.2002 vide Form No.3124 for allotment of one acre of land in the following three areas namely: Jasola, Sarita Vihar and Vasant Kunj.

5. The IAC made recommendation for allotment of land to the Society in Vasant Kunj vide letter dated 23.01.2004. It appears that this letter recommending allotment of land in Vasant Kunj was issued under some mis-conception. The Sponsorship Letter and Essentiality Certificate had been issued for Jasola area only and there was no Essentiality Certificate or Sponsorship Letter for Vasant Kunj area. Vasant Kunj area was in Zone 20, whereas Jasola in Zone 25 at the relevant time and now it is in Zone 29.

6. A complaint was made by one Mr. Sukhbir Singh, who was a resident of Vasant Kunj on 21.02.2003, stating that the Society was trying to illegally get an allotment in Vasant Kunj area for establishing a school whereas the sponsorship letter was issued by the Directorate of Education for Jasola area. Despite the said objection, being on record and also the fact that the Society was not entitled to any allotment in any area other than for which the Essentiality Certificate and Sponsorship Letter had been issued, the file for allotment of land measuring 0.54 hectares in Pocket 6 & 7, Sector-B, Vasant Kunj was prepared and submitted for approval. The said file was also placed before the Lieutenant Governor who had in turn granted the in-principle approval for the same on 24.03.2003.

7. Despite the in-principle approval of the Lieutenant Governor, no allotment letter was issued to the Society. A note was made on the same day for verification of the complaint before proceeding any further. The Director of Education was required to give a clarification as to how the land was recommended for allotment in Vasant Kunj area, in place of Jasola. These communications are dated 31.03.2003 and 03.04.2003. The note regarding verification of the complaint was made on the same file in which in-principle approval was granted by the Lieutenant Governor and it was recorded that only after verification, the matter was to be proceeded further.

8. In the meantime, a resolution was passed on 15.12.2003 by the competent body of the appellant that allotment of land to Educational Institutions running on commercial lines should be made through auction including the cases where the allotment was yet to be made. As no allotment had been made in favour of the Society, any further allotment would be covered by the policy decision dated 15.12.2003. A second complaint dated 19.01.2004 was made by one Mr. A.B. Gour on similar lines as the complaint dated 21.02.2003. Several other complaints were received with respect to allotment of public land for educational sites to establish institutions on commercial basis. Considering the seriousness of complaints, a CBI enquiry was directed to be conducted.

9. In the meantime, the Society applied for Essentiality Certificate for establishing Junior High School (Class I to Class VIII) for Vasant Kunj area. The Competent Authority i.e. the Deputy Director of Education, vide letter dated 29.01.2004, issued the Essentiality Certificate for Vasant Kunj area. Once again it was limited for a period of five years subject to obtaining all other necessary permissions and fulfilment of all conditions. The Central Government, in consultation with the appellant amended the Delhi Development Authority (Disposal of Developed Nazul Land) Rules, 1981[3] vide Delhi Development Authority (Disposal of Developed Nazul Land) Amendment Rules, 2006, dated 19.04.2006 making it mandatory that allotment of land could be made either through Auction or by Tender.

10. The appellant, vide communication dated 19.06.2008, rejected the request for allotment in view of the changed policy and required the Society to participate in public auction of school sites, if it was so interested. The appellant again, vide letter dated 18.05.2012 in response to request letter of the Society dated 30.01.2011, informed that the request for allotment letter had been examined and duly rejected by the competent authority.

11. The Society, in the meantime, approached the High Court of Delhi by way of W.P.(Civil) No.4459 of 2014 on 19.07.2014 praying for a writ of Mandamus directing the respondent therein to implement the decision already taken for allotment of institutional plot to the

3 For short, "1981 Rules"

appellant in view of the approval granted for Vasant Kunj area. Parity was also claimed with one Jyotika Education Society decided by the Delhi High Court in L.P.A. No.1670-71 of 2006. Relief claimed in the writ petition is reproduced hereunder:

i) To issue a writ in the nature of Mandamus or any other appropriate order or direction directing the respondents to implement the decision already taken for allotment of an institutional plot to the petitioner for establishment of a middle school in Vasant Kunj pocket 6&7 Sector B and at par with Jyotika Education society and other matter decided by the Hon'ble Court decided in LPA No. 1670-71/2006.

ii) Quash the impugned letter dated 19/06/2003 and 18/05/2012 as the allotment to establish the middle school was approved by the Hon'ble on 24/03/2003 much prior to the notification of change in policy i.e. 19/04/2006 hence both the impugned letter against the natural principle of justice.

iii) Restore the letter of sponsorship issued by the Directorate of Education in 2003.

iv) Any other relief as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may, also be granted.

12. The appellant filed its counter affidavit and additional affidavit. After exchange of pleadings, the learned Single Judge, vide judgment dated 15.11.2018, quashed the communications dated 19.06.2008 and 18.05.2012 and further directed the appellant to issue allotment letter forthwith. The learned Single Judge allowed the writ petition on the following findings:

i) The complaint made was with respect to the allotment in Jasola and not Vasant Kunj;

ii) Vasant Kunj and Jasola fall in the same zone;

iii) Change in policy cannot be made retrospectively;

iv) Doctrine of legitimate expectation should have been invoked in favour of the Society;

v) The right to allotment had accrued to the Society in March, 2003 and the same could not be nullified.

13. The appellant was aggrieved by the judgment of the learned Single Judge as, according to it, the judgment was both factually and legally incorrect and as such unsustainable. It preferred an intra-Court appeal before the Division Bench which was registered as L.P.A. No.224 of 2019. The Division Bench, by the impugned order dated 12.11.2021, dismissed the appeal on the reasoning that change of policy from allotment to auction could not have any retrospective effect, and therefore, the rejection of allotment was illegal. The appellant filed a Review Petition before the Division Bench registered as R.P.No.15 of 2022, which was disposed of, vide order dated 22.02.2022 without interfering with the main order, except for a clarification. It is against these two orders that the present appeals have been filed.

14. This Court, while issuing notice on 13.07.2022, passed an interim order staying the operation and effect of the impugned orders. The fact thus remains that till date no allotment has been made in favour of the respondent Society.

15. We have heard Ms. Madhavi Divan, learned Additional Solicitor General for the appellant and Dr. Abhishek Manu Singhvi, learned senior counsel for the respondent.

ARGUMENTS BY APPELLANT

16. The arguments advanced by Ms. Divan may be briefly summarised as under:

    i) The respondent had no vested right conferred upon them as no allotment had taken place in their favour at any time. It was merely a noting in the office file and in-principle approval of the Lieutenant Governor. However, with a rider that the complaint already made by Mr. Sukhbir Singh on 21.02.2003 was to be verified and thereafter further process was to take place. Subsequently, the Society had been duly communicated that the request for allotment had been rejected which was communicated twice; firstly, on 19.06.2008 and later on 18.05.2012.

    ii) The internal notings are not decisions and do not confer any right, till such time, the decision taken on file is translated into allotment order and duly communicated to the allottee. Mere internal notings and approval cannot form a basis for claiming a right. Reliance was placed upon the following judgments:

a. **Bachhittar Singh vs State of Punjab**[4]

b. **Sethi Auto Service Station vs DDA**[5]

c. **Mahadeo vs Sovan Devi**[6]**.**

iii) Once there is a change in law, a policy decision taken by the competent authority, where allotment was replaced by 'public auction' or 'tender' and such policy decision also providing that this change would apply to even pending cases, no claim could be set up by the Society contrary to the said change in policy. The Society was duly communicated that as and when auction for educational sites is held, it was at liberty to participate in the same. Reliance was placed upon the following judgement for this preposition:

a. **Howrah Municipal Corporation & Ors. Vs. Ganges Rope Co. Ltd. & Ors**.[7].

iv) It was mandatory to possess an Essentiality Certificate and the Sponsorship Letter from the competent authority for specific zones where the institution was to be set up or established. In the present case, initially the Society had the Essentiality Certificate and the Sponsorship Letter for Jasola area. Later on it only had obtained an Essentiality Certificate for Vasant Kunj area. It admittedly till date has no Sponsorship Letter for Vasant Kunj area. As such also the Society was not eligible for any allotment of educational site or for that matter even eligible for applying for setting up an educational institution in Vasant Kunj area.

v) The claim of the Society that allotments had been made in favour of the Vikram Shilla Education Society, High Brow Education Society and M/s Jyotika Education Welfare Society would not be of any help for two reasons. Firstly, all these Societies possessed the Essentiality Certificate and the Sponsorship Letters for the specific areas where allotment was sought. Secondly, if any wrong had been committed in allotting educational sites to these three Societies, no negative parity could be claimed on its basis.

4 AIR 1963 SC 395

5 (2009) 1 SCC 180

6 Civil Appeal No. 5876 of 2022 (decided on 30.08.2022)

7 (2004) 1 SCC 663

vi) The plea of a legitimate expectation raised by the Society on the basis of the in-principle approval of the Lieutenant Governor also was unfounded in law. The said doctrine of legitimate expectation would not be affected in the present case, for the reason that once a policy decision had been taken in larger public interest and also to maintain transparency in dealing with land belonging to the State, to be settled by way of auction or tender, the liberty was also given to the Society to apply and participate.

vii) The request for allotment was made as far back as March, 2003. The policy had changed on 15.12.2003, the 1981 Rules had also been amended later on in April 2006, the rejection for allotment was made in 2008 and 2012, the Society for the first time challenged the rejection only in July 2014. It never challenged the change in the policy decision nor the amendment to the 1981 Rules. As such there was an inordinate delay of 10 years on the part of the Society in filing the writ petition. Today after 20 years, there can be no justification for making any such allotment.

viii) Learned Single Judge as also the Division Bench committed factual and legal error in allowing the writ petition and dismissing the appeal of the appellant respectively. It was thus prayed that the appeal be allowed and the impugned order be set aside and the writ petition filed by the Society be dismissed.

ARGUMENTS BY RESPONDENT

17. On the other hand, Dr. Abhishek Manu Singhvi, learned senior counsel, defended the impugned orders while making the following submissions:

i) The appellant had been continuously changing its stand in the pleadings filed before the High Court and before this Court. Most of the arguments advanced before this Court were not pleaded or raised before the High Court. This Court may, therefore, not consider such pleadings, documents and arguments which are not available before the High Court.

ii) In particular, it was pointed out that the fact regarding the CBI enquiry was never raised before and was being raised for the first time before this Court. The fact that there was no need for

a school in Vasant Kunj area is also being raised for the first time before this Court. The fact that Vasant Kunj and Jasola fall in different Zones has also been raised for the first time before this Court.

iii) The Lieutenant Governor being the highest executive authority and having approved in-principle allotment in favour of the Society in Vasant Kunj area on 24.03.2003, nothing further was required to be deliberated upon and it was just a ministerial act of issuing the allotment letter pursuant to the said approval which was required. The appellant for reasons best known to it delayed the issue of allotment letter and over a period of time have been raising all kinds of frivolous pleas to deprive the Society from the allotment and establishing an educational institution in Vasant Kunj area.

iv) The change in policy could not be given retrospective effect. The in-principle approval was granted on 24.03.2003, whereas the change in policy came in December, 2003. The 1981 Rules were much later amended in April 2006. The Society would be entitled to be dealt with the practice and procedure existing at the time when the request was made and in-principle approval was granted by the Lieutenant Governor.

v) Lastly it was submitted that in similar facts and circumstances, the appellant had allotted land to different Societies even after the change of policy and the amendment in the 1981 Rules without holding public auction or by tender process.

ANALYSIS

18. Having considered the submissions advanced, our analysis on the various issues is as under:

18.1 Taking up the last point first as raised by the appellant that there was inordinate delay in approaching the Court, we find much substance in the same. It is well settled that the litigant who is not diligent cannot invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India. The in-principle approval having been granted on 24.03.2003, there was no justification for the Society to wait for 11 years to file a writ petition in the year 2014 on the basis of the said in-principle approval of the Lieutenant Governor. The Society

ought to have exercised due diligence and should have claimed its rights within a reasonable time from the date of said in-principle approval if the same was not being implemented and the allotment letter was not being issued. There is no justifiable or satisfactory explanation for the said period of inordinate delay of 11 years. The writ petition ought to have been dismissed on this ground alone. Reference can be made to a recent judgment of this Court in **State of Orissa & Anr. vs. Laxmi Narayan Das (Dead) thr. LRs & Ors**.[8] Paragraphs 25, 30, 32, 33 and 34 are extracted hereunder:

> "25. In New Delhi Municipal Council v. Pan Singh and others, (2007) 9 SCC 278, this Court has opined that though there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, yet ordinarily a writ petition should be filed within a reasonable time. In the said case the respondents had filed the writ petition after seventeen years and the court, as stated earlier, took note of the delay and laches as relevant factors and set aside the order passed by the High Court which had exercised the discretionary jurisdiction.
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> xxx xxx
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> 30. Subsequently, a Constitution Bench of this Court in Senior Divisional Manager, Life Insurance Corporation of India Ltd. and others v. Shree Lal Meena, (2019) 4 SCC 479, considering the principle of delay and laches, opined as under:- "36. We may also find that the appellant remained silent for years together and that this Court, taking a particular view subsequently, in Sheel Kumar Jain v. New India Assurance Company Limited, (2011)12 SCC 197 would not entitle stale claims to be raised on this behalf, like that of the appellant. In fact the appellant slept over the matter for almost a little over two years even after the pronouncement of the judgment. 37. Thus, the endeavour of the appellant, to approach this Court seeking the relief, as prayed for, is clearly a misadventure, which is liable to be rejected, and the appeal is dismissed." 31.

8 2023 INSC 619 paras 23-34

In Bharat Coking Coal Ltd. and others v. Shyam Kishore Singh - (2020) 3 SCC 411, the issue regarding the delay and laches was Civil Appeal No.8072 of 2010 Page 27 of 51 considered by this Court while dismissing the petition filed belatedly, seeking change in the date of birth in the service record.

xxx xxx

32. The issue of delay and laches was considered by this Court in Union of India and others vs. N. Murugesan and others, (2022) 2 SCC 25. Therein it was observed that a neglect on the part of a party to do an act which law requires must stand in his way for getting the relief or remedy. The Court laid down two essential factors i.e. first, the length of the delay and second, the developments during the intervening period. Delay in availing the remedy would amount to waiver of such right. Relevant paras 20 to 22 of the above mentioned case are extracted below: "20. The principles governing delay, laches, and acquiescence are overlapping and interconnected on many occasions. However, they have their distinct characters and distinct elements. One can say that delay is the genus to which laches and acquiescence are species. Similarly, laches might be called a genus to a species by name acquiescence. However, there may be a case where acquiescence is involved, but not laches. These principles are common law principles, and perhaps one could identify that these principles find place in various statutes which restrict the period of limitation and create non-consideration of condonation in certain circumstances. They are bound to be applied by Civil Appeal No.8072 of 2010 Page 28 of 51 way of practice requiring prudence of the court than of a strict application of law. The underlying principle governing these concepts would be one of estoppel. The question of prejudice is also an important issue to be taken note of by the court. 21. The word "laches" is derived from the French language meaning "remissness and slackness". It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable

relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy. 22. Two essential factors to be seen are the length of the delay and the nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party approaching the court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy on a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the court. Thus, a man responsible for his conduct on equity is not expected to be allowed to avail a remedy." Civil Appeal No.8072 of 2010 Page 29 of 51

33. Finally, in paras 37 and 38, it was observed as under : "37. We have already dealt with the principles of law that may have a bearing on this case. … there was an unexplained and studied reluctance to raise the issue .... 38. ….Hence, on the principle governing delay, laches … Respondent No. 1 ought not to have been granted any relief by invoking Article 226 of the Constitution of India."

34. If the aforesaid principles of law are applied in the facts of the case in hand from the table of list of dates as available in para no. 12, it is evident that there is huge delay on the part of the respondents to avail of their appropriate remedy."

18.2 It may also be noticed that the original Essentiality Certificate and Sponsorship Letter were with respect to setting up an educational institution in Jasola Area. The said certificates and the requirements were area specific. On the basis of an Essentiality Certificate and Sponsorship Letter for Jasola Area, no allotment could have been proposed for Vasant Kunj area. Complaint had already been made prior to the in-principle approval and had substance. Apparently for the same reason, the note was made below the in-principle

approval that further process to take place after verification of the complaint. It may be noted here that the Essentiality Certificate, the Sponsorship Letter and the allotment letter are to be carried out by three different authorities. The last of the three stages i.e. allotment was to be carried out by appellant. However, only upon fulfilment of the conditions as provided under the relevant rules and the policy. The appellant could not be compelled to make an allotment where the essential and mandatory conditions were not fulfilled, as in the case at hand. The High Court fell in error in not correctly appreciating this aspect of the matter.

18.3 The fact that Jasola and Vasant Kunj fall in different areas or zones is admitted by the Society in as much as it had separately applied for Essentiality Certificate for Vasant Kunj, which was also granted in 2004. The appellant has specifically stated that Jasola area was in Zone 25 (now Zone 29) whereas Vasant Kunj area was in Zone 20. The High Court thus committed an error in treating them to be in the same Zone without any basis.

18.4 The policy decision taken on 15.12.2003 clearly mentioned that allotment of land would be made through auction and also included those cases where allotment was yet to be made. Subsequently the 1981 Rules were amended in April 2006, whereby also the provision for allotment was replaced by auction or by tender. There was no challenge either to the policy decision of December, 2003 or to the amendment of 2006 to the 1981 Rules. Merely seeking a Writ of Mandamus on the strength of the in-principle approval given by the Lieutenant Governor would not be maintainable in view of the change situation which had arisen much earlier to the filing of the writ petition.

18.5 The arguments advanced by Dr. Singhvi that the appellant had been changing its stand continuously is no help as the facts of the case which are on record and which are not disputed, need to be accepted, even if they are raised at a later stage. The respondents have not been able to establish or even prima facie establish that the facts as narrated by the appellant and as recorded above were incorrect.

18.6 The issue relating to the CBI enquiry being raised before this Court as also the other facts like Vasant Kunj area did not require a school, or that Vasant Kunj and Jasola fall in different zones being raised for the first time before this Court also do not have any bearing on the merits of the matter in view of the conduct of the respondent Society which approached the Court after 11 years.

18.7 The issue relating to internal notings as to whether it would confer any right or not has been adequately dealt with and settled by series of judgements of this Court. It is well settled that until and unless the decision taken on file is converted into a final order to be communicated and duly served on the concerned party, no right accrues to the said party. Mere notings and in-principle approvals do not confer a vested right. Relevant extracts from judgments of this Court in this regard are being reproduced hereunder:

a) **Bhachhittar Singh** (supra):

"9. The question, therefore, is whether he did in fact make such an order. Merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government two things are necessary. The order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and then it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up the State Government cannot, in our opinion, be regarded as bound by what was stated in the file…..

[Emphasis supplied]

10. ……Thus it is of the essence that the order has to be communicated to the person who would be affected by that order before the State and that person can be bound by that order. For, until the order is communicated to the person affected by it, it would be open to the Council of Ministers to consider the matter over and over again and, therefore, till its communication the order cannot be regarded as anything more than provisional in character."

[Emphasis supplied]

b) **Sethi Auto Service Station** (supra)

"14. It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is communicated to the person concerned."

[Emphasis supplied]

"22. From the afore-extracted notings of the Commissioner and the order of the Vice Chairman, it is manifest that although there were several notings which recommended consideration of the appellants' case for relocation but finally no official communication was addressed to or received by the appellants accepting their claim. After the recommendation of the Technical Committee, the entire matter was kept pending; in the meanwhile, a new policy was formulated and the matter was considered afresh later in the year 2004, when the proposal was rejected by the Vice Chairman, the final decision making authority in the hierarchy. It is, thus, plain that though the proposals had the recommendations of State Level Co-ordinator (oil industry) and the Technical Committee but these did not ultimately fructify into an order or decision of the DDA, conferring any legal rights upon the appellants. Mere favourable recommendations at some level of the decision making process, in our view, are of no consequence and shall not bind the DDA. We are, therefore, in complete agreement with the High Court that the notings in the file did not confer any right upon the appellants, as long as they remained as such. We do not find any infirmity in the approach adopted by the learned Single Judge and affirmed by the Division Bench, warranting interference."

[Emphasis supplied]

c) **Mahadeo** (supra),

> "14. It is well settled that inter-departmental communications are in the process of consideration for appropriate decision and cannot be relied upon as a basis to claim any right. This Court examined the said question in a judgment reported as 3Omkar Sinha v. Sahadat Khan3 . Reliance was placed on Bachhittar Singh v. State of Punjab4 to hold that merely writing something on the file does not amount to an order. Before something amounts to an order of the State Government, two things are necessary. First, the order has to be expressed in the name of the Governor as required by clause (1) of Article 166 and second, it has to be communicated. As already indicated, no formal order modifying the decision of the Revenue Secretary was ever made. Until such an order is drawn up, the State Government cannot, in our opinion, be regarded as bound by what was stated in the file.
>
> [Emphasis supplied]

18.8 Reference can also be made to another judgment of this Court in **Municipal Committee, Barwala, District Hisar, Haryana trough its Secretary/President v. Jai Narayan and Company and Another**[9], wherein this Court took a similar view.

18.9 Whether the change in policy was retrospective or not is not an issue here. The change in policy decision taken on 15.12.2003 clearly mentions that even pending allotment matters were to be dealt with according to said change i.e. of holding auctions. This decision of change in policy brought about on 15.12.2003 was never challenged as is apparent from the relief claimed in the petition. Therefore, the settled procedure to be followed on or after 15.12.2003 was only to provide land by way of auction of educational sites and not by way of any allotment. Before that date there was no allotment of land in favour of the respondent. Even otherwise it is the settled position of law that whenever the State intends to transfer any land resort should be by public auction or inviting tenders.

9 (2022) SCC Online SC 376

18.10 Another argument raised by Dr. Singhvi regarding allotment having been made in favour of other Societies is also of no help. In the present case, the Society did not have the necessary Sponsorship Letter for establishing the school in Vasant Kunj area, and therefore, it was not even eligible to apply for procuring a site in Vasant Kunj area under the original rules. Further it is well settled that if any allotment had been made contrary to the existing policy and rules, the same would not form a basis of benefit being extended to another society as under law negative parity is not recognised or approved rather it is disapproved.

19. For the reasons recorded above, we are convinced that the only outcome of the writ petition was dismissal. The Single Judge and Division Bench fell in serious error while granting relief to the respondent Society. Accordingly, the appeals are allowed, the impugned orders passed by the Division Bench and Single Judge are set aside. The writ petition is dismissed.

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

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeals allowed.

[2024] 1 S.C.R. 473 : 2024 INSC 44

The State of Assam and Others

v.

Binod Kumar and Others

(Civil Appeal No. 1933 of 2023)

18 January 2024

[Aniruddha Bose and Sanjay Kumar*, JJ.]

Issue for Consideration

Rule 63(iii) of the Assam Police Manual, which dates back to a point of time when the Police Act, 1861, was in force, can be said to be still valid and lawful in the framework of the Assam Police Act, 2007 and the 2007 Rules relating to preparation of ACRs/ APARs of IPS Officers in the rank of Superintendents of Police .

Headnotes

Service law – Assam Police Manual – r. 63(iii) – Assam Police Act, 2007 – s. 14(2) – Reporting Authority, entitled to initiate Annual Confidential Reports (ACRs)/Annual Performance Appraisal Reports (APARs) of Indian Police Service (IPS) Officers working as District Superintendents of Police (SPs) in the State of Assam – Assessment initiated by the Deputy Commissioner, as the 'Reporting Authority', if lawful – r. 63(iii), if violative of s. 14(2):

Held: 1970 Rules/2007 Rules define reporting, reviewing and accepting authorities to mean that they must all be from the same service or department, intervention by the Deputy Commissioner during the exercise of performance assessment of SPs of the districts in the State of Assam, by virtue of r. 63(iii), cannot be accepted, being in direct conflict therewith, and would tantamount to permitting the Deputy Commissioner to interfere with the internal organization of the police force, which would be contrary to the mandate of s.14(2) – It cannot be said that the Deputy Commissioner is the most suitable person to assess the performance of the SP, as he works under his control and direction – Clause 6 in r. 3 relating to appraisal by the 'Reporting Authority', Law and Order is only one of the twenty named domains within the purview of

* Author

the Deputy Commissioner, thus, the Deputy Commissioner would not even be competent to assess the overall performance of the SP – Furthermore, the Circular issued by the Government of India stipulated that the 'Reporting Authority' should be in a higher grade of pay than the officer reported upon – State Governments must ensure that a member of the service does not initiate the Confidential Report of another member of the service in the same grade of pay – Thus, r. 63(iii) does not fit in with the scheme obtaining under the 1970 Rules and the 2007 Rules – Conclusion by the High Court, that the r. 63(iii) which prescribes that such assessment should be initiated by the Deputy Commissioner concerned, as the 'Reporting Authority' is invalid on the ground that it is in direct conflict with s.14(2), is upheld – Circular No. 11059/4/89-AIS.III, dated 28.12.1990. [Paras 16, 18, 19, 23, 25-27]

Assam Police Act, 2007 – s. 14(1) and (2) – Harmonious construction of the provisions:

Held: On a plain reading, s. 14(1) and s. 14(2) appear to be in derogation of each other, inasmuch as s.14(1) vests the Deputy Commissioner with control over the SP but s. 14(2) makes it clear that such control would not extend to the Deputy Commissioner interfering with the internal organization or discipline within the police force in the district – These provisions must be harmoniously construed by restricting the power vesting in the Deputy Commissioner u/s. 14(1), by duly carving out what has been excepted u/s. 14(2) – Such harmonious construction necessary to give effect to both provisions, so that they operate without conflict. [Para 21]

Case Law Cited

Dharani Sugars and Chemicals Limited vs. Union of India and others **[2019] 6 SCR 307:(2019) 5 SCC 480**; *Kanai Lal Sur vs. Paramnidhi Sadhukhan* **[1958] SCR 360:AIR 1957 SC 907**; *S. Gopal Reddy vs. State of A.P.* **[1996] 3 Suppl. SCR 439**:**(1996) 4 SCC 596**; *Sultana Begum vs. Prem Chand Jain* **[1996] 9 Suppl. SCR 707**:**(1997) 1 SCC 373**; *State Bank of India and others vs. Kashinath Kher and others* **(1996) 8 SCC 762 – referred to.**

State of Haryana vs. P.C.Wadhwa, IPS, Inspector General of Police and another **[1987] 2 SCR 1030:(1987) 2 SCC 602 – relied on.**

Books and Periodicals Cited

Sir Rupert Cross. *'Statutory Interpretation* 3rd Edition, 1995 – referred to.

List of Acts

Assam Police Manual; Assam Police Act, 2007; All India Services (Confidential Rolls) Rules, 1970; All India Services (Performance Appraisal Report) Rules, 2007; Police Act, 1861.

List of Keywords

Reporting Authority; Annual Confidential Reports; Annual Performance Appraisal Reports; Indian Police Service; District Superintendents of Police; Deputy Commissioner; All India Service; Reviewing Authority; Accepting Authority; Deputy Inspector General of Police; Inconsistency; System of governance; Criminal and police administration; Hierarchical superiority; Separation of powers; Castigate; Parity; Policy making; Harmonious construction; Objectivity; Impartiality; Fair assessment; Propriety; Reasonableness; Law and Order; Internal organisation.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1933 of 2023.

From the Judgment and Order dated 05.12.2017 of the High Court of Gauhati in WPC No.4752 of 2015.

Appearances for Parties

Nalin Kohli, Sr. A.A.G., R Balasubramanian, Sr. Adv., Shuvodeep Roy, Ms. Nimisha Menon, Sarthak Sharma, Ayushman Arora, Advs. for the Appellants.

Aman Lekhi, L.Narasimha Reddy, Sr. Advs., Somanadri Goud Katam, Ujjwal Sinha, Vijay Pal, Ms. Namrata Trivedi, Sirajuddin, Aniket Seth, Ms. Snehil Sonam, Ritwiz Rishabh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sanjay Kumar, J

1. By judgment dated 05.12.2017, the Gauhati High Court allowed W.P(C). No.4752 of 2015 and held Rule 63(iii) of the Assam Police Manual invalid on the ground that it is in direct conflict with Section 14(2) of the Assam Police Act, 2007. This judgment is called in question by the State of Assam and its officials in the Home Department.

2. While ordering notice on 07.01.2019, this Court directed that no coercive steps should be taken against the appellants on the basis of the impugned judgment. On 21.03.2023, this Court issued notice to the learned Attorney General for India, being of the opinion that his presence was necessary for effective adjudication of this appeal.

3. The core controversy in this case is as to who should be the 'Reporting Authority' to initiate Annual Confidential Reports (ACRs)/ Annual Performance Appraisal Reports (APARs) of Indian Police Service (IPS) Officers working as District Superintendents of Police (SPs) in the State of Assam. More particularly, the issue is whether Rule 63(iii) of the Assam Police Manual (for brevity, 'the Manual'), which prescribes that such assessment should be initiated by the Deputy Commissioner concerned, as the 'Reporting Authority', is lawful. The specific ground successfully urged before the High Court by the respondents herein, viz., IPS Officers working as SPs in the State of Assam, is that this Rule is violative of Section 14(2) of the Assam Police Act, 2007, (for brevity, 'the Act of 2007').

4. It would be apposite at this stage to note the tone and tenor of the relevant statutory provisions. Rule 63(iii) of the Manual, in the context of initiation of the ACR/APAR of a SP of a district, reads as follows:

> '(iii) Superintendent of Police - the report should be initiated by Deputy Commissioner, reviewed by the Deputy Inspector General of Police i/c Range and sent to the Commissioner of Division. The Commissioner of Division will send the same with his opinion to the Inspector General of Police for acceptance.

> The Inspector General of Police shall refer the report to the Deputy Inspector General of Police, S.B., for recording his remarks regarding performance of the Superintendent of Police of the District in subjects pertaining to the S.B.'

Section 14 of the Act of 2007 reads thus:

> '14. Relationship of Superintendent of Police with District Magistrates -
>
> (1) The administration of the Police throughout the local jurisdiction of the Magistrate is vested in the Superintendent of Police under the general control and direction of the Deputy Commissioner as District Magistrate. The latter is responsible for keeping peace and maintenance of law and order in a district and may employ the police as he thinks best for the purpose.
>
> (2) The Deputy Commissioner as District (*sic*.) Magistrate has however, no authority to interfere in the internal organization and discipline of the Police force, but it is his duty to bring to the notice of the Superintendent of Police, all cases in which the conduct of and qualification of Police Officer affect the general administration of a district.'

5. As IPS Officers belong to an 'All India Service', it would be pertinent to note the provisions of the All India Services (Confidential Rolls) Rules, 1970 (for brevity, 'the 1970 Rules'), which were thereafter replaced by the All India Services (Performance Appraisal Report) Rules, 2007 (for brevity, 'the 2007 Rules'), in the context of the mode and method of preparation of ACRs/APARs of IPS Officers in the rank of SPs. Rules 2(e), 2(f) and 2(a) of the 1970 Rules defined 'Reporting Authority', 'Reviewing Authority' and 'Accepting Authority' respectively, apropos preparation of ACRs/APARs. These Rules read as under: -

> '2(e) 'reporting authority' means the authority who was, during the period for which the confidential report is written, immediately superior to the member of the service and such other authority as may be specifically empowered in this behalf by the Government;

> 2(f) 'reviewing authority' means authority or authorities supervising the performance of the reporting authority as may be specifically empowered in this behalf by the Government;
>
> 2(a) 'accepting authority' means such authority or authorities supervising the performance of the reviewing authority as may be specifically empowered in this behalf by the Government.'

Rule 2(e) above was thereafter amended, *vide* Notification No. 22012/4/87-AIS-III dated 08.12.1987, and from that date it read thus: -

> '2(e) 'reporting authority' means such authority or authorities supervising the performance of the member of the Service reported upon as may be specifically empowered in this behalf by the Government.'

6. The 1970 Rules continued to govern the field till the advent of the 2007 Rules. Rules 2(j), 2(k) and 2(a) of the 2007 Rules define 'Reporting Authority', 'Reviewing Authority' and 'Accepting Authority' respectively. These Rules read as under: -

> '2(j) 'reporting authority' means such authority or authorities supervising the performance of the member of the Service reported upon as may be specifically empowered in this behalf by the Government.
>
> 2(k) 'reviewing authority' means such authority or authorities supervising the performance of the reporting authority as may be specifically empowered in this behalf by the Government.
>
> 2(a) 'accepting authority' means the authority which supervises the performance of the reviewing authority as may be specifically empowered in this behalf by the Government.'

7. Hitherto, the Police Act, 1861, was applicable in the State of Assam and the Assam Police Manual originated from it. However, upon the Act of 2007 being brought into force, the Police Act, 1861, was repealed in so far as its application to the State of Assam was concerned. The question presently is whether Rule 63(iii) of the Manual, which dates back to a point of time when the Police Act, 1861, was in force,

can be said to be still valid and lawful in the framework of the Act of 2007 and the 2007 Rules relating to preparation of ACRs/APARs of IPS Officers in the rank of SPs.

8. As per Rule 63(iii) of the Manual, the ACR/APAR of a SP should be initiated by the Deputy Commissioner concerned and the same would be reviewed by the Deputy Inspector General of Police in charge of the Range and then sent to the Commissioner of the Division. The Commissioner would then send the same with his opinion to the Inspector General of Police for acceptance who, in turn, would refer the report to the Deputy Inspector General of Police (Special Branch) for his remarks on the SP's performance in subjects pertaining to that Branch.

9. It is the contention of the appellants that a government servant has no right, much less a legal right, to insist that his/her ACR/APAR ought to be initiated by a particular 'Reporting Authority'. It is argued that there is no inconsistency in Rule 63(iii) when compared with the scheme of the Act of 2007 and the 1970 Rules/2007 Rules. Reliance is placed upon the 2007 Rules and the 1987 amendment of Rule 2(e) of the 1970 Rules, to contend that it is not necessary that a 'Reporting Authority' should be the immediate superior of the member of the service whose ACR/APAR is being prepared and it is sufficient if the authority supervises his/her performance. It is contended that, as Section 14(1) of the Act of 2007 vests the Deputy Commissioner/District Magistrate (hereinafter referred to as, 'the Deputy Commissioner) with control over the functioning of the SP of that district, the Deputy Commissioner would be the most suitable person to report upon the performance of that SP. The appellants would point out that the SP works under the control and direction of the Deputy Commissioner, who has the overall responsibility of keeping peace and maintaining law and order in the district and who is empowered to employ the police force within the district as he/she thinks best for that purpose.

10. On the other hand, the respondents would point out that Section 14(2) of the Act of 2007 makes it clear that the Deputy Commissioner cannot interfere with the internal organization or discipline within the police force in the district and can only inform the SP if the conduct and/or qualification of a police officer affects the general administration of the district. They contend that the archaic Rule 63(iii) of the Manual is not compatible with the scheme obtaining under the Act of 2007

and the 2007 Rules and that the Gauhati High Court was well justified in holding to that effect and invalidating it.

11. At the outset, we may note that the system of governance obtaining under the Police Act, 1861, was altogether different from what it is now. At that time, the Deputy Commissioner exercised far wider powers, being the head of the criminal and police administration in the district. In such circumstances, it was proper that he/she should be vested with the power of assessing the performance of the SP of that district. Rule 63 of the Manual also makes this clear as it speaks of the recording officers being fully conversant with the quality of the work of the 'officers working under them' and goes on to say that the intention is that the work of an officer should be known to all his 'superiors' along the line. The hierarchical superiority of the Deputy Commissioner over the SP in that setup is, therefore, clear.

12. However, after the separation of powers in terms of the regime now prevailing, the Deputy Commissioner is no longer the head of criminal and police administration in the district. Presently, Section 14(1) of the Act of 2007 provides that the administration of the police within the district vests in the SP of that district and Section 14(2) of the Act of 2007 makes it clear that the Deputy Commissioner would not have the power to interfere with the internal organization of the police in the district or with discipline within the police force. Notably, Rule 25(c) of the Manual empowered the Deputy Commissioner to order an enquiry in case of misconduct by a police officer, in direct variance with Section 14(2) of the Act of 2007 which unequivocally divests the Deputy Commissioner of such disciplinary power. This distinction, which was brought about in the administration of the police, must necessarily be kept in mind while considering the validity of the procedure prescribed under Rule 63(iii) of the Manual. As pointed out by ***Sir Rupert Cross*** in his '***Statutory Interpretation (3rd Edition, 1995)***, a statutory provision has to be considered first and foremost as a norm of the current legal system whence it takes force, as it has a legal existence independent of the historical contingencies of its promulgation and should be interpreted in the light of its place within the system of legal norms currently in force. These observations were quoted with approval by this Court in ***Dharani Sugars and Chemicals Limited vs. Union of India and others***[1].

1 (2019) 5 SCC 480

13. That apart, one must also keep in mind that IPS Officers, being members of an All India Service, would be amenable to the 2007 Rules. Section 65 of the Act of 2007 makes it clear that police personnel in the State of Assam shall be governed by the existing Discipline and Appeal Rules and other Service Conduct Rules in force, as applicable to the Indian Police Service, State Police Service and others serving in the State Police Establishment. Therefore, merely because they are deployed/deputed to work in the State of Assam, IPS Officers cannot be denied the benefit of the 2007 Rules which would be applicable across the board to their ilk serving all over the country. It would, therefore, be incorrect to castigate such IPS Officers as insisting upon a 'Reporting Authority' of their choice. They are merely seeking parity with their kind working in other parts of the country. It is in this context that the extant 2007 Rules would have a direct impact on the issue under consideration.

14. The sheet anchor of the appellants' case is the that the definition of "Reporting Authority' in the 1970 Rules, post the 1987 amendment, and in the 2007 Rules does not require such authority to be 'immediately superior' to the officer being reported upon. Further, it is argued that, thereunder, the Government has been vested with the discretion of empowering any of the supervising authorities as the 'Reporting Authority' and the same would fall in the realm of policy-making. Trite to state, such discretion must be exercised judiciously and the resultant policy must necessarily fall within the four corners of the statutory scheme. The further argument that, as the designated reviewing and accepting authorities are senior officers in the police hierarchy, it would not make a difference if the 'Reporting Authority' is not from that department, needs mention only to be rejected. Each cog in the assessment process has its own role to play and this is clearly spelt out by Rule 63 of the Manual itself, which stipulates that inability or failure to report properly and objectively would be construed as a failure of the recording/reviewing officer and commented upon as such by the next level. On the same lines, Instruction 5 of the Instructions appended to Form I in the 1970 Rules, titled 'Confidential Report for Indian Police Service Officers', stipulates that if the 'Reviewing Authority' finds that the 'Reporting Authority' made the report without due care and attention, he shall record a remark to that effect and the same shall be entered in his Confidential Roll.

15. Significantly, though a 'Reporting Authority', as defined, is required to be someone who supervises the performance of the officer reported upon and not necessarily his/her immediate superior, there was no change in the definition of 'Reviewing Authority'. Be it noted that the 1970 Rules and the 2007 Rules both define 'Reviewing Authority' to mean the authority or authorities supervising the performance of the 'Reporting Authority', as may be specifically empowered in this behalf by the Government. It is in the backdrop of this definition of 'Reviewing Authority', that Rule 63(iii) of the Manual needs to be examined. Notably, a Deputy Commissioner, being the 'Reporting Authority' thereunder, would be altogether independent of the police department, being either an IAS Officer or a State Civil Service Officer. Needles to state, performance of a Deputy Commissioner would not be assessed by the Deputy Inspector General of Police, the designated 'Reviewing Authority' under Rule 63(iii), but by his/her own superior in the Administrative Service. There is, thus, a clear departure from the 1970 Rules/2007 Rules.

16. The definition of 'Reporting Authority' in the 1970 Rules, post 1987, and in the 2007 Rules, did away with the mandate of having the 'immediate superior' of the officer reported upon undertaking that exercise but it still requires the 'Reporting Authority' to be someone who supervises the performance of the said officer. Ordinarily, such supervision would be by an officer from within the same department, who is higher in rank than the officer reported upon. The Government was, no doubt, given discretion to empower any of the authorities who supervise the performance of the officer reported upon to assume such role. This discretion, however, cannot be construed to mean that someone from outside the department can be given such power, in the light of the 'Reviewing Authority' being defined as someone who supervises the performance of such 'Reporting Authority'. This clearly implies that both authorities must belong to the same service or department. In effect, Rule 63(iii) of the Manual does not fit in with the scheme obtaining under the 1970 Rules and the 2007 Rules.

17. The learned Attorney General would suggest that this definition be given a restricted meaning to the effect that the 'Reviewing Authority', i.e., the Deputy Inspector General of Police, would supervise the performance of the 'Reporting Authority', viz., the Deputy Commissioner, only to the extent of how he/she assessed the performance of the SP and no more. However, we are of

the opinion that such a construction does not flow from the plain language of the definition and would require something more to be read into it than was intended. Reference may be made to ***Kanai Lal Sur vs. Paramnidhi Sadhukhan***[2], wherein this Court observed that the words used in a statute must be interpreted in their plain grammatical meaning and it is only when they are capable of two constructions that the question of giving effect to the policy or object of the legislation can legitimately arise.

18. Further, reading down the meaning of the definition would have unintended consequences, fully divorced from the unambiguous words used therein, whereby 'Reviewing Authority' is defined to mean that such an authority must be one who supervises the performance of the 'Reporting Authority' in all respects and not in relation to one function alone.

19. Pertinently, there is no discernible conflict or contradiction between the definitions of 'Reporting Authority' and 'Reviewing Authority' in the 1970 Rules, post 1987, and in the 2007 Rules. The clear import of these definitions is that such authorities must be from within the same service or department. Invocation of the doctrine of harmonious construction *vis-à-vis* these definitions, therefore, does not arise. Given the clear intent of the 1970 Rules/2007 Rules that the reporting, reviewing and accepting authorities should be from within the same service or department, the question is whether breach of such requirement can be permitted in the State of Assam under Rule 63(iii) of the Manual.

20. In this milieu, Section 14(2) of the Act of 2007 assumes relevance. Section 14(1) of the Act of 2007 states that administration of the police within the local jurisdiction of the Deputy Commissioner is vested in the SP, under the general control and direction of such Deputy Commissioner, but Section 14(2) makes it clear that the Deputy Commissioner has no authority to interfere with the internal organization and discipline of the police force. This sub-section further states that it would be within the power and duty of the Deputy Commissioner to bring to the notice of the SP all such cases in which the conduct of and/or qualification of a police officer

2 AIR 1957 SC 907

affects the general administration within the district and no more. On a plain reading, Section 14(1) and Section 14(2) of the Act of 2007 appear to be in derogation of each other, inasmuch as Section 14(1) vests the Deputy Commissioner with control over the SP but Section 14(2) makes it clear that such control would not extend to the Deputy Commissioner interfering with the internal organization or discipline within the police force in the district. These provisions must be harmoniously construed by restricting the power vesting in the Deputy Commissioner under Section 14(1), by duly carving out what has been excepted under Section 14(2). Such harmonious construction would be necessary to give effect to both provisions, so that they operate without conflict and a head-on collision (See ***S. Gopal Reddy vs. State of A.P***.[3] and ***Sultana Begum vs. Prem Chand Jain***[4]).

21. We may note that even as per the Manual, a SP is not made subservient to a Deputy Commissioner. Rule 25 of the Manual demonstrates this. It provides that though the SP is required to obey the instructions of the Deputy Commissioner in the first instance, the SP can thereafter request the Deputy Commissioner to refer any difference of opinion between them on any question relating to police administration to the Commissioner, who would decide such reference. Moreover, the SP is at liberty to submit his case to the Inspector General of Police if he is dissatisfied with the decision of the Commissioner. It is, thus, clear that a SP is required to work under the 'general control and direction' of a Deputy Commissioner and obey his/her instructions but that does not place the SP under the hierarchical supremacy of that Deputy Commissioner.

22. Further, when liberty has been given to the SP to disagree with the Deputy Commissioner on any point relating to police administration and seek resolution of such difference of opinion through the Commissioner and, thereafter, the Inspector General of Police, it would be a parody to subject the performance assessment of such a SP to the same Deputy Commissioner with whom he/she had disagreed. Such an ACR/APAR cannot be taken to be impartial and

3 (1996) 4 SCC 596

4 (1997) 1 SCC 373

objective, once it is preceded by a difference of opinion between the SP and the Deputy Commissioner, leading to a reference being made to higher authorities. Such a situation must necessarily be avoided to maintain the sanctity of the assessment process. This constitutes one more reason why the Deputy Commissioner should not be the 'Reporting Authority' of the SP of that district.

23. Significantly, Circular No. 11059/4/89-AIS.III, dated 28.12.1990, issued by the Government of India in exercise of power under Rules 3 and 10A of the 1970 Rules, stipulated that the 'Reporting Authority' should be in a higher grade of pay than the officer reported upon. The Government noted that there were instances where the ACRs of the members of All India Services were initiated by officers belonging to the same batch or drawing the same pay scale as the officer reported upon and instructed that the State Governments must ensure that a member of the service does not initiate the Confidential Report of another member of the service in the same grade of pay. It is, therefore, clear that the 'Reporting Authority' must necessarily be in a higher grade of pay than the officer who is being reported upon. It may be noticed that Rule 11 of the 2007 Rules empowers the Central Government to issue instructions with regard to the writing of the Performance Appraisal Report. However, no new instruction or circular has been issued in exercise of power thereunder, contrary to the earlier Circular dated 28.12.1990. However, instances have been cited by the respondents where ACRs/APARs of the SPs in the State of Assam were initiated by Deputy Commissioners who were not in a higher grade of pay.

24. In this regard, we may also note that, in ***State Bank of India and others vs. Kashinath Kher and others***[5], this Court held that officers reporting upon performance must show objectivity, impartiality and fair assessment, without any prejudices whatsoever, and the highest sense of responsibility so as to inculcate devotion to duty, honesty and integrity. It was further observed that as officers may get demoralized by negative ACRs,which would be deleterious to the efficacy and efficiency of public service, such ACRs should be written by a superior officer of high rank. Earlier, in ***State of Haryana***

5 (1996) 8 SCC 762

vs. P.C.Wadhwa, IPS, Inspector General of Police and another[6], this Court considered whether the State Government could empower any authority to be the 'Reporting Authority' of the Inspector General of Police under Rule 2(e) of the 1970 Rules. It was observed that, from the point of view of propriety and reasonableness and having regard to the intention behind the Rule, which is manifest, such an authority must be one superior in rank to the member of the service concerned. No doubt, these observations were made in the context of the unamended Rule 2(e) of the 1970 Rules, but the principle culled out is sound and still holds good.

25. The appellants would argue that the Deputy Commissioner is the most suitable person to assess the performance of the SP, as he works under his control and direction, but we are not impressed. Form I in Appendix II to the 2007 Rules pertains to performance appraisal of all IPS Officers upto the level of Inspector General of Police, which would include SPs. Clause 6 in Rule 3 thereof, relating to appraisal by the 'Reporting Authority', provides various domain assignments wherefrom the 'Reporting Authority' is required to select any four. 'Law and Order' is only one of the twenty named domains, which would come within the purview of the Deputy Commissioner and the remaining nineteen would not be within his/her purview and supervision. Seized of only one of the twenty domains, the Deputy Commissioner would not even be competent to assess the overall performance of the SP.

26. On the above analysis and given the fact that the 1970 Rules/2007 Rules define reporting, reviewing and accepting authorities to mean that they must all be from the same service or department, intervention by the Deputy Commissioner during the exercise of performance assessment of SPs of the districts in the State of Assam, by virtue of Rule 63(iii) of the Manual, cannot be countenanced, being in direct conflict therewith, and would tantamount to permitting the Deputy Commissioner to interfere with the internal organization of the police force, which would be contrary to the mandate of Section 14(2) of the Act of 2007.

6 (1987) 2 SCC 602

27. We, therefore, find no grounds to disagree with the conclusion arrived at by the Gauhati High Court, holding to that effect.

The appeal is, therefore, devoid of merit and is accordingly dismissed.

Applications for permission to file additional documents are allowed. Other pending applications, if any, shall stand closed.

Before parting with the case, we place on record our appreciation and gratitude to Mr. R. Venkataramani, learned Attorney General, for his erudite and able assistance.

Parties shall bear their own costs.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeal dismissed.

[2024] 1 S.C.R. 488 : 2024 INSC 27

M/s. K.P. Mozika

v.

Oil and Natural Gas Corporation Ltd. and Ors.

(Civil Appeal No.3548 of 2017)

09 January 2024

[Abhay S. Oka* and Rajesh Bindal, JJ.]

Issue for Consideration

In a group of appeals, the assessee have, under a contract, agreed to provide different categories of motor vehicles, such as trucks, trailers, tankers, buses, scrapping winch chassis, and cranes, to the Oil and Natural Gas Corporation Limited (ONGC). In the other cases where Indian Oil Corporation Limited (IOCL) has entered into agreements with transporters to provide tank trucks to deliver its petroleum products. Whether, by hiring the motor vehicles/ cranes, there is a transfer of the right to use any goods. If there is a transfer of the right to use the goods, it will amount to a sale in terms of Clause 29A(d) of Art. 366 of the Constitution of India. Whether the transactions will amount to service, thereby attracting liability to pay service tax.

Headnotes

Constitution of India – sub-clause (d) of Clause 29A of Art. 366 – Assam General Sales Tax Act, 1993 – Assam Value Added Tax Act, 2003 – Finance Act (brought into force with effect from 16.05.2008) – s. 65(105)(zzzzj) – The entire controversy revolves around the question whether the transactions reflected from the agreements subject matter of these appeals amount to a sale within the meaning of sub-clause (d) of Clause 29A of Article 366 of the Constitution of India and, consequently, whether it is a "sale" within the meaning of clause (iv) of sub-section (43) of Section 2 of the VAT Act:

Held: On a conjoint reading of the terms of the contract, it is apparent that the contract is for providing the service of cranes to ONGC – The reason is that the transferee (ONGC) is not required to face legal consequences for using the cranes supplied by the contractor – Therefore, the tests laid down by Dr AR Laxmanan, J. in clauses (c) and (d) of paragraph 97 in the case of Bharat Sanchar

* Author

Nigam Limited & Anr. v. Union of India & Ors. [2006] 2 SCR 823 are not fulfilled – Moreover, on a conjoint reading of the clauses, it appears that the use of the cranes provided by the contractor to ONGC will be by way of only a permissive use – Though the cranes are used for carrying out the work as suggested by ONGC, the entire control over the cranes is retained by the contractor, inasmuch as it is the contractor who provides crew members for operating the cranes, it is the contractor who has to pay for fuel, oil, etc. and for maintenance of any loss or damage to the equipment of the contractor, staff of the contractor, any third party and staff and property of ONGC – Therefore, as regards the contract to provide cranes, the finding of the High Court that there was a transfer of the right to use cranes was not correct – Similarly in other cases, it is apparent that there is no intention to transfer the use of any particular tank truck in favour of IOCL – The contract is to provide tank trucks for the transportation of goods – Once the tank trucks provided by the contractor are loaded with goods, the entire responsibility of their safe transit, including avoiding contamination, delivery, and unloading at the destination, is of the contractor – The test (c) is not satisfied – Therefore, it is impossible to conclude that there is a transfer of the right to use tank trucks in favour of IOCL – In the given appeals, all the five tests laid down by Dr AR Laxmanan, J. are not fulfilled – When the substantial control remains with the contractor and is not handed over to the user, there is no transfer of the right to use the vehicles, cranes, tankers, etc – Whenever there is no such control on the goods vested in the person to whom the supply is made, the transaction will be of rendering service within the meaning of Section 65(105)(zzzzj) of the Finance Act after the said provision came into force – All the appeals preferred by assessee are allowed. [Paras 35, 40 and 42]

Constitution of India – sub-clause (d) of Clause 29A of Art. 366 – What are the tests applied to determine whether the transaction involved the transfer of the right to use any goods under sub-clause (d) of Clause 29A of Article 366 of the Constitution of India.

Held: What is relevant in the case of Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors. [2006] 2 SCR 823 is the concurring view taken by Dr. AR Laxmanan, J. and the tests laid down in paragraph 97 of the decision. [Para 31]

Case Law Cited

Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors. **[2006] 2 SCR 823: (2006) 3 SCC 1;** *Great Eastern Shipping Company Limited v. State of Karnataka & Ors* **[2019] 17 SCR 856: (2020) 3 SCC 354;** *Commissioner of Service Tax, Ahmedabad v. Adani Gas Limited* **2020 SCCOnline SC 682;** *Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited* **2022 SCC Online SC 976** – **relied on.**

Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash **[1955] SCR 243: AIR 1954 SC 459,** *The State of Madras v. Gannon Dunkerley & Co.* **[1959] SCR 379: AIR 1958 SC 560;** *M/s. K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III* **[1965] SCR 112: AIR 1965 SC 1082***; V. Meiyappan v. Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr.* **(1967) 20 STC 115 (Madras)***; The State of A.P. & Anr. v. Rashtriya Ispat Nigam Limited* **(2002) 3 SCC 314***; Ahuja Goods Agency & Anr. v. State of Uttar Pradesh & Ors.***1997 SCC online All 1381;** *Imagic Creative (P) Ltd. v. Commissioner of Commercial Taxes & Ors.* **[2008] 1 SCR 457: (2008) 2 SCC 614***; 20th Century Finance Corporation Ltd. & Anr. v. State of Maharashtra* **[2000] 1 Suppl. SCR 120: (2000) 6 SCC 12***; Aggarwal Brothers v. State of Haryana & Anr* **(1999) 9 SCC 182 – referred to.**

List of Acts

Constitution of India – sub-clause (d) of Clause 29A of Art. 366; Assam General Sales Tax Act, 1993; Assam Value Added Tax Act, 2003; Finance Act (brought into force with effect from 16.05.2008) – s. 65(105)(zzzzj).

List of Keywords

Transfer of the right to use any goods for any purpose; Sale; Service; Sales tax; Service tax; Taxable service; Tax on sale or purchase of goods; Hiring of the motor vehicles; Agreements for hiring cranes; Agreements for hiring trucks; Agreements for hiring of buses; Agreements for transportation of petroleum products by vehicles; Agreements for hiring trailers; Agreements for hiring water tankers; Agreements for hiring of scrapping winch chassis.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.3548 of 2017.

From the Judgment and Order dated 25.11.2009 of the High Court of Gauhati in WA No.140 of 2007.

With

Civil Appeal Nos.4658, 4657, 383 of 2013, 3580 of 2017, 8714, 8705, 8710, 9291, 8715 Of 2012, 3579, 3578 of 2017, 4659, 4661, 4660 of 2013, 3573, 3575, 3574, 3577, 3576 of 2017, 4662 of 2013, 3549, 3557 of 2017, 7954, 8693 of 2012, 3554, 3556, 3553, 3555, 3565, 3551, 3552, 3558, 3559, 3566-3569, 3572, 3561, 3562, 3564, 3563, 3570, 3571, 3560 And 3550 of 2017

Appearances for Parties

N. Venkatraman, A.S.G., Nalin Kohli, Sr. A.A.G., S Ganesh, Arijit Prasad, Sr. Advs., Hrishikesh Baruah, Kumar Kshitij, Ms. Apoorva Jain, Uday Gupta, Ms. Shivani M. Lal, Ms. Sanam Singh, Hiren Dasan, M.K.Tripathi, Harish Dasan, Rajiv Ranjan, Ms. Yogamaya M.G., Rajeev Kumar Gupta, R. C. Kaushik, Vijaynand Tripathi, Vivasvan Gautam, Raj Bahadur Yadav, Mohan Pandey, Anil Shrivastav, Ananga Bhattacharyya, Manish Goswami, Rameshwar Prasad Goyal, Sumeet Lall, Jagjit Singh Chhabra, Mukesh Kumar Maroria, Mohd. Akhil, Ms. Ruchi Kohli, Ms. Nisha Bagchi, Shuvodeep Roy, Aastik Dhingra, Ms. Nimisha Menon, Ankit Roy, Sarthak Sharma, Raj Bahadur Yadav, Mrs. Nisha Bagchi, Shashank Bajpai, Mrs. Ruchi Kohli, Prashant Singh II, Sabarish Subramanium, B. Krishna Prasad, Ms. Ruchi Kohli, M/s. Corporate Law Group, Ms. Sangeeta Bharti, Ms. Sangeeta Bharati, Ashish Kumar, Ms. Prerna Mehta, Saurav Agrawal, Ravindra Raizada, Ms. Anmol Dhindsa, Kamlendra Mishra, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. This group of appeals concerns the liability to pay tax under the Assam General Sales Tax Act, 1993 (for short, 'the Sales Tax Act') and the Assam Value Added Tax Act, 2003 (for short, 'the VAT Act'),

respectively. In some cases, in this group of appeals, the assessees have, under a contract, agreed to provide different categories of motor vehicles, such as trucks, trailers, tankers, buses, scrapping winch chassis, and cranes, to the Oil and Natural Gas Corporation Limited (for short, 'ONGC'). There are other cases where Indian Oil Corporation Limited (for short, 'IOCL') has entered into agreements with transporters to provide tank trucks to deliver its petroleum products.

2. These cases have been clubbed together as similar questions of law and fact arise. Broadly, the question is whether, by hiring these motor vehicles/cranes, there is a transfer of the right to use any goods. If there is a transfer of the right to use the goods, it will amount to a sale in terms of Clause 29A(d) of Article 366 of the Constitution of India. In short, if the transactions do not fall in the definition of 'Sale' in Clause 29A(d), the same may not attract tax under the Sales Tax Act or the VAT Act. As a result, there will be other questions about whether the transactions will amount to service, thereby attracting liability to pay service tax.

3. We are referring to the facts in Civil Appeal No. 3548 of 2017 and Civil Appeal No. 383 of 2013 for convenience. The judgment dated 25th November 2009 subject matter of challenge in Civil Appeal no.3548 of 2017 is the main judgment. Most of the other impugned judgments directly or indirectly rely upon the said judgments. There are different impugned judgments and orders passed on 24th July 2012, 25th November 2009, 9th December 2009, 29th June 2010 and 25th August 2010. Civil Appeal no.3548 of 2017 arises from the impugned judgment dated 25th November 2009 passed by a Division Bench of the Gauhati High Court in a writ appeal. In this case, the agreement is of 13th April 2006, by which the appellant agreed to provide services of truck-mounted hydraulic cranes with crew, etc., to ONGC for carrying out its various operations. The appellant had to approach the High Court on the threat given by ONGC to deduct tax at source under the VAT Act in respect of the services provided by the appellant. Similar petitions were filed before the learned Single Judge of the Gauhati High Court. The learned Single Judge dismissed the petitions by holding that the contract was for the transfer of the right to use the goods and, therefore, there is a liability under the VAT Act and the Sales Tax Act. The learned Single Judge also passed orders in similar writ petitions disposing of the same in terms of the

order dated 19th December 2006. Therefore, the appellants filed writ appeals before the Division Bench. By the impugned judgment dated 25th November 2009, the Division Bench dismissed the writ appeals by holding that under the agreements in question, there was a transfer of the right to use the goods covered by the contract.

SUBMISSIONS OF THE LEARNED COUNSEL APPEARING FOR THE APPELLANTS IN CIVIL APPEAL NO.3548 OF 2017 AND OTHER CONNECTED CASES

4. In Civil Appeal no.3548 of 2017 and other connected matters, i.e. Civil Appeal no.7954 of 2012, Civil Appeal no.8715 of 2012, Civil Appeal no.9291 of 2012, Civil Appeal no.3549 of 2017, Civil Appeal no.3550 of 2017, Civil Appeal no.3551 of 2017, Civil Appeal no.3552 of 2017, Civil Appeal no.3553 of 2017, Civil Appeal no.3555 of 2017, Civil Appeal no.3558 of 2017, Civil Appeal no.3559 of 2017, Civil Appeal no.3564 of 2017, Civil Appeal no.3565 of 2017, Civil Appeal nos.3566-3569 of 2017, Civil Appeal no.3570 of 2017 and Civil Appeal no.3571 of 2017, the learned counsel appearing for the appellants pointed out that the taxes on sale of goods and advertisements were covered by Entry 48 in List-II of the Seventh Schedule to the Government of India Act, 1935. Under the Seventh Schedule to the Constitution of India, Entry 92A of List-I confers power on the Government of India to impose taxes on the sale of goods. Similar legislative powers were vested in the State under Entry 54 of List-II of levy of taxes on the sale or purchase of goods other than newspapers, subject to the provisions of Entry 92-A of List-I. On the interpretation of the sale of goods covered by Entry 54 of List-II, the learned counsel relied upon several decisions of this Court in the cases of ***Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash***[1], ***The State of Madras v. Gannon Dunkerley & Co.***[2], and ***M/s. K.L. Johar & Co. v. The Deputy Commercial Tax Officer, Coimbatore III***[3]. The learned counsel also pointed out the provisions of Clause 29A, added by way of the 46th Amendment Act 1982 to Article 366 of the Constitution of India. He pointed out that in the present group of appeals, we are concerned with sub-clause (d) of

1 AIR 1954 SC 459

2 AIR 1958 SC 560

3 AIR 1965 SC 1082

Clause 29A of Article 366 of the Constitution of India, which provides that the tax on the sale and purchase of goods includes a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. He pointed out that by this amendment to the Constitution of India, by way of legal fiction, six cases of transactions were treated as deemed sale of goods. Therefore, 'deemed sale' must be read in every provision wherever the phrase 'tax on sale and purchase of goods' appears. He pointed out the decisions that cover the contingencies covered by sub-clauses (a) to (f) of Clause 29A of Article 366 of the Constitution of India. As far as sub-clause (d) is concerned, he relied upon the decision of the High Court of Madras in the case of ***A. V. Meiyappan v. Commissioner of Commercial Taxes, Board of Revenue, Madras & Anr.***[4]***.***

5. Coming to the Sales Tax Act, the learned counsel pointed out that the same was repealed by virtue of Section 107 of the VAT Act. He submitted that the VAT Act is in conformity with the 46th Amendment to the Constitution of India. He also pointed out the view taken by the High Court of Tripura in the judgments and orders dated 3rd November 2014 and 29th February 2016, wherein the said High Court, after analysing the similar contract, came to the conclusion that the said transaction did not involve any transfer of right to use.

6. He pointed out that the question will be whether the transactions subject matter of these appeals constitute deemed sales within the meaning of Section 2(43)(iv) of the VAT Act with effect from 1st May 2005. He submitted that if the said provisions of the VAT Act are not applicable, the transactions will be subject to service tax under Section 65(105)(zzzzj) of the Finance Act, 1994 (for short, 'the Finance Act'). On facts, he pointed out that the agreement subject matter of Civil Appeal nos.3566-3569 of 2017 specifically provided that the transactions in question would not be by way of lease or transfer of right to use the vehicle/equipment.

7. He mainly relied upon the concurring view of the Hon'ble Dr.Justice AR Lakshmanan in the case of ***Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors.***[5] He relied upon what is held in paragraph

4 (1967) 20 STC 115 (Madras)

5 (2006) 3 SCC 1

97 of the said decision. He submitted that the five tests laid down therein can be called the *Panchratna* Test. His submission is that at no point was the complete and exclusive dominion of cranes, and other vehicles passed on to ONGC in view of the express terms of the contracts in question. He pointed out that in the present case, the employees on cranes worked for the contractor and not for ONGC. The contractor appoints those who work on cranes and not ONGC. The responsibility of repair and maintenance, including alternative arrangements, is of the contractor, not ONGC. The contractor is obliged to make arrangements at his own cost for shelter, food, night stay and other requirements of the employees working on the cranes. He pointed out that as per the terms of the agreement, the contractor and ONGC are not responsible for providing secured parking to the cranes in the sense that even if the cranes are parked at the site of ONGC, the same are at the risk of the contractor. More importantly, the contractor is liable for a claim for compensation that may arise due to injury to any third party by reason of the use of the cranes. The contractor is mandated to fully indemnify ONGC against any consequence under law arising from any accident caused by the cranes to the equipment/property/personnel of ONGC. He submitted that in the facts of the case, sub-clauses (c), (d) and (e) of the Panchratna test are not fulfilled.

8. He relied upon a decision of this Court in the case of ***The State of A.P. & Anr. v. Rashtriya Ispat Nigam Limited.***[6] By inviting the attention of this Court to the decision in the case of ***Great Eastern Shipping Company Limited v. State of Karnataka & Ors.***[7]***,*** he submitted that in the facts of the case before this Court, the 'Tug' which was the subject matter of the contract was made available to the port twenty-four hours a day throughout the contract period. The contract provided that during the contract period, the tug will be available with the port for all purposes and under control in every respect. He also referred to this Court's decision in ***Commissioner of Service Tax, Delhi v. Quick Heal Technologies Limited***[8]***.*** In the said case, this Court observed that the transaction was of software sale, and once it is accepted that the software put in a

6 (2002) 3 SCC 314

7 (2020) 3 SCC 354

8 2022 SCC Online SC 976

compact disk is goods, there cannot be any service element in the transaction. He submitted that by accepting the contentions raised by him, consequential directions will have to be issued to settle the account of the contractors.

Submissions in Civil Appeal No. 383 of 2013

9. The learned senior counsel appearing for the appellant in Civil Appeal No. 383 of 2013 has also made detailed submissions. He relied upon the standard contract executed between the appellants–Indian Oil Corporation Limited (IOCL), and the transporters operating tank trucks to deliver petroleum products at specified rates. He pointed out that the Superintendent of Tax issued notice to the appellants (IOCL) to deduct sales tax while paying hiring charges to the contractors on the footing that by hiring the tank trucks, there is a transfer of the right to use goods and, therefore, the transaction is of sale covered by Clause 29A of Article 366 of the Constitution of India. In the writ petition filed by the appellants, the learned Single Judge took the view that the transactions do not constitute transfer of right to use goods. In the writ appeals preferred by the respondent, the Division Bench interfered. The learned senior counsel submitted that the expression 'transfer of right to use any goods' has been the subject matter of several decisions of this Court. He urged that mere execution of a contract without passing the domain of the goods does not result in the transfer of the right to use any goods, and therefore, it will not be a 'deemed sale'. He also relied on this Court's decisions in the cases of ***BSNL***[5] and ***Rashtriya Ispat Nigam Limited***[6]. He submitted that the test consistently applied by this Court is that there can be a transfer of the right to use goods provided that there is a parting with possession of goods for the limited period of its use. During the said period, the effective control of goods must be transferred. By relying upon several clauses of the agreements, he submitted that there is no transfer of the right to use the tank trucks under the contract. He pointed out that the effective control over the vehicles remains with the transporter and is never transferred to the appellants. Relying upon the decision of Allahabad High Court in the case of ***Ahuja Goods Agency & Anr. v. State of Uttar Pradesh & Ors.***[9]**.** He submitted that there is a consistent judicial opinion that hiring vehicles does not amount to a transfer of effective control and possession.

9 (1997) 106 STC 540 = 1997 SCC online All 1381

10. He submitted that a transaction can be subject to either service or sales tax, and the said transaction cannot be subjected to both taxing statutes. He relied upon a decision of this Court in the case of ***Imagic Creative (P) Ltd. v. Commissioner of Commercial Taxes & Ors.***[10]

11. Therefore, he relied upon the decision of this Court in the case of ***Gannon Dunkerley & Co***[2]***.*** He pointed out why the Law Commission suggested an amendment to the Constitution of India by incorporating clause 29A under Article 366. He submitted that under clause 29A of Article 366, it is provided that the transfer, delivery, or supply of goods shall be deemed to be a sale of those goods by the person making the transfer, delivery, or supply. He relied upon the decision in the case of ***BSNL***[5]. He submitted that whether the contract falls in one category or the other is to be decided by finding out the substance of the contract. He also pointed out the decision of this Court in the case of ***Rashtriya Ispat Nigam Ltd.***[6] for dealing with the issue of effective control. He heavily relied upon the opinion of the Hon'ble Dr. Justice A.R. Laxmanan in the case of ***BSNL***[5].

12. The learned senior counsel relied upon several clauses in the agreement executed by the appellant. He submitted that after 2003, the transaction was liable to service tax.

13. The learned counsel appearing for the appellants in Civil Appeal nos.8714, 8710, 8705, 8693, and 3573-3579 of 2017 submitted that the contract of providing SCB trailers to ONGC was a contract of service and not of transfer of right to use goods in view of the terms of the contract in question. He invited the attention of this Court to several clauses in the contract. Therefore, the learned counsel urged that the specific terms of the contract indicate that it was a service contract and was not a sale.

Submissions by the State of Assam

14. The learned counsel appearing for the State of Assam relied upon a decision of this Court in the case of ***20th Century Finance Corporation Ltd. & Anr. v. State of Maharashtra***[11]***.*** He submitted that the contracts entered into by ONGC will have to be read as a whole. He relied upon the test of effective control found in this Court's decision in the case of ***Rashtriya Ispat Nigam Limited***[6]. He

10 (2008) 2 SCC 614

11 (2000) 6 SCC 12

urged that it is not lawful to split the "transfer of right to use goods" into "sale and service" for the purposes of taxation. He relied upon a decision of this Court in the case of ***BSNL***[5]. His submission is that the transaction covered by the contract of hiring cranes presupposes that there is a transfer of the right to use the cranes. Therefore, the provisions regarding making available staff, maintenance, etc., are irrelevant. He urged that the actual delivery of goods is not necessary for effecting the transfer which are deliverable and are actually delivered at some stage. He submitted that if the tests laid down in the case of ***BSNL***[5] by the Hon'ble Dr. Justice AR Laxmanan are applied, it will establish that what was transferred was the right to use the goods. He submitted that as regards all the contracts subject matter of this group of appeals, such as contracts for hiring cranes, water tankers and trailers, the suppliers have transferred exclusive control and dominion over the goods to the hirer during the subsistence of the contracts.

15. In the case of ***Gannon Dunkerley & Co***[2], this Court has reiterated that in the case of composite contracts, the States did not have the power to severe sale and service components and impose tax only on sales. The learned counsel also invited our attention to the statement of objects and reasons of the Constitution (46th Amendment) Bill, 1981. He pointed out the statement of objects and reasons mentioned therein. He submitted that the contracts in the present cases clearly show that during the contract period, complete control and dominion over the cranes, trucks and trailers is given to the hirer. It is irrelevant that the cranes, trucks, etc., come back to the contractor after the contract period. He submitted that the concept of 'deemed sale' under sub-clause (d) of Clause 29A of Article 366 of the Constitution of India comes into operation even if there is no legal transfer of ownership of the vehicles followed by its delivery. He pointed out that deemed sale is not a sale of the goods, but it is of the right to use the goods. Even if there is actually no sale of cranes, tankers or trailers in terms of the Sale of Goods Act, there is a deemed sale as the terms of the contracts read as a whole show that there was an intention on the part of the parties to transfer the right to use the said goods. He pointed out that this Court, in the case of ***Aggarwal Brothers v. State of Haryana & Anr.***[12] **,** reiterated that

12 (1999) 9 SCC 182

the provisions are for transferring the right to use the goods and not the transfer of goods. He submitted that the test of effective control is satisfied in this case.

16. Inviting our attention to Section 65(105)(zzzzj) of the Finance Act, the learned counsel submitted that the said provisions exclude those transactions in which there is a transfer of possession and effective control.

17. The learned counsel invited our attention to the various clauses in the contract subject matter of Civil Appeal No. 3548 of 2017. The learned counsel, relying upon what is held in paragraph 51(iv) of the decision of this Court in the case of ***Quick Heal Technologies Ltd.***[8]***,*** submitted that when we talk about effective control, it does not mean physical control. He reiterated that the return of physical possession of the trailers, trucks, and cranes has no relevance.

Submissions of the Union of India

18. The learned Additional Solicitor General appearing on behalf of the Union of India contended that the transactions subject matter of this group of appeals are essentially in the nature of rendering service, thereby attracting service tax. He submitted that the VAT Act and the Sales Tax Act will have no application, and the transactions will attract service tax. Therefore, the submission is that no interference is called for.

CONSIDERATION OF SUBMISSIONS

19. We have carefully considered the submissions canvassed across the Bar. Entry 48 of List–II of the Seventh Schedule to the Government of India Act, 1935 provided for "taxes on sale of goods and on advertisement". In the case of ***Gannon Dunkerley & Co***[2], which is a landmark judgment, this Court dealt with the interpretation of Entry 48 of List–II of the Seventh Schedule to the Government of India Act, 1935 and Entry 54 of List-II of the Seventh Schedule to the Constitution of India which provided for "taxes on sale of goods". This Court held that the expression "sale of goods" has a well-recognised legal import. It was held that the expression "sale of goods" will have to be given the same meaning as defined in the Sale of Goods Act. The same view was reiterated in the case of ***K.L.Johar & Co. v.***

Deputy Commercial Tax Officer, Coimbatore III[13]**.** Thus, the State legislature was empowered to levy tax on the sale of goods provided there was a sale within the meaning of the Sale of Goods Act. A necessary ingredient of the sale of goods is the transfer of property in the goods subject matter of sale from the seller to the buyer. The essential ingredient of such a sale is handing over possession of the goods and transferring the property in the goods to the buyer. Under Entry 92A of List-I of the Seventh Schedule to the Constitution of India, even the Central legislature is empowered to levy tax on the sale and purchase of goods other than newspapers where such sale or purchase occurs during the course of inter-state trade or commerce.

20. Thereafter, the 46th Amendment to the Constitution of India was made. By the said amendment, Clause 29A was added to Article 366 with effect from 2nd February 1983. Clause 29A reads thus:

> "**(29A) "tax on the sale or purchase of goods" includes—**
>
> (a) a tax on the transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration;
>
> (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (c) a tax on the delivery of goods on hire-purchase or any system of payment by instalments;
>
> (d) a tax on the transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (e) a tax on the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;

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> (f) a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made."
>
> (underline supplied)

In this case, we are concerned with sub-clause (d) of Clause 29A. Sub-clause (d) essentially defines "tax on the sale or purchase of goods". Sub-clause (d) provides that tax on the sale or purchase of goods includes a tax on the transfer of the right to use any goods for any purpose. We will have to interpret the statutory provisions in the light of sub-clause (d) of Clause 29A of Article 366. The amendment came into force on 2nd February 1983.

21. Before we interpret sub-clause (d) of Clause 29A, it is necessary to refer to the provisions of the Sales Tax Act. In the said Act, the definition of "sale" required the transfer of property in goods by any person by cash, deferred payment, or other valuable consideration. The VAT Act came into force with effect from 28th April 2005. The VAT Act repealed the Sales Tax Act. The VAT Act is in conformity with the 46th Amendment to the Constitution of India, particularly Clause 29A of Article 366. The definition of "sale" in sub-section (43) of Section 2 of the VAT Act is very exhaustive which is in terms of Clause 29A of Article 366 of the Constitution of India. Clause (iv) of sub-section (43) of Section 2 of the VAT Act contains an inclusive definition of "sale", which includes, "a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration".

22. In the present group of appeals, broadly, we are dealing with the following categories of cases:

- **a.** Agreements for hiring cranes;
- **b.** Agreements for hiring trucks;

c. Agreements for hiring of buses;

d. Agreements for transportation of petroleum products by vehicles;

e. Agreements for hiring trailers;

f. Agreements for hiring water tankers; and

g. Agreements for hiring of scrapping winch chassis.

23. The impugned judgment and order subject matter of challenge in Civil Appeal no.3548 of 2017 decides a group of 20 cases wherein the agreements were for providing/hiring cranes to ONGC and agreements pertaining to water tankers and trailers. The said judgment was against the assessee.

24. Civil Appeal no.383 of 2013 arises from the contract between the transport agencies and the appellant–IOCL, for transporting petroleum products by vehicles. The impugned judgment and order is of 24th July 2012. Civil Appeal No. 3548 of 2017 has been preferred by the assessee. The same is the case with Civil Appeal No. 383 of 2013. Civil Appeal No. 3580 of 2017 has been preferred by the Union of India. Civil Appeal no.4657 of 2013 is preferred by the assessee for challenging the judgment and order dated 24th July 2012. By the said judgment, again, a group of cases were decided by the Gauhati High Court. Even the said cases were decided against the assessee on the basis of the decision, which is the subject matter of challenge in Civil Appeal No. 3548 of 2017.

25. Civil Appeal no.3580 of 2017 is in the nature of a cross-appeal preferred by the Union of India against the judgment, which is the subject matter of challenge in Civil Appeal 4657 of 2013. This was a case of a contract for the supply of trailers. In this case, the contention raised by the Union of India is that the transaction does not amount to a sale within the meaning of the VAT Act and that the agreement is of rendering service.

26. The entire controversy revolves around the question of whether the transactions reflected from the agreements subject matter of these appeals amount to a sale within the meaning of sub-clause (d) of Clause 29A of Article 366 of the Constitution of India and, consequently, whether it is a “sale” within the meaning of clause (iv) of sub-section (43) of Section 2 of the VAT Act. The definition

of "sale" under the Sales Tax Act, in sub-section (33) of Section 2, incorporates the requirement of transfer of property in goods.

27. Now, we come to the interpretation of sub-clause (d) of Clause 29A of Article 366. As pointed out earlier, the States had legislative competence for enacting a law regarding imposing a tax on the sale of goods as per Entry 54 of List-II. Followed by the decision of this Court in the case of ***Gannon Dunkerley & Co***[2], there are several decisions wherein the view taken was that though there were transactions which resembled sale, the tax could not be levied on the same as there was no sale of goods within the meaning of the Sale of Goods Act. The sale of goods contemplated under Entry 54 of List-II was consistently interpreted as a sale in terms of the Sale of Goods Act.

28. Clause 29A of Article 366 was inserted on 2nd February 1983, thereby introducing the concept of "deemed sale". We are concerned with sub-clause (d) of Clause 29A, which we have reproduced earlier. As noted earlier, the condition for applicability of the sale of goods under the Sale of Goods Act is that apart from the transfer of possession of the goods, there must be a transfer of the property in goods to the buyer. However, sub-clause (d) of Clause 29A refers not to the transfer of property in the goods to the buyer but to the transfer of the right to use any goods for any purpose for consideration as mentioned in sub-clause (d) of Clause 29A. The transfer of the right to use any goods can be for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration. Only because a person is allowed to use certain goods of the owner, *per se,* there is no transfer of the right to use any goods. The transaction can be either of transfer of right to use the goods or granting mere permission to use the goods without transfer of the right to use the goods.

29. This Court has interpreted sub-clause (d) of Clause 29A in various decisions. The first important decision on this aspect is a decision of the Constitution Bench in the case of ***20th Century Finance Corporation Ltd.***[11]. This was a case where the appellant had entered into a master-lease agreement with the lessee. The lessee was a party that desired to take equipment for use on hire. Under the agreement, the appellant agreed to give diverse machinery/ equipment listed in the schedule to the master-lease agreement.

The master-lease agreement provided that the appellants would place the orders for individual equipment on the request made by the lessee, and the equipment to be leased would be dispatched by the manufacturer or supplier concerned to the location specified in the lease agreement. At the instance of the lessee, the appellant used to place purchase orders to the suppliers or manufacturers for the supply of individual items or equipment. After the equipment was delivered and put to use, the lessee used to execute supplementary lease schedules acknowledging the receipt of the leased equipment. Such supplementary lease agreements used to form an integral part of the master-lease agreements. The controversy arose because some States started levying tax merely because the goods were found to be located in their States at the time of executing the master contract. The States where the goods were delivered started levying taxes on the said goods. In particular, the challenge was to the validity of legislations of various States on the ground that one transaction of transfer of the right to use goods was subjected to tax in different States. In the facts of the case, the issue considered by the Constitution Bench was "Where is the situs of the taxable event on the transfer of right to use goods under Article 366(29-A)(d) of the Constitution." In paragraph 27 of the aforesaid decision, the Constitution Bench held that the levy of tax in accordance with Clause 29A(d) is not on the use of goods but on the transfer of the right to use goods. In other words, it was held that the right to use goods accrues only because of the transfer of the right to use goods. It was held that the transfer is *sine qua non* for the right to use any goods. It was held that if the goods are available, the transfer of the right to use goods occurs when the contract for the goods is executed. In other words, if the goods are available, irrespective of whether the goods are delivered and the written agreement is entered into between the parties, a taxable event on such a deemed sale would be executing a contract to transfer the right to use goods. However, when there is no written agreement but an oral or implied transfer of the right to use goods, it may be effected by the delivery of goods. Only in such cases the taxable event would be the delivery of goods. In this context, in paragraph 28, the Constitution Bench held that it cannot be said that there would be no complete transfer of the right to use goods unless the goods are delivered. When the goods are in existence, the taxable event for the transfer of the right to use

goods occurs when a contract is executed between the lessor and the lessee, and the situs of sale of such a deemed sale would be where the agreement in respect thereof is executed.

30. There is another decision of this Court in the case of ***BSNL***[5]. This case was decided by a bench of three Hon'ble Judges of this Court. The question decided in this case was about the nature of the transaction by which mobile phone connections were provided. The question was whether it was a sale of goods that would attract sales tax or a service that would attract service tax under Entry 97 of List-I of the Seventh Schedule to the Constitution of India. There were several issues, including an issue of whether there is any transfer of the right to use any goods by providing access to telephone connection by the telephone service provider to the subscriber. Another issue was whether a transaction of providing a telephone connection was a sale, which is an inter-state sale. There were separate but concurring judgments delivered. Justice Ruma Pal authored the leading judgment for herself and Justice Dalveer Bhandari. In this decision, reference was made to the decision in the case of ***Gannon Dunkerley & Co.***[2]. It was held that even after Clause 29A of Article 366 was introduced, the meaning of the word "goods" was not altered. It was held that even after Clause 29A was introduced, the ingredients of the sale of goods continue to have the same definition as discussed in the case of ***Gannon Dunkerley & Co.***[2]. It was held that the transactions which are mutant sales are limited to Clause 29A of Article 366. However, all the transactions must qualify as sales within the meaning of the Sales Tax Act to levy sales tax. In paragraph 74, the decision in the case of ***20th Century Finance Corporation Ltd.***[11] was interpreted. In paragraphs 74 and 75 of the judgment in the case of ***BSNL***[5], Justice Ruma Pal observed thus:-

> **"74.** In determining the situs of the transfer of the right to use the goods, the Court did not say that delivery of the goods was inessential for the purposes of completing the transfer of the right to use. The emphasised portions in the quoted passage evidences that the goods must be available when the transfer of the right to use the goods takes place. The Court also recognised that for oral contracts the situs of the transfer may be where the goods are delivered (see para 26 of the judgment).

> **75.** In our opinion, the essence of the right under Article 366(29-A)(d) is that it relates to user of goods. It may be that the actual delivery of the goods is not necessary for effecting the transfer of the right to use the goods but the goods must be available at the time of transfer, must be deliverable and delivered at some stage. It is assumed, at the time of execution of any agreement to transfer the right to use, that the goods are available and deliverable. If the goods, or what is claimed to be goods by the respondents, are not deliverable at all by the service providers to the subscribers, the question of the right to use those goods, would not arise."
>
> (underline supplied)

Thus, this Court held that to attract sub-clause (d) of Clause 29A of Article 366, the goods must be available at the time of transfer, must be deliverable and delivered at some stage. If the goods are not deliverable at all by the service provider to the subscriber, the question of the right to use those goods would not arise.

31. What is relevant in the case of ***BSNL***[5] is the concurring view taken by Dr. AR Laxmanan, J. In paragraph 97, Dr. AR Laxmanan, J held thus:

> **"97.** To constitute a transaction for the transfer of the right to use the goods, the transaction must have the following attributes:
>
> (a) there must be goods available for delivery;
>
> (b) there must be a consensus ad idem as to the identity of the goods;
>
> (c) the transferee should have a legal right to use the goods—consequently all legal consequences of such use including any permissions or licences required therefor should be available to the transferee;
>
> (d) for the period during which the transferee has such legal right, it has to be the exclusion to the transferor—this is the necessary concomitant of the plain language of the statute viz. a "transfer of the right to use" and not merely a licence to use the goods;

(e) having transferred the right to use the goods during the period for which it is to be transferred, the owner cannot again transfer the same rights to others."

(underline supplied)

32. The view taken by Dr AR Laxmanan, J has been consistently followed thereafter by this Court in various decisions. In the case of ***Great Eastern Shipping Company Limited***[7]***,*** paragraph 97 of the view expressed by Dr. AR Laxmanan, J was quoted with approval. A Bench of three Hon'ble Judges of this Court in the case of ***Commissioner of Service Tax, Ahmedabad v. Adani Gas Limited***[14] quoted paragraph 97 of the view expressed by Dr AR Laxmanan, J with approval. In fact, in paragraph 17, the Bench observed that the tests laid down in paragraph 97 of the decision in the case of ***BSNL***[5] have been applied to determine whether the transaction involved the transfer of the right to use any goods under sub-clause (d) of Clause 29A of Article 366 of the Constitution of India.

33. In the case of ***Quick Heal Technologies Ltd.***[8], in paragraph 46, the tests laid down by Dr. AR Laxmanan, J have been quoted with approval. In paragraph 53 of the said decision, this Court held thus:

"**53.** The following principles to the extent relevant may be summed up:

53.1. The Constitution (Forty-sixth Amendment) Act intends to rope in various economic activities by enlarging the scope of "tax on sale or purchase of goods" so that it may include within its scope, the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (*a*) to (*f*) of clause (29-A) of Article 366. The works contracts, hire purchase contracts, supply of food for human consumption, supply of goods by association and clubs, contract for transfer of the right to use any goods are some such economic activities.

53.2. The transfer of the right to use goods, as distinct from the transfer of goods, is yet another economic activity intended to be exigible to State tax.

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53.3. There are clear distinguishing features between ordinary sales and deemed sales.

53.4. Article 366(29-A)(*d*) of the Constitution implies tax not on the delivery of the goods for use, but implies tax on the transfer of the right to use goods. The transfer of the right to use the goods contemplated in sub-clause (*d*) of clause (29-A) cannot be equated with that category of bailment where goods are left with the bailee to be used by him for hire.

53.5. In the case of Article 366(29-A)(*d*) the goods are not required to be left with the transferee. All that is required is that there is a transfer of the right to use goods. In such a case taxable event occurs regardless of when or whether the goods are delivered for use. What is required is that the goods should be in existence so that they may be used.

53.6. The levy of tax under Article 366(29-A)(*d*) is not on the use of goods. It is on the transfer of the right to use goods which accrues only on account of the transfer of the right. In other words, the right to use goods arises only on the transfer of such right to use goods.

53.7. The transfer of right is the *sine qua non* for the right to use any goods, and such transfer takes place when the contract is executed under which the right is vested in the lessee.

53.8. The agreement or the contract between the parties would determine the nature of the contract. Such agreement has to be read as a whole to determine the nature of the transaction. If the consensus ad idem as to the identity of the good is shown the transaction is exigible to tax.

53.9. The locus of the deemed sale, by transfer of the right to use goods, is the place where the relevant right to use the goods is transferred. The place where the goods are situated or where the goods are delivered or used is not relevant.**"**

Thus, to decide the controversy involved in this group of appeals, the contract between the parties will have to be tested on the touchstone of the five tests laid down by Dr AR Laxmanan, J in the case of

BSNL[5]. Thus, the contract will be covered by sub-clause (d) of Clause 29A of Article 366, provided all the five conditions laid down are fulfilled. This Court has made a distinction between transferring the right to use and merely a license to use goods. In every case where the owner of the goods permits another person to use goods, the transaction need not be of the transfer of the right to use the goods. It can be simply a license to use the goods which may not amount to the transfer of the right to use.

34. In Civil Appeal no.3548 of 2017, in the impugned judgment, the Division Bench of the High Court proceeded on the footing that the terms and conditions of the agreement, by which cranes were supplied to ONGC, were more or less similar. In paragraph 12 of the impugned judgment, the Division Bench has also dealt with the contracts of supply of water tankers and trailers. Thus, the contracts, as far as the supply of cranes is concerned, are almost identical. It is stated that the contract subject matter of challenge in Civil Appeal nos.3566-3569 of 2017 is slightly different. Therefore, by way of illustration, firstly, we are referring to the terms and conditions of the contract dated 13th April 2006, which is the subject matter of challenge in Civil Appeal no.3548 of 2017. Some of the relevant clauses and features of the said agreement are as follows:

a. Clause 2 regarding scope of work/contract, reads thus:

"**2. Scope of Work/Contract:**

1.The services of the manned (Driver/Operator/Slinger/ Khalasi etc. as the case may be) Crane (type of vehicle/ equipment to be given) as per the technical specifications given herein or a vehicle/equipment of equivalent technical specifications and acceptable to ONGC, along with the necessary accessories, with valid permits/licenses, insurance etc. Sufficient fuel, in well maintained condition and fulfilling other pre-requisites, should be available for performing the duties as advised by ONGC, at the appointed time and place, throughout the contract period, not by way of lease or transfer or rights, for use of the vehicle/equipment, by the contractor to ONGC.

2. .. .."

(underline supplied)

Thus, the contract itself provides that there is no transfer of the right to use the crane/equipment;

b. The other salient features are :

i. The specifications of cranes and other equipment are provided in clause 3.1. Clause 3.3 provides that apart from the cranes, the contract shall provide a necessary number of slings, hooks, dunnage material and other material for loading and unloading. The specific material is mentioned in the said clause;

ii. Though in clause 6.2, the registration number of two cranes has been mentioned, what is important here is clause 5.2. It provides that even if a particular crane or its documents have been approved by ONGC, when a crane is defective, another crane of similar specifications must be offered as a replacement by the contractor. Therefore, the contract does not remain confined only to the two cranes described in clause 6.2, but the contractor has an obligation to replace the cranes;

iii. The operational staff, such as driver, crane operator, rigor-slinger, khalasi, cleaner, etc. as specifically mentioned in clause 8.17 and 8.18 shall be provided by the contractor. The crew must operate the cranes with requisite safety accessories, such as safety shoes, gloves, safety helmets, etc. The contractor shall provide these safety accessories at his own cost and shall be replaced by him from time to time;

iv. The contractor shall make arrangements at his own cost for shelter, food, night-stay and other requirements of the staff near the site of operation;

v. The normal working hours on the cranes shall be from 7 to 10 hours with a break of half an hour. These timings shall be subject to change. There shall be four days' maintenance off for the cranes;

vi. The contractor must make adequate and proper arrangements for fuel, lubricants and other consumables, etc., in relation to the cranes and other items. The contractor shall look after the repair and maintenance of the cranes;

vii. The contractor shall ensure that the cranes comply with the requirements of the Motor Vehicles Act, 1988 and the rules and regulations framed thereunder. Similarly, the crew members must be legally competent and hold valid licences;

viii. The contractor will be solely responsible and shall keep ONGC indemnified against any consequence under any law arising from any accident caused to the equipment/ property/personnel engaged in the contract. Even for damage or injury to any third party due to the operation of cranes, the contractor will be responsible. The contractor shall safeguard his interest through comprehensive insurance at his own cost, and the ONGC shall not be liable to pay any amount towards the insurance;

ix. It will be the contractor's responsibility to arrange parking of the cranes at selected places. However, the contractor shall be responsible for providing the cranes at the requisite site at the requisite time;

x. The insurance taken by the contractor shall cover all the risks of whatsoever nature to any third party, any equipment/property/personnel of the contractor and damage to the property or personnel of ONGC;

xi. It will be the responsibility of the contractor to register himself under the Contract Labour (Regulation and Abolition) Act, 1970; and

xii. It is provided that after using cranes for a specific period, as mentioned in the contract, the contractor has to park the cranes on the sites provided by ONGC at the risk of the contractor.

35. On a conjoint reading of the aforesaid terms of the contract, it is apparent that the contractor has an option of replacing the cranes in case one of the cranes was not working properly. Only the contractor is liable to take care of the legal consequences of using the cranes. The contractor must maintain the cranes, and it is for the contractor to pay for consumables like fuel, oil, etc. Even the cranes must be moved and operated by the crew members appointed by the contractor. Moreover, in case of any mishap or

accident in connection with the cranes or connection with the use of the cranes or as a consequence thereof, the entire liability will be of the contractor and not of the ONGC. Thus, in short, the contract is for providing the service of cranes to ONGC. The reason is that the transferee (ONGC) is not required to face legal consequences for using the cranes supplied by the contractor. Therefore, the tests laid down in clauses (c) and (d) of paragraph 97 of the decision of Dr AR Laxmanan, J are not fulfilled in this case. Moreover, on a conjoint reading of the aforesaid clauses, it appears that the use of the cranes provided by the contractor to ONGC will be by way of only a permissive use. Though the cranes are used for carrying out the work as suggested by ONGC, the entire control over the cranes is retained by the contractor, inasmuch as it is the contractor who provides crew members for operating the cranes, it is the contractor who has to pay for fuel, oil, etc. and for maintenance of any loss or damage to the equipment of the contractor, staff of the contractor, any third party and staff and property of ONGC. Therefore, we find that as regards the contract to provide cranes, the finding of the High Court that there was a transfer of the right to use cranes was not correct as the transactions do not satisfy all the five tests referred to above.

36. We have also carefully perused the terms and conditions of the contract subject matter of challenge in Civil Appeal nos.3566-3569 of 2017. The contract concerns hiring services of ten truck-mounted all-terrain hydraulic cranes with the crew. In this case, like the other contracts, Clause 2 provides that the supply of equipment will not be by way of lease or transfer or right to use the equipment. All the other clauses are practically the same. Even in this case, also, the reasons which are recorded earlier will squarely apply. The contracts do not reflect the intention on the part of the contractor to transfer the right to use the goods.

37. Now, we come to Civil Appeal No. 4657 of 2013 and Civil Appeal no.3580 of 2017. In this case, the contract is of 20th November 2008 by and between the ONGC and M/s.Ali Brothers. The contract is for hiring a 20-metre-ton trailer. The salient features of the said contract are as under:

a. Even in this contract, the entire manpower was to be provided by the Contractor;

b. The contractor was required to indemnify ONGC from all the actions, proceedings, claims, demands, and liabilities arising out of or in the course of or caused by the execution of work under the contract;

c. The driver must be appointed by the employer having a valid professional driving license with three years of experience;

d. The contractor must register himself under the Contract Labour (Regulation and Abolition) Act, 1970;

e. The trailer shall be available for 26 days in a calendar month. The normal working hours will be 12 hours;

f. The contractor shall make his own arrangements for parking all the trailers after duty hours;

g. The contractor shall be responsible for the loss of the material provided by ONGC during transportation. In case of any accident or damage while the trailer is on ONGC duty, there shall be no liability of any nature incurred by the ONGC;

h. The contractor must take insurance of trailers covering all the risks and liabilities, which will cover unlimited third-party claims and the claims under the Workmen's Compensation Act, 1923, made by the workmen.

38. Looking at these clauses, it is obvious that the contractor fully controls the trailers during the contract period, and therefore, again, this is a case of a license granted to ONGC to use the trailer, and the right to use the trailer is not transferred to ONGC. Hence, test (c) out of the five tests is not fulfilled in this case.

39. Now, we come to Civil Appeal no.383 of 2013. In this case, the contract was for operating tank trucks to deliver petroleum products at specified rates. The salient features of the contract are as under:

a. The contractors shall operate the tank trucks;

b. IOCL will have the right to requisition a further number of tank trucks in addition to what is provided in the contract;

c. IOCL did not guarantee any minimum turnover, whether daily, monthly or annually, during the contract period and therefore, the contractor will not be entitled to take ideal charges or minimum charges from IOCL;

d. The entire operational cost, including salary and other emoluments of drivers, cleaners, cost of fuel and lubricating oil, maintenance and repairs of the tank trucks, road tax and other taxes, and insurance shall be borne by the Contractor;

e. The contractor will be liable to any loss or damage caused to the IOCL, its employees or any third party resulting from fire, leakage, negligence, explosion, accident or any other cause in operating the said tank trucks at the time of loading and unloading and during transit;

f. The personnel of IOCL will do the loading of the tank trucks at the depot with the help of the driver and the cleaner, but the unloading will be the responsibility of the contractor;

g. The complete responsibility for delivering the correct quality and quantity of the products at the destination will be of the contractor;

h. The contractor will keep the tank trucks in serviceable condition. In the event that a tank truck is not serviceable, the contractor shall be bound to effect supplies to outstation in drums by using stake trucks;

i. The contractor shall remain fully responsible to IOCL for custody of the product, its quantity and quality;

j. If the contractor fails to place its tank trucks at the depots of IOCL, it will be the contractor's responsibility to engage tank trucks from outside.

40. On a conjoint reading of the clauses mentioned above, it is apparent that there is no intention to transfer the use of any particular tank truck in favour of IOCL. The contract is to provide tank trucks for the transportation of goods. Once the tank trucks provided by the contractor are loaded with goods, the entire responsibility of their safe transit, including avoiding contamination, delivery, and unloading at the destination, is of the contractor. The test (c) is not satisfied in this case. Therefore, it is impossible to conclude that there is a transfer of the right to use tank trucks in favour of IOCL. Essentially, it is a contract to provide the service of transporting the goods using tank trucks to IOCL. Therefore, even in this case, all the five tests laid down by Dr AR Laxmanan, J are not fulfilled.

41. Now, at this stage, we may refer to Section 65(105)(zzzzj) of the Finance Act, which was brought into force with effect from 16th May 2008. Section 65(105)(zzzzj) reads thus:

> **"Section 65. Definitions – .. ..**
>
> (1) .. ..
>
> . .. .
>
> (105) "Taxable service" means any service provided or to be provided –
>
> (a) .. ..
>
> . .. .
>
> (zzzzj) to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use, without transferring right of possession and effective control of such machinery, equipment and appliances.**"**

It provides that "taxable service" means any service provided to any person by any other person in relation to the supply of tangible goods, including machinery, equipment and appliances for use without transferring the right of possession and effective control of such machinery, equipment and appliances.

42. Essentially, the transfer of the right to use will involve not only possession, which may be granted at some stage (after execution of the contract), but also the control of the goods by the user. When the substantial control remains with the contractor and is not handed over to the user, there is no transfer of the right to use the vehicles, cranes, tankers, etc. Whenever there is no such control on the goods vested in the person to whom the supply is made, the transaction will be of rendering service within the meaning of Section 65(105)(zzzzj) of the Finance Act after the said provision came into force.

CONCLUSION

43. To conclude, all the appeals preferred by the assessees will have to be allowed.

44. Accordingly, we allow all the appeals of the assessees by holding that the contracts are not covered by the relevant provisions of the Sales Tax Act and of the VAT Act, as the contracts do not provide for the transfer of the right to use the goods made available to the person who is allowed to use the same. Civil Appeal no.3580 of 2017 preferred by the Union of India is disposed of in view of the earlier findings with the liberty to the Union of India to initiate proceedings, if any, for recovery of service tax in accordance with law.

45. There will be no order as to costs.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal preferred by assesses, allowed.

[2024] 1 S.C.R. 517 : 2024 INSC 36

Asma Lateef & Anr.

v.

Shabbir Ahmad & Ors.

(Civil Appeal No. 9695 of 2013)

12 January 2024

[B.R. Gavai, Dipankar Datta* and Aravind Kumar, JJ.]

Issue for Consideration

Whether the order dated 05.08.1991 (vide which application u/rr.5 and 10 of Or.VIII, CPC was allowed by the Trial Court for pronouncement of judgment against defendant no.2 in the suit) suffered from a jurisdictional error so grave that the decree drawn up subsequently is incapable of execution by the Executing Court and an objection that it is inexecutable was available to be raised u/s. 47, CPC by the respondents 1 to 3.

Headnotes

Code of Civil Procedure, 1908 – rr. 5, 10 of Or. VIII and s.47 – Respondents 1 to 3 had filed an objection u/s. 47 of the CPC in an execution application filed before the Executing Court by the appellants-plaintiffs – It was urged, based on the case pleaded therein, that the decree put to execution was inexecutable – The Executing Court allowed the objections and the execution application was dismissed – However, the Revisional Court directed the Executing Court to proceed with the execution of decree – Respondents 1 to 3 filed application u/Art. 227 against the revisional order – The High Court quashed the order passed by the Revisional Court and relegated the parties to the remedy of having their rights, in respect of the suit property, adjudicated by the appropriate forum – Propriety:

Held: Appellants-plaintiffs had instituted a civil suit against the three defendants-K (defendant no.1), K's son S (defendant no.2) and R (defendant no.3) – K filed his written statement on 05.12.1990 and *inter-alia* contended that suit was barred by s.331 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 – No written statements was filed by other two defendants – Appellants

* Author

moved an application u/rr. 5, 10 of Or.VIII, CPC for pronouncement of judgment against S (defendant no.2) and the same was allowed – K passed away and the suit against him was dismissed as abated – In the instant case, the trial Court is presumed to be aware of the fact that the written statement of K was on record or else it would not have fixed the next date for settling 'issues' – In a situation where maintainability of the suit was in question and despite S not having filed his written statement, it was not a case where the Trial Court could simply pronounce judgment without even recording a satisfaction that it had the jurisdiction to try the suit and adjudicate the contentious issue(s), not to speak of pronouncing its verdict against S without assigning a single reason by treating the averments in the plaint to be admitted – The High Court rightly observed that even on pronouncement of judgment against S, the *lis* remained alive as against K and decision on the objection as to maintainability could have resulted in a contrary decision – In the matter at hand, the filing of the written statement by K denying the averments made in the plaint warranted that the appellants' claims be proved by evidence, oral and/or documentary, instead of decreeing the suit against one of the defendants in a most slipshod manner – As far as the objection available to the respondents 1 to 3 u/s. 47 of CPC is concerned, it is the settled position of law that the powers of an executing court, though narrower than an appellate or revisional court, can be exercised to dismiss an execution application if the decree put to execution is unmistakably found to suffer from an inherent lack of jurisdiction of the court that made the same rendering it a nullity in the eyes of law – The Executing Court and the High Court were right in holding that the objection raised by the respondents 1 to 3 to the executability of the decree was well-founded – Further, the decision rendered by a court on the merits of a controversy in favour of the plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction and, thus, be assailable as lacking in inherent jurisdiction and be treated as a nullity in the eyes of law; as a logical corollary, the order dated 05.08.1991 is held to be *ab initio* void and the decree drawn up based thereon is inexecutable – That apart, the order dated 05.08.1991 does not reveal any adjudication leading to determination of the rights of the parties in relation to any of the matters in controversy in the suit and, therefore, the decree since drawn up is not a formal expression of

an adjudication/determination since there has been no adjudication/ determination so as to conform to the requirements of a decree within the meaning of section 2(2) of CPC – Therefore, the trial Court had no authority to decree the suit against S in exercise of its power u/r.10 of Or.VIII, CPC – No reason to interfere with the judgment of the High Court. [Paras 6,20,29,41,50,52]

Code of Civil Procedure, 1908 – r.10 of Or. VIII – Scope and extent of power – Discussed. [Paras 13, 14, 15, 16, 17]

Code of Civil Procedure, 1908 – rr. 5, 10 of Or. VIII – When the defendant defaults in filing written statement – What is required by the plaintiff:

Held: In a given case, the defendant defaults in filing written statement and the first alternative were the only course to be adopted (pronouncing judgment against defendant), it would tantamount to a plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court – Generally, in order to be entitled to a judgment in his favour, what is required of a plaintiff is to prove his pleaded case by adducing evidence – Rule 10, in fact, has to be read together with Rule 5 of Order VIII and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission – Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim. [Para 18]

Code of Civil Procedure, 1908 – Jurisdiction – Essence of:

Held: The essence really is that a court must not only have the jurisdiction in respect of the subject matter of dispute for the purpose of entertaining and trying the claim but also the jurisdiction to grant relief that is sought for – Once it is conceded that the jurisdiction on both counts is available, it is immaterial if jurisdiction is exercised erroneously – An erroneous decision cannot be labelled as having been passed 'without jurisdiction' – It is, therefore, imperative that the distinction between a decision lacking in inherent jurisdiction and a decision which suffers from an error committed in the exercise of jurisdiction is borne in mind. [Para 35]

Code of Civil Procedure, 1908 – Jurisdiction – Determination of question of jurisdiction by civil Court:

Held: Jurisdiction is the entitlement of the civil court to embark upon an enquiry as to whether the cause has been brought before it by the plaintiff in a manner prescribed by law and also whether a good case for grant of relief claimed been set up by him – As and when such entitlement is established, any subsequent error till delivery of judgment could be regarded as an error within the jurisdiction – The enquiry as to whether the civil court is entitled to entertain and try a suit has to be made by it keeping in mind the provision in section 9, CPC and the relevant enactment which, according to the objector, bars a suit – The question of jurisdiction has to be determined at the commencement and not at the conclusion of the enquiry. [Para 38]

Code of Civil Procedure, 1908 – Jurisdiction – Question of jurisdiction at the stage when a Court considers the question of grant of interim relief:

Held: Where interim relief is claimed in a suit before a civil court and the party to be affected by grant of such relief, or any other party to the suit, raises a point of maintainability thereof or that it is barred by law and also contends on that basis that interim relief should not to be granted, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a *prima facie* satisfaction that the suit is maintainable or that it is not barred by law – It would be inappropriate for a court to abstain from recording its *prima facie* satisfaction on the question of maintainability, yet, proceed to grant protection *pro tem* on the assumption that the question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC – That could amount to an improper exercise of power – If the court is of the opinion at the stage of hearing the application for interim relief that the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief – However, if an extraordinary situation arises where it could take time to decide the point of maintainability of the suit and non-grant of protection *pro tem* pending such decision could lead to irreversible consequences, the court may proceed to make an appropriate order in the manner justifying the

course of action it adopts – In other words, such an order may be passed, if at all required, to avoid irreparable harm or injury or undue hardship to the party claiming the relief and/or to ensure that the proceedings are not rendered infructuous by reason of non-interference by the court. [Para 39]

Judgment/Order – Cardinal principle of:

Held: It is one of the cardinal principles of the justice delivery system that any verdict of a competent judicial forum in the form of a judgment/order, that determines the rights and liabilities of the parties to the proceedings, must inform the parties what is the outcome and why one party has succeeded and not the other - the 'why' constituting the reasons and 'what' the conclusion – Apart from anything else, insistence of the requirement for the reason(s) to support the conclusion guarantees application of mind by the adjudicator to the materials before it as well as provides an avenue to the unsuccessful party to test the reasons before a higher court – All civil courts in the country have to regulate their judicial work in accordance with the terms of the provisions of the CPC – Any egregious breach or violation of such provisions, would be ultra vires. [Paras 47, 48]

Case Law Cited

Balraj Taneja v. Sunil Madan, **[1999] 2 Suppl. SCR 258 : (1999) 8 SCC 396;** *Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman,* **[1971] 1 SCR 66 : (1970) 1 SCC 670**; *Dhurandhar Prasad Singh v. Jai Prakash University,* **[2001] 3 SCR 1129 : (2001) 6 SCC 534;** *Official Trustee v. Sachindra Nath Chatterjee,* **[1969] SCR 92 : AIR 1969 SC 823**; *Rafique Bibi v. Sayed Waliuddin,* **[2003] 3 Suppl. SCR 100 : (2004) 1 SCC 287 – relied on.**

Surjit Singh and Others v. Harbans Singh and Others, **[1995] 3 Suppl. SCR 354 : (1995) 6 SCC 50;** *Manohar Lal v. Ugrasen,* **[2010] 7 SCR 346 : (2010) 11 SCC 557**; *Hukam Chand v. Om Chand,* **(2001) 10 SCC 715**; *Nagubai Ammal v. B. Shama Rao,* **[1956] SCR 451 : AIR 1956 SC 593**; *Swaran Lata Ghosh v. H.K. Banerjee,* **[1969] 3 SCR 976 : (1969) 1 SCC 709**; *Balvant N. Viswamitra v. Yadav Sadashiv Mule,* **[2004] 3 Suppl. SCR 519 : (2004) 8 SCC 706 – referred to.**

Hirday Nath Roy v. Ramachandra Barna Sarma, **1920 SCC OnLine Cal 85 : ILR LXVIII, Cal 138 – referred to.**

Books and Periodicals Cited

Hon'ble P.B. Mukharji, CJ., The New Jurisprudence: The Grammar of Modern Law – referred to.

List of Acts

Code of Civil Procedure, 1908 ; Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950.

List of Keywords

Jurisdictional error; Essence of jurisdiction; Question of jurisdiction; Lack in inherent jurisdiction; Cardinal principle of judgment; Powers of an executing court; Objection against execution of decree; Executability of the decree; Inexecutable decree; Requirements of a decree.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9695 of 2013.

From the Judgment and Order dated 04.02.2011 of the High Court of Judicature at Allahabad in CMWP No.15236 of 2009.

Appearances for Parties

Ms. Meenakshi Arora, Sr. Adv., Rahul Narayan, Shashwat Goel, Vishal Kr. Kaushik, Advs. for the Appellants.

Ms. Preetika Dwivedi, Abhishek Chaudhary, Adarsh Upadhyay, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dipankar Datta, J.

The Challenge

1. Respondents 1 to 3 had filed an objection under section 47 of the Code of Civil Procedure, 1908 ("CPC", hereafter) in an execution application filed before the Executing Court by the appellants. It was urged, based on the case pleaded therein, that the decree put to

execution was inexecutable. The Executing Court, on 19th March, 2008, allowed the objections of the respondents 1 to 3, resulting in dismissal of the execution application.

2. A revision was carried by the appellants from the order dated 19th March, 2008 before the Revisional Court which, *vide* its order dated 21st February, 2009, dismissed the objection filed by the respondents 1 to 3 and directed the Executing Court to proceed with the execution of the decree whilst treating such objection as non-maintainable.

3. The revisional order dated 21st February, 2009 was challenged by the respondents 1 to 3 in an application under Article 227 of the Constitution[1] before the High Court of Judicature at Allahabad ("High Court", hereafter). The High Court, by its judgment and order dated 4th February, 2011, quashed the order passed by the Revisional Court and relegated the parties to the remedy of having their rights, in respect of the suit property, adjudicated by the appropriate forum.

4. This appeal, by special leave, registers a challenge to the said judgment and order of the High Court.

Factual Conspectus

5. Having regard to the nature and extent of controversy raised at the stage of execution, a decision on this appeal does not necessitate noting the facts triggering it and the rival contentions in great depth; however, we propose to briefly narrate the essential facts and submissions advanced by learned counsel for the parties before recording our conclusions.

6. The relevant facts, shorn of unnecessary details, are noticed hereunder:

a. Appellants claimed that their great-grandmother, one Khatoon Jannat Bibi, had orally gifted them a certain property ("suit property", hereafter) on 16th August, 1988 whereafter a memorandum recording the same was also executed before the relevant tehsildar and that they were in peaceful possession of the same continuously.

b. Appellants, as plaintiffs, through their power of attorney holder,

1 Civil Misc. Writ Petition No. 15236 of 2009

instituted a civil suit[2] ("Suit", hereafter) before the Trial Court under section 38 of the Specific Relief Act, 1963 ("Specific Relief Act", hereafter) against three defendants - a son of Khatoon Jannat Bibi named Asad Ullah Kazmi [defendant no. 1] ("Kazmi", hereafter), Kazmi's son Samiullah [defendant no. 2] and one purported caretaker, Mr. Ram Chandra Yadav [defendant no. 3] in respect of the suit property, more particularly described in the plaint. Appellants prayed for a permanent injunction against the three defendants from interfering with the appellants' peaceful possession of the suit property.

c. Kazmi, sometime in 1990, initiated proceedings for declaration of rights before the Sub-Divisional Officer under section 229B of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 ("UPZA & LR Act", hereafter); the said proceedings were, however, dismissed on 27th February, 1999 [4 (four) years after his death].

d. In the Suit, an application for interim injunction was filed by the appellants. The Trial Court on 31st May, 1990, allowed the application and directed Kazmi and Samiullah to maintain *status quo* with regard to the suit property, and directed them not to interfere with the appellants' peaceful possession thereof.

e. Kazmi filed his written statement in the Suit on 5th December, 1990 where he *inter alia* contended that the Suit was barred by section 331 of the UPZA & LR Act and not maintainable before a civil court since the suit property was *bhoomidhari* land. It was further averred that the Suit was barred by section 41(h) of the Specific Relief Act; he also contended that his son Samiullah, the defendant no.2, had no concern with the suit property as long as his father (Kazmi) was alive and, hence, Samiullah had been wrongly impleaded as the defendant no.2. Kazmi also denied that Khatoon Jannat Bibi had the right to make any oral gift; inasmuch as she had only a life interest in the property, after her demise, the same devolved upon him exclusively.

f. It is to be noted that no written statement was filed on behalf

2 Original Suit No. 58 of 1990

of the other two defendants.

g. Upon the appellants moving an application under Rules 5 and 10 of Order VIII, CPC for pronouncement of judgment against Samiullah, the same was allowed by the Trial Court by its order dated 5th August, 1991[3], to which we propose to advert in course of our analysis.

h. Subsequently, the Trial Court, on 10th October, 1991, framed 11 (eleven) issues for consideration in the Suit, of which the very first one was on its competency to try the Suit.

i. Kazmi passed away on 15th July, 1995, after which his sons, Samiullah and Fariduddin [respondents 4 and 5 herein] transferred the suit property to the respondents 1 to 3 ("Purchasers", hereafter) *vide* a sale deed dated 3rd November, 1997. The Suit against Kazmi remained pending even after his demise, and none of his other heirs or legal representatives were brought on record as substituted defendants. The Suit against Kazmi was finally dismissed as abated on 27th April, 2009.

j. Appellants, as purported decree holders, filed an execution application[4] before the Executing Court, on 16th December, 1997, praying that respondents 4 and 5 be punished for violating the order dated 5th August, 1991 and that the sale deed dated 3rd November, 1997 in favour of the Purchasers be declared invalid.

k. The Executing Court, *vide* an interim order passed on 16th January, 1998, restrained the Purchasers from interfering in any manner with the suit property.

l. Thereupon, the Purchasers filed their objection under section 47, CPC wherein they submitted, *inter alia*, that the order dated 5th August, 1991 was neither a judgment nor a decree and could not be executed.

m. Further, on 7th December, 2004, the appellants filed a contempt petition[5] against the respondents alleging contempt of orders dated 31st May, 1990 and 5th August 1991, and the Executing

3 The decree was signed on 11th November, 1991.

4 Execution Application No. 58 of 1997

5 Civil Misc Contempt Petition No. 62 of 2004

Court order dated 16th January, 1998 by interfering with the appellants' possession of the suit property.

n. These events were followed by the proceedings and the judgments/orders referred to in paragraphs 1 to 4 hereinabove.

Impugned Judgment

7. The Purchasers invoked the appropriate jurisdiction of the High Court by challenging the order dated 21st February, 2009 of the Revisional Court. The High Court formulated two points for determination, *viz.* (i) whether the petitioners before it (respondents 1 to 3 herein), who are subsequent purchasers of the suit property, had any right to maintain an objection under section 47, CPC against execution of the decree? and (ii) whether the order dated 5th August, 1991, passed in purported exercise of power under Rule 10 of Order VIII, CPC decreeing the suit against Samiullah alone is without jurisdiction and a nullity which is *non est* and inexecutable in nature? The High Court also framed an ancillary point as to whether the sale deed dated 23rd November, 1997 made by Samiullah in favour of the Purchasers was null and void.

8. While the two main points were answered in the affirmative, the ancillary point was answered in the negative. In course of rendering its judgment, the High Court held the order dated 5th August, 1991, and consequently the decree drawn on the basis thereof, to be beyond jurisdiction and a nullity. The High Court was also of the opinion that the revisional order dated 21st February, 2009 deserved to be set aside and the writ petition allowed, which it duly ordered. The parties were granted liberty to take recourse to available legal remedies to have determination of the title to the suit property adjudicated. Certain salient observations made by the High Court in the impugned judgment are summarised below for convenience:

a. The order dated 5th August 1991, passed by the Trial Court, in the Suit, restrained only the defendant no.2 from interfering with the peaceful enjoyment of the appellants' rights relating to the suit property, but did not restrict the sons of Kazmi from dealing with or transferring the same.

b. The transfer of the suit property was not in derogation of section 52 of the Transfer of Property Act, 1882 ("ToP Act", hereafter) and that the Purchasers could object to the

appellants' execution application.

c. It is a cardinal principle that to succeed in a suit for permanent prohibitory injunction, the plaintiff must either establish title, proprietary rights over the suit property or prove possession over the same; however, the Trial Court had not found either the title of the plaintiffs or proved their possession in respect of the suit property.

d. A court need not always pronounce judgment on the facts of a plaint or on those admitted due to non-filing of a written statement or want of specific denial. A court has the option of pronouncing judgment only in cases where it deems it prudent; it also has the option to pass such an appropriate order as it seems fit.

e. A reading of Rules 1, 5 and 10 of Order VIII, CPC show that they concern themselves with only a single defendant to a suit and not several defendants. The Trial Court, instead, could have proceeded to hear the Suit *ex parte* under Rule 11 of Order IX, CPC since Kazmi's written statement was on the record. Hence, the Trial Court had no authority in law to decree the Suit against one defendant without adjudicating upon the controversy involved.

f. The order dated 5th August, 1991 was not a judgment within the scope of section 2(9) read with Rule 4(2) of Order XX, CPC and did not meet the basic requirements of a "judgment" and a decree as per section 2(9) and 2(2), CPC, respectively.

Rival Contentions

9. Ms. Meenakshi Arora, learned senior counsel for the appellants while seeking our interference with the impugned judgment submitted as under:

a. The High Court fell into error by not appreciating the fact that the Executing Court exceeded its jurisdiction by going behind the order dated 5th August, 1991 and the decree that was drawn up in terms thereof, returning a finding that the same was not executable.

b. Samiullah had been provided ample opportunity to file his written statement but had failed to do so. In any event, the order dated 5th August, 1991 had not been challenged, and had attained finality.

c. The Trial Court, *vide* an interim order dated 31st May, 1990, had directed Kazmi and Samiullah to maintain *status quo* and not interfere with the peaceful possession of the suit property, by the appellants. The High Court had erroneously held that a perusal of the aforementioned order did not indicate any rider placed upon the parties from alienating the suit property, and that the sale deed dated 3rd November, 1997 was validly entered into.

d. The Purchasers were purchasers *pendente lite* and could not have purchased the suit property without leave of the Trial Court. The decisions in **Surjit Singh and Others v. Harbans Singh and Others**[6] and **Manohar Lal v. Ugrasen**[7] were referred to in support of the contentions that the transfer of property during pendency of proceedings and also in contravention of the interim order of injunction was impermissible.

e. Further, the Purchasers forcibly dispossessed the appellants of their peaceful possession of the suit property on 10th October, 2004 in gross violation of the injunction order dated 16th January, 1998 passed by the Executing Court.

f. Reliance placed by the High Court on **Balraj Taneja v. Sunil Madan**[8] was misplaced in the present case as this Court, in **Balraj Taneja** (supra), while holding that reasons must be given while decreeing a suit under Rule 10 of Order VIII, CPC, was seized of a matter where the decree was challenged in appellate proceedings. In the present case, the decree was sought to be declared inexecutable in execution proceedings, far beyond the reach of such a narrow jurisdiction.

10. Ms. Preetika Dwivedi, learned counsel for the Purchasers (respondents 1 to 3) in support of upholding of the impugned judgment, submitted as under:

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6 (1995) 6 SCC 50

7 (2010) 11 SCC 557

8 (1999) 8 SCC 396

a. The order dated 5th August, 1991 passed by the Trial Court is not a judgment within the scope of section 2(9) read with Rule 4 of Order XX, CPC and the principle of law laid down in **Balraj Taneja** (supra) was rightly applied by the High Court.

b. The High Court had rightly granted all the parties liberty to have the title to the suit property adjudicated by the appropriate forum; hence, it could not be said that the appellants were prejudiced in any manner whatsoever. Further, any question relating to the title, and validity of the sale deed in favour of the Purchasers could be determined by the appropriate forum.

c. At the time of purchase, the names of Kazmi's sons, i.e. respondents 4 and 5, were present in the land revenue records pertaining to the suit property, after which the Purchasers' names have been inserted through mutation.

d. As per the law laid down in **Hukam Chand v. Om Chand**[9] and **Nagubai Ammal v. B. Shama Rao**[10], the transfer of the suit property was not in violation of section 52, ToP Act since the statute did not put an absolute embargo on the transfer of such property *pendente lite*.

Analysis

11. We have heard learned counsel for the parties and perused the impugned judgment as well as the other materials on record.

12. The sole question of law which arises for a decision in this appeal is:

> Whether the order dated 5th August, 1991 suffered from a jurisdictional error so grave that the decree drawn up subsequently is incapable of execution by the Executing Court and an objection that it is inexecutable was available to be raised under section 47, CPC by the respondents 1 to 3?

13. Prior to answering the above question, we consider it appropriate to examine the scope and extent of power exercisable under Rule 10 of Order VIII, CPC.

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9 (2001) 10 SCC 715

10 AIR 1956 SC 593

14. Rule 10 of Order VIII, CPC, used as the primary source of power by the Trial Court in passing the order dated 5th August, 1991 against Samiullah, postulates the procedure that could be adopted when a party fails to present its written statement upon the same being called for by the court. Rule 10 reads as follows:

> "**10.** Procedure when party fails to present written statement called for by Court.—
>
> Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment a decree shall be drawn up."

15. We have no hesitation to hold that Rule 10 is permissive in nature, enabling the trial court to exercise, in a given case, either of the two alternatives open to it. Notwithstanding the alternative of proceeding to pronounce a judgment, the court still has an option not to pronounce judgment and to make such order in relation to the suit it considers fit. The verb 'shall' in Rule 10 [although substituted for the verb 'may' by the Amendment Act of 1976] does not elevate the first alternative to the status of a mandatory provision, so much so that in every case where a party from whom a written statement is invited fails to file it, the court must pronounce the judgment against him. If that were the purport, the second alternative to which 'shall' equally applies would be rendered otiose.

16. At this stage, we consider it apposite to take a quick look at **Balraj Taneja** (supra) to examine the scope of Rule 10 of Order VIII. Therein, this Court ruled that a court is not supposed to pass a mechanical judgment invoking Rule 10 of Order VIII, CPC merely on the basis of the plaint, upon the failure of a defendant to file a written statement. The relevant paragraphs of the judgment are reproduced below for convenience:

> "**29.** As pointed out earlier, the court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the court proceed to pass judgment blindly merely because a written statement has

> not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the court. In a case, specially where a written statement has not been filed by the defendant, the court should be a little cautious in proceeding under Order 8 Rule 10 CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of the court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression 'the court may, in its discretion, require any such fact to be proved' used in sub-rule (2) of Rule 5 of Order 8, or the expression 'may make such order in relation to the suit as it thinks fit' used in Rule 10 of Order 8."

No doubt this decision was rendered considering that the verb used in the provision is 'may', but nothing substantial turns on it.

17. What emerges from a reading of **Balraj Taneja** (supra), with which we wholeheartedly concur, is that only on being satisfied that there is no fact which need to be proved on account of deemed admission, could the court pass a judgment against the defendant who has not filed the written statement; but if the plaint itself suggests involvement of disputed questions of fact, it would not be safe for the court to pass a judgment without requiring the plaintiff to prove the facts. **Balraj Taneja** (supra) also lays down the law that provision of Rule 10 of Order VIII, CPC is by no means mandatory in the sense that a court has no alternative but to pass a judgment in favour of the plaintiff, if the defendant fails or neglects to file his written statement.

18. If indeed, in a given case, the defendant defaults in filing written statement and the first alternative were the only course to be adopted, it would tantamount to a plaintiff being altogether relieved of its obligation to prove his case to the satisfaction of the court. Generally, in order to be entitled to a judgment in his favour, what is required of a plaintiff is to prove his pleaded case by adducing evidence. Rule 10, in fact, has to be read together with Rule 5 of Order VIII and the position seems to be clear that a trial court, at its discretion, may require any fact, treated as admitted, to be so proved otherwise than by such admission. Similar is the position with section 58 of the Indian Evidence Act, 1872. It must be remembered that a plaint in a suit is not akin to a writ petition where not only the facts are to be pleaded but also the evidence in support of the pleaded facts is to be annexed, whereafter, upon exchange of affidavits, such petition can be decided on affidavit evidence. Since facts are required to be pleaded in a plaint and not the evidence, which can be adduced in course of examination of witnesses, mere failure or neglect of a defendant to file a written statement controverting the pleaded facts in the plaint, in all cases, may not entitle him to a judgment in his favour unless by adducing evidence he proves his case/claim.

19. Having noted what Rule 10 of Order VIII postulates, the order dated 5th August, 1991 may be examined now since it is the genesis of the present litigation before us. The order made by the Trial Court on 5th August, 1991, reads as below:

> "68-C application moved by the plaintiffs under Order-8 Rule-5 (2) & (3) read with Rule 10 CPC. According to the plaintiff, Samiullah son of Asad Ullah Kazmi, defendant no. 1 has been impleaded as defendant no. 1 (*sic*, defendant no. 2) as he was also threatening to encroach the right of the plaintiff in the disputed property. He appeared through counsel and moved application and has also filed affidavits 50-C & 57-C but he failed to file any written statement. It is clear that so many date has been given for written statement and lastly it was 29.4.91, which was fixed for written statement and for issues, but the defendant has (*sic*, not) filed written statement and on this ground the plaintiff has moved the above application 68-C.

> The learned counsel for the plaintiff has argued that he has appeared through counsel and enough time has been given to him calling upon him to file the written statement, but he failed to file written statement. The case is covered by Order-8 Rule 10 C.P.C. The defendant no. 2 remained absent. In view of the above, I am of the opinion that it is fit case to proceed under Order-8 Rule 10 C.P.C.
>
> Accordingly, the suit of the plaintiffs is decreed under Order-8 Rule 10 C.P.C. with cost against defendant no. 2. The defendant no. 2 is restrained not to interfere in the peaceful right and enjoyment of the plaintiff in respect of the disputed building, trees and other properties.
>
> Fix 9.9.1991 for Issues."

20. In the present case, Kazmi had indeed filed his written statement dealing with the appellants' plaint before the order dated 5th August, 1991 was made. There, not only had Kazmi denied the assertions made in the plaint but he had also specifically objected to the maintainability of the suit itself before the Trial Court on the ground noted above. The Trial Court is presumed to be aware of the fact that the written statement of Kazmi was on record or else it would not have fixed the next date for settling 'issues'. In a situation where maintainability of the suit was in question and despite Samiullah not having filed his written statement, it was not a case where the Trial Court could simply pronounce judgment without even recording a satisfaction that it had the jurisdiction to try the suit and adjudicate the contentious issue(s), not to speak of pronouncing its verdict against Samiullah without assigning a single reason by treating the averments in the plaint to be admitted. The High Court rightly observed that even on pronouncement of judgment against Samiullah, the *lis* remained alive as against Kazmi and decision on the objection as to maintainability could have resulted in a contrary decision.

21. No tribunal, far less a civil court, in exercise of judicial power ought to play ducks and drakes with the rights of the parties. We are left to wonder what would have been the status of the rival claims if Kazmi had not passed away and accepting his objection, the Suit were dismissed on the ground of maintainability. In such a case, could such a dismissal be reconciled with the purported decree drawn up against Samiullah? The answer would have to be in the negative.

Or, take the situation that has cropped up here. The suit has been dismissed *qua* Kazmi on 27th April, 2009 as abated. Although Ms. Arora had submitted in course of hearing that steps have since been successfully taken to set aside abatement and an assurance was given to file additional documents by 12th December, 2023 in support of such a submission, the additional documents e-filed beyond time do not reveal that (i) abatement has been set aside, (ii) the heirs/ legal representatives substituted in place of Kazmi and (iii) the suit restored to its original file and number. The result is that the suit stands dismissed as against the principal defendant without any determination by the Trial Court on his objection that such court did not possess the jurisdiction to entertain and try the suit.

22. We are constrained to observe that it is to avoid such a situation of contradictory/inconsistent decrees that power under Rule 10 of Order VIII ought to be invoked with care, caution, and circumspection, only when none of several defendants file their written statements and upon the taking of evidence from the side of the plaintiff, if deemed necessary, the entire suit could be decided. As in the present case, where even one of several defendants had filed a written statement, it would be a judicious exercise of discretion for the court to opt for the second alternative in Rule 10 of Order VIII, CPC unless, of course, extraordinary circumstances exist warranting recourse to the first alternative. In the matter at hand, the filing of the written statement by Kazmi denying the averments made in the plaint warranted that the appellants' claims be proved by evidence, oral and/or documentary, instead of decreeing the suit against one of the defendants in a most slipshod manner.

23. We find close resemblance of the facts and circumstances under consideration in **Swaran Lata Ghosh v. H.K. Banerjee**[11]. A money suit instituted by the respondent before this Court was tried by the High Court at Calcutta and after taking evidence the learned Single Judge on 17th August, 1962, passed the following order:

> "There will be a decree for Rs 15,000 with interest on judgment on Rs 15,000 at 6% per annum and costs. No interim interest allowed."

11 (1969) 1 SCC 709

Pursuant to that order a decree was drawn up. An appeal carried from the decree before the Division Bench failed. The Division Bench assigned sketchy reasons for the conclusion that the Trial Court "rightly decreed the suit" and disposed of the appeal with certain modification of the decree. While allowing the appeal and setting aside the decree passed by the high court and remanding the suit to the Court of first instance for trial according to law, this Court noted that Rules 1 to 8 of Order XX, CPC are, by the express provision contained in Rule 3(5) of Order XLIX, CPC inapplicable to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction and hence, a judge of a Chartered High Court was not obliged to record reasons in a judgment strictly according to the provisions contained in Rules 4(2) and 5 of Order XX, CPC. Notwithstanding such a provision, this Court proceeded to record in paragraph 6 as follows:

> "**6.** Trial of a civil dispute in court is intended to achieve, according to law and the procedure of the court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial, the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the

> dispute is ordinarily entitled to know the grounds on which the court has decided against him, and more so, when the judgment is subject to appeal. The appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint."

24. However, there, it was an appellate decree which this Court was called upon to examine. We realise that we are not examining the correctness of a judgment/order arising from exercise of appellate jurisdiction by the High Court but a judgment approving an order on an objection under section 47, CPC, scope wherefor is limited.

25. Our real task is to ascertain whether the decree drawn up on the basis of the order dated 5th August, 1991 and put to execution by the appellants could have been objected to by the respondents 1 to 3 as inexecutable under section 47, CPC. Section 47, CPC, being one of the most important provisions relating to execution of decrees, mandates that an executing court shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit.

26. Reference to a couple of authorities on the scope and nature of section 47, CPC, at this stage, would not be inapt.

27. In **Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman**[12], this Court was considering the scope of objection under section 47 of the CPC in relation to the executability of a decree. Therein, it was laid down that only such a decree could be the subject-matter of objection which is a nullity and not a decree which was erroneous either in law or on facts. Law was laid down in the following terms:

> "**6.** A court executing a decree cannot go behind the decree: between the parties or their representatives it must take the decree according to its tenor and cannot entertain

12 (1970) 1 SCC 670

any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7. When a decree which is a nullity, for instance, where it is passed without bringing the legal representative on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction…."

(underlining ours, for emphasis)

28. In **Dhurandhar Prasad Singh v. Jai Prakash University**[13], this Court further expounded the powers of a court under section 47, CPC in the following words:

"**24.** The exercise of powers under Section 47 of the Code is microscopic and lies in a very narrow inspection hole. Thus it is plain that executing court can allow objection under Section 47 of the Code to the executability of the decree if it is found that the same is void ab initio and a nullity, apart from the ground that the decree is not capable of execution under law either because the same was passed in ignorance of such a provision of law or the law was promulgated making a decree inexecutable after its passing…."

(underlining ours, for emphasis)

13 (2001) 6 SCC 534

29. The legality of the order of the High Court, together with the order of the Executing Court that the former went on to uphold, has to be tested having regard to the settled position of law as noticed above and bearing in mind that the powers of an executing court, though narrower than an appellate or revisional court, can be exercised to dismiss an execution application if the decree put to execution is unmistakably found to suffer from an inherent lack of jurisdiction of the court that made the same rendering it a nullity in the eye of law.

30. For reasons more than one, we propose to hold that the Executing Court and the High Court were right in holding that the objection raised by the respondents 1 to 3 to the executability of the decree was well-founded.

31. What appears to be of significance in the light of the decisions referred to above is the importance of the legal term 'jurisdiction', and the question whether the Trial Court did have the jurisdiction to pass the order it did on 5th August, 1991 followed by the decree signed on 11th November, 1991.

32. What does 'jurisdiction' mean? In the ensuing discussion, we feel inclined to draw guidance from certain decisions of ancient vintage which have stood the test of time.

33. The wisdom of Sir Ashutosh Mukherjee, A.C.J., speaking for a Full Bench of the High Court at Calcutta in **Hirday Nath Roy v. Ramachandra Barna Sarma**[14], more than a century back, profitably assists us in understanding what is meant by 'jurisdiction', 'lack of jurisdiction' and 'error in the exercise of jurisdiction'. The relevant passage reads as under:

> "…An examination of the cases in the books discloses numerous attempts to define the term 'jurisdiction', which has been stated to be 'the power to hear and determine issues of law and fact'; 'the authority by which judicial officers take cognizance of and decide causes'; 'the authority to hear and decide a legal controversy'; 'the power to hear and determine the subject-matter in controversy between parties to a suit and to adjudicate or exercise any judicial power over them'; 'the power to hear, determine

14 1920 SCC OnLine Cal 85 : ILR LXVIII, Cal 138

and pronounce judgment on the issues before the Court'; 'the power or authority which is conferred upon a Court by the legislature to bear and determine causes between parties and to carry the judgments into effect'; 'the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution. … This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value, and nature of the subject-matter. … This classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction of the subject-matter is obviously of a fundamental character. Given such jurisdiction, we must be careful to distinguish exercise of jurisdiction from existence of jurisdiction; for fundamentally different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction. The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction should be included in the conception of jurisdiction itself is sometimes a question of great nicety… But the distinction between existence of jurisdiction and exercise of jurisdiction has not always been borne in mind and this has sometimes led to confusion. … We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination. A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that when the jurisdiction of a Court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

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> Besides the cases mentioned therein, reference may particularly be made to the judgment of Srinivas Aiyangar, J., in Tuljaram v. Gopala [32 Mad. L.J. 434; 21 Mad. L.J. 220 (1916).] , where the true rule was stated to be that if a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of that litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity."
>
> (underlining ours, for emphasis)

34. **Hirday Nath Roy** (supra) found approval in **Official Trustee v. Sachindra Nath Chatterjee**[15], a co-ordinate Bench decision of this Court. The relevant observations of this Court in **Sachindra Nath Chatterjee** (supra) are reproduced below:

> "**12.** It is plain that if the learned judge had no jurisdiction to pass the order in question then the order is null and void. It is equally plain that if he had jurisdiction to pronounce on the plea put forward before him the fact that he made an incorrect order or even an illegal order cannot affect its validity. …
>
> **15.** *** it is clear that before a Court can be held to have jurisdiction to decide a particular matter it must not only have jurisdiction to try the suit brought but must also have the authority to pass the orders sought for. It is not sufficient that it has some jurisdiction in relation to the subject-matter of the suit. Its jurisdiction must include the power to hear and decide the questions at issue, the authority to hear and decide the particular controversy that has arisen between the parties. …"
>
> (underlining ours, for emphasis)

35. The essence really is that a court must not only have the jurisdiction in respect of the subject matter of dispute for the purpose of entertaining and trying the claim but also the jurisdiction to grant relief that is sought for. Once it is conceded that the jurisdiction on both counts

15 AIR 1969 SC 823

is available, it is immaterial if jurisdiction is exercised erroneously. An erroneous decision cannot be labelled as having been passed 'without jurisdiction'. It is, therefore, imperative that the distinction between a decision lacking in inherent jurisdiction and a decision which suffers from an error committed in the exercise of jurisdiction is borne in mind.

36. Moving on to decisions of not too distant an origin, we notice that this Court in **Rafique Bibi v. Sayed Waliuddin**[16] whilst relying on **Vasudev Dhanjibhai Modi** (supra), has made valuable observations as to the circumstances where an order passed could be regarded as a nullity. The relevant observations made in **Rafique Bibi** (supra) read thus:

> "**6.** What is 'void' has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.
>
> **7.** Two things must be clearly borne in mind. Firstly, 'the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense: their meaning is relative, depending upon the court's willingness to grant relief in any particular situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results." (Administrative Law, Wade and Forsyth, 8th Edn., 2000, p. 308.) …

16 (2004) 1 SCC 287

> **8.** A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings."
>
> (underlining ours, for emphasis)

37. Also, a reading of **Rafique Bibi** (supra) makes it clear that the lack of jurisdiction must be patent on the face of the decree to enable an executing court to conclude that the decree was a nullity. Hence, it is clear that all irregular or wrong decrees would not necessarily be void. An erroneous or illegal decision, which was not void, could not be objected in execution or incidental proceedings. This *dictum* was also affirmed by a Bench of 3 (three) Hon'ble Judges of this Court in **Balvant N. Viswamitra v. Yadav Sadashiv Mule**[17].

38. What follows from a conspectus of all the aforesaid decisions is that jurisdiction is the entitlement of the civil court to embark upon an enquiry as to whether the cause has been brought before it by the plaintiff in a manner prescribed by law and also whether a good case for grant of relief claimed been set up by him. As and when such entitlement is established, any subsequent error till delivery of judgment could be regarded as an error within the jurisdiction. The enquiry as to whether the civil court is entitled to entertain and try a suit has to be made by it keeping in mind the provision in section 9, CPC and the relevant enactment which, according to the objector, bars a suit. Needless to observe, the question of jurisdiction has to be determined at the commencement and not at the conclusion of the enquiry.

17 (2004) 8 SCC 706

39. Although not directly arising in the present case, we also wish to observe that the question of jurisdiction would assume importance even at the stage a court considers the question of grant of interim relief. Where interim relief is claimed in a suit before a civil court and the party to be affected by grant of such relief, or any other party to the suit, raises a point of maintainability thereof or that it is barred by law and also contends on that basis that interim relief should not to be granted, grant of relief in whatever form, if at all, ought to be preceded by formation and recording of at least a *prima facie* satisfaction that the suit is maintainable or that it is not barred by law. Such a satisfaction resting on appreciation of the averments in the plaint, the application for interim relief and the written objection thereto, as well as the relevant law that is cited in support of the objection, would be a part of the court's reasoning of a *prima facie* case having been set up for interim relief, that the balance of convenience is in favour of the grant and non-grant would cause irreparable harm and prejudice. It would be inappropriate for a court to abstain from recording its *prima facie* satisfaction on the question of maintainability, yet, proceed to grant protection *pro tem* on the assumption that the question of maintainability has to be decided as a preliminary issue under Rule 2 of Order XIV, CPC. That could amount to an improper exercise of power. If the court is of the opinion at the stage of hearing the application for interim relief that the suit is barred by law or is otherwise not maintainable, it cannot dismiss it without framing a preliminary issue after the written statement is filed but can most certainly assign such opinion for refusing interim relief. However, if an extraordinary situation arises where it could take time to decide the point of maintainability of the suit and non-grant of protection *pro tem* pending such decision could lead to irreversible consequences, the court may proceed to make an appropriate order in the manner indicated above justifying the course of action it adopts. In other words, such an order may be passed, if at all required, to avoid irreparable harm or injury or undue hardship to the party claiming the relief and/or to ensure that the proceedings are not rendered infructuous by reason of non-interference by the court.

40. Turning to the facts of the present case, Kazmi had challenged the maintainability of the Suit in the written statement filed by him before the Trial Court contending *inter alia* that the suit property was *bhoomidhari* land owing to which the Suit was barred by section 331

of UPZA & LR Act as well as it was barred under section 41(h) of the Specific Relief Act and, thus, not maintainable before the civil court. What was required of the Trial Court in such situation was to record a satisfaction, at least *prima facie*, that the Suit was maintainable and then proceed to pass such orders as it considered proper in the circumstances. A glance at the order dated 5th August, 1991, is sufficient to inform us that the Trial Court, in no words whatsoever, made any decision on whether it was entitled in law to decide the plea before it, prior to decreeing the Suit against Samiullah under Rule 10 of Order VIII, CPC. The question of competence to try the Suit, we have found, was the first of several issues arising for decision in the Suit and despite such looming presence of an important issue before the Trial Court which, if examined and answered in favour of Kazmi, would have ousted jurisdiction, it preferred not to wait and proceeded to decree the same against Samiullah without a whisper on its competency to do the same.

41. The legal and factual position of the present case having been noted above, we hold that a decision rendered by a court on the merits of a controversy in favour of the plaintiff without first adjudicating on its competence to decide such controversy would amount to a decision being rendered on an illegal and erroneous assumption of jurisdiction and, thus, be assailable as lacking in inherent jurisdiction and be treated as a nullity in the eye of law; as a logical corollary, the order dated 5th August, 1991 is held to be *ab initio* void and the decree drawn up based thereon is inexecutable.

42. There is one other reason which we wish to assign as a ground for upholding the order of the Executing Court and the High Court.

43. Reference may once again be made to **Balram Taneja** (supra) where the law has been reiterated succinctly, as follows:

> "**41.** There is yet another infirmity in the case which relates to the 'judgment' passed by the Single Judge and upheld by the Division Bench.
>
> **42.** 'Judgment' as defined in Section 2(9) of the Code of Civil Procedure means the statement given by the Judge of the grounds for a decree or order. What a judgment should contain is indicated in Order 20 Rule 4(2) which says that a judgment 'shall contain a concise statement

of the case, the points for determination, the decision thereon, and the reasons for such decision'. It should be a self-contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the court and in what manner. The process of reasoning by which the court came to the ultimate conclusion and decreed the suit should be reflected clearly in the judgment.

43. ***

44. ***

45. Learned counsel for Respondent 1 contended that the provisions of Order 20 Rule 4(2) would apply only to contested cases as it is only in those cases that 'the points for determination' as mentioned in this rule will have to be indicated, and not in a case in which the written statement has not been filed by the defendants and the facts set out in the plaint are deemed to have been admitted. We do not agree. Whether it is a case which is contested by the defendants by filing a written statement, or a case which proceeds ex parte and is ultimately decided as an ex parte case, or is a case in which the written statement is not filed and the case is decided under Order 8 Rule 10, the court has to write a judgment which must be in conformity with the provisions of the Code or at least set out the reasoning by which the controversy is resolved.

46. *** Even if the definition were not contained in Section 2(9) or the contents thereof were not indicated in Order 20 Rule 4(2) CPC, the judgment would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. In judicial proceedings, there cannot be arbitrary orders. A Judge cannot merely say 'suit decreed' or 'suit dismissed'. The whole process of reasoning has to be set out for deciding the case one way or the other. This infirmity in the present judgment is glaring and for that reason also the judgment cannot be sustained."

(underlining ours, for emphasis)

We concur with the observation that a judgment, as envisaged in section 2(9), CPC, should contain the process of reasoning by which the court arrived at its conclusion to resolve the controversy and consequently to decree the suit.

44. It is indubitable that a "judgment", if pronounced by a court under Rule 10 of Order VIII, CPC, must satisfy the requirements of Rule 4(2) of Order XX, CPC, and thereby conform to its definition provided in section 2(9) thereof.

45. Further, even a cursory reading of Rule 10 of Order VIII, CPC impresses upon us the fundamental mandate that a "decree" shall follow a "judgment" in a case where the court invokes power upon failure of a defendant to file its written statement. It is, therefore, only a "judgment" conforming to the provisions of the CPC that could lead to a "decree" being drawn up. As is manifest on the face of the record of the present case, apart from the *ipse dixit* of the Trial Court that the case is fit for being proceeded against under Rule 10 of Order VIII and that the suit *qua* Samiullah ought to be decreed with the injunctive order, no ingredients that a "judgment" should contain as per the CPC appear in the order dated 5th August, 1991.

46. We deem it fit to advert to the fine words of wisdom imparted to us by Hon'ble P.B. Mukharji, CJ., in 'The New Jurisprudence: The Grammar of Modern Law' where the learned author says:

> "The supreme requirement of a good judgment is reason. Judgment is of value on the strength of its reason. The weight of a judgment, its binding character or its persuasive character depends on the presentation and articulation of reason. Reason, therefore, is the soul and spirit of a good judgment."

47. It is one of the cardinal principles of the justice delivery system that any verdict of a competent judicial forum in the form of a judgment/ order, that determines the rights and liabilities of the parties to the proceedings, must inform the parties what is the outcome and why one party has succeeded and not the other - the 'why' constituting the reasons and 'what' the conclusion. Apart from anything else,

insistence of the requirement for the reason(s) to support the conclusion guarantees application of mind by the adjudicator to the materials before it as well as provides an avenue to the unsuccessful party to test the reasons before a higher court.

48. All civil courts in the country have to regulate their judicial work in accordance with the terms of the provisions of the CPC. Any egregious breach or violation of such provisions, including the one noticed here, would be *ultra vires*.

49. Let us now examine whether there is a 'decree' within the scope of section 2(2), CPC. Section 2(2) is reproduced hereunder:

> (2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include -
>
> (a) any adjudication from which an appeal lies as an appeal from an order, or
>
> (b) any order of dismissal for default.
>
> (underlining ours, for emphasis)

50. The decree signed by the Trial Court on 11th November, 1991 is not on record. Nevertheless, at the cost of repetition, we record that examination of the order dated 5th August, 1991 does not reveal any adjudication leading to determination of the rights of the parties in relation to any of the matters in controversy in the suit and, therefore, the decree since drawn up is not a formal expression of an adjudication/determination since there has been no adjudication/ determination so as to conform to the requirements of a decree within the meaning of section 2(2). In this regard, we express our concurrence with both the High Court and the Executing Court that there is no decree at all in the eye of law.

51. We, therefore, hold that a decree that follows a judgment or an order (of the present nature) would be inexecutable in the eyes of law and execution thereof, if sought for, would be open to objection in an application under section 47, CPC.

Conclusion

52. For the reasons mentioned above, we conclude that the Trial Court had no authority to decree the suit against Samiullah in exercise of its power under Rule 10 of Order VIII, CPC.

53. There is no reason to interfere with the judgment and order of the High Court under challenge. It is upheld and the appeal, accompanied by any pending applications, stands dismissed. Parties shall bear their own costs.

54. It is, however, made clear that no part of the observations of this Court, or of the High Court or of those below, be treated as an expression of opinion in any particular matter or on any factual aspect whatsoever. Determination of the title to the suit property, adjudication on the validity of the sale deed in favour of the Purchasers, or decision on any other contentious issue are left open for a forum of competent jurisdiction to embark upon, if approached by any of the parties.

55. We are aware that pursuant to Interim Application No. 4 of 2013 moved by the appellants, this Court had appointed one Mr. Suryanarayana Singh as the Court Receiver in respect of the property ("Court Receiver", hereafter) on 14th March, 2014. The Court Receiver already appointed shall stand discharged forthwith. Unpaid remuneration, if any, shall be borne by the appellants.

56. However, the Court Receiver shall provide accounts of income and expenditure in respect of the suit property to the appellants as well as the respondents 1 to 3 within two months and any claim of either of the parties would be open to be raised and addressed in accordance with law.

Headnotes prepared by: Ankit Gyan *Result of the case:* Appeal dismissed.

[2024] 1 S.C.R. 549 : 2024 INSC 41

Nara Chandrababu Naidu

v.

The State of Andhra Pradesh & Anr.

(Criminal Appeal No. 279 of 2024)

16 January 2024

[Aniruddha Bose* and Bela M. Trivedi,* JJ.]

Issue for Consideration

Interpretation of s.17A, Prevention of Corruption Act, 1988 incorporated by the Prevention of Corruption (Amendment) Act, 26 of 2018 and its applicability to the facts of the present case.

Headnotes

Prevention of Corruption Act, 1988 – s.17A inserted by the Prevention of Corruption (Amendment) Act, 26 of 2018 – Operation – Allegations against the appellant for commission of offences u/ss.166, 167, 418, 420, 465, 468, 471, 409, 209 and 109 r/w ss.120-B, 34, 37, IPC and ss.12, 13(2) r/w ss.13(1) (c) and (d), 1988 Act allegedly committed between 2015 and 2019 when he was the Chief Minister of the State of Andhra Pradesh – FIR was registered in 2021 initially against 26 accused, the appellant was later added as accused– Appellant sought quashing of the FIR and the order of remand passed by the Special Court – Dismissed by High Court – Plea of the appellant *inter alia* that the absence of prior approval as mandated by s.17A vitiated the conduct of enquiry or inquiry or investigation:

Held: Per Aniruddha Bose, J. If an enquiry, inquiry or investigation is intended in respect of a public servant on the allegation of commission of offence under the 1988 Act after s.17A thereof becomes operational, which is relatable to any recommendation made or decision taken, at least *prima facie*, in discharge of his official duty, previous approval of the authority postulated in sub-section (a) or (b) or (c) of s.17A shall have to be obtained – In absence of such previous approval, the action initiated under the 1988 Act shall be illegal – In the present case, original FIR was registered on 09.12.2021 and the appellant was implicated on

* Author

08.09.2023 – There is no evidence of any substantive enquiry, inquiry, or investigation made against him prior to coming into operation of s.17A – Appellant cannot be proceeded against for offences under the 1988 Act as no previous approval of the appropriate authority was obtained – **Per Bela M. Trivedi, J.** s.17A having been introduced as a part of larger legislative scheme, and the other offences under the PC Act having been redefined or newly inserted by way of Amendment Act, 2018, is required to be treated as substantive and not merely procedural in nature – Such a substantive amendment could not be made applicable retrospectively to the offences like ss.13(1)(c) and 13(1)(d) which have been deleted under the Amendment Act, 2018 – Intention of the legislature was to make s.17A applicable only to the new offences as amended by Amendment Act, 2018 and not to the offences which existed prior to the coming into force of the Amendment Act 2018 – In the instant case, the offences u/s.13(1)(c) and (d) were in force when the same were allegedly committed by the appellant – Deletion of the said provisions and the substitution of the new offence u/s.13 by the Amendment Act, 2018 would not affect the right of the investigating agency to investigate nor would vitiate or invalidate any proceedings initiated against the appellant – In view of difference of opinion, matter referred to the Hon'ble the Chief Justice of India for constitution of a Larger Bench. [Paras 12, 13, 20, 34 and 15, 21, 27]

Prevention of Corruption Act, 1988 – Penal Code, 1860 – Code of Criminal Procedure, 1973 – s.223 – Allegations of commission of offences against the appellant under different provisions of IPC and 1988 Act – Appellant was added as accused by filing the Accused Adding Memo – By the Amendment Act 2018, several provisions, particularly the offences described under ss.7, 8, 9, 10 and 13 in the 1988 Act were substituted with the new provisions; and several new provisions like s.17A were inserted – Appellant filed petition seeking quashing of the FIR and the consequential order of remand passed by the Special Court, dismissed by High Court – Appellant argued that if the initial action was not in consonance with law, all subsequent and consequential proceedings would fall and once offences under the PC Act were effaced from existence, the custody of the appellant pursuant to the orders passed by the Special Court was without any sanction of law:

Held: Per Aniruddha Bose, J. The offences against the appellant relate to the same or similar set of transactions in relation to which the Special Judge was proceeding with the case initiated by the F.I.R. dated 09.12.2021 against the other accused persons – Sub clause (a) of the s.223, so far as charging and trying of an accused is concerned, could apply in the present case, as the non-obstante clause with which s.4, 1988 Act is couched, would not oust the principles contained in s.223 – Remand order not interfered with as the Special Judge had the jurisdiction to pass such order even if the offences under the 1988 Act could not be invoked at that stage – Lack of approval in terms of s.17A would not have rendered the entire order of remand non-est – Appellant could be proceeded against before the Special Judge for allegations of commission of offences under the IPC for which also he has been implicated – **Per Bela M. Trivedi, J.** Appellant having been implicated for the other offences under IPC also, the Special Court was completely within its jurisdiction to pass the remand order in view of the powers conferred upon it u/ss.4, 5 of the 1988 Act – No jurisdictional error committed by the Special Court in passing the order of remand – Impugned judgment and order passed by the High Court also does not suffer from any illegality, not interfered with. [Paras 30, 33, 34 and 29]

Case Law Cited

In the judgment of Aniruddha Bose, J.

Dr. S.M. Mansoori(Dead) Through Legal Representatives v. Surekha Parmar and Others **(2023) 6 SCC 156**; *State of Rajasthan v. Tejmal Choudhary* **2021 SCC Online SC 3477 – distinguished.**

Ebha Arjun Jadeja and others v. State of Gujarat **(2019) 9 SCC 789 – held inapplicable.**

Shambhoo Nath Misra v. State of U.P. & Others **[1997] 2 SCR 1139: (1997) 5 SCC 326**; *State of Uttar Pradesh v. Paras Nath Singh* **[2009] 8 SCR 85: (2009) 6 SCC 372**; *Matajog Dobey v. H. C. Bhari* **[1955] SCR 925: AIR 1956 SC 44**; *State of Telangana v. Managipet alias Mangipet Sarveshwar Reddy* **(2019) 19 SCC 87**; *Anant Gopal Sheorey v. State of Bombay* **[1959] SCR 919: AIR 1958 SC 915**; *Rattan Lal v. State of Punjab* **[1964] SCR 676: AIR 1965 SC 444**; *CBI v.*

R.R. Kishore **2023 INSC 817**; *Yashwant Sinha and Others v. Central Bureau of Investigation through its Director and Another* **[2019] 17 SCR 917: (2020) 2 SCC 338**; *Rameshbhai Dabhai Naika v. State of Gurajat and Others* **[2012] 2 SCR 104: (2012) 3 SCC 400**; *Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra* **AIR 2021 SC 315;** *State v. M. Maridoss* **(2023) 4 SCC 338**; *R.P. Kapur v. State of Punjab* **AIR 1960 SC 866**; *State of Haryana v. Bhajan Lal* **[1990] 3 Suppl. SCR 259: (1992) Supp. (1) SCC 335**; *Mahmood Ali & others v. State of UP* **2023 INSC 684***; State through Central Bureau of Investigation, New Delhi v. Jitender Kumar Singh* **[2014] 2 SCR 621: (2014) 11 SCC 724***; Chiranjilal Goenka v. Jasjit Singh & Others* **[1993] 2 SCR 454: (1993) 2 SCC 507***; State of Tamil Nadu v. Paramasiva Pandian* **[2001] 4 Suppl. SCR 525: (2002) 1 SCC 15**; *State of Punjab v. Davinder Pal Singh Bhullar* **(2011) 14 SCC 427**; *Kaushik Chaterjee v. State of Haryana* **[2020] 9 SCR 311: (2020) 10 SCC 92**; *A. Sreenivasa Reddy v. Rakesh Sharma and Another* **2023 INSC 682;** *Vivek Gupta v. Central Bureau Investigation and Another* **[2003] 3 Suppl. SCR 1087: (2003) 8 SCC 628 – referred to.**

In the judgment of Bela M. Trivedi, J.

Subramanian Swamy v. Director, Central Bureau of Investigation and Another **[2014] 6 SCR 873: (2014) 8 SCC 682 – followed.**

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Yashwant Sinha and Others v. Central Bureau of Investigation through its Director and Another **[2019] 17 SCR 917: (2020) 2 SCC 338 – held inapplicable.**

Anant Gopal Sheorey v. State of Bombay **[1959] SCR 919: AIR 1958 SC 915**; *Rattan Lal v. State of Punjab* **[1964] SCR 676: AIR 1965 SC 444**; *State of Punjab v. Davinder Pal Singh Bhullar* **(2011) 14 SCC 427**; *R.P. Kapur v. State of Punjab* **AIR 1960 SC 866**; *State of Haryana v. Bhajan Lal* **[1990] 3 Suppl. SCR 259: (1992) Supp. (1) SCC 335**; *G.J. Raja v. Tejraj Surana* **(2019) 9 SCC 469**; *S. Gopal Reddy v. State of A.P.* **[1996] 3 Suppl. SCR 439: 1996 (4) SCC 596**; *Indian Handicrafts Emporium & Ors v. Union of India & Ors.* **[2003] 3 Suppl. SCR 43: 2003 (7) SCC 589**; *Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. v. Central Bureau of Investigation* **[2018] 2 SCR 1045: 2018 (16) SCC 299**; *R.M.D. Chamarbaugwalla & Anr. v. Union of India & Anr;* **AIR 1957 SC 628 – referred to.**

List of Acts

Prevention of Corruption Act, 1988; Prevention of Corruption (Amendment) Act, 26 of 2018; Penal Code, 1860; Code of Criminal Procedure, 1973.

List of Keywords

Misappropriation of government funds; Siphoning of public funds; Quashing of the FIR; Remand order; Public servant; Previous approval of the appropriate authority; Amendment prospective, retrospective or retroactive; Interpretation of Statutes; Special Court; Jurisdictional error.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 279 of 2024.

From the Judgment and Order dated 22.09.2023 of the High Court of Andhra Pradesh at Amravati in CRLP No.6942 of 2023.

Appearances for Parties

Harish N Salve, Sidharth Luthra, Dammalpati Srinivas, Pramod Kumar Dubey, Siddharth Aggarwal, Sr. Advs., Guntur Prabhakar, Ms. Prerna Singh, Guntur Pramod Kumar, Kumar Vaibhaw, Gautam Bhatia, Anmol Kheta, Ayush Kaushik, Rajni Gupta, Vishwajeet Singh, Ayush Shrivastava, Mohd. Ashaab, Ms. Aditi, Satyam Sharma, Advs. for the Appellant.

P Sudhakar Reddy, A.A.G., Mukul Rohatgi, Ranjit Kumar, Jaideep Gupta, S Niranjan Reddy, Sr. Advs., Mahfooz Ahsan Nazki, Santosh Krishnan, Polanki Gowtham, K V Girish Chowdary, Ms. Rajeswari Mukherjee, Sahil Raveen, M. Bala Krishna, Ms. Deepshikha Sansanwal, T Vijaya Bhaskar Reddy, Meeran Maqbool, Ms. Ruchi Guasain, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Aniruddha Bose, J.

Leave granted.

2. The appellant is aggrieved by initiation of a criminal proceeding against him and his detention in connection with the same by the respondent State through its CID. Allegations have been made against him for commission of offences under Sections 166, 167, 418, 420, 465, 468, 471, 409, 209 and 109 read with Sections 120-B, 34 and 37 of the Indian Penal Code, 1860 and Section 12 and 13(2) read with Sections 13(1)(c) and (d) of the Prevention of Corruption Act, 1988. The said offences are alleged to have been committed between the years 2015 and 2019, during which period he was the Chief Minister of the State of Andhra Pradesh. Initially, a First Information Report dated 09.12.2021 was lodged with CID Police Station, Andhra Pradesh, Mangalagiri implicating twenty-six persons as accused. On that basis, CR No. 29/2021 was registered. The appellant was not included in the array of accused persons in that F.I.R. The offences primarily relate to siphoning of public funds and I shall refer broadly to the allegations forming the basis of the F.I.R. in the succeeding paragraphs of this judgment. The list of accused persons was subsequently expanded and the appellant was also arraigned as an accused by an "Accused Adding Memo"

dated 08.09.2021 lodged before the Special Judge, SPE & ACB cases (hereinafter referred to as "the Special Judge"). The appellant was implicated as accused no.37, whereas another individual, Kinjarapu Atchannaidu was made the 38th accused. The latter is a former minister of Andhra Pradesh and appears to be a member of the legislative assembly of that State at present. The appellant was arrested on 09.09.2023 and was produced before the Special Judge on 10.09.2023. He was remanded to judicial custody by the Special Judge. The appellant applied before the High Court on 12.09.2023 for quashing the F.I.R. in Crime No. 29 of 2021 implicating him, invoking the jurisdiction of the Court under Section 482 of the Code of Criminal Procedure, 1973 (1973 Code). The legality of the remand order dated 10.09.2023 was also challenged in the same petition before the High Court. The appellant's plea was rejected and his petition was dismissed on 22.09.2023 by a learned Single Judge. The present appeal is against this judgment of dismissal of the said petition.

3. The primarily allegation against the appellant is facilitating diversion of public money in the approximate range of Rs.370/- crores, which was to be used for setting up of six clusters of skill development centres in Andhra Pradesh. For this purpose, Andhra Pradesh State Skill Development Corporation (hereinafter referred to as "APSSDC") was established through a memorandum numbered as G.O.Ms. No.47 dated 10.09.2014 (referred to as 13.12.2014 in the order of the Special Judge dated 10.09.2023) issued by the Higher Education (EC A2) Department. APSSDC entered into an agreement with two corporate entities, Siemens Industry Software India Pvt. Ltd. ("SIEMENS" in short) and Design Tech India Pvt. Ltd. (we shall refer to it henceforth as "Design Tech"). The original object, in terms of a memorandum numbered as G.O.Ms. No. 4 dated 30.06.2015 issued by the Skill Development, Entrepreneurship & Innovation (Skills) Department approving the said Agreement, was to set up six different clusters comprising of one Centre of Excellence and five Technical Skill Development Institutions and Skill Development Centres in Andhra Pradesh. The total project cost was conceived to be Rs.3281,05,13,448/- with each of the six clusters costing Rs.546,84,18,908/-. Government contribution was limited to 10 percent of the cost amounting to Rs.55,00,00,000/- , with SIEMENS and Design Tech providing grant-in-aid of 90%

i.e., Rs.491,84,18,908/-. It is the State's case that requirement of contribution of the two corporate entities was ignored and the final memorandum of agreement only entailed outflow of Rs.330/- crores from the State to Design Tech. A signed copy of this memorandum, which does not carry any date, has been made Annexure R-15 to the counter-affidavit of the State (Volume IV at page 206).

4. Submission on the part of the State is that in course of an investigation by the Additional Director General, GST Intelligence at Pune, while examining claims of availing CENVAT credit by Design Tech and one Skillar Enterprises India Pvt. Ltd. ("Skillar"), a financial scam was unearthed involving both SIEMENS and Design Tech. This was in relation to funds pertaining to the project of setting up skill development centres. The complaint of the taxing body was that SIEMENS and Design Tech had subcontracted substantial part of their work to Skillar despite there being no provision of any sub-contract in the Agreement. Design Tech had claimed that Skillar provided training software development including various sub-modules designed for high end software for advance manufacturing of CAD/CAM. As per Design Tech, royalty and subscription were paid to Skillar, as they developed the software and Skillar had directly supplied the same to the Skill Development Centres in Andhra Pradesh. As recorded in the judgment under appeal, when the tax authorities confronted Skillar, they took a stand that no technical work was sub-contracted and the training software development modules, which were provided, were technical materials. According to Skillar royalty and subscription were wrongly mentioned in the invoices. It appears that an in-depth scrutiny by the tax authorities showed that the concerned software including various sub-modules purported to have been supplied by Skillar to Design Tech was purchased by Skillar from different companies. It is also the State's stand that these companies were shell/defunct companies and they had issued invoices without providing any services and that they were used as vehicles for diverting funds. The APSSDC had conducted a forensic audit in the year 2020 and the audit found flaws and irregularities in the systems and in utilisation of funds between the financial years 2014-2015 and 2018-2019.

5. As per the investigating authorities a sum of Rs.370/- crores from the government funds of the APSSDC has been siphoned off. Case of the State against the appellant is that he was the mastermind, who had unilaterally appointed G. Subbarao and K Lakshminarayana

(accused nos. 1 and 2) as MD and CEO, and Director for the Skill Development Corporation without getting approval from the Andhra Pradesh Cabinet. It was the appellant who had approved the same and as per his instruction, Memorandum of Association and Articles of Association of APSSDC were also approved. As per estimation, costs for six clusters, were projected as Rs.3319.68 crores but the private participants did not infuse any fund as per their original obligation. It is recorded in the impugned judgement that the Andhra Pradesh Cabinet headed by the appellant at the instance of the accused no.1 had approved sanction of a budget of Rs.370/- crores towards 10% contribution of the government in the project and G.O.Ms. No.4 dated 30.06.2015 was issued to that effect. The main complaint against the appellant is that he had fast tracked the project and approved the cost estimation with criminal intent and by pursuing the government officials, he had ensured release of Rs.370/- crores. The project was allotted to Design Tech and SIEMENS on nomination basis, without following any tender process. Misappropriation of government funds through corrupt and illegal methods has been alleged and abuse of official position has been attributed to the appellant. Summary of the allegations against the appellant is revealed from the Memorandum dated 08.09.2023, filed on behalf of the prosecution, for adding the appellant as an accused. These allegations, inter-alia, are to the following effect: -

> *"….A-37 by abusing his (A-37) official position, fraudulently committed criminal breach of trust with a common intention, caused wrongful loss to the Government exchequer by allowing accused and others to divert APSSDC funds by using fake invoices as genuine one for purpose of cheating through the shell, defunct companies without providing materials/services to the APSSDC-Siemens project."*

6. On behalf of the appellant, the main argument, which was also made before the High Court, revolves around non-compliance of Section 17A of the Prevention of Corruption Act, 1988 in implicating the appellant under Sections 12, 13(2) read with 13(1) (c) and (d) of the 1988 Act and proceeding against him inter-alia, under the aforesaid provisions. The arguments on behalf of the appellants have been mainly advanced by Mr. Harish N. Salve and Mr. Siddharth Luthra, learned Senior Advocates. Mr. Mukul Rohatgi with Mr. Ranjit Kumar, both learned Senior Counsel have primarily argued on behalf of the

State. It is also the appellant's case that once fault is found with implicating the appellant under the aforesaid provisions of the 1988 Act, the entire proceeding qua the appellant before the Special Judge would also collapse because in such a case the Special Judge under the PC Act would have had acted beyond his jurisdiction and the remand order would become non-est.

7. Section 17A was introduced to the 1988 Act with effect from 26.07.2018. The said provision reads: -

> "*17A.* ***Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.*** *—No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—*
>
> *(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;*
>
> *(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;*
>
> *(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:*
>
> *Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:*
>
> *Provided further that the concerned authority shall convey its decision under this section within a period of three*

months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

8. The High Court, inter-alia, held that the said provision cannot be applied to any offence committed prior to 26.07.2018. It has also been highlighted before us on behalf of the State that offences under Section 13 (1) (c) & (d) were deleted from the said statute by the Prevention of Corruption (Amendment) Act, 26 of 2018. It was by the same Amendment Act, that Section 17A was incorporated in the said statute. On this basis, it is urged, that any protective measure, which is conceived in the Amendment Act could not extend to offences committed when such protective measure for obtaining prior approval was not a part of the statutory scheme. The High Court primarily decided the case on the premise that the aforesaid provision cannot be given retrospective effect.

9. The other limb of argument of the State, which was also sustained by the High Court is that a regular inquiry was already ordered on 05.06.2018 regarding the allegations of corruption against the officials of APSSDC. This was ordered by the Director General of Anti-Corruption Bureau, Andhra Pradesh. A redacted version of this letter dated 05.06.2018 has been annexed in Volume V of the compilation of documents submitted by the State (at page 2 thereof). This compilation of documents (pages 2 to 7A of the said volume) suggests that Anti-Corruption Bureau had been asking for information in that regard. I quote below the redacted version of the said letter:-

" Office of the Director General
Anti-Corruption Bureau,
Andhra Pradesh,
Vijayawada

Rc No.10/RE-CIU/2018 *Dated:5-6-2018*

MEMORANDUM

Sub:- Public Servants-Industries Department-Allegations of corruption against the officials of A.P. State Skill Development Corporation, Vijayawada-Regular Enquiry-ordered-Reg.

Ref: 1) Letter of Sri <OMITTED> Pune, dt. 14-5-2018.

2) CBI Letter No.122 2017 (CE-117/2017) CBI/Pune/3865, dated 2-10-2017

* * *

The letter of <OMITTED> Pune and letter of CBI, Pune are enclosed herewith. You are instructed to conduct a Regular Enquiry into the contents letter of petition and submit a RE report within the stipulated time. You are also directed to submit Plan of Action duly approved by the LA-cum-Special PP, ACB, HO, Vijayawada.

-Sd/-
For Director General,
Anti-Corruption Bureau,
A.P., Vijayawada

To:
Sri Narra Venkateswara Rao,
DSP, CIU, ACB, Vijayawada."

10. The High Court has accepted the argument of the State that a regular enquiry was ordered on 05.06.2018 regarding the allegations of corruption against the officials of APSSDC by the DG Anti-Corruption Bureau AP before Section 17A of the 1988 Act came into operation i.e. on 25.07.2018. As a corollary, the requirement of previous approval as contemplated in the aforesaid provision would not be applicable in the case of the appellant.

11. First, I shall examine the point as to whether enquiry had commenced by the letter of 05.06.2018. I have quoted the letter of 05.06.2018 in the preceding paragraph. This letter refers to an earlier letter dated 14.05.2018 addressed to the Andhra Pradesh Anti-Corruption Bureau by the Director General of GST Intelligence, Pune submitting information regarding corruption and siphoning of Government funds pertaining to APSSDC. The letter dated 05.06.2018 essentially carries a request for enquiry. There is no indication in the materials produced before us as to whether any step was taken in pursuance of such request till the year 2021. The first suggestion of any active enquiry can be seen in a letter of 22.02.2021 originating from the Deputy Superintendent of Police, Anti-Corruption Bureau of that State, which states that the bureau is investigating a regular enquiry pertaining to allegations of corruption, misappropriation of funds and procedural

lapses in relation to collaboration of APSSDC/AP Government with Design Tech. It appears that there was a previous communication in this regard dated 09.02.2021. Even though reference is made to the letter of 05.06.2018 in this communication, there are no specific particulars of such enquiry or the date on which such enquiry was started. There are subsequent letters dated 22.02.2021, 30.03.2021, 23.06.2021 and 18.08.2021, all referring to the letter of 05.06.2018. But as it has been already observed earlier, there are no specific particulars regarding when and in what form the enquiry has started. There obviously was a time gap between the date of issue of the letter of 05.06.20218 and actual date on which the enquiry was commenced. The State has justified this delay in its counter affidavit. It has been stated that instead of acting on the letter of the taxing authorities dated 14.05.2018, which in turn has been referred to in the communication of 05.06.2018, the note file pertaining to the project was removed by the appellant from the secretariate in collaboration with other accused persons and this was done to temper with evidence and to ensure that the offences were not brought to light. This act of removal of file may constitute a or an independent offence. But if otherwise no enquiry was started because of such alleged wrong, this time gap cannot be treated to have caused the date of issue of the letter of 05.06.2018 to be starting point of an enquiry, in the nature contemplated in Section 17A of the 1988 Act.

12. Section 17A thereof postulates prior approval from the appointing authority in relation to any enquiry, inquiry, or investigation under the 1988 Act. While the expression "inquiry" has been defined in the 1973 code, there is no specific definition of the word "enquiry". The Concise Oxford English Law Dictionary, Revised Tenth Edition, defines the said expression as "an act of asking for an information". It entails commencement of an active search to ascertain the truth or falsity of an alleged wrongful act.

13. In ordinary perception, "enquiry" by a police officer would imply positive exercise for searching certain details or particulars pertaining to allegations of commission of an offence by an accused persons or a set of accused persons. "Inquiry" is defined in Section 2 (g) of the 1973 and implies inquiry conducted under the Code by a Magistrate or Court. Similarly, "investigation" in terms of Section 2 (h) of the same Code includes all the proceedings conducted thereunder for

collection of evidence by a police officer or a person authorised by a Magistrate in that behalf. The nature of actions undertaken by the State after 05.06.1988 constitutes neither inquiry nor investigation, as no step under the 1973 Code was taken by the State prior to the year 2021. If that is the meaning attributed to this expression, the letter of 05.06.2018 or the earlier letter from taxing authority dated 14.05.2018 cannot be construed to be the commencing point of any enquiry. These were requests for starting an enquiry, which obviously did not commence prior to the aforesaid dates in the year 2021. Thus, on this point I cannot accept the finding of the High Court that a regular enquiry was already initiated on 05.06.2018. The restriction in Section 17A of the 1988 Act is on conducting an enquiry by a police officer without the prior approval of the authority specified therein. A request to conduct an enquiry by itself cannot be the starting point of the enquiry under the said provision to bypass the restriction postulated therein. Moreover, in the facts of this case, actual search for information had commenced in the year 2021, as I have already indicated, and lack of action on this count has been attributed by the State to the appellant and the other accused persons themselves. We are not going into the truth of such allegations. But if such allegations are assumed to be correct, the same shall only support the appellant's case that no enquiry was initiated before incorporation of Section 17A in the statute book. Further, in the F.I.R. or the preliminary enquiry report dated 09.12.2021, there was no reference to the communication of 05.06.2018. I, accordingly, hold that before Section 17A of the 1988 Act had become operational, no enquiry, inquiry or investigation had commenced as against the appellant in relation to the subject crime.

14. Mr. Salve has also relied on a Standard Operating Procedure (hereinafter referred to as "SOP") for processing cases under Section 17A of the 1988 Act. This has been issued under Memo no.428/07/2021-AVD.IV(B) dated 03.09.2021 by the Department of Personnel and Training of the Government of India. This memo in detail records how the aforesaid provisions shall apply. Clause 4.2 thereof stipulates: -

> *"Enquiry for the purposes of these SOPs, means any action taken, for verifying as to whether the information pertains to commission of offence under the Act."*

15. As there is no authoritative guideline defining what constitutes an enquiry, I find it safe to rely on the explanation given in the aforesaid clause of the SOP. This explanation also contemplates any action taken for verifying as to whether the information pertains to commission of offences under the Act or not. Again, the memo of 05.06.2018, if tested standalone, cannot be construed to imply taking any action.

16. The High Court citing the judgments of this Court in the cases of **Shambhoo Nath Misra -vs- State of U.P. & Others** [(1997) 5 SCC 326] and **State of Uttar Pradesh -vs- Paras Nath Singh** [(2009) 6 SCC 372], has held that the protection of sanction sought by the accused persons therein cannot be applied because when a public servant is alleged to have committed the offence of fabrication of records or misappropriation of public funds, it cannot be said that he acted in discharge of his official duty. Obviously, it cannot be said that such misdemeanour on the part of a public servant can be equated to his official duties. But these judgments were delivered while interpreting the provisions of Section 197 of 1973 Code. The requirement of previous sanction contemplated in Section 197 of the 1973 Code comes at the stage of taking cognizance of an offence. Thus, a judicial authority, in such a context has the advantage of coming to some form of opinion as to whether the offending acts can be said to have been committed in discharge of his official duty or not. In the case of **Dr. S.M. Mansoori(Dead) Through Legal Representatives -vs- Surekha Parmar and Others** [(2023) 6 SCC 156], the complaint related to offences punishable under Sections 498-A and 506 read with Section 34 of IPC as well as Sections 3 and 4 of the Dowry Prohibition Act, 1961. The police personnel had entered the house of the appellant therein without any previous sanction and the charges framed against the accused were quashed by the High Court on the ground that prior sanction under Section 197 of 1973 Code was not taken. In that context, it was held by a Coordinate Bench of this Court that looking at the nature of allegations in the complaint, at that stage it was impossible to conclude that the acts alleged to have been done by the accused were committed by her while in discharge of official duty. The High Court judgment was set aside and it was opined by the Coordinate Bench in the facts of that case, that a final view on that issue would be taken only after the evidence was recorded.

17. So far as the provision of Section 197 of the 1973 Code is concerned, the requirement for deciding the question on obtaining sanction is at the stage of taking cognizance. Thus, some element of application of mind is necessary while examining that issue. In the case of **Matajog Dobey -vs- H. C. Bhari (AIR 1956 SC 44),** there was use of force when a tax raiding party was resisted from conducting a search. This gave rise to two complaints, which were sent to two magistrates for judicial enquiry. Summonses were issued against the income tax officials and the accompanying policemen over use of force. **Matajog Dobey** (supra), the resistor, contended that use of such force was not in discharge of official duty. Objection was raised against the issuance of summons on the ground of lack of sanction as contemplated in Section 197 of the Criminal Procedure Code, which was prevalent at that point of time (1950). Negating such a contention, a Constitution Bench of this Court observed:-

> *"20. Is the need for sanction to be considered as soon as the complaint is lodged and on the allegations therein contained? At first sight, it seems as though there is some support for this view in Hori Ram case and also in Sarjoo Prasad v. King-Emperor. Sulaiman, J. says that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution. Varadachariar, J. also states that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceeding. But a careful perusal of the later parts of their judgments shows that they did not intend to lay down any such proposition. Sulaiman, J. refers (at P-179) to the prosecution case as disclosed by the complaint or the police report and he winds up the discussion in these words:"Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground". The other learned Judge also states at p. 185, "At this stage we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty". It must be so. The question may arise at any stage of the*

proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case.

xxx xxx xxx

23. Where a power is conferred or a duty imposed by statute or otherwise, and there is nothing said expressly inhibiting the exercise of the power or the performance of the duty by any limitations or restrictions, it is reasonable to hold that it carries with it the power of doing all such acts or employing such means as are reasonably necessary for such execution. If in the exercise of the power or the performance of the official duty, improper or unlawful obstruction or resistance is encountered, there must be the right to use reasonable means to remove the obstruction or overcome the resistance. This accords with commonsense and does not seem contrary to any principle of law. The true position is neatly stated thus in Broom's Legal Maxims, 10th Edn. at p. 312:" It is a rule that when the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its command."

The scope of operation of Section 17A of the 1988 Act is, however, different from that of Section 197 of the Code. The requirement of taking sanction under Section 19 of the 1988 Act also is at the same stage. Unlike Section 197 of 1973 Code (which is near identically phrased as the same section in the earlier version of the Code), Section 17A of the 1988 Act imposes restriction on police officer at the enquiry stage itself, from proceeding against a public servant in relation to any offence alleged to have been committed by him, relatable to any **recommendation made** or **decision taken** by such public servant (**emphasis added)**, without previous approval of the authorities stipulated in the said Section. We do not think the

cases arising out of Section 197 of the 1973 Code would give proper guidance for interpreting the provision of Section 17A of the 1988 Act because, in the cases under Section 197, the decision on requirement for sanction is to be taken at the stage of taking cognizance. Thus, there is in-built scope of application of judicial mind to assess, at least prima-facie, if an alleged act falls within discharge of official duty or not. Under the provisions of Section 17A of the 1988 Act, there is no scope of judicial application of mind in determining if the flaw in making recommendation or taking decision is interwoven with discharge of official duty or function or not. Moreover, the qualified embargo therein is on a police officer. On the point as to assessing whether the offending act is in discharge of official duty or not, having regard to the nature of duties of a police officer, he is less equipped to assess that factor, which involves some form of judicial application of mind. No material has been placed before us to demonstrate that the concerned police officer had undertaken any exercise for prima facie forming his opinion as to whether the offence alleged against the appellant was relatable to any recommendation made or decision taken by the appellant in discharge of his official duty. Unlike in the case of **Dr. S.M. Mansoori** (supra), in which the offences involved, by their very nature, were prima facie not relatable to discharge of official duty by the accused, here the appellant's actions relate to making recommendations or taking decisions and these decisions and recommendations otherwise, prima face, relate to discharge of official functions. In the case of **State of Telangana -vs- Managipet alias Mangipet Sarveshwar Reddy** [(2019) 19 SCC 87] the accused questioned the authorisation of the investigating officer in terms of Section 17 of the 1988 Act. This Court held :-

> *"**36.** The High Court has rightly held that no ground is made out for quashing of the proceedings for the reason that the investigating agency intentionally waited till the retirement of the accused officer. The question as to whether a sanction is necessary to prosecute the accused officer, a retired public servant, is a question which can be examined during the course of the trial as held by this Court in K. Kalimuthu [K. Kalimuthu v. State, (2005) 4 SCC 512 : 2005 SCC (Cri) 1291] . In fact, in a recent judgment in Vinod Kumar Garg v. State (NCT of Delhi) [Vinod Kumar Garg v. State (NCT of Delhi), (2020) 2 SCC 88 : (2020)*

1 SCC (Cri) 545 : (2020) 1 SCC (L&S) 146] , this Court has held that if an investigation was not conducted by a police officer of the requisite rank and status required under Section 17 of the Act, such lapse would be an irregularity, however unless such irregularity results in causing prejudice, conviction will not be vitiated or be bad in law. Therefore, the lack of sanction was rightly found not to be a ground for quashing of the proceedings."

18. I shall test later in this judgment as to whether the remand proceeding before the Special Judge was mere irregularity or fatal, but before that I have to answer the question as to whether the protection of Section 17A is applicable in the case of the appellant.

19. Large part of Mr. Salve's arguments was devoted to the proposition that the content of Section 17A of the 1988 Act was procedural in nature and relying on the judgments of this court in the cases of (i) **Anant Gopal Sheorey -vs- State of Bombay** [AIR 1958 SC 915]; (ii) **Rattan Lal -vs- State of Punjab** [AIR 1965 SC 444]; and (iii) **CBI -vs- R.R. Kishore** [2023 INSC 817], he has argued that the said provision is retroactive and not retrospective. His submission is that the amended provision applies at the starting point of enquiry, inquiry, or investigation, even though the offence may relate back to a period when the requirement of obtaining previous sanction was not necessary for starting these processes. I have already referred to Section 19 of the 1988 Act which requires the Court to satisfy itself whether such sanction stated therein has been taken at the stage of taking cognizance. So far as acts of a public servant in making recommendation or taking decision in discharge of official duties are concerned, an entry point check, prior in time has been contemplated for the investigating agencies. Thus, the requirement of taking prior approval would arise at that stage, being the beginning or commencing of enquiry, inquiry, or investigation. In my view a plain reading of the said Section leads to such an interpretation. Section 17A does not distinguish between alleged commission of offence prior to 26.07.2018 or post thereof. This provision stipulates the time when any enquiry, inquiry or investigation is commenced by a police officer. Mr. Rohtagi drew my attention to the judgment of this Court in the case of **State of Rajasthan -vs- Tejmal Choudhary** [2021 SCC Online SC 3477] to refute Mr. Salve's submissions on this point. In this judgment, a Coordinate Bench has held that the Section 17A of the 1988 Act is

substantive in nature and is therefore applicable prospectively. The same view has been taken by different High Courts but as I have an authority of this Court on this point, I do not consider it necessary to refer to all these High Court Judgements.

20. In the case of **Tejmal Choudhary** (supra) the FIR was registered on 01-01-2018 and the accused public servant sought quashing of the FIR on the ground of introduction of Section 17A in the 1988 Act. In para 10 of this judgment, the Coordinate Bench observed that:-

> *"**10.** In State of Telangana v. Managipet alias Mangipet Sarveshwar Reddy reported (2019) 19 SCC 87, this Court rejected the arguments that amended provisions of the PC Act would be applicable to an FIR, registered before the said amendment came into force and found that the High Court had rightly held that no grounds had made out for quashing the proceedings."*

In the present case, original FIR was registered on 09.12.2021 and the appellant was implicated in the aforesaid offences on 08.09.2023. There is no evidence of any substantive enquiry, inquiry, or investigation made against him prior to coming into operation of the Section 17A of the 1988 Act. Hence, the case at hand is distinguishable from the ratio laid down in the judgment of this Court of in the case of **Tejmal Choudhary** (supra).

21. The Amendment Act by which Section 17A of the 1988 Act was brought into the said statute also deleted the provisions of sub-clauses (c) and (d) of Section 13 (1) thereof. At the time the memorandum of adding the appellant as accused was issued, the said Amendment Act had become operational, but at the time of alleged commission of offence, aforesaid two sub-clauses were part of the statute book. Thus, per se, the appellant could be held liable for commission of offences stipulated in the said provisions, though their subsequent deletion might have some impact on the ultimate outcome of the case. We are not concerned with that aspect of the controversy at this stage. It has been asserted by Mr. Rohtagi, however, that since at the time of commission of offence, the protective shield of Section 17A was not in force, the appellant could not claim the benefits thereof. I, however, do not accept this argument. It has been already observed by me that the point of time Section 17A of 1988 Act would become applicable is the starting point of enquiry, inquiry,

or investigation and not the time of commission of the alleged offence. In the event any of the three acts on the part of the prosecution is triggered off post 26.07.2018, the mandate of Section 17A would be applicable. The wording of Section 17A restricts the power of a police officer to conduct any of the three acts into any offence by a public servant "under this act". Thus, if the process of enquiry commences at a time attracting specific provisions of the 1988 Act which stand deleted by the Amendment Act of 2018, the restrictive protection in form of Section 17A ought to be granted. The phrase "under this act", on such construction ought to include offences which were in the statue book at the time the subject-offences are alleged to have been committed. Mr. Rohatgi, however, wants me to construe this expression, i.e. "under this Act" to mean the 1988 Act, as it existed on and from the date the provisions of Section 17A was introduced. As the said section did not exist at the time of alleged commission of the offences, his submission is that the said provision could not apply in the case of the appellant. The said section, however, as I have already narrated, had become operational when the enquiry started. Thus, proceeding on the basis that the said provision is prospective in its operation, the material point of time for determining its prospectivity would be the starting point of enquiry or inquiry and investigation.

22. The question as to whether the phrase "under this Act" used in Section 17A of the 1988 Act, would mean to be "the Act", as it existed at the time of alleged commission of offence or "the Act" as it stood post amendment when the enquiry commenced would also have to be answered by this Court. While dealing with the issue of necessity for obtaining prior approval, I have already held that the appellant could be implicated under Section 13 (1)(c) and (d), as at the time of alleged commission of the offences, these provisions were alive. Once certain offences are deleted from an enactment, they do not vanish totally unless the lawmakers say so. They move to the back pages and can be revived if they were committed before being enacted out of the legislation. But I cannot give a restrictive interpretation to the expression "under this Act" to give an isolated retrospective operation to the said phrase, detaching it from rest of the provisions of Section 17A of the Act and remove the protective shield in a situation where an enquiry has started after introduction of the said provision but relates to an offence committed prior to

its introduction in 2018. The said phrase ought to be relatable to the date of starting of the enquiry, inquiry or investigation and not to the time or date of commission of offence.

23. Otherwise, if I apply an interpretation of the expression "under this Act" to mean the statute as it exists at the time the enactment is invoked, the same phrase is invoked, the same might result in divesting the Special Judge of his power to proceed against the appellant, as at the time the appellant's case was brought to the Special Judge, the aforesaid two sub-sections stood deleted from Section 13 (1) of the 1988 Act.

I am making this observation because the Special Judge's jurisdiction is derived from Sections 3 and 4 of the 1988 Act. These provisions read:-

> "***3. Power to appoint special Judges**.—(1) The Central Government or the State Government may, by notification in the Official Gazette, appoint as many special Judges as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely:—*
>
> *(a) any offence punishable under this Act; and*
>
> *(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).*
>
> *(2) A person shall not be qualified for appointment as a special Judge under this Act unless he is or has been a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge under the Code of Criminal Procedure, 1973 (2 of 1974).*
>
> ***4. Cases triable by special Judges.**—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or in any other law for the time being in force, the offences specified in sub-section (1) of section 3 shall be tried by special Judges only.*
>
> *(2) Every offence specified in sub-section (1) of section 3 shall be tried by the special Judge for the area within which it was committed, or, as the case may be, by the*

special Judge appointed for the case, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the Central Government.

(3) When trying any case, a special Judge may also try any offence, other than an offence specified in section 3, with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(4) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the trial of an offence shall be held, as far as practicable, on day-to-day basis and an endeavour shall be made to ensure that the said trial is concluded within a period of two years:

Provided that where the trial is not concluded within the said period, the special Judge shall record the reasons for not having done so:

Provided further that the said period may be extended by such further period, for reasons to be recorded in writing but not exceeding six months at a time; so, however, that the said period together with such extended period shall not exceed ordinarily four years in aggregate."

24. Now if I accept the meaning Mr. Rohtagi wants us to give to the said expression as employed in Section 17A of the 1988 Act, the same expression i.e. "under this Act" as contained in Section 3 (1) (a) would also have to be read to mean as "the Act" prevailing at the point of time the appellant's case is brought to the Special Judge. This would result in shrinking the jurisdiction of the Special Judge to try offences which have been repealed by the Amendment Act of 2018. I am unable to agree with Mr. Rohatgi on this point. It is an established principle of statutory interpretation that if a particular phrase is employed in different parts of an enactment, Courts ought to proceed with an understanding that the legislature intended to assign the same meaning to that expression used in different provisions thereof, unless of course, a contrary intention appears from the statute itself. Here I find no such contrary intention.

25. Now I shall examine the legality of a proceeding which is started without complying with the requirement of previous approval under

Section 17A of the 1988 Act. In the case of **Yashwant Sinha and Others -vs- Central Bureau of Investigation through its Director and Another** [(2020) 2 SCC 338], a Bench of this Court comprising of three Hon'ble Judges, while dealing with power of review had also examined this question. The Bench was unanimous in rejecting the review plea. In a concurring judgment one of the Hon'ble Judges, (K. M. Joseh, J.) held:-

> ***"116.*** *In the year 2018, the Prevention of Corruption (Amendment) Act, 2018 (hereinafter referred to as "the 2018 Act", for short) was brought into force on 26-7-2018. Thereunder, Section 17-A, a new section was inserted, which reads as follows:*
>
> > *"**17-A. Enquiry or inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties**.—(1) No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—*
> >
> > *(a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;*
> >
> > *(b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;*
> >
> > *(c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:*
> >
> > *Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:*

Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

(emphasis supplied)

117. *In terms of Section 17-A, no police officer is permitted to conduct any enquiry or inquiry or conduct investigation into any offence done by a public servant where the offence alleged is relatable to any recommendation made or decision taken by the public servant in discharge of his public functions without previous approval, inter alia, of the authority competent to remove the public servant from his office at the time when the offence was alleged to have been committed. In respect of the public servant, who is involved in this case, it is clause (c), which is applicable. Unless, therefore, there is previous approval, there could be neither inquiry or enquiry or investigation. It is in this context apposite to notice that the complaint, which has been filed by the petitioners in Writ Petition (Criminal) No. 298 of 2018, moved before the first respondent CBI, is done after Section 17-A was inserted. The complaint is dated 4-10-2018. Para 5 sets out the relief which is sought in the complaint which is to register an FIR under various provisions. Paras 6 and 7 of the complaint are relevant in the context of Section 17-A, which read as follows:*

"6. We are also aware that recently, Section 17-A of the Act has been brought in by way of an amendment to introduce the requirement of prior permission of the Government for investigation or inquiry under the Prevention of Corruption Act.

7. We are also aware that this will place you in the peculiar situation, of having to ask the accused himself, for permission to investigate a case against him. We realise that your hands are tied in this matter, but we request you to at least take the first step, of seeking permission of the Government under Section 17-A of the Prevention of Corruption Act for investigating this offence and under which, "the concerned authority shall convey its decision

under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month"."

(emphasis supplied)

***118.** Therefore, the petitioners have filed the complaint fully knowing that Section 17-A constituted a bar to any inquiry or enquiry or investigation unless there was previous approval. In fact, a request is made to at least take the first step of seeking permission under Section 17-A of the 2018 Act. Writ Petition (Criminal) No. 298 of 2018 was filed on 24-10-2018 and the complaint is based on non-registration of the FIR. There is no challenge to Section 17-A. Under the law, as it stood, both on the date of filing the petition and even as of today, Section 17-A continues to be on the statute book and it constitutes a bar to any inquiry or enquiry or investigation. The petitioners themselves, in the complaint, request to seek approval in terms of Section 17-A but when it comes to the relief sought in the writ petition, there was no relief claimed in this behalf."*

The same view has been reflected in the case of **Tejmal Choudhary** (supra).

26. One point which has been urged in relation to this authority is that this was not a contention raised by the parties in the judgment of **Yashwant Sinha** (supra) and was not dealt with by the majority opinion. Hence, according to the respondents a concurring opinion could not be a binding authority on a point which has not been dealt with by the majority of the Hon'ble Judges in the Bench. Mr. Rohatgi relied on a decision in the case of **Rameshbhai Dabhai Naika -vs- State of Gurajat and Others** [(2012) 3 SCC 400] on this point. The ratio of this decision would not apply in the context of the judgment delivered in the case of **Yashwant Sinha** (supra), as in the latter authority the majority view does not reflect any discord over the concurring view. In my opinion, however, position of law laid down in a concurring judgment ought to be treated as part of the main judgment and that opinion would form a binding authority. I should not distinguish between the main judgment and the concurring view and isolate the reasoning contained in the concurring opinion and hold the reasoning contained in the main opinion (of majority of the judges) only to have the status of a binding precedent. The

concurring view is just as much part of the main opinion (of majority of the judges) and will be a binding precedent, composite with the majority view. The position of law would be different if the majority view had expressed, either directly or by implication, a contrary view. That is not the case so far as the judgment in the case of **Yashwant Sinha** (supra) is concerned. Hence this principle of law contained in the concurring judgment would constitute precedent even though it was expressed in a concurring judgment of a learned Single Judge which the majority members of the Bench have not differed. Thus, the steps taken against the appellant under the 1988 Act ought to be invalidated as the same did not commence with prior approval as laid down under Section 17A of the 1988 Act.

27. The cases of **Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra** [AIR 2021 SC 315] and **State -vs- M. Maridoss** [(2023) 4 SCC 338] were cited by the respondents to contend that investigation ought not be scuttled at a nascent stage and it was also highlighted that the petition for quashing of an FIR was made within five days from the date the appellant was arraigned as an accused. It is a fact that the appellant had approached the quashing Court with extraordinary speed but that factor by itself would not render his action untenable, ousting him from the judicial forum to have the proceeding against him invalidated. In the cases of **R.P. Kapur -vs- State of Punjab** [AIR 1960 SC 866] and **State of Haryana -vs- Bhajan Lal** [(1992) Supp. (1) SCC 335], it has been held that prosecution undertaken in violation of a legal bar would be a valid ground for quashment of the proceeding. Further, in the case of **Mahmood Ali & others -vs- State of UP** [2023 INSC 684] a Coordinate Bench of this Court has observed :-

> *"13..... The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation....."*

28. Now I shall address the issue as to whether striking down the set of offences under the 1988 Act from the FIR would render the remand order passed by the Special Judge appointed in terms of Section 3 of the aforesaid statute illegal and non-est. For the purpose of

testing this legal issue, which was raised on behalf of the appellant, it would be necessary to refer to the provisions of Sections 3 and 4 of the 1988 Act which have been reproduced above.

29. The question of lack of prior approval under the 1988 Act was raised before the Special Judge at the time of remand but this argument was rejected on the ground that time for commission of the alleged offences related to a period prior to 26.07.2018. I have in the earlier part of this judgment discussed this question and held the point in favour of the appellant.

30. There are allegations of commission of offences against the appellant under different provisions of the 1860 Code. I have been taken through the memorandum for adding the appellant as accused and also the order of the remand Court. The IPC offences also relate to the same or similar set of transactions, for which the aforesaid provisions of the 1988 Act were applied. The substantive offences alleged against the appellant are Section 12 and Sections 13(1) (c) and (d) read with Section 13(2), which is the provisions prescribing punishment. I am not satisfied, at this stage, that the 1988 Act offences are so dominant in the set of allegations against the appellant that once I consider the allegations against the appellant de hors the alleged offences under 1988 Act, the allegations of commission of the IPC offences would automatically collapse. At this stage, in my opinion, the alleged commission of IPC offences are not mere ancillary to the 1988 Act offences, as has been argued by Mr. Salve and Mr. Luthra and if commission of offences by the appellant under the IPC provisions is proved, could form the basis of conviction independent of the offences under the 1988 Act. Thus, the ratio of the judgement of this Court in the case of **Ebha Arjun Jadeja and others -vs- State of Gujarat** [(2019) 9 SCC 789], to which I was a party, would not aid the appellant. In this judgment, it was held:-

> "***18.*** *In the case in hand, the only information recorded which constitutes an offence is the recovery of the arms. The police officials must have known that the area is a notified area under the TADA Act and, therefore, carrying such arms in a notified area is itself an offence under the TADA Act. It is true that this may be an offence under the Arms Act also but the basic material for constituting an offence both under the Arms Act and the TADA Act is*

identical i.e. recovery of prohibited arms in a notified area under the TADA Act. The evidence to convict the accused for crimes under the Arms Act and the TADA Act is also the same. There are no other offences of rape, murder, etc. in this case. Therefore, as far as the present case is concerned, non-compliance with Section 20-A(1) of the TADA Act is fatal and we have no other option but to discharge the appellants insofar as the offence under the TADA Act is concerned. We make it clear that they can be proceeded against under the provisions of the Arms Act."

As would be evident from quoted portion of the judgment in the case of **Ebha Arjun Jadeja** (supra), the Coordinate Bench had permitted proceeding against the appellant therein under the provisions of the Arms Act though basic material for constituting the offences was both under the Arms Act and the TADA.

31. In the case of **State through Central Bureau of Investigation, New Delhi -vs- Jitender Kumar Singh** [(2014) 11 SCC 724] certain persons who were not public servants were being tried with a public servant in relation to offences outside the purview of the 1988 Act. The public servant however was implicated in offences under the aforesaid statute. It has been held and observed in this judgment:-

"***46.*** *We may now examine Criminal Appeal No. 161 of 2011, where the FIR was registered on 2-7-1996 and the charge-sheet was filed before the Special Judge on 14-9-2001 for the offences under Sections 120-B, 420 IPC read with Sections 13(2) and 13(1) of the PC Act. Accused 9 and 10 died even before the charge-sheet was sent to the Special Judge. The charge against the sole public servant under the PC Act could also not be framed since he died on 18-2-2005. The Special Judge also could not frame any charge against non-public servants. As already indicated, under sub-section (3) of Section 4, the Special Judge could try non-PC offences only when "trying any case" relating to PC offences. In the instant case, no PC offence has been committed by any of the non-public servants so as to fall under Section 3(1) of the PC Act. Consequently, there was no occasion for the Special Judge to try any case relating to the offences under the PC Act against the appellant. The trying of any case under the PC Act against a public*

servant or a non-public servant, as already indicated, is a sine qua non for exercising powers under sub-section (3) of Section 4 of the PC Act. In the instant case, since no PC offence has been committed by any of the non-public servants and no charges have been framed against the public servant, while he was alive, the Special Judge had no occasion to try any case against any of them under the PC Act, since no charge has been framed prior to the death of the public servant. The jurisdictional fact, as already discussed above, does not exist so far as this appeal is concerned, so as to exercise jurisdiction by the Special Judge to deal with non-PC offences.

47. *Consequently, we find no error in the view taken by the Special Judge, CBI, Greater Mumbai in forwarding the case papers of Special Case No. 88 of 2001 in the Court of the Chief Metropolitan Magistrate for trying the case in accordance with law. Consequently, the order passed by the High Court is set aside. The competent court to which Special Case No. 88 of 2001 is forwarded, is directed to dispose of the same within a period of six months. Criminal Appeal No. 161 of 2011 is allowed accordingly."*

Citing this authority along with the judgement of this court in the cases of (i) **Chiranjilal Goenka -vs- Jasjit Singh & Others** [(1993) 2 SCC 507], (ii) **State of Tamil Nadu -vs- Paramasiva Pandian** [(2002) 1 SCC 15], (iii) **State of Punjab -vs- Davinder Pal Singh Bhullar** [(2011) 14 SCC 427] and (iv) **Kaushik Chaterjee -vs- State of Haryana** [(2020) 10 SCC 92] it was argued that the defect of jurisdiction strikes at the very power or authority of the Court and hence the Special Judge could not have passed the remand order and hence the entire proceeding against the appellant before the Special Judge ought to fail. On the same point, certain other authorities were also referred to but we do not consider it necessary to individually cite those authorities and deal with them separately.

32. So far as the present case is concerned, the principle of law laid down in the authorities referred to in the preceding paragraph would not apply. In Section 4(3) of the 1988 Act it has been stipulated that when trying any case, a Special Judge may also try any offence other than an offence specified in Section 3, with which the accused

may be charged with under the 1973 Code, at the same trial. In the case of **Jitender Kumar Singh** (supra), the public servant against whom allegations of commission of offences under the 1988 Act were brought, had died before framing of charge and other accused persons were not public servants. They were not charged with any offence under the 1988 Act. It was in this context the aforesaid judgment was delivered. It has been submitted before us on behalf of the State that other co-accused persons have been implicated in offences under the 1988 Act. A similar line of reasoning was followed in the case of **A. Sreenivasa Reddy -vs- Rakesh Sharma and Another** [2023 INSC 682]. I have earlier observed that the offences against the appellant relate to the same or similar set of transactions in relation to which the Special Judge is proceeding with the case initiated by the F.I.R. dated 09.12.2021 against the other accused persons. In this context, I shall refer to Section 223 of the 1973 Code, which stipulates :-

> "***223. What persons may be charged jointly***.—*The following persons may be charged and tried together, namely:—*
>
> *(a) persons accused of the same offence committed in the course of the same transaction;*
>
> *(b) persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;*
>
> *(c) persons accused of more than one offence of the same kind, within the meaning of section 219 committed by them jointly within the period of twelve months;*
>
> *(d) persons accused of different offences committed in the course of the same transaction;*
>
> *(e) persons accused of an offence which includes theft, extortion, cheating, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first-named persons, or of abetment of or attempting to commit any such last named offence;*

(f) persons accused of offences under sections 411 and 414 of the Indian Penal Code (45 of 1860) or either of those sections in respect of stolen property the possession of which has been transferred by one offence;

(g) persons accused of any offence under Chapter XII of the Indian Penal Code (45 of 1860) relating to counterfeit coin and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence; and the provisions contained in the former part of this Chapter shall, so far as may be, apply to all such charges:

Provided that where a number of persons are charged with separate offences and such persons do not fall within any of the categories specified in this section, the [Magistrate or Court of Session] may, if such persons by an application in writing, so desire, and [if he or it is satisfied] that such persons would not be prejudicially affected thereby, and it is expedient so to do, try all such persons together."

33. Sub clause (a) of the aforesaid provision of the 1973 Code, so far as charging and trying of an accused is concerned, could apply in the present case, as the non-obstante clause with which Section 4 of the 1988 Act is couched, would not oust the principles contained in Section 223 of the 1973 Code. There is no incompatibility in applying the aforesaid principle considering the content of sub-section 3 of Section 4 of 1988 Act. In the case of **Vivek Gupta -vs- Central Bureau Investigation and Another** [(2003) 8 SCC 628] decided by a Coordinate Bench of this Court, it has been held:-

"***14.*** *The only narrow question which remains to be answered is whether any other person who is also charged of the same offence with which the co-accused is charged, but which is not an offence specified in Section 3 of the Act, can be tried with the co-accused at the same trial by the Special Judge. We are of the view that since sub-section*

(3) of Section 4 of the Act authorizes a Special Judge to try any offence other than an offence specified in Section 3 of the Act to which the provisions of Section 220 apply, there is no reason why the provisions of Section 223 of the Code should not apply to such a case. Section 223 in clear terms provides that persons accused of the same offence committed in the course of the same transaction, or persons accused of different offences committed in the course of the same transaction may be charged and tried together. Applying the provisions of Sections 3 and 4 of the Act and Sections 220 and 223 of the Code of Criminal Procedure, it must be held that the appellant and his co-accused may be tried by the Special Judge in the same trial.

15. *This is because the co-accused of the appellant who have been also charged of offences specified in Section 3 of the Act must be tried by the Special Judge, who in view of the provisions of sub-section (3) of Section 4 and Section 220 of the Code may also try them of the charge under Section 120-B read with Section 420 IPC. All the three accused, including the appellant, have been charged of the offence under Section 120-B read with Section 420 IPC. If the Special Judge has jurisdiction to try the co-accused for the offence under Section 120-B read with Section 420 IPC, the provisions of Section 223 are attracted. Therefore, it follows that the appellant who is also charged of having committed the same offence in the course of the same transaction may also be tried with them. Otherwise it appears rather incongruous that some of the conspirators charged of having committed the same offence may be tried by the Special Judge while the remaining conspirators who are also charged of the same offence will be tried by another court, because they are not charged of any offence specified in Section 3 of the Act."*

34. A question has also been raised by the appellant as to whether the Special Judge could have passed the remand order in the event

the remand was asked for only in respect of alleged commission of the IPC offences. We are apprised in course of hearing that the appellant has been enlarged on bail. Hence, this question need not be addressed by me in this judgment. I, accordingly, dispose of this appeal with the following directions:-

(i) If an enquiry, inquiry or investigation is intended in respect of a public servant on the allegation of commission of offence under the 1988 Act after Section 17A thereof becomes operational, which is relatable to any recommendation made or decision taken, at least prima facie, in discharge of his official duty, previous approval of the authority postulated in sub-section (a) or (b) or (c) of Section 17A of the 1988 Act shall have to be obtained. In absence of such previous approval, the action initiated under the 1988 Act shall be held illegal.

(ii) The appellant cannot be proceeded against for offences under the Prevention of Corruption Act, 1988 as no previous approval of the appropriate authority has been obtained. This opinion of this Court, however, shall not foreclose the option of the concerned authority in seeking approval in terms of the aforesaid provision. In this case, liberty is preserved for the State to apply for such approval as contained in the said provision.

(iii) I decline to interfere with the remand order dated 10.09.2023 as I am of the view that the Special Judge had the jurisdiction to pass such order even if the offences under the 1988 Act could not be invoked at that stage. Lack of approval in terms of Section 17A would not have rendered the entire order of remand non-est.

(iv) The appellant, however, could be proceeded against before the Special Judge for allegations of commission of offences under the Indian Penal Code, 1860 for which also he has been implicated.

35. The appeal stands partly allowed, in the above terms.

36. All connected applications stand disposed of.

Bela M. Trivedi, J.

1. Leave granted.

2. The entire controversy in the instant Appeal centres around the interpretation of Section 17A of the Prevention of Corruption Act,1988 (hereinafter referred to as the "PC Act"), and its applicability to the facts of the present case. Having had the benefit of going through the draft opinion of my esteemed Brother Justice Aniruddha Bose, I deem it appropriate to pen down my views on the issues involved in the Appeal.

FACTUAL MATRIX:

3. Bereft of unnecessary details, the bare minimum facts required to decide the present Appeal are that the appellant, who is sought to be added as the accused No. 37 vide the "Accused Adding Memo" dated 08.09.2023, in the FIR No. 29/2021 registered at the P.S. CID P.S., AP, Amarvathi, Mangalalagiri, on 09.12.2021, was the Chief Minister of Andhra Pradesh between 2014-2019. The said FIR No.29/2021 was initially registered against 26 accused on the basis of the report of the Chairman APSSDC dated 07.09.2021 and the preliminary enquiry report dated 09.12.2021, for the offences under Sections 166, 167, 418, 420, 465, 468, 471, 409, 201, 109 read with 120-B IPC and Section 13(2) read with Section 13(1)(c) and 13(1)(d) of the PC Act, in connection with the alleged swindling of funds by the then Special Secretary and other officers of the Government and by the Directors, Project team members and other officers of M/s Siemens and M/s DesignTech and their shell/defunct allies, by creating bogus invoices and thereby siphoning of funds of the government.

4. As per the case of the respondent state, the office of Director General, Anti-corruption Bureau, A.P, Vijayawada, vide the memorandum dated 05.06.2018 had directed the DSP, CIU, ACB, Vijayawada to conduct a Regular Inquiry into the letter/complaint dated 14.05.2018 received by it in respect of the allegations of corruption made against the officials of the A.P. State Skill Development Corporation Vijayawada. Based on the report of the complainant Sri Konduru Ajay Reddy, Chairman, APSSDC; and the PE Report of Sri N. Surendra, Dy. S.P. EOW-II, CID, A.P. Mangalagiri, the case being FIR No. 29/2021 was registered on 09.12.2021.

5. It was stated in the "Accused Adding Memo" dated 08.09.2023 filed in CR No. 29/2021 against the appellant (A-37) *inter alia* that–

> "As per the investigation so far done, *prima facie* established that A36 committed the offence through a prior conspiracy led by A-37 along with A-1 A-2 and others. A-38 colluded with A-37, on 16.2.2015, as a minister in the AP cabinet led by A-37, approved the cost estimation of Siemens project received through A-1, without getting any assessment, verification, proper DPR and evaluation. The accused A-38 while holding office as public servant as a Minister holding departments i.e SDEI & APSSDC, conspired, colluded with A-37, A-2, A-6 to A-10 and with criminal intention, released the Govt funds through the accused without verifying the contribution of Technology partners, allowed other accused to do fraudulent and illegal acts, committed misappropriation of Government funds to the tune of around Rs.279 Crores which were entrusted to them or under their control by corrupt and illegal methods. A-37 & A-38 through A-1, allowed other accused to divert APSSDC funds by using fake invoices as genuine one for purpose of cheating through the shell, defunct companies without providing materials/services to the APSSDC-Siemens project by the M/s DesignTech, by conspiring, colluding and intentionally co-operating in the commission offence with several acts of by the concerned Directors of companies and private persons. A-38 as a Minister holding a concerned department i.e SDE&I & APSSDC did not review the project and caused the wrongful loss to the Govt. and wrongful gain to himself and others.
>
> Therefore, a prima-facie case was established for the offences U/s 120(B), 418, 420, 465, 468, 471, 409, 201, 109 r/w 34 & 37 IPC & Section 12, 13(2) r/w 13(1) (c) and (d) of Prevention of Corruption Act, 1988 against Sri Nara Chandra Babu Naidu (A- 37), formerly Chief Minister of Andhra Pradesh and against Sri K. Atchannaidu, the then Minister for Labour & Employment, Factories, Youth & Sports, Skill Development and Entrepreneurship, Govt. of A.P were added as accused no. 37 and A-38 respectively to this case."

6. The appellant was arrested on 09.09.2023 and was produced before the Special Court for SPE and ACB cases Vijayawada, A.P. The Special Court on 10.09.2023, passed the order remanding the appellant (accused no.37) to the judicial custody till 22.09.2023 under Section 167 Cr.PC by holding *inter alia* that the material on record *prima facie* showed that accused no. 37 had in pursuance of criminal conspiracy, while holding his office as a public servant, colluded with the other accused and committed misappropriation of government funds to the tune of Rs.279 crores by corrupt and illegal methods, causing huge loss to the Government exchequer. It was also observed that there was a *prima facie* material to show the nexus of accused no.37 with the other accused no. 1, 2, 6 and 38 and the other representatives of shell companies, and also sufficient material eliciting the role of A-37 in the approval of the Skill Development Project and its activities, attracting the offences under IPC and PC Act.

7. The appellant thereafter filed a petition being Criminal Petition no. 6942/2023 in the High Court under Section 482 of Cr.PC seeking to quash the FIR being no.29/2021 qua him and the consequential order of remand dated 10.09.2023 passed by the Special Court. The said Criminal Petition came to be dismissed by the High Court vide the impugned order dated 22.09.2023 which is under challenge before this Court by way of the present Appeal.

SUBMISSIONS

8. During the course of lengthy arguments made by a battery of lawyers led by learned Senior Advocate Mr. Harish N. Salve appearing for the appellant, broadly following submissions were made:

(i) The absence of a prior approval as mandated by Section 17A of the PC Act, vitiated the conduct of enquiry or inquiry or investigation; the initiation and continuation of investigation in FIR No. 29 of 2021 dated 09.12.2021, including the various investigative steps of adding of the appellant as Accused No. 37 and arresting the appellant on 08.09.2023; and the remand of the appellant into the custody pursuant to the orders passed by the Special Court.

(ii) Section 17A of the PC Act which was introduced with effect from 26.07.2018, interdicts "…. any enquiry or inquiry or investigation into an offence alleged to have been committed by a public servant ……", without the previous approval of functionaries specified in Clauses (a), (b) or (c), as the case may be, the only exception being where a public servant is apprehended "red handed".

(iii) Section 17A constitutes a complete legal bar to the very initiation of any enquiry, inquiry or investigation as was noted by this Court in ***Yashwant Sinha & Ors. Vs. Central Bureau of Investigation***[1].

(iv) Section 17A relates to the procedure by which an enquiry, inquiry or investigation into an offence is to be conducted. It is a procedural provision, which does not impair any right of the investigating agencies. In this regard reliance is placed on ***Anant Gopal Sheorey vs. State of Bombay***[2] and on ***Rattan Lal Alias Ram Rattan Vs. State of Punjab***[3].

(v) No person has a "vested right in the remedies and the methods of procedure in trials for crime." A law that draws upon antecedent facts in its prospective operation is not retrospective - it is sometimes referred to as being retroactive.

(vi) Section 17A is retroactive in the sense that it would apply in future in relation to all enquires, inquires or investigations being conducted, even though such enquiries, inquires or investigations may be in respect of offences which may have allegedly been committed prior to coming into force of Section 17A.

(vii) Section 17A (c) uses the phrase "at the time when the offence was alleged to have been committed". Meaning thereby it suggest that the provision is intended to apply to offences committed in the past without any limitation.

(viii) The question whether a prosecution can be initiated after a substantive offence is deleted is not being raised in the present case - the appellant's case will be that in such matters, if the law

1 **(2020) 2 SCC 338**

2 **AIR 1958 SC 915**

3 **AIR 1965 SC 444**

does not consider an act to be an offence anymore, initiating a prosecution after the offence is deleted violates Article 21. However, that will arise in the Trial and the issue is not being raised at this stage.

(ix) The conclusion of the High Court that the provision cannot be applied in the case of any offence committed prior to 26.07.2018 is erroneous, as in the instant case the alleged offences have taken place till 2019, as for the case of the prosecution.

(x) The SOP issued in relation to Section 17A contemplates a step-by-step approval requirement as per the notification issued in this behalf.

(xi) The alleged offences in the present case relate to the recommendations made/decisions taken by the appellant in discharge of his official functions or duties. The focus of the provision under Section 17A is the person who has committed the offence and not merely the offence. The private acts of a person, not in his or her capacity as a public servant are not protected by this provision, however, if the offences are based on the allegations in connection with recommendations or decisions taken in discharge of his official functions or duties, section 17A would apply. The allegations levelled against the appellant have a clear nexus to his post of Chief Minister.

(xii) Section 17A uses the phrase "any offence". Hence the requirement of obtaining prior approval under Section 17A is applicable to all offences, and not just offences under the PC Act. In any event, even if the prior approval under Section 17A applies only to allegations of offences under the PC Act, the continuation of investigation under IPC offences cannot be countenanced as the basic material for constituting both kinds of offences is the same.

(xiii) It is trite law that if the initial action is not in consonance with law, all subsequent and consequential proceedings would fall. In the present case, once offences under the PC Act are effaced from existence, the custody of the appellant pursuant to the orders passed by the Special Court from time to time was without any sanction of law, as the Special Court in that case had no powers to remand persons accused of offences

under the IPC alone. The jurisdictional fact for the exercise of jurisdiction by the Special Court is the existence of an offence under the PC Act, and once such jurisdictional fact ceases to exist, the orders of Special Court are required to be treated as without any sanction of law and non-est. In this regard, reliance is placed on ***State of Punjab vs. Davinder Pal Singh Bhullar & Others***[4].

(xiv) A legal bar to a prosecution is a valid ground for quashing the proceedings as held by this Court in ***R.P. Kapur vs. State of Punjab***[5] and ***State of Haryana Vs. Bhajan Lal***[6]***.***

9. Learned Senior Advocate Mr. Mukul Rohtagi for the Respondent – State of Andhra Pradesh made following submissions: -

(i) None of the facets contained in Section 17A would be applicable to the facts of the present case in as much as Section 17A of the PC Act came into force with effect from 26.07.2018, whereas the Regular Enquiry was initiated in respect of the alleged scam against the appellant and others by ACB vide the letter dated 05.06.2018, on the basis of the complaint received from within the DGSTI on 14.05.2018. When the Enquiry began, Section 17A was not in existence and therefore cannot be made applicable to the present case.

(ii) On 11.07.2021, the State issued a memo at the request of the M.D. of APSSDC entrusting a detailed investigation into the very alleged scam. As long as the enquiry into the offence. i.e. facts constituting the offence by the ACB and the CID enquiry are one and the same i.e. about the siphoning of funds from APSSDC during the period 2015-2018. Therefore, the date of initiation of Enquiry into the said offence for the purpose of deciding the applicability of Section 17A of the PC Act is the date on which the Enquiry was first initiated into that particular offence, i.e. 05.06.2018 in the instant case.

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4 **(2011) 14 SCC 770**

5 **AIR 1960 SC 866**

6 **1992 (Suppl.) SCC 335**

(iii) The word "Enquiry" is neither defined in the Code of Criminal Procedure nor in the PC Act. As per the Standard Operating Procedure issued by the Government of India however describes "enquiry" as – "enquiry for the purposes of the SOPs means any action taken, for verifying as to whether the information pertains to commission of an offence under the Act." Hence, the date of initiation of Enquiry is only offence specific and not investigation agency specific or complaint/ complainant specific, and does not change by the mere change of investigating agency.

(iv) The Enquiry, which was initiated by the ACB on 05.06.2018 i.e. much prior to the incorporation of Section 17A into the PC Act, was later entrusted to the AP CID. All the decisions that formed part of the offences were taken much prior to the amendment of the PC Act i.e. between 2015 and 2017. Therefore, no approval as contemplated under Section 17A would be required.

(v) The offences allegedly committed by the appellant were not in discharge of his official functions or duties. Even as per the appellants case, he was neither the Minister In-Charge of the concerned Project, nor had he had anything to do with the concerned corporation (APSSDC).

(vi) In the instant case, the alleged offences have been registered not only under the PC Act but also under various offences of Indian Penal Code (IPC) like Sections 409, 166, 167, 418, 420, 465, 468, 471, 201 and 109 read with Section 120(B) of IPC. Committing criminal breach of trust/misappropriation of funds could never be construed to fall under the discharge of official duties. In any case the question whether an act is within one's official capacity or not can only be decided in the course of trial.

(vii) As held in ***State of Rajasthan vs. Tejmal Choudhary***,[7] Section 17A of PC Act is 'a Substantive Provision' and is therefore applicable only prospectively. Section 17A envisages a substantive right against non-prosecution of innocent acts in course of official duty; and not an obstacle/ hurdle in the investigation process of the prosecution, especially when the sanction is denied. Section 17A creates new rights, disabilities

7 **2021 SCC Online SC 3477**

and obligations and therefore it ought not to be applied retrospectively as held in ***G.J. Raja vs. Tejraj Surana*** [8]**.**

(viii) Under the 2018 amendment, other than introducing Section 17A, other sections like Section 13 (1)(c) and 13(1)(d) i.e. the offences for which the appellant is charged, were specifically repealed and the offences were redefined. Section 17A can have no application to the offences as they existed prior to the 2018 amendment.

(ix) Even if Section 17A of the PC Act were to be applicable to the present case, the IPC offences would survive and therefore also the FIR qua the appellant cannot be quashed. The question of competence of a particular court to try the offences would arise only after the investigation is complete and a chargesheet is filed.

(x) When one of the co-accused has been charged under the offences under both the PC Act and the IPC, while the other co-accused have only been charged under the IPC, the Special Court would have jurisdiction to try both the accused persons in view of Sections 3, 4 and 5 of the PC Act. In the instant case 38 persons including multiple public servants have been arrayed as the accused in Crime No. 29 of 2021 before the AP CID Police Station, and therefore the Special Court under the PC Act has the jurisdiction to try all the accused involved in the case.

(xi) In case of two possible constructions of a provision in the PC Act, it is the duty of the Court to interpret it in the manner which roots out corruption, as opposed to creating a road block in the fight against corruption.

(xii) Section 17A of the PC Act is substantially similar to Section 197 of the Cr.P.C., and this Court has interpretively narrowed down the circumstances in which sanction under Section 197 of Cr.P.C. needs to be obtained, by holding that official duties, when discharged for collateral or other benefits, would fall outside the scope of the term “official duties”.

8 **(2019) 9 SCC 469**

(xiii) The judgment in case of ***Yaswant Sinha vs. CBI*** (supra)**,** relied upon by the appellant was not a binding precedent, as the portion thereof relied upon was a discordant note in Hon'ble Justice Joseph's judgment, which was in variance with the main judgment.

(xiv) The appellant was added as an accused by filing the "Accused Adding Memo" on 07.09.2023 and the petition for quashing the FIR was filed by the appellant merely 5 days later, on 12.09.2023. There was a clear attempt on the part of the appellant therefore to scuttle the investigation at the preliminary stage qua him. When there are adequate grounds to initiate a criminal investigation, the same cannot be scuttled more particularly when the other central agencies are also investigating the same scam alleged against the appellant.

ANALYSIS:

10. At the outset, it may be noted that the PC Act 1988 sets the framework for prosecuting individuals involved in corrupt activities and provides measures to prevent corruption in various spheres of the society. By emphasizing accountability, transparency and strict legal consequences, the PC Act stands to combat corruption and to foster and uphold the culture of ethical conduct. The very objectives of the Act are to prevent corruption, to promote transparency and accountability in the public administration, to deter individuals from engaging in corrupt practices by imposing strict penalties, protects whistleblowers etc. It also provides for the investigation and prosecution of corruption cases, outlining the procedure for gathering evidence, conducting trials and ensuring a fair and expeditious legal process. By the Prevention of Corruption (Amendment) Act 2018 (hereinafter referred to as the Amendment Act, 2018), the PC Act 1988 was further amended, to fill in the gaps in the description and coverage of the offence of bribery so as to bring it in line with the current international practices and also to meet more effectively the country's obligations under the United Nations Convention Against Corruption. The Central Government in exercise of the powers conferred by sub section (2) of Section (1) of the Amendment Act, 2018, had vide the Notification dated 26.07.2018 appointed the 26th July 2018 as the date on which the provisions of the said Amendment shall come into force. Accordingly, the said provisions of the Amendment Act, 2018 came into force on 26.07.2018.

11. By the Amendment Act 2018, several provisions more particularly the offences described under Section 7, 8, 9, 10 and 13 in the PC Act, 1988 were substituted with the new provisions; and several new provisions like Section 7A, 17A, 18A, 29A etc. were inserted. Certain provisions pertaining to the punishments of the offences under the Act were also amended. The newly added Section 17A being relevant for this Appeal, is reproduced as under: -

> "**17A. Enquiry or Inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties.—**
>
> No police officer shall conduct any enquiry or inquiry or investigation into any offence alleged to have been committed by a public servant under this Act, where the alleged offence is relatable to any recommendation made or decision taken by such public servant in discharge of his official functions or duties, without the previous approval—
>
> (a) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of the Union, of that Government;
>
> (b) in the case of a person who is or was employed, at the time when the offence was alleged to have been committed, in connection with the affairs of a State, of that Government;
>
> (c) in the case of any other person, of the authority competent to remove him from his office, at the time when the offence was alleged to have been committed:
>
> Provided that no such approval shall be necessary for cases involving arrest of a person on the spot on the charge of accepting or attempting to accept any undue advantage for himself or for any other person:
>
> Provided further that the concerned authority shall convey its decision under this section within a period of three months, which may, for reasons to be recorded in writing by such authority, be extended by a further period of one month."

12. Since the main issue involved in the present Appeal is in respect of the interpretation of the newly inserted provision Section 17A, let us regurgitate the basic principles of Statutory interpretation as propounded by this Court from time to time. It is well known rule of interpretation of statutes that the courts must look to the object which the Statute seeks to achieve while interpreting any of the provisions of the Act. A purposive approach for interpreting the Act is necessary[9]**.** The purport and object of the Act must be given its full effect[10]. The text and the context of the entire Act must be looked into while interpreting any of the expressions used in the Statue. If two views are possible, the view which most accords the object of the Act, and which makes the Act workable must necessarily be the controlling view. Even penal Statutes are governed not only by their literal language, but also by the object sought to be achieved by Parliament[11]**.** Even if the words occurring in the Statute are plain and unambiguous, they have to be interpreted in a manner which would fit in the context of the other provisions of the Statutes and bring about the real intention of the legislature[12]**.**

13. Although not specifically mentioned in the Statement of Objects and Reasons of the Amendment Act, 2018, the object of inserting Section 17A in the PC Act, which is in *pari materia* with the provisions contained in Section 6A of the Delhi Special Police Establishment Act 1946, is to protect the honest public servants from the harassment by way of inquiry or investigation in respect of the decisions taken or acts done in bonafide performance of their official functions or duties. Whereas Section 19 bars the courts from taking the cognizance of an offence punishable under the PC Act, alleged to have been committed by public servants except with the prior sanction of the concerned authorities mentioned therein, Section 17A bars the police officer from conducting any enquiry or inquiry or investigation of offences relatable to recommendations made or decision taken by public servant in discharge of official functions or duties, without the previous approval of the concerned authorities mentioned therein. From the bare reading, it is discernible that Section 17A has the following main four facets.

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9 **S. Gopal Reddy Vs. State of A.P.; 1996 (4) SCC 596.**

10 **Indian Handicrafts Emporium & Ors. Vs. Union of India & Ors.; 2003 (7) SCC 589.**

11 **Asian Resurfacing of Road Agency Pvt. Ltd. & Anr. Vs. Central Bureau of Investigation; 2018 (16) SCC 299.**

12 **R.M.D. Chamarbaugwalla & Anr. Vs. Union of India & Anr; AIR 1957 SC 628.**

(I) Enquiry or inquiry or investigation of offences under the PC Act.

(ii) Alleged offences should be relatable to the recommendation made or decision taken by a public servant.

(iii) Such recommendation made or decision taken by a public servant should be in discharge of official functions or duties and

(iv) Previous approval of the authorities mentioned therein.

14. Though the word 'Enquiry' as contained in Section 17A has neither been defined in the PC Act nor in the CrPC, as per the Standard Operating Procedures (SOPs) issued by the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel& Training) dated 3rd September, 2021 for processing of cases under Section 17A, "Enquiry" means any action taken, for verifying as to whether the information received by the Police Officer pertains to the commission of an offence under the Act (Para 4.2 of the said SOPs). The meaning of the words 'inquiry' and 'investigation' for the purposes of Section 17A could be imported from the definitions contained in Section 2(g) & Section 2(h) respectively of Cr.PC, the same being made applicable subject to certain modifications in view of Section 22 of the PC Act.

15. As stated earlier, the provisions pertaining to the offences under the PC Act particularly the offences under Section 7, 8, 9, 10 and 13, have been substantially amended, and the new offence under Section 7(A), has been inserted by the Amendment Act 16/2018. Such substitution in place of existing provisions and such insertion of new provisions in the PC Act, have created new set of rights and liabilities under the Act. Section 17A having been newly inserted simultaneously with such amendments in the provisions pertaining to the offences, in my opinion, Section 17A could be made applicable only to the said amended/ newly inserted offences under the PC Act. Section 17A having been introduced as a part of larger legislative scheme, and the other offences under the PC Act having been redefined or newly inserted by way of Amendment Act, 2018, Section 17A is required to be treated as a substantive and not merely a procedural in nature. Such a substantive amendment could not be made applicable retrospectively to the offences like Section 13(1)(c) and 13(1)(d), which have been deleted under the Amendment Act, 2018.

16. The submission of ld. Senior Advocate Mr. Salve that since Section 17A constitutes a legal bar to the very initiation of enquiry, inquiry or investigation into the offence alleged to have been committed by a public servant, without the previous approval of the functionaries specified in the said provision, such a provision is procedural in nature, and therefore the mandate of Section 17A should be made retroactively applicable i.e. even to the pending enquiry, inquiry or investigation, if not made applicable retrospectively, also can not be accepted. The cardinal principle of construction is that every statute would have prospective operation, unless it is expressly or by necessary implication made to have a retrospective operation. There could not be a presumption against the retrospectivity. In the instant case, the Amendment Act, 2018, by which Section 17A was inserted, was specifically made applicable with effect from 26.07.2018 by the Central Government vide the Notification of the even date. Hence, the intention of the Legislature was also to make the amendments applicable prospectively from a particular date and not retrospectively or retroactively. In ***Vineeta Sharma vs. Rakesh Sharma and Others***[13]**,** a three-judge bench has very aptly distinguished the effect of retrospective statute, retroactive statute and prospective statute, and has observed as under: -

> **"61.** The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backwards and takes away or impairs vested rights acquired under existing laws. A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended Section 6, since the right is given by birth, that is, an antecedent event, and the provisions operate concerning claiming rights on and from the date of the Amendment Act.
>
> **62.** The concept of retrospective and retroactive statute was stated by this Court in *Darshan Singh* v. *Ram Pal Singh* [*Darshan Singh* v. *Ram Pal Singh*, 1992 Supp (1) SCC 191] , thus: (SCC pp. 211-13, paras 35-37)

13 **2020 (9) SCC 1**

"*35*. Mr Sachar relies on *Gokal Chand* v. *Parvin Kumari* [*Gokal Chand* v. *Parvin Kumari*, (1952) 1 SCC 713 : AIR 1952 SC 231] , *Garikapati Veeraya* v. *N. Subbiah Choudhry* [*Garikapati Veeraya* v. *N. Subbiah Choudhry*, AIR 1957 SC 540] , *Jose Da Costa* v. *Bascora Sadasiva Sinai Narcornim* [*Jose Da Costa* v. *Bascora Sadasiva Sinai Narcornim*, (1976) 2 SCC 917] , *Govind Das* v. *CIT* [*Govind Das* v. *CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133] , *Henshall* v. *Porter* [*Henshall* v. *Porter*, (1923) 2 KB 193] , *United Provinces* v. *Atiqa Begum* [*United Provinces* v. *Atiqa Begum*, 1940 SCC OnLine FC 11 : AIR 1941 FC 16] , in support of his submission that the Amendment Act was not made retrospective by the legislature either expressly or by necessary implication as the Act itself expressly provided that it shall be deemed to have come into force on 23-1-1973; and therefore there would be no justification to giving it retrospective operation. The vested right to contest which was created on the alienation having taken place and which had been litigated in the court, argues Mr Sachar, could not be taken away. In other words, the vested right to contest in appeal was not affected by the Amendment Act. However, to appreciate this argument we have to analyse and distinguish between the two rights involved, namely, the right to contest and the right to appeal against the lower court's decision. Of these two rights, while the right to contest is a customary right, the right to appeal is always a creature of statute. The change of the forum for appeal by enactment may not affect the right of appeal itself. In the instant case we are concerned with the right to contest and not with the right to appeal as such. There is also no dispute as to the propositions of law regarding vested rights being not taken away by an enactment which is ex facie or by implication not retrospective. But merely because an Act envisages a past act or event in the sweep of its operation, it may not necessarily be said to be retrospective. Retrospective, according to *Black's Law Dictionary*, means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law, according to the same dictionary, means a law which looks backwards

> or contemplates the past; one which is made to affect acts or facts occurring, or rights occurring, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Retroactive statute means a statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights."

17. Thus, whereas the prospective statute operates from the date of its enactments conferring new rights, the retrospective statute operates backwards and takes away or impairs vested rights acquired under the existing laws. A retroactive statute is one that does not operate retrospectively, however depending upon the status and nature of the events or transactions, the operation of the statute is extended or given effect from the date prior to its enactment. So far as the Amendment Act, 2018 is concerned, it has been made applicable specifically from the date of its notification i.e. 26.07.2018.

18. In ***Hitendra Vishnu Thakur and Others vs. State of Maharashtra and Others***[14]*,* it was held by this Court that a statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation unless otherwise provided either expressly or by necessary implication. The ratio of the said judgment in ***Hitendra Vishnu Thakur*** was also followed in ***G.J. Raja vs. Tejraj Surana***[15]***.***

19. In ***State of Telangana vs. Managipet @ Mangipet Sarveshwar Reddy***[16]***,*** this Court rejected the arguments that the amended provisions of the PC Act would be applicable to an FIR registered before the said amendment came into force.

20. In a very recent decision in the case of ***State of Rajasthan vs. Tejmal Choudhary***[17]***,*** this Court set-aside the interim order passed by the High Court which had quashed the proceedings only on the

14 **(1994) 4 SCC 602**

15 **(2019) 19 SCC 469**

16 **(2019) 19 SCC 87**

17 **(2021) SCC OnLine SC 3477**

ground that the approval was not obtained under Section 17A of the PC Act, by observing *inter alia* that the legislative intent in the enactment of a statute is to be gathered from the express words used in the statute, unless the plain words literally construed give rise to absurd results. It has been further observed therein that this Court has to go by the plain words of the statute to construe the legislative intent, and that it could not possibly have been the intent of the legislature that all pending investigations up to July 2018 should be rendered infructuous.

21. Apart from the afore-stated legal position, it is also required to be noted that while passing the Amendment Act 2018 by which the then existing offences under the PC Act were deleted and redefined, and by which some new offences were inserted, the Legislature had simultaneously introduced Section 17A. It was also stated in the Amendment Act that the same shall come into force from the date as may be notified by the Central Government. Therefore, it is required to be presumed that the intention of the legislature was to make Section 17A applicable only to the new offences as amended by Amendment Act, 2018 and not to the offences which existed prior to the coming into force of the Amendment Act 2018. Any other interpretation may lead to an anomalous situation resulting into absurdity in as much as there could not be prior approval of the authorities as contemplated under Section 17A for the offences which have been deleted by the Amendment Act, 2018. If the submission of Mr. Salve that Section 17A is retroactive in operation is accepted, then all the pending proceedings of enquiry, inquiry and investigation as on 26.7.2018, carried out in respect of the offences which existed prior to the amendment would become infructuous, frustrating the very object of the Act.

22. As stated earlier, the very object of the PC Act is to combat the corruption, and the object of Section 17A is to protect the honest and innocent public servants from undergoing the harassment by the police for the recommendations made or decisions taken in discharge of official functions or duties. It cannot be the object of Section 17A to give benefit to the dishonest and corrupt public servants. If any enquiry or inquiry or investigation carried out by a police officer in respect of the offence committed by a public servant is held to

be *non est* or infructuous by making Section 17A retrospectively or retroactively applicable, the same would not only frustrate the object of the PC Act but also would be counter-productive. It is axiomatic that no proceeding could stand vitiated or could become infructuous on account of the subsequent amendment in the Act. The well-known and well accepted rule of interpretation of statute is that the courts should take into consideration the other provisions of the Act also while interpreting a particular provision, and should avoid such interpretation as would lead to an anomalous situation or to frustration of the object of the Act.

23. As held in ***Subramanian Swamy vs. Manmohan Singh and Another***[18]***,*** in case of two possible constructions of a provision in the PC Act, it would be the duty of the court to accept the one that seeks to eradicate corruption to the one which seeks to perpetuate it. In ***Subramanian Swamy vs. Director, Central Bureau of Investigation and Another***[19], the Constitution Bench had observed while dealing with Section 19 of the P.C. Act that the protection against malicious prosecution which is extended in public interest, cannot become a shield to protect corrupt officials.

24. The judgment in case of ***Yashwant Sinha and Others vs. Central Bureau of Investigation*** (supra), relied upon by Mr. Salve also would not be of any help to the appellant. Mr. Salve has relied upon the observations made by Hon'ble Justice Joseph in his concurring judgment, which according to Mr. Rohtagi was a discordant note in variance with the main judgment of two judges. Be that as it may, what has been observed by Justice Joseph is that Section 17A constitutes a bar of any enquiry, inquiry or investigation without the previous approval of the concerned authority. The said observation nowhere states that Section 17A shall operate retrospectively or retroactively.

25. Even otherwise, absence of approval before conducting any enquiry or inquiry or investigation into an offence alleged to have been committed by a public servant, as contemplated in Section 17A could never be the ground for quashing the FIR registered against

18 **(2012) 3 SCC 64**

19 **(2014) 8 SCC 682**

the public servant or the proceedings conducted against him, more particularly when he is also charged for the other offences under the IPC in respect of the same set of allegations. As stated earlier, there are other important facets contained in Section 17A, like whether the alleged offence is relatable to the recommendation made or decision taken by the public servant or not, and whether such recommendation or decision was made or taken in discharge of his official functions or duties or not etc. Such facets could be examined only when the evidence is led during the course of trial. The alleged acts which *prima facie* constitute the offences, though done under the purported exercise of official function or duty, could not fall within the purview of Section 17A. The Protection sought to be granted to a public servant under Section 17A could not be extended to his acts which *prima facie* were not in discharge of his official functions or duties. Any other interpretation would certainly tantamount to scuttling the investigation at a very nascent stage. Such could neither be the intention of the legislature nor could such provision be interpreted in the manner which would be counter productive or frustrating the very object of the PC Act.

26. In response to the court's query as to how an FIR could have been registered in 2021 for the offences under Section 13(1)(c) and 13(1)(d) which have already been deleted by the Amendment Act 2018, Mr. Rohtagi submitted that though the old provision of Section 13 has been substituted by the new provision, and though Section 13(1)(c) and 13(1)(d) are no more offences under the amended provision of Section 13, the right of the investigating agency which had accrued to investigate the crime which took place prior to the amended provision of Section 13, continues in view of Clauses 'c' and 'e' of Section 6 of the General Clauses Act. According to him, unless a different intention appears in the Amendment Act 2018, the right of the investigating agency to investigate the offences under Section 13(1)(c) and 13(1)(d) could not be said to have been affected by the Amendment Act 2018. I find substance in the said submission of Mr. Rohtagi, in view of the observations made by this Court in ***M.C. Gupta vs. Central Bureau of Investigation, Dehradun***[20]***,*** which clinches the issue.

20 **(2012) 8 SCC 669**

"14. Viewed from this angle, clauses (*c*) and (*e*) of Section 6 of the GC Act become relevant for the present case. Sub-clause (*c*) says that if any Central Act repeals any enactment, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. In this case, the right which had accrued to the investigating agency to investigate the crime which took place prior to the coming into force of the new Act and which was covered by the 1947 Act remained, unaffected by reason of clause (*c*) of Section 6. Clause (*e*) says that the repeal shall not affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment and Section 6 further states that any such investigation, legal proceeding or remedy may be instituted, continued or enforced and such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed. Therefore, the right of CBI to investigate the crime, institute proceedings and prosecute the appellants is saved and not affected by the repeal of the 1947 Act. That is to say, the right to investigate and the corresponding liability incurred are saved. Section 6 of the GC Act qualifies the effect of repeal stated in sub-clauses (*a*) to (*e*) by the words "unless a different intention appears". Different intention must appear in the repealing Act (see *Bansidhar* [(1989) 2 SCC 557]). If the repealing Act discloses a different intention, the repeal shall not result in situations stated in sub-clauses (*a*) to (*e*). No different intention is disclosed in the provisions of the new Act to hold that the repeal of the 1947 Act affects the right of the investigating agency to investigate offences which are covered by the 1947 Act or that it prevents the investigating agency from proceeding with the investigation and prosecuting the accused for offences under the 1947 Act. In our opinion, therefore, the repeal of the 1947 Act does not vitiate or invalidate the criminal case instituted against the appellants and the consequent conviction of the appellants for offences under the provisions of the 1947 Act."

27. In view of the afore-stated legal position, unless a different intention is disclosed in the new Act or repealing Act, a repeal of an Act would not affect the right of the investigating agency to investigate the offences which were covered under the repealed Act. If the offences were committed when the repealed Act was in force, then the repeal of such Act would neither affect the right of the investigating agency to investigate the offence nor would vitiate or invalidate any proceedings instituted against the accused. In the instant case also the offences under Section 13(1)(c) and 13(1)(d) were in force when the same were allegedly committed by the appellant. Hence, the deletion of the said provisions and the substitution of the new offence under Section 13 by the Amendment Act, 2018 would not affect the right of the investigating agency to investigate nor would vitiate or invalidate any proceedings initiated against the appellant.

28. Having considered the different contours of Section 17A, I am of the opinion that Section 17A would be applicable to the offences under the PC Act as amended by the Amendment Act, 2018, and not to the offences existing prior to the said amendment. Even otherwise, absence of an approval as contemplated in Section 17A for conducting enquiry, inquiry or investigation of the offences alleged to have been committed by a public servant in purported exercise of his official functions or duties, would neither vitiate the proceedings nor would be a ground to quash the proceedings or the FIR registered against such public servant.

29. In the instant case, the Appellant having been implicated for the other offences under IPC also, the Special Court was completely within its jurisdiction to pass the remand order in view of the powers conferred upon it under Section 4 and 5 of the PC Act. There was no jurisdictional error committed by the Special Court in passing the impugned order of remand. The impugned judgment and order passed by the High Court also does not suffer from any illegality or infirmity which would warrant interference of this Court.

30. In that view of the matter, the appeal being devoid of merits is dismissed.

ORDER

As we have expressed opinions taking different views on the interpretation of Section 17A of the Prevention of Corruption Act, 1988 as also its applicability to the appellant in the subject-case, we refer the matter to the Hon'ble the Chief Justice of India. The Registry to place the papers before the Hon'ble the Chief Justice of India so that appropriate decision can be taken for the constitution of a Larger Bench in this case for adjudication on the point on which contrary opinions have been expressed by us.

Headnotes prepared by: Divya Pandey

Result of the case: Matter referred to the Hon'ble the Chief Justice of India for constitution of a Larger Bench.

[2024] 1 S.C.R. 604 : 2024 INSC 46

Kusha Duruka

v.

The State of Odisha

(Criminal Appeal No.303 of 2024)

19 January 2024

[Vikram Nath and Rajesh Bindal,* JJ.]

Issue for Consideration

Matter pertains to the prerequisites to be mandatorily mentioned in the application filed for grant of bail; and effect of non-mentioning of details of previous bail applications and order in all bail applications.

Headnotes

Bail – Bail applications – Prerequisites to be mandatorily mentioned in the application filed for grant of bail:

Held: Details and copies of orders passed in the earlier bail applications filed by the petitioner which have been already decided – Details of any bail application filed by the petitioner, pending in any court, higher or lower court, and if none is pending, a clear statement to that effect – All bail applications filed by the different accused in the same FIR to be listed before the same Judge – Registry of the court to also annex a report generated from the system about decided or pending bail applications in the case in question – Investigating Officer assisting the State Counsel in court duty bound to apprise him of the orders, if any, passed by the court with reference to different bail applications or other proceedings in the same crime case – Counsel appearing for the parties to conduct themselves truly like officers of the Court – These suggestions are to streamline the proceedings and avoid anomalies with reference to the bail applications. [Paras 20, 21]

Bail – Grant of bail pending trial – Non-mentioning of details of previous bail applications and order in bail applications – On facts, allegations under the NDPS Act against the appellant and co-accused – Rejection of bail applications by the Sessions

* Author

Court – However, the High Court allowed the co-accused's bail application whereas appellant's bail application was dismissed – Both the orders pronounced by different judges of the High Court– Thereagainst, the appellant filed SLP and notice was issued – Meanwhile, the second bail application filed by the appellant was allowed by the judge of the High Court who had granted the bail to the co-accussed, however in the said order, there was no mention of the fact that it was the second bail application filed by the appellant nor regarding the pendency of the SLP before this Court, in which notice had already been issued - Propriety:

Held: In the list of dates and events as also in the body of the bail application, the appellant did not mention regarding disposal of his earlier bail application by the High Court and also filing of the SLP in this Court – During the pendency of the matter before this Court a fresh bail application was filed not only before the trial court but even before the High Court – High Court even granted bail to the appellant – In the bail application filed before the High Court, it was not mentioned that the same was second bail application filed by the appellant – This Court cannot comment on the contents of the bail application filed before the Sessions Judge as the copy thereof is not available on record here – Though considering the conduct of the appellant, one of the option available was to cancel his bail, however, such an extreme step is not taken – Appeal is dismissed as infructuous and the cost of ₹10,000/-, imposed on the appellant. [Paras 18, 22, 23]

Administration of justice – Justice delivery system – Suppression of material facts – Effect:

Held: Litigant, who attempts to pollute the stream of justice with falsehood, misrepresentation and suppression of facts, is not entitled to any relief, interim or final – Suppression of material facts from the court of law, is actually playing fraud with the court – Maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted – Maxims. [Para 7]

Case Law Cited

Pradhani Jani v. The State of Odisha **Criminal Appeal No.1503/2023 decided on 15.05.2023 – relied on.**

Chandra Shashi v. Anil Kumar Verma **[1994] 5 Suppl. SCR 465:(1995) 1 SCC 421**; *K.D. Sharma Vs. Steel Authority of India Limited and others* **[2008] 10 SCR 454:(2008) 12 SCC 481**; *Dalip Singh v. State of Uttar Pradesh and others* **[2009] 16 SCR 111:(2010) 2 SCC 114**; *Moti Lal Songara Vs. Prem Prakash @ Pappu and another* **[2013] 6 SCR 496:(2013) 9 SCC 199**; *Saumya Chaurasia v. Directorate of Enforcement* **2023 INSC 1073**; *Pradip Sahu v. The State of Assam* **Special Leave Petition (Criminal) No. 4876 of 2022 dated 24.08.2023 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Narcotic Drugs and Psychotropic Substances Act, 1985.

List of Keywords

Administration of justice; Contempt of court; Fabricated document; Justice delivery system; Personal gain; Falsehood; Misrepresentation; Suppression of material facts; Maxim supressio veri, Expression faisi; Degradation of moral values; Education system; Bail application; Unqualified apology; Deprecation; Second bail application; Standing Order; Stamp reporting section; Cost.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.303 of 2024

From the Judgment and Order dated 06.03.2023 of the High Court of Orissa at Cuttack in BLAPL No.1855 of 2022.

Appearances for Parties

Haraprasad Sahu, Sushant Kumar Mallik, Pranaya Kumar Mohapatra, Advs. for the Appellant.

Ashok Parija, AG, Basant R., Sr. Adv., Prakash Ranjan Nayak, Balaram Nayak, Sibashish Misra, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

Leave granted.

2. This is another case in which an effort has been made to pollute the stream of administration of justice.

3. About three decades ago, this Court in **Chandra Shashi v. Anil Kumar Verma**[1] was faced with a situation where an attempt was made to deceive the Court and interfere with the administration of justice. The litigant was held to be guilty of contempt of court. It was a case in which husband had filed fabricated document to oppose the prayer of his wife seeking transfer of matrimonial proceedings. Finding him guilty of contempt of court, he was sentenced to two weeks' imprisonment by this Court. This Court observed as under:

> "**1.** The stream of administration of justice has to remain unpolluted so that purity of court's atmosphere may give vitality to all the organs of the State. Polluters of judicial firmament are, therefore, required to be well taken care of to maintain the sublimity of court's environment; so also to enable it to administer justice fairly and to the satisfaction of all concerned.
>
> **2.** Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice. Such persons are required to be properly dealt with, not only to punish them for the wrong done, but also to deterothers from indulging in similar acts which shake the faith of people in the system of administration of justice.
>
> * * *
>
> **14.** The legal position thus is that if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere

1 (1995) 1 SCC 421

with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated documents is filed with the aforesaid *mens rea*. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large. Anil Kumar is, therefore, guilty of contempt."

4. In **K.D. Sharma Vs. Steel Authority of India Limited and others**[2] it was observed by this Court:

> "**39.** If the primary object as highlighted in **Kensington Income Tax Commrs., (1917) 1 KB 486 : 86 LJKB 257 : 116 LT 136 (CA)** is kept in mind, an applicant who does not come with candid facts and "clean breast" cannot hold a writ of the court with "soiled hands". Suppression or concealment of material facts is not an advocacy. It is a jugglery, manipulation, manoeuvring or misrepresentation, which has no place in equitable and prerogative jurisdiction. If the applicant does not disclose all the material facts fairly and truly but states them in a distorted manner and misleads the court, the court has inherent power in order to protect itself and to prevent an abuse of its process to discharge the rule nisi and refuse to proceed further with the examination of the case on merits. If the court does not reject the petition on that ground, the court would be failing in its duty. In fact, such an applicant requires to be dealt with for contempt of court for abusing the process of the court."
>
> *[emphasis supplied]*

5. In **Dalip Singh v. State of Uttar Pradesh and others**[3]**,** this Court noticed the progressive decline in the values of life and the conduct of the new creed of litigants, who are far away from truth. It was observed as under:

> "1. For many centuries Indian society cherished two basic values of life i.e. "satya" (truth) and "ahinsa" (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi

2 (2008) 12 SCC 481

3 (2010) 2 SCC 114

> guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice- delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.
>
> 2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."
>
> *(emphasis supplied)*

6. In **Moti Lal Songara Vs. Prem Prakash @ Pappu and another**[4], this Court, considering the issue regarding concealment of facts before the Court, observed that "court is not a laboratory where children come to play", and opined as under:

> "**19.** The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge

4 (2013) 9 SCC 199

of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi , i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused- respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum.

20. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand."

(emphasis supplied)

7. It was held in the judgments referred to above that one of the two cherished basic values by Indian society for centuries is "satya" (truth) and the same has been put under the carpet by the petitioner. Truth constituted an integral part of the justice-delivery system in the pre-Independence era, however, post-Independence period has seen drastic changes in our value system. The materialism has overshadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. In the last 40 years, the values have gone down and now a litigants can go to any extent to mislead the court. They have no respect for the truth. The principle has been evolved to meet the challenges posed by this new breed of litigants. Now it is well settled that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. Suppression of material facts from the court of law, is actually playing fraud with the court. The maxim supressio veri, expression faisi, i.e. suppression of the truth is equivalent to the expression of falsehood, gets attracted.

Its nothing but degradation of moral values in the society, may be because of our education system. Now we are more happy to hear anything except truth; read anything except truth; speak anything except truth and believe anything except truth. Someone rightly said that `Lies are very sweet, while truth is bitter, that's why most people prefer telling lies.'

8. In a recent matter, this Court again came across a litigant who had tried to overreach the Court by concealing material facts in **Saumya Chaurasia v. Directorate of Enforcement[5].** It was a case where the appellant before this Court had challenged the order passed by the High Court[6] rejecting his bail application. He was accused of committing various crimes under the Indian Penal Code and the Prevention of Money Laundering Act, 2002. His bail application was rejected by the High Court on 23.06.2023. In the pleadings before this Court, it was mentioned that the High Court had committed gross error in not considering the chargesheet dated 08.06.2023 and the cognizance order dated 16.06.2023, which clearly suggested that there was error apparent on the fact of it. The fact which was available on record was that an order in the bail application was reserved by the High Court on 17.04.2023 and pronounced on 23.06.2023. Having some suspicion, this Court directed the appellant to file an affidavit to clarify the aforesaid position. There was no specific reply given to the aforesaid query to the Court. Rather vague statements were made. Considering the facts available, this Court observed that there was a bold attempt by and on behalf of the appellant therein to misrepresent the facts for challenging the order impugned therein, regarding the conduct of the parties and the counsel, this Court made the following observations:

> "14. It cannot be gainsaid that every party approaching the court seeking justice is expected to make full and correct disclosure of material facts and that every advocate being an officer of the court, though appearing for a particular party, is expected to assist the court fairly in carrying out its function to administer the justice. It hardly needs to be

5 2023 INSC 1073

6 High Court of Chhattisgarh at Bilaspur in Miscellaneous Crl. Case No.1258/2023

> emphasized that a very high standard of professionalism and legal acumen is expected from the advocates particularly designated Senior advocates appearing in the highest court of the country so that their professionalism may be followed and emulated by the advocates practicing in the High Courts and the District Courts. Though it is true that the advocates would settle the pleadings and argue in the courts on instructions given by their clients, however their duty to diligently verify the facts from the record of the case, using their legal acumen for which they are engaged, cannot be obliviated."
>
> (*emphasis supplied)*

8.1. Finally, this Court dismissed the appeal with costs of ₹1,00,000/-.

9. In **Pradip Sahu v. The State of Assam**[7] the accused who was found to be guilty of concealing material facts from the court and against him the High Court[8] had directed for taking appropriate legal action, had challenged the order passed by the High Court before this Court. In the aforesaid case, first bail application filed by the appellant there was dismissed by the High Court[9], thereafter he moved second bail application before the High Court in which notice was issued on 30.11.2021. During the pendency of the aforesaid application before the High Court, the appellant therein moved fresh bail application before the Trial Court on 01.12.2021, which was granted on the same day. The aforesaid facts came to the notice of the High Court on 08.12.2021 when a report of the Registrar (Judicial) was received, who was directed to conduct the enquiry in the matter. However, on an apology tendered by the appellant therein and also considering the facts as stated that he belonged to Tea Tribe community and his brother, a cycle mechanic, who was also pursuing the case, did not appreciate the intricacy of the law. As a result of which, the mistake occurred. This Court, having regard to the unqualified apology tendered by the appellant therein, had set aside the order passed by the High Court to file FIR/complaint against the appellant therein.

7 Special Leave Petition (Criminal) No. 4876 of 2022, decided by this Court on 24.08.2023

8 Gauhati High Court

9 On 11.11.2021

10. May be in the facts of the aforesaid case, this Court had accepted unconditional apology tendered by the appellant therein and the given facts situation accepted his apology but it is established that there is a consistent effort by the litigants to misrepresent the Court wherever they can.

11. The prayer in the present appeal is for grant of bail pending trial. The appellant claimed that he is in custody since 03.02.2022 in connection with crime[10] registered under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985. The allegation in the FIR is that the appellant and the co-accused Gangesh Kumar Thakur @ Gangesh Thakur were in exclusive and conscious possession of 23.8 kg *Ganja* and were transporting the same.

12. The appellant and his co-accused Gangesh Kumar Thakur @ Gangesh Thakur filed an application for release on bail pending trial before the Sessions Judge-cum-Special Judge, Malkangiri immediately after their arrest on 03.02.2022. The same was rejected vide order dated 04.02.2022. At that stage even the chargesheet had not been filed.

    12.1 Being aggrieved against the order of rejection of the bail application by the Sessions Judge, the appellant filed first bail application[11] before High Court. While the same was pending the co-accused Gangesh Thakur also filed bail application[12] before the High Court. The High Court vide order dated 17.01.2023 allowed the bail application filed by Gangesh Kumar Thakur @ Gangesh Thakur. However, the bail application filed by the appellant was dismissed vide impugned order dated 06.03.2023. Aggrieved against the same, the appellant filed the SLP[13] before this Court. Notice in the same was issued on 22.09.2023. When the matter was listed on 08.11.2023, learned counsel for the State sought time to file counter affidavit. On 06.12.2023, the

10 FIR No. 29 dated 03.02.2022, at P.S. Orkel, District Malkaganj, Odisha

11 BLAPL No. 1855 of 2022

12 BLAPL NO. 11709 of 2022

13 Special Leave Petition (Criminal) No. 12301 of 2023

learned counsel for the appellant pointed out that during the pendency of the present matter before this Court, the High Court vide order dated 11.10.2023 had granted bail to the appellant. As he did not have hard copy of the order passed by the High Court, he placed before us a soft copy of the said order through his mobile phone. On a reading of the aforesaid order, this Court found that the same neither mentioned the fact that it was the second bail application[14] filed by the appellant nor pendency of the SLP before this Court, in which notice had already been issued. Taking the matter seriously and deprecating such a practice this Court passed the following order on 06.12.2023:

> "This petition has been filed assailing the correctness of order dated 6th March, 2023 passed by the High Court of Orissa at Cuttack in BLAPL No. 1855 of 2022, 'Kusha Duruka Versus State of Odisha' whereby the prayer for bail was rejected. Notice was issued by this Court on 22nd September, 2023.
>
> Today the learned counsel for the petitioner informs this Court that during the pendency of this petition, the High Court has granted bail to the petitioner on 11th October, 2023. He has placed before us a soft copy of the said order through his mobile, according to which BLAPL No. 10860 of 2023 was allowed apparently on the ground of parity extended to another co-accused.
>
> From reading of the said order, we find that it neither mentions that it was the second bail application filed by the petitioner before the High Court nor does it reflects any reference to the petition pending before this Court in which notice had already been issued in September, 2023.
>
> We seriously deprecate such practice by the litigant and the counsel.

14 BLAPL No. 10860 of 2023

> We accordingly, direct that original record of the said bail application, allowed by the High Court on 11th October, 2023, be called for forthwith.
>
> We further direct that this order be communicated to the Hon'ble Chief Justice as also the Registrar of the High Court of Orissa forthwith (today itself) and the aforementioned file of BLAPL No. 10860 of 2023 titled 'Kusha Duruka Versus Versus State of Odisha' be immediately sealed and thereafter be forwarded to this Court.
>
> We also request the Hon'ble the Chief Justice to obtain comments of the learned Judge as to whether he was apprised of the aforesaid two facts as recorded earlier in this order regarding the bail application being the second bail application and the secondly the pendency of the present petition.
>
> The State of Odisha will also file its comments as to whether the public prosecutor appearing for the State of Odisha pointed out such facts or not.
>
> The report shall be submitted by the Secretary, Department of Law and Justice of the State of Odisha as also by the Joint Secretary or the Additional Secretary (Law) attached to the High Court.
>
> List this matter again on 13th December, 2023."

13. In terms of the aforesaid order, this Court received the original record pertaining to second bail application filed by the appellant in which he was granted bail by the High Court vide order dated 11.10.2023; a report dated 08.12.2023 from the High Court along with a note from the Hon'ble Judge who had dealt with the bail application filed by the appellant and passed the order on 11.10.2023; affidavit of Special Secretary, Home Department, Government of Odisha dated 11.12.2023 and affidavit and report of Principal Secretary, Law Department, Government of Odisha dated 12.12.2023.

14. Before we deal with the matter, we deem it appropriate to note down the dates and events in a tabular form.

DATE	EVENTS
03.02.2022	FIR No.29 dated 03.02.2022 was registered at Police Station Orkel, District Malkangiri, Odisha, under Section 20(b)(ii)(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985.
03.02.2022	The appellant as well as co-accused were arrested.
04.02.2022	The first bail application filed by the appellant as well as the co-accused was rejected by the Sessions Judge-cum-Special Judge, Malkangiri (Special G.R. Case No.38/2022).
	The appellant approached the High Court for grant of bail by filing bail application bearing BLAPL No. 1855 of 2022.
	The co-accused Gangesh Kumar Thakur @ Gangesh Thakur approached the High Court for grant of bail by filing bail application bearing BLAPL No.11709 of 2022.
	As is evident from the records available before this Court, bail application filed by the appellant was assigned to Judge 'A'[15].
	During the pendency of the bail application filed by the appellant, the bail application filed by the co-accused Gangesh Kumar Thakur was listed before Judge 'B'[9].
17.01.2023	The bail application filed by the co-accused Gangesh Kumar Thakur @ Gangesh Thakur was allowed by Judge 'B'; The order does not suggest that the State Counsel had pointed before the court that there is another bail application filed by the co-accused (the appellant) pending consideration before the court.
06.03.2023	The bail application filed by the appellant was rejected by Judge 'A'; the High Court had specifically recorded in the order that the co-accused Gangesh Kumar Thakur @ Gangesh Thakur had been released vide order dated 17.01.2023.
21.07.2023	Aggrieved against the order rejecting the bail application filed by the appellant, SLP was filed before this Court.

15 We are consciously not mentioning the name of the Hon'ble Judge

15.09.2023	During the pendency of the matter before this Court, second bail application filed by the appellant was rejected by the Sessions Judge-cum-Special Judge, Malkangiri. The argument raised by the appellant that the co-accused has already been granted the bail, is noticed in the order. It does not record the fact that a petition filed by the appellant seeking bail is pending before this Court.
21.09.2023	While the matter was pending before this Court, the appellant filed second bail application before the High Court and the same was not disclosed before this Court.
22.09.2023	Notice in the SLP was issued to the respondent.
11.10.2023	During pendency of the matter before this Court Judge 'B' granted bail to the appellant.
08.11.2023	Learned counsel for the State appeared and sought time for filing counter affidavit to the SLP. Though the High Court had already granted bail to the appellant but still it was not pointed out when the matter was taken up by this Court.
06.12.2023	Learned counsel for the appellant pointed out before this Court that the appellant had already been released by the High Court. This Court called for explanation and the record of the case from the High Court.

15. In the Affidavit dated 11.12.2023 filed by the Principal Secretary, Law Department, Govt. of Odisha, while narrating the facts of the case, it was stated that the learned counsel appearing for the State in the High Court did not have the knowledge of the fact that the first bail application filed by the appellant was rejected on 06.03.2023 by the High Court and also regarding filing of the SLP by the petitioner before this Court.

15.1 The contents of para of the aforesaid affidavit are extracted below:

> "It is submitted that the State Counsel before the Hon'ble High Court of Orissa was not aware of the fact that, earlier BLAPL No.1855/2022 was rejected

vide order dated 06.03.2023 as well as the fact of filing of S.L.P.(Crl.)No.12301/2023. A copy of report of the State Counsel is as ANNEXURE-A"

15.2 Along with the affidavit a report from the State Counsel was also annexed. It was mentioned therein that in second bail application though the appellant had disclosed about filing of his first bail application, he had not disclosed any fact regarding pendency of the SLP before this Court. It was further mentioned that in the list of dates the factum of rejection of earlier bail application or filing of the SLP was not mentioned. Even at the time of hearing this fact was not disclosed. Learned State Counsel did not have any instructions from the Inspector Incharge regarding pendency of the present petition before this Court.

15.3 To similar effect is the affidavit filed by the Special Secretary, Home Department, Govt. of Odisha.

16. In compliance to the order dated 06.12.2023 passed by this Court, a report has been received from the High Court. The comments of Judge 'B', as requested, were annexed with the report and original file of second bail application of appellant was also received from the High Court. It is mentioned therein that at the time of hearing of the second bail application, the court was not apprised of the factum of pendency of the SLP before this Court, in which notice had already been issued on 22.09.2023.

16.1 A copy of Standing Order No.2 of 2023, in partial modification of earlier Standing Order No.1 of 2020 issued by the High Court on 21.05.2023, was annexed with the report. It was issued in pursuance to the observation made by this Court in **Pradhani Jani v. The State of Odisha**[16]. The Standing Order was issued with reference to the listing of the bail applications under Sections 438 and 439 Cr.P.C. Para 2 of the Standing Order with reference to the bail applications under Section 439 Cr.P.C. is extracted below:

16 Criminal Appeal No.1503/2023 decided on 15.05.2023

> "2. The subsequent bail applications under section 439 Cr.P.C. including applications for interim bail shall be listed before the Hon'ble Judge who, at the earliest, decided any of the earlier bail applications under section 439 Cr.P.C. arising out of the same FIR (decided on merit or disposed of as withdrawn/ not pressed). In the event the Hon'ble Judge is not available on account of superannuation, transfer etc. or recuses, the said application shall be listed before the Hon'ble Judge who next disposed of any of those bail applications, and so on. If none of the Hon'ble Judges who decided the earlier bail applications is available, the application shall be listed before the regular Bench as per roster."

17. In substance, it was directed that the Stamp Reporting Section will verify in case any bail application arising out of the same FIR has been disposed of earlier. The Stamp Reporting Section shall furnish complete details. The subsequent bail applications are to be listed before the same Judge. However, in case of non-availability or superannuation of the that Judge, alternate system has been provided. It is further directed that while listing the subsequent bail application, final order(s) of earlier bail application(s) arising out of the same FIR shall be tagged. To put the record straight, the order passed by this Court in **Pradhani Jani's** case (supra) is extracted hereinbelow:

> "3. The perusal of the paper books would reveal that various applications filed by various accused have been entertained by different learned Single Judges of the same High Court. In many of the High Courts, the practice followed is that the applications arising out of the same FIR should be placed before one Judge. However, it appears that it is not the practice in Orissa High Court. In the present case, we have come across orders passed by at least three different Judges in the applications of various accused arising out of same FIR.
>
> 4. Such a practice leads to anomalous situation. Certain accused are granted bail whereas certain accused for the very same crime having similar role are refused bail.

> 5. We, therefore, quash and set aside the impugned order dated 31.01.2023 and remand the matter back to the High Court. The High Court is requested to consider the effect of the orders passed by the other coordinate Benches and pass orders afresh. The same shall be done within a period of one month from today.
>
> 6. The Registrar (Judicial) of the Registry of this Court is directed to forward a copy of this order to the Registrar General of the Orissa High Court, who is requested to take note of the aforesaid and consider passing appropriate order so that contrary orders in the same crime are avoided."

18. A perusal of the paper book in second bail application shows that there is a report annexed by the Registry in the matter. It mentioned about the earlier two bail applications filed in the FIR in-question. The first bail application filed by the appellant was disposed of on 06.03.2023. Bail application filed by the co-accused Gangesh Kumar Thakur was disposed of on 17.01.2023. The next one was the second bail application filed by the appellant. Though Standing Order No.2 of 2023 directed the Registry to annex all the orders passed in the earlier bail applications by different accused in the same FIR, however, the order passed by the High Court in the case of the appellant, rejecting his earlier bail application, does not form part of the bail application before the High Court. Only the order dated 17.01.2023 passed in the bail application, filed by the co-accused Gangesh Kumar Thakur was annexed. Further, in the list of dates and events, the appellant did not mention regarding disposal of his earlier bail application by the High Court and also filing of the SLP in this Court. Though, just below the name of the parties, the appellant had mentioned the number of earlier bail application filed by him. Even in the body of the bail application, the appellant has conspicuously remained silent about the dismissal of his earlier bail application by the High Court and filing of the SLP before this Court. During the pendency of the matter before this court a fresh bail application was filed not only before the Trial Court but even before the High Court. The High Court even granted bail to the appellant. In the bail application filed before the High Court, it was not mentioned that the same was second bail application filed by the appellant. This Court cannot comment on the contents of the bail application filed before the Sessions Judge as the copy thereof is not available on record here.

19. It is further evident from the order dated 17.01.2023 vide which bail application, BLAPL NO.11709 of 2022 of the co-accused Gangesh Kumar Thakur was allowed by the High Court by Judge 'B'. Learned State Counsel did not point out the factum of pendency of another bail application filed by the co-accused arising out of the same FIR at that stage. The concerned investigating officer must be aware of this fact but had not pointed out the same before the court.

20. In our opinion, to avoid any confusion in future it would be appropriate to mandatorily mention in the application(s) filed for grant of bail:

    (1) Details and copies of order(s) passed in the earlier bail application(s) filed by the petitioner which have been already decided.

    (2) Details of any bail application(s) filed by the petitioner, which is pending either in any court, below the court in question or the higher court, and if none is pending, a clear statement to that effect has to be made.

    This court has already directed vide order passed in **Pradhani Jani'**s case (supra) that all bail applications filed by the different accused in the same FIR should be listed before the same Judge except in cases where the Judge has superannuated or has been transferred or otherwise incapacitated to hear the matter. The system needs to be followed meticulously to avoid any discrepancies in the orders.

    In case it is mentioned on the top of the bail application or any other place which is clearly visible, that the application for bail is either first, second or third and so on, so that it is convenient for the court to appreciate the arguments in that light. If this fact is mentioned in the order, it will enable the next higher court to appreciate the arguments in that light.

    (3) The registry of the court should also annex a report generated from the system about decided or pending bail application(s) in the crime case in question. The same system needs to be followed even in the case of private complaints as all cases filed in the trial courts are assigned specific numbers (CNR No.), even if no FIR number is there.

    (4) It should be the duty of the Investigating Officer/any officer assisting the State Counsel in court to apprise him of the order(s), if any, passed by the court with reference to different

bail applications or other proceedings in the same crime case. And the counsel appearing for the parties have to conduct themselves truly like officers of the Court.

21. Our suggestions are with a view to streamline the proceedings and avoid anomalies with reference to the bail applications being filed in the cases pending trial and even for suspension of sentence.

22. Though considering the conduct of the petitioner, one of the option available was to cancel his bail, however, we do not propose to take such an extreme step in the case in hand. However, this can be the option exercised by the Court if the facts of the case so demand seeing the conduct of the parties.

23. The present appeal is, accordingly, dismissed as infructuous. However, still we deem it appropriate to burden the appellant with a token cost of ₹10,000/-, which shall be deposited by him with Mediation and Conciliation Centre, attached to Orissa High Court, within a period of eight weeks from today. Within two weeks thereafter, proof of deposit be furnished in this Court.

24. A copy of the order be sent to the Registrars General of all the High Courts to be placed before the Chief Justices for correction of the system, wherever required, as this Court comes across similar issues from different High Courts.

25. The original record received from the High Court be sent back.

Headnotes prepared by: Nidhi Jain *Result of the case:* Appeal dismissed.