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Fuleshwar Gope
v.
Union of India & Ors.

(Criminal Appeal No. 3923 of 2024)

23 September 2024

[C.T. Ravikumar and Sanjay Karol,* JJ.]

Issue for Consideration

Issue arose as to whether the validity of the Sanction Order can be challenged at any stage; whether violation of s.45(2) of the UAPA r/w rr.3 and 4 of the 2008 Rules, if any, vitiates the proceedings, whether violation of statutory timelines and the requirement of independent review which includes application of mind, are necessary aspects of procedure; whether the appellant's involvement were actually independent of the ones in which A-6 and other members were arrayed as accused; and whether the statutory exemption u/s.22 A of the UAPA applies to the appellant who claims to be unaware of the affairs of the company.

Headnotes†

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008 – rr.3 and 4 – Time limit for making a recommendation by the Authority – Time limit for sanction of prosecution – Appellant's case that he was made an accused and a member of the larger conspiracy – Allegations against him that on directions of A 6, a terrorist and chief of People's Liberation Front of India-PLFI, the appellant formed a company, which used to directly/indirectly collect funds for the use of activities of PLFI; and that the appellant criminally conspired and formed an unlawful association with members of PLFI-A 7 and 14 – FIR against six persons alleging that Rs.25.83 lakhs of demonetized currency brought to the concerned Bank by A-6 – Appellant sought to quash suo motu letter in respect of the investigation; sanction letter granting sanction qua prosecution of the appellant as accused; and cognizance order under IPC and UAPA – Division Bench refused to quash the same – Challenge to:

* Author

Held: No infirmity in the order granting sanction against the appellant – It is not incumbent upon the authority to record detailed reasons to support its conclusion and, as such, the orders challenged, cannot be faulted with on that ground – Since trial is underway and numerous witnesses already stand examined, the challenge to the validity of the sanction *qua* the appellant left it to be raised before the trial judge – Whether or not both A-6 and the appellant are part of the same, continuing, ongoing transactions, is to be decided on the basis of evidence adduced at trial, and not at this stage, by this Court, thus, left to the appellants to raise this issue before the trial judge – Furthermore, as regards, application of exemption u/s.22A, this is a matter for the trial court to consider and not for this Court to decide at this stage, keeping in view that the trial is underway and proceeded substantially. [Paras 18, 41, 46, 50]

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Validity of Sanction Order – Challenged to, at what stage:

Held: Validity of sanction should be challenged at the earliest instance available, before the Trial Court – If such a challenge is raised at an appellate stage it would be for the person raising the challenge to justify the reasons for bringing the same at a belated stage – Such reasons would have to be considered independently so as to ensure that there is no misuse of the right of challenge with the aim to stall or delay proceedings – On facts, keeping in view the submission made that the trial is underway and numerous witnesses (113 out of 125) already stand examined, no finding given on the challenge to the validity of the sanction *qua* the appellant and leave it to be raised before the trial judge, who shall, if such a question is raised decide, it promptly. [Paras 18, 51.1]

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008 – rr.3 and 4 – Time limit for making a recommendation by the Authority – Time limit for sanction of prosecution – Timelines in accordance with s.45(2) r/w rr.3 & 4 and the requirement of independent review, if necessary aspects of procedure, and non-adherence of which would vitiate proceedings under the UAPA:

Held: Timelines mentioned in rr.3 and 4 are couched in mandatory language and, thus, have to be strictly followed – This is keeping in view that UAPA being a penal legislation, strict construction must be accorded to it – Timelines imposed by way of statutory Rules are a way to keep a check on executive power which is a necessary position to protect the rights of accused persons – Independent review by both the authority recommending sanction and the authority granting sanction, are necessary aspects of compliance with s.45 of the UAPA – As regards appellant's case that the timelines were not followed, the first sanction was granted more than a year after the recommendation was moved; and that there was no independent review on the part of both recommending authority and central government, as the sanction was merely granted within a day each, the gap between the first action against A-6 and the arrest of the appellant is a result of continuing investigation, as the appellant was made an accused in the second supplementary chargesheet, arising out of the same FIR; and since the investigation continued, the gap cannot be termed fatal so as to render the arrest of the appellant as unlawful or illegal – Grant of sanction is within the stipulated time – Furthermore, it cannot be said that there was non application of mind and lack of independent review. [Paras 20, 28.4, 41, 51.2]

Code of Criminal Procedure, 1973 – ss.218-222 – Misjoinder of charges – Violation of CrPC – Plea of the appellant that the transactions in connection with which he has been brought to the book were actually independent of the ones in which A-6 and other members were arrayed as accused; and that that there has been gross misuse of powers by the NIA and a violation ss.218-224 CrPC:

Held: ss.218-222 not violated – Appellant falls under the latter category-multiple persons in the same trial (appellant is A-17 out of a total of 20 accused persons) – Joint or separate trial is a decision to be taken by the trial judge at the beginning of the trial considering the possibility of prejudice; and causing judicial delay, if any – Language of s.223 is directory in nature, signified by the use of word 'may' – Joint trial, if held, after having considered the two factors given, cannot be said to be *ipso facto* prejudicial to the parties – It is alleged that A-6 who is the Chief of PLFI, extorts money from various persons and that the company A-20 of which the appellant is a director, is used to legitimise the proceeds of

such unlawful actions – However, appellant's case that there is no connection between the charges levied on A-6 and the transactions because of which he has been made an accused, whereas the prosecution submits that both A-6 and A-17 are part of the same, continuing, ongoing transactions – Whether or not actually the case is a question to be decided on the basis of evidence adduced at trial, and not at this stage, by this Court – Thus, it is left to the appellants to raise this issue before the trial judge, who shall, if such a question is raised, decide it promptly at the appropriate stage. [Paras 44.3, 45, 46, 52.1]

Unlawful Activities (Prevention) Act, 1967 – s.22A – Offences by companies – Statutory exemption u/s.22 A – Applicability to the appellant who claims to be unaware of the affairs of the company:

Held: Whether or not the exemption u/s.22A applies is a matter to be established by the way of evidence for the person claiming such exemption has to demonstrate that either he was not in charge of the affairs of the company which has allegedly committed the offence, or that he had made reasonable efforts to prevent the commission of the offence – This is a matter for the trial court to consider and not for this Court to decide at this stage, keeping in view that the trial is underway and proceeded substantially. [Paras 50, 52.2]

Unlawful Activities (Prevention) Act, 1967 – s.22A – Offences by companies – Applicability of s.22A:

Held: For application of s.22A, offence has to committed by a company; all persons who at the time of the offence were in control of, or responsible for, the company's affairs shall be deemed guilty; such person would be saved from guilt as under if they can demonstrate that such act was not in their knowledge; they had taken reasonable care to prevent such offence from taking place – s.22A further provides that if it can be proved that the offence committed by the company was with consent; in connivance of; and attributable to neglect on the part of any promoter, director, manager, secretary or any other officer of the company, then they shall be held guilty. [Para 48]

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008 –

rr.3 and 4 – Time limit for making a recommendation by the Authority – Time limit for sanction of prosecution – Timelines, whether directory or mandatory:

Held: Timelines, generally speaking, as part of statutory framework are extremely essential to an effective, efficient and focused machinery of criminal investigation, prosecution and trial – All stakeholders to the smooth functioning of these procedures of law must do their part in realising such timelines – They are the essential aspects of right to speedy trial, which is enshrined u/Art.21 of the Constitution of India. [Para 22]

'Application of mind' – Concept of:

Held: Application of mind must form part of any judicial, quasi-judicial or administrative order – To demonstrate the same, consideration of material placed before such authority must be reflected – It being a cerebral exercise, it is not within reason to set out any formula to explain what application of mind may actually mean or look like – It is to be ascertained in the facts and circumstances of each case – In the context of penal laws, authorities tasked with evaluating material prior to granting of sanction for prosecution, or the act of granting sanction itself must apply their mind to each and every facet of the material placed before it to arrive at the conclusion particularly so because the effect of the task at hand is immense – Grant/non-grant of sanction is what sets in motion the machinery of strict laws such as UAPA or TADA. [Paras 25, 26]

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Procedure for sanction provided under the UAPA:

Held: Court is enjoined from taking cognizance without previous sanction either by the Central Government or the State Government, as applicable, and such sanction shall only be given after the report of the authority appointed by the Central Government or the State Government, as the case may be, has been considered – This authority is to make an independent review of the evidence gathered and make a recommendation to the government within a time bound manner – If any Court takes cognizance without prior sanction of the Government, Centre or State, the same shall be in contravention of the Act and thus, bad in law – This sanction is not a function of the Government alone and it can only be granted

after an independent body, *albeit* appointed by the Government, makes an independent review of the evidence. [Paras 28, 28.1]

Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008 – rr.3 and 4 – Time limit for making a recommendation by the Authority – Time limit for sanction of prosecution – Construction of:

Held: Penal statutes are statutes to be interpreted strictly – Rules flowing from statutory power, have the effect of a statute – s.52 of the UAPA grants power to the Central Government to make Rules for the purpose of carrying out the provisions of the Act – s.52(2)(ee) enables the Government to prescribe the time for recommendation and grant of sanction u/s.45 – Rules are unequivocal in both, using the word 'shall' as also providing a specfic time period for both activities, i.e., making recommendation and granting sanction – In matters of strict construction, when a timeline is provided, along with the use of the word 'shall' and particularly when the same is in the context of a law such as the UAPA, it cannot be considered a mere technicality or formality – It demonstrates clear intention on the part of the Legislature – Compulsion has been imposed, and for compliance with that compulsion, a timeline has been provided – While the legislation is aimed at curbing unlawful activities and practices detrimental to national security and accordingly, provides the authorities of the Government ample power to undertake and complete all procedures and processes permissible under law to that end, at the same time the interest of accused persons must also be safeguarded and protected – Time granted is only for consideration of the material collected by way of an independent review and then making a recommendation whereafter the sanctioning authority may then consider the materials as well as recommendation to finally, grant or deny the sanction – It is not for the purpose of the investigation itself, which understandably can be a time-consuming process, given the multiple variables involved – Timelines in such cases, serve as essential aspects of checks and balances and of course, are unquestionably important – Legislative intent is clear – Rules made by virtue of statutory powers prescribe both a mandate and a time limit – Same has to be followed – Strict adherence to the timeline mentioned in rr. 3 and 4 of the 2008, Rules to apply prospectively. [Paras 31, 32, 33]

Unlawful Activities (Prevention) Act, 1967 – s.45(2) – Cognizance of offences – Independent review – Meaning –

Plea that since both the recommending and the granting authorities took merely a day each in performing their respective functions, the requirement of an independent review which is to be undertaken by both authorities has been left unfulfilled thereby vitiating the sanction in question:

Held: Independent review would mean a contemplation or study of the material gathered by the investigating officer to conclude as to whether or not a sanction to proceed under the provisions of the UAPA ought to be granted – Similarly, at the next stage, the sanctioning authority is to mull over and critically notice both the materials gathered as also the conclusion drawn by the recommending authority, in its act of granting sanction – Independence of this authority is *sine qua non*, without which it would have lost its entire purpose – Plea of the appellant that short amount of time taken in recommending and granting sanction, against him which is a sign of non-application of mind and lack of independent review, cannot be accepted – There is no question, as there rightly cannot be, on the competence of either of the authorities – Thus, solely on the ground that the time taken was comparatively short or even that other orders were similarly worded cannot call the credibility of the sanction into question – Thus, independent review as well as application of mind are questions to be determined by way of evidence and as such should be raised at the stage of trial, so as to ensure that there is no undue delay in the proceedings reaching their logical and lawful conclusion on these grounds – If it is raised belatedly, however, the Court seized of the matter, must consider the reasons for the delay prior to delving into the merits of such objections – Belated challenges on these grounds cannot be allowed to act as roadblocks in trial or cannot be used as weapons in shirking away from convictions arising out of otherwise validly conducted prosecutions and trials – Order passed by an administrative authority is not to be tested by way of judicial review on the same anvil as a judicial or quasi-judicial order – While it is imperative for the latter to record reasons for arriving at a particular decision, for the former it is sufficient to show that the authority passing such order applied its mind to the relevant facts and materials – Thus, no infirmity in the order granting sanction against the appellant – It is not incumbent upon such authority to record detailed reasons to support its conclusion and, as such, the orders challenged, cannot be faulted with on that ground. [Paras 37, 40, 41]

Words and phrases – Word independent – Meaning of:

Held: Act, or evaluation is made in a way which is lone standing or which does not rely on any other factor, such as previous consideration or evaluation by another authority, to arrive at its conclusion – Independence, which is the state of being independent would also be instructive in the understanding – Review, as a concept is to be understood for it is the coming together of these two aspects which would form the understanding of the term 'independent review' – Import of the term independent review as can be understood, is a re-examination, scrutiny or critique of something which is not dependent or subject to control by any other factor or authority. [Paras 35-37]

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State of Karnataka v. S. Subbegowda [2023] 11 SCR 19 **: 2023 SCC OnLine SC 911;** *Nasib Singh v. State of Punjab* [2021] 13 SCR 566 **: (2022) 2 SCC 89;** *State of U.P. v. Paras Nath Singh* [2009] 8 SCR 85 **: (2009) 6 SCC 372;** *State (NCT of Delhi) v. Navjot Sandhu* [2005] Supp. 2 SCR 79 **: (2005) 11 SCC 600;** *Union of India v. Deoki Nandan Aggarwal* [1991] 3 SCR 873 **: 1992 Supp (1) SCC 323;** *Institute of Chartered Accountants of India v. Price Waterhouse* [1997] Supp. 2 SCR 267 **: (1997) 6 SCC 312;** *Shiv Shakti Coop. Housing Society v. Swaraj Developers* [2003] 3 SCR 762 **: (2003) 6 SCC 659 – relied on.**

Pradeep Ram v. State of Jharkhand & Anr. [2019] 8 SCR 824 **: (2019) 17 SCC 326;** *Bhushan Kumar & Anr. v. State (NCT of Delhi)* [2012] 2 SCR 696 **: (2012) 5 SCC 424;** *State of Gujarat v. Afroz Mohammed Hasanfatta* [2019] 1 SCR 1104 **: (2019) 20 SCC 539;** *Ashraf Khan v. State of Gujarat* **(2012) 11 SCC 606;** *State of Gujarat v. Anwar Osman Sumbhaniya* [2019] 2 SCR 749 **: (2019) 18 SCC 524;** *Anirudhsinhji Karansinhji Jadeja v. State of Gujarat* [1995] Supp. 2 SCR 637 **: (1995) 5 SCC 302;** *Rambhai Nathabhai Gadhvi v. State of Gujarat* [1997] Supp. 3 SCR 356 **: (1997) 7 SCC 744;** *Seeni Nainar Mohammed v. State* [2017] 3 SCR 312 **: (2017) 13 SCC 685;** *Jamiruddin Ansari v. CBI* [2009] 7 SCR 759 **: (2009) 6 SCC 316;** *Peoples' Union for Civil Liberties v. Union of India* [2004] 1 SCR 232 **: (2004) 9 SCC 580;** *Sanjay Dutt v. State through CBI* [1994] Supp. 3 SCR

263 : **(1994) 5 SCC 410;** *Arup Bhuyan v. State of Assam* [2023] 8 SCR 496 : **(2023) 8 SCC 745;** *Central Bureau of Investigation v. Ashok Kumar Aggarwal* **(2014) 14 SCC 295;** *Parkash Singh Badal v. State of Punjab* [2006] Supp. 10 SCR 197 : **(2007) 1 SCC 1;** *Dinesh Kumar v. Airport Authority of India* [2011] 13 SCR 260 : **(2012) 1 SCC 532** *Central Bureau of Investigation & Ors. v. Pramila Virendra Kumar Agarwal* **(2020) 17 SCC 664;** *P.K. Pradhan v. State of Sikkim* [2001] 3 SCR 1119 : **(2001) 6 SCC 704;** *Rangku Dutta v. State of Assam* [2011] 8 SCR 639 : **(2011) 6 SCC 358;** *Hussein Ghadially v. State of Gujarat* [2014] 9 SCR 364 : **(2014) 8 SCC 425;** *Mahesh Kariman Tirki v. State of Maharashtra,* **SLP (Crl.) Nos.11072-11073/2022;** *Binod Ganjhu v. Union of India,* **W.P(Crl) 308 of 2022;** *State of Rajasthan v. Mohinuddin Jamal Alvi* **(2016) 12 SCC 608;** *Roopesh v. State of Kerala,* **2022 SCC OnLine Ker 1372;** *Vijay Rajmohan v. Central Bureau of Investigation (Anti-Corruption Branch)* [2022] 19 SCR 563 : **(2023) 1 SCC 329;** *Standard Chartered Bank v. Directorate of Enforcement* [2005] Supp. 1 SCR 49 : **(2005) 4 SCC 530;** *State of Jharkhand v. Ambay Cements* [2004] Supp. 6 SCR 125 : **(2005) 1 SCC 368;** *Manjit Singh v. CBI* [2011] 1 SCR 997 : **(2011) 11 SCC 578;** *State of T.N. v. Sivarasan* [1996] Supp. 8 SCR 243 : **(1997) 1 SCC 682;** *Priya Indoria v. State of Karnataka* [2023] 15 SCR 525 : **(2024) 4 SCC 749;** *State of U.P. v. Manbodhan Lal Srivastava* [1958] 1 SCR 533 : **1957 SCC OnLine SC 4;** *State of U.P. v. Babu Ram Upadhya* [1961] 2 SCR 679 : **1960 SCC OnLine SC 5;** *Bachahan Devi v. Nagar Nigam, Gorakhpur* [2008] 2 SCR 424 : **(2008) 12 SCC 372;** *Vijay Dhanuka v. Najima Mamtaj* [2014] 4 SCR 171 : **(2014) 14 SCC 638;** *Union of India v. A.K. Pandey* **(2009) 10 SCC 552;** *C.S. Krishnamurthy v. State of Karnataka* [2005] 2 SCR 1163 : **(2005) 4 SCC 81;** *State of M.P. v. Harishankar Bhagwan Prasad Tripathi* [2010] 9 SCR 1148 : **(2010) 8 SCC 655;** *State of Maharashtra v. Mahesh G. Jain* [2013] 3 SCR 850 : **(2013) 8 SCC 119;** *Judgebir Singh v. National Investigation Agency* [2023] 6 SCR 1 : **2023 SCC OnLine SC 543;** *State of Punjab v. Mohd. Iqbal Bhatti* [2009] 11 SCR 790 : **(2009) 17 SCC 92;** *State of Bihar v. P.P. Sharma,* **1992 Supp (1) SCC 222;** *Superintendent of Police (CBI) v. Deepak Chowdhary* [1995] Supp. 2 SCR 818 : **(1995) 6 SCC 225;** *Mohd. Iqbal M. Shaikh v. State of Maharashtra* [1998] 2 SCR 734 : **(1998) 4 SCC 494;** *Balbir v. State of Haryana* [1999] Supp. 4 SCR 120 : **(2000) 1 SCC 285;** *R. Dineshkumar v. State* [2015] 5 SCR 605 :

(2015) 7 SCC 497; *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla* **[2007] 2 SCR 862 : (2005) 8 SCC 89;** *Susela Padmavathy Amma v. Bharti Airtel Ltd* **[2024] 3 SCR 647 : 2024 SCC OnLine SC 311;** *N. Rangachari v. BSNL* **[2007] 5 SCR 329 : (2007) 5 SCC 108;** *Central Bank of India v. Asian Global Ltd.* **[2010] 7 SCR 694 : (2010) 11 SCC 203;** *Gunmala Sales (P) Ltd. v. Anu Mehta* **[2014] 10 SCR 1117 : (2015) 1 SCC 103;** *Rajesh Viren Shah v. Redington India Ltd.* **(2024) 4 SCC 305 – referred to.**

Montreal Street Railway Company v. Normandin, **LR (1917) AC 170 – referred to.**

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List of Acts

Unlawful Activities (Prevention) Act, 1967; Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008; Criminal Law Amendment Act, 1908; Code of Criminal Procedure, 1973; National Investigation Agency Act, 2008.

List of Keywords

Validity of Sanction Order; Violation of statutory timelines; Requirement of independent review; Application of mind; Statutory exemption u/s.22 A of the UAPA; Time limit for making recommendation by Authority; Time limit for sanction of prosecution; Terrorist and chief of People's Liberation Front of India-PLFI; Activities of PLFI; Unlawful association; Demonetized currency; Quash suo motu letter; Investigation; Sanction letter; Penal legislation; Strict construction; Grant of sanction; Non-application of mind; Violation of CrPC; Timelines, whether directory or mandatory; Procedure for sanction under the UAPA; Strict adherence to timeline.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3923 of 2024

From the Judgment and Order dated 21.03.2023 of the High Court of Jharkhand at Ranchi in WPCR No. 443 of 2022

Appearances for Parties

Balaji Srinivasan, Rohan Dewan, Vishwaditya Sharma, Ms. Harsha Tripathi, Advs. for the Appellant.

Vikramjeet Banerjee, A.S.G., Ms. Swarupama Chaturvedi, Sr. Adv., Ms. Rukhmini Bobde, Raghav Sharma, Madhav Singhal, Ms. Zeenat Malick, Arvind Kumar Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

Leave granted.

2. Impugned in this appeal by special leave is a judgment of the High Court of Jharkhand at Ranchi dated 21st March, 2023 in W.P.(Crl.) No.443 of 2022, whereby the learned Division Bench refused to quash –

(a) Suo motu letter No.F.No.11011/51/2017/IS-IV dated 16th January, 2018 in respect of the investigation of Bero P.S. Case No. 67/2016 dated 10th November, 2016;

(b) Sanction letter No.11011/51/2017/NIA dated 22nd July, 2020 granting sanction qua prosecution of the present appellant as accused No.17 in R.C.-02/2018/NIA/DLI; and

(c) Cognizance order dated 25th July, 2020 u/s 120B of the Indian Penal Code r/w Section 17, 18, 21 & 22 of U.A. (P) Act, 1967, u/S 17(i) & (ii) of CLA Act, 1908 and charges framed on 16th March, 2021 pending trial before the Court of learned Special Judge, NIA, Ranchi;

It is to be noted that initially quashing was also sought in respect of sanction *vide* letter No.06/Avi-01/21/2017-2637 dated 12th May, 2017 granted by the Principal Secretary, Department of Home, Prisons & Disaster Management, Ranchi. However, paragraph 4 of the impugned judgment records that this specific prayer was not pressed before it.

BACKGROUND FACTS

3. The facts necessary for the disposal of the present appeal, shorn of unnecessary detail are :-

3.1 It is alleged that the appellant, Fuleshwar Gope[1] is an associate of the People's Liberation Front of India[2] and is acquainted with the facts that Dinesh Gope @ Kuldeep Yadav @ Banku (A-6) is a terrorist and the chief of PLFI who collects money through extortion. He is further said to have criminally conspired and formed an unlawful association with members of PLFI, namely, Dinesh Gope, Sumant Kumar @ Pawan Kumar (A-7) and Hira Devi @ Anita Devi (A-14).

3.2 On the direction of A-6, it is alleged that the appellant formed a company M/s. Shiv Shakti Samridhi Infra Pvt. Ltd. (A-20) along with A-14 which was more in the nature of a partnership. This company's bank account was used to directly/indirectly collect funds from legitimate or illegitimate sources for the use of activities of PLFI on the directions of A-6.

3.3 On 10th November, 2016, FIR No.67 of 2016 at Bero, Jharkhand was registered against six persons under Section 212, 213/34, 414 of the Indian Penal Code, 1860 and Sections 13, 17, 40 of the Unlawful Activities (Prevention) Act, 1967[3] and Section 17 of the Criminal Law Amendment Act, 1908 on the allegation that Rs.25.83 lakhs of demonetized currency was brought to the concerned branch of the State Bank of India by A-6.

3.4 On 9th January, 2017, chargesheet No.01/2017 was filed and the learned Judicial Magistrate 1st Class took cognizance thereof. On 18th March, 2017, Deputy Commissioner, Ranchi sought sanction to prosecute which was granted by the Principal Secretary, Department of Home, Prisons & Disaster Management. However, subsequently, the Ministry of Home Affairs,[4] Government of India issued a transfer order in respect thereto on 16th January, 2018 and as such the FIR was re-registered as a case under the National Investigation Agency.[5] MHA further initiated *suo-motu* sanction on 16th October, 2019 against twelve accused persons, A-1 to A-12.

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1 Hereinafter referred to as A-17

2 Abbreviated as 'PLFI'

3 Abbreviated as 'UAPA'

4 Abbreviated as 'MHA'

5 Abbreviated as "NIA"

3.5 On 21st October, 2019, a supplementary chargesheet was filed by NIA wherein the Appellant was named as a witness for the Prosecution, as PW-65. On 5th November, 2019, Special Judge NIA took cognizance of the same.

3.6 The Appellant was subsequently arrested on 13th July, 2020. On 22nd July, 2020, *suo-motu* sanction was issued against an additional seven persons (A-13 to A-20), the Appellant is A-17. A second Supplementary Chargesheet was filed the next day i.e. 23rd July, 2020 under Sections 17, 18, 21, and 22C of the UAPA.

3.7 On 14th November, 2022, the Appellant filed a Writ Petition before the High Court seeking for quashing of the Sanction Order dated 22nd July, 2020, taking of the cognizance of the second Supplementary Chargesheet *vide* an order 25th July, 2020 and framing of charges by order dated 16th March, 2021.

3.8 It is in this backdrop, that the judgment impugned was passed.

IMPUGNED JUDGMENT

4. Before the High Court it was contended primarily that Sections 6(2) & (3) of the National Investigation Agency Act, 2008[6] were not complied with and thereby the statutory timelines mentioned therein were completely ignored. Further, it was argued that Sections 45(1) & (2) of the UAPA were not adhered to.

5. The High Court framed the following issues for its consideration:

> "8. …
>
> (i) Whether the Central Government has got *suo-moto* power to handover the investigation to the N.I.A. once the investigation has been completed by the District Police.
>
> (ii) Whether the Order of Sanction dated 22.07.2020 issued by the Under Secretary to the Government of India in exercise of power conferred under Section 45(2) of U.A.(P) Act, 1967 suffers from any illegality.
>
> (iii) Whether the order taking cognizance against the petitioner under Section 120B I.P.C read with Sections 17,

6 Hereinafter 'NIA, 2008'

18, 21 & 22C of U.A.(P) Act, 1967 and Section 17(i) & (ii) of C.L.A Act, 1908 suffers from any infirmity."

5.1 The Court in deciding the first issue placed reliance on ***Pradeep Ram*** v. ***State of Jharkhand & Anr.***,[7] and more particularly paragraph 49 thereof, to hold that there is no lack of jurisdiction on the part of NIA to carry out further investigation and submit the supplementary report(s).

5.2 The second issue concerned the legality and propriety of sanction which was challenged on the ground that Rule 3 of the Unlawful Activities (Prevention) (Recommendation & Sanction of Prosecution) Rules, 2008[8] was not followed. The Court referred to the contents of the sanction order dated 22nd July, 2020, impugned before it, and then concluded that the timeline stipulated in Rule 3 referred to supra, has been strictly adhered to.

5.3 The third issue is as to whether the cognizance order is afflicted by non-application of mind. The Court considered the judgment in ***Bhushan Kumar & Anr.*** v. ***State (NCT of Delhi)***[9] and ***State of Gujarat*** v. ***Afroz Mohammed Hasanfatta***[10] to examine the power of the Magistrate at the stage of issuing process or summons. It was finally concluded that the approach of the learned Special Judge in dealing with the material placed before them by way of case diary, statements of various prosecution witnesses, other documents and material objects, requires no interference.

6. Aggrieved by the above findings of the High Court, the appellant is before this Court.

ARGUMENTS ADVANCED

7. We have heard Mr. Balaji Srinivasan, learned Advocate-on-Record for the appellant and Mr. Vikramjit Banerjee, learned Additional Solicitor General of India and Ms. Swarupama Chaturvedi, learned Senior Counsel for the Union of India.

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7 [2019] 8 SCR 824 : (2019) 17 SCC 326

8 Hereinafter '2008 Rules'

9 [2012] 2 SCR 696 : (2012) 5 SCC 424

10 [2019] 1 SCR 1104 : (2019) 20 SCC 539

8. In assailing the impugned judgment, the appellants have advanced the following contentions.

8.1 Section 45 of UAPA read with Rules 3 and 4 of the 2008 Rules provided for a detailed procedure with respect to grant of sanction along with a timeline within which the same is to be granted. The impugned sanction is not in consonance with the statutory mandate as the same was issued 2 years and 11 months after the incident and 2 years and 6 months after the letter dated 12th May, 2017.

8.2 Clause (2) of Section 45 of the UAPA was violated as the requirement of 'independent review' while according sanction was not complied with. It is contended that the sanction order was passed mechanically without supplying any reasons or application of mind. The orders are stereotypical and standard. It is submitted that Section 45 requires independent scrutiny and application of mind at each stage – by requisitioning authority; by an independent agency and then by the sanctioning authority. Since, in the present facts the same was not complied with, sanction orders are liable to be quashed.

8.3 Validity of sanction is a question that can be raised at any stage of proceedings. There are instances of this Court setting aside convictions after completion of trial and even quashing entire proceedings upon the filing of bail application, before trial on the ground of invalidity of sanction. In furtherance of this submission, various judgments have been referred to. ***Ashraf Khan v. State of Gujarat***;[11] ***State of Gujarat v. Anwar Osman Sumbhaniya***;[12] ***Anirudhsinhji Karansinhji Jadeja*** v. ***State of Gujarat***;[13] ***Rambhai Nathabhai Gadhvi*** v. ***State of Gujarat***;[14] ***Seeni Nainar Mohammed*** v. ***State***;[15] and ***Jamiruddin Ansari*** v. ***CBI***.[16]

11 [2012] 12 SCR 1033 : (2012) 11 SCC 606

12 [2019] 2 SCR 749 : (2019) 18 SCC 524

13 [1995] Supp. 2 SCR 637 : (1995) 5 SCC 302

14 [1997] Supp. 3 SCR 356 : (1997) 7 SCC 744

15 [2017] 3 SCR 312 : (2017) 13 SCC 685

16 [2009] 7 SCR 759 : (2009) 6 SCC 316

8.4 Both the requisitioning and sanctioning authorities have not considered that *mens rea* is absent which, as is well established, is a requisite to constitute a criminal offence unless explicitly excluded. Reference is made to ***Peoples' Union for Civil Liberties*** v. ***Union of India***[17] and ***Sanjay Dutt*** v. ***State through CBI***.[18] In referring to latter judgment, reliance is placed on the holding that if a reasonable interpretation exists which permits the avoidance of penalty, Courts are bound to take that approach.

8.5 The appellant was not made an accused in the first module, i.e., FIR No.67/2016 nor in the second module (initiated by an alleged hawala transaction which took place on 22nd May 2018) and sanction in respect thereof was granted by the Central Government on 16th October, 2019. He was, in fact, made an accused in an independent transaction involving A-20 regarding which the sanction order (impugned herein) was issued on 22nd July, 2020.

8.6 The proviso to Section 22A exempts a person who is not in charge of and responsible for the affairs of the company, from prosecution. The appellant contends that he has wrongly been roped into the proceedings even when he is a Munshi working as a daily wager. He is illiterate and does not understand business transactions. A-6 took undue advantage of his situation, once A-7 and A-14 stole his identity.

8.7 No particular role has been ascribed to the appellant. This case by the NIA has been thrust upon him given, (a) he is a director in the company which is A-20; (b) the said company allegedly received funds that were to be used by PLFI; (c) he hails from the same locality and is a distant acquaintance of Dinesh Gope who is the leader of the PLFI.

9. The stand of the respondent - Union of India, as can be understood from the materials on record and the written submissions, is that -

9.1 The sanction order that has led to the present proceedings has been granted after following due process. The NIA recommended prosecution of the accused persons including

17 [2004] 1 SCR 232 : (2004) 9 SCC 580

18 [1994] Supp. 3 SCR 263 : (1994) 5 SCC 410

the present appellant vide its letter dated 14th July, 2020. The Central Government, in accordance with Section 45(2) of the UAPA referred the investigation report to the authority by letter dated 15th July, 2020, comprising two members for the purpose of independent review. The authority by its letter dated 16th July, 2020 forwarded its report to the Ministry within the stipulated time period under Rule 3 of 2008 Rules. In other words, there is no violation of the Rules.

9.2 The impugned sanction order has been passed considering all the relevant materials on record, including the recommendation of the authority constituted under Section 45(2) of the UAPA. The authority consisted of a retired High Court Judge and the retired Law Secretary.

9.3 Independent review took place at all relevant stages pursuant to which Central Government accorded sanction. Merely because the sanction was granted within one day of the recommendation, it cannot be said that there was non-application of mind.

9.4 Second and Third Module as explained in the supplementary chargesheets are not independent and separate transactions from that initiated in the FIR, but rather, are a part of the same continuing transaction undertaken by the accused persons to channel the Proceeds of Terrorism. The NIA on being entrusted with the investigation, had investigated the same and submitted the two supplementary chargesheets.

9.5 The appellant is an active member of a terrorist gang and a close associate of Dinesh Gope (A-6) and was involved in collecting and channelizing funds by forming companies. A-20 of which the Appellant/A-17 was a director, served as a front to launder proceeds of terrorism. The claim of the appellant that A-7 & A-14 stole his identity is unsustainable and quashing cannot be placed on such a vague plea.

9.6 The trial is at a very advanced stage, and as such, no discretion be exercised in quashing the criminal proceedings.

10. At the outset, we clarify that despite the last of the submissions made by the learned Additional Solicitor General, the Appellant invited findings on his submissions. Hence, we proceed to decide the issue on merits.

QUESTIONS FOR CONSIDERATION BEFORE THIS COURT

11. Having considered the factual matrix and the submissions advanced by the learned counsel for the parties the following questions arise for our consideration:-

(i) Whether the Validity of the Sanction Order can be challenged at any stage?

(ii) Whether a violation of Section 45(2) of the UAPA r/w Rules 3 & 4, if any, vitiates the proceedings? In other words, whether violation of - (a) statutory timelines and (b) the requirement of independent review which includes application of mind, are necessary aspects of procedure without which, any transaction under the UAPA shall be compromised to a point that its sanctity is rendered questionable?

(iii) Whether in the present facts, the argument of the appellant that the transactions in connection with which he has been brought to the book were actually independent of the ones in which Dinesh Gope (A-6) and other members were arrayed as accused, has any merit?

(iv) Whether, in the facts, the statutory exemption under Section 22 A of the UAPA applies to the appellant who claims to be unaware of the affairs of the company?

CONSIDERATION

(a) UAPA : An Introduction

12. The preamble of the Act reads as under:-

> "An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations [,and for dealing with terrorist activities,] and for matters connected therewith."

13. A Bench of Three Judges of this Court (*of which both of us were members*) considered the objective of the Act in the following terms in ***Arup Bhuyan*** v. ***State of Assam***[19]:-

19 [2023] 8 SCR 496 : (2023) 8 SCC 745

"85. The main objective of the UAPA is to make powers available for dealing with activities directed against the integrity and sovereignty of India. It is also required to be noted that pursuant to the recommendation of the Committee on National Integration and Regionalisation appointed by the National Integration Council Act on whose recommendation the Constitution (Sixteenth Amendment) Act, 1963 was enacted, UAPA has been enacted. It appears that the National Integration Council appointed a Committee on National Integration and Regionalisation to look into, inter alia, the aspect of putting reasonable restrictions in the interests of sovereignty and integrity of India and thereafter the UAPA has been enacted. Therefore, the UAPA has been enacted to make powers available for dealing with the activities directed against integrity and sovereignty of India.

86. Now let us consider the Preamble to the UAPA, 1967. As per Preamble, the UAPA has been enacted to provide for the more effective *prevention* of certain unlawful activities of individuals and associations and dealing with terrorist activities and for matters connected therewith. Therefore the aim and object of enactment of the UAPA is also to provide for more effective prevention of certain unlawful activities. That is why and to achieve the said object and purpose of effective prevention of certain unlawful activities Parliament in its wisdom has provided that where an association is declared unlawful by a notification issued under Section 3, a person, who is and continues to be a member of such association shall be punishable with imprisonment for a term which may extend to 2 years, and shall also be liable to fine. Therefore, Parliament in its wisdom had thought it fit that once an association is declared unlawful after following due procedure as required under Section 3 and subject to the approval by the Tribunal still a person continues to be a member of such association is liable to be punished/ penalised."

(Emphasis supplied)

(b) Relevant Statutory Provisions

14. At this juncture, we may refer to the applicable statute and rules.

14.1 The requisite clauses of Section 2 (definitions clause of the Act) are as under:-

> "**2. Definitions.-**(1) In this Act, unless the context otherwise requires,-
>
> … … …
>
> (e) "Designated Authority" means such officer of the Central Government not below the rank of Joint Secretary to that Government, or such officer of the State Government not below the rank of Secretary to that Government, as the case may be, as may be specified by the Central Government or the State Government, by notification published in the Official Gazette;
>
> … … …
>
> (ec) "person" includes— (i) an individual, (ii) a company, (iii) a firm, (iv) an organisation or an association of persons or a body of individuals, whether incorporated or not, (v) every artificial juridical person, not falling within any of the preceding sub-clauses, and (vi) any agency, office or branch owned or controlled by any person falling within any of the preceding sub-clauses;] (f) "prescribed" means prescribed by rules made under this Act;
>
> … … …
>
> (g) "proceeds of terrorism" means,— (i) all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, irrespective of person in whose name such proceeds are standing or in whose possession they are found; or
>
> (ii) any property which is being used, or is intended to be used, for a terrorist act or for the purpose of an individual terrorist or a terrorist gang or a terrorist

organisation. Explanation.—For the purposes of this Act, it is hereby declared that the expression "proceeds of terrorism" includes any property intended to be used for terrorism;"

14.2 Section 45 of the Act is extracted below for ready reference.

"**45. Cognizance of offences**.— [(1)] No court shall take cognizance of any offence—

(i) under Chapter III without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf;

(ii) under Chapter IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.

(2) Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation, within such time as may be prescribed, to the Central Government or, as the case may be, the State Government."

(Emphasis supplied)

14.3 Rules 3 & 4 of the 2008 Rules read as follows:-

"**3. Time limit for making a recommendation by the Authority**. – The Authority shall, under sub-section (2) of Section 45 of the Act, make its report containing the recommendations to the Central Government [or, as the case may be, the State Government] within seven working days of the receipt of the evidence gathered by the investigating officer under the Code.

> **4. Time limit for sanction of prosecution.**-The Central Government [or, as the case may be, the State Government] shall, under sub-section (2) of Section 45 of the Act, take a decision regarding sanction for prosecution within seven working days after receipt of the recommendations of the Authority."
>
> (Emphasis supplied)

ISSUE No. 1- Challenge to validity of sanction – at what stage?

15. Now, we proceed to examine the first question before this Court. In order to do so it is essential to extract the relevant portion of the sanction order:-

> "5. And whereas, the Central Government in terms of the provisions of Section 45(2) of the Unlawful Activities (Prevention) Act, 1967 (as amended) and the Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008 referred the above mentioned Investigation Report vide this Ministry's letter of even no. dated 15th July, 2020 to the Authority comprising of two members namely Justice Dr. Satish Chandra (Retired) and Dr TK Vishwanathan, Law Secretary (Retired), constituted vide this Ministry's order No. 11034/1/2009/IS-IV dated 03.07.2015 for making an independent review of the evidence gathered in the course of investigation (term of the Authority extended till 31.07.2021 vide this Ministry's order dated 12.06.2020);
>
> 6. And whereas, the Authority vide letter dated 16th July, 2020 forwarded its report to this Ministry within the time limit as prescribed in rule Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008 and, after being satisfied with the material available on record and facts and circumstances therein, recommended for sanction for prosecution against the above mentioned accused persons/entities under the relevant sections of law including the Unlawful Activities (Prevention) Act, 1967;
>
> 7. And now, therefore, the Central Government, after carefully examining the material placed on record and the recommendations of the Authority, is satisfied that a

prima facie case is made out against the accused persons/ entities under the relevant sections of law and hereby accords sanction for prosecution under section 45(1) of the Unlawful Activities (Prevention) Act, 1967…"

BY ORDER AND IN THE NAME OF
THE PRESIDENT OF INDIA
Sd/-
(Dharmendar Kumar)
Under Secretary to the Government of India"

(Emphasis supplied)

16. The question of validity of sanction being challenged, and at what stage it may be permissible, has engaged this Court on few previous occasions, *albeit* in context of different statutes. It shall be useful to refer to them.

16.1 In ***Central Bureau of Investigation*** v. ***Ashok Kumar Aggarwal***[20] this Court noted the importance of the process of grant of sanction. It has been termed "*not an acrimonious exercise but a solemn and sacrosanct act*" in the context of the Prevention of Corruption Act, 1988.[21] The Court summarised the essentials for validity of prosecution as under:-

> **"16.** In view of the above, the legal propositions can be summarised as under:
>
> **16.1.** The prosecution must send the *entire* relevant record to the sanctioning authority including the FIR, disclosure statements, statements of witnesses, recovery memos, draft charge-sheet and all other relevant material. The record so sent should also contain the material/document, if any, which may tilt the balance in favour of the accused and on the basis of which, the competent authority may refuse sanction.
>
> **16.2.** The authority *itself* has to do complete and conscious scrutiny of the whole record so produced

20 [2013] 14 SCR 983 : (2014) 14 SCC 295

21 Hereinafter, 'PC Act'

by the prosecution independently applying its mind and taking into consideration all the relevant facts before grant of sanction while discharging its duty to give or withhold the sanction.

16.3. The power to grant sanction is to be exercised strictly keeping in mind the public interest and the protection available to the accused against whom the sanction is sought.

16.4. The order of sanction *should make it evident* that the authority had been aware of all relevant facts/materials and had applied its mind to all the relevant material.

16.5. In every individual case, the prosecution has to establish and satisfy the court by leading evidence that the entire relevant facts had been placed before the sanctioning authority and the authority had applied its mind on the same and that the sanction had been granted in accordance with law."

(Emphasis supplied)

16.2 In ***Parkash Singh Badal*** v. ***State of Punjab***,[22] this Court held that an authority, which is the sanctioning authority is not required to separately specify each of the offences against the accused public servant. This is to be done at the stage of framing of charge. What the law requires is that materials must be placed before the sanctioning authority so as to enable the application of mind in arriving at a decision.

16.3 In ***Dinesh Kumar*** v. ***Airport Authority of India***,[23] Lodha, J. (as he then was) observed:

"**10.** In our view, invalidity of sanction where sanction order exists, can be raised on diverse grounds like non-availability of material before the sanctioning authority or bias of the sanctioning authority or the order of sanction having been passed by an

22 [2006] Supp. 10 SCR 197 : (2007) 1 SCC 1

23 [2011] 13 SCR 260 : (2012) 1 SCC 532

> authority not authorised or competent to grant such sanction. The above grounds are only illustrative and not exhaustive. All such grounds of invalidity or illegality of sanction would fall in the same category like the ground of invalidity of sanction on account of non-application of mind—a category carved out by this Court in *Parkash Singh Badal* [(2007) 1 SCC 1 : (2007) 1 SCC (Cri) 193] , the challenge to which can always be raised in the course of trial."

16.4 In ***Central Bureau of Investigation & Ors.*** v. ***Pramila Virendra Kumar Agarwal***,[24] while referring to ***Dinesh Kumar*** (supra), this Court reiterated the distinction between absence of sanction and the alleged invalidity of sanction on account of non-application of mind. It was held that absence as in issue can be raised at the threshold, however, invalidity, as in issue can only be raised at trial.

16.5 A Bench of three learned Judges in ***P.K. Pradhan*** v. ***State of Sikkim***[25] discussed the application of Section 197 of the Code of Criminal Procedure, 1973.[26] Having referred to a host of precedents, it was concluded that:

> "15. …It is well settled that question of sanction under Section 197 of the Code can be raised any time after the cognizance; maybe immediately after cognizance or framing of charge or even at the time of conclusion of trial and after conviction as well. But there may be certain cases where it may not be possible to decide the question effectively without giving opportunity to the defence to establish that what he did was in discharge of official duty. In order to come to the conclusion whether claim of the accused that the act that he did was in course of the performance of his duty was a reasonable one and neither pretended nor fanciful, can be examined during the course of trial by giving opportunity to the defence to establish it. In

24 (2020) 17 SCC 664

25 [2001] 3 SCR 1119 : (2001) 6 SCC 704

26 Hereinafter 'CrPC'

such an eventuality, the question of sanction should be left open to be decided in the main judgment which may be delivered upon conclusion of the trial."

(Emphasis supplied)

16.6 In recent past, this court, in ***State of Karnataka*** v. ***S. Subbegowda***,[27] while addressing the question of sanction and its validity in the context of PC Act underscored that challenge to sanction should be brought at the earliest stage possible and held that:

"**10.** … It is also well settled proposition of law that the question with regard to the validity of such sanction should be raised at the earliest stage of the proceedings, however could be raised at the subsequent stage of the trial also. In our opinion, the stages of proceedings at which an accused could raise the issue with regard to the validity of the sanction would be the stage when the Court takes cognizance of the offence, the stage when the charge is to be framed by the Court or at the stage when the trial is complete i.e., at the stage of final arguments in the trial. Such issue of course, could be raised before the Court in appeal, revision or confirmation, however the powers of such court would be subject to sub-section (3) and sub-section (4) of Section 19 of the said Act. It is also significant to note that the competence of the court trying the accused also would be dependent upon the existence of the validity of sanction, and therefore it is always desirable to raise the issue of validity of sanction at the earliest point of time. It cannot be gainsaid that in case the sanction is found to be invalid, the trial court can discharge the accused and relegate the parties to a stage where the competent authority may grant a fresh sanction for the prosecution in accordance with the law."

(Emphasis supplied)

27 [2023] 11 SCR 19 : 2023 SCC OnLine SC 911

17. The afore-cited authorities point to only one conclusion which is that sanction, though should be challenged at the earliest possible opportunity, it can be challenged at a later stage as well. These judgments, although not specifically in the context of laws such as UAPA, posit a generally acceptable rule that a right available to the accused, which may provide an opportunity to establish innocence, should not be foreclosed by operation of law, unless specifically provided within the statutory text. At the same time, challenging validity of sanction cannot and should not be a weapon to slow down or stall otherwise valid prosecution. Other legislations such as the CrPC provide mechanisms for the sanction and subsequent actions to be saved from being invalidated due to any irregularity etc. Section 465 CrPC provides for the possibility that a sanction granted under Section 197 CrPC can be saved by its operation. Similarly, a sanction under the PC Act, if found that there was any error, omission or irregularity would not be vitiated unless the same has resulted in failure of justice.

18. The UAPA does not provide for any such saving of the sanction. This implies that, in the wisdom of the legislature, the inbuilt mechanism of the Act of having two authorities apply their mind to the grant of a sanction, is sufficient. This emphasizes the role and sanctity of the operation to be carried out by both these authorities. In order to challenge the grant of sanction as invalid, the grounds that can be urged are that (1) all the relevant material was not placed before the authority; (2) the authority has not applied its mind to the said material; and (3) insufficiency of material. This list is only illustrative and not exhaustive. The common thread that runs through the three grounds of challenge above is that the party putting forward this challenge has to lead evidence to such effect. That, needless to say, can only be done before the Trial Court. In that view of the matter, we have no hesitation in holding that while we recognise the treasured right of an accused to avail all remedies available to him under law, in ordinary circumstances challenge to sanction under UAPA should be raised at the earliest possible opportunity so as to enable the Trial Court to determine the question, for its competence to proceed further and the basis on which any other proceeding on the appellate side would depend on the answer to this question. [See: ***S. Subbegowda*** (supra)]

In the attending facts and circumstances of the present case, keeping in view the submission made at the bar that the trial is underway

and numerous witnesses (113 out of 125) already stand examined, we refrain from returning any finding on the challenge to the validity of the sanction *qua* the present appellant and leave it to be raised before the Trial Judge, who shall, if such a question is raised decide, it promptly.

ISSUE No.2 :

19. The next issue that we must consider is whether the timelines in accordance with Section 45(2) of the UAPA r/w Rules 3 & 4 of the 2008 Rules and the requirement of independent review are necessary aspects of procedure, non-adherence of which would vitiate proceedings. As already reproduced above, the rules provide a seven day period within which the concerned authority is to make its recommendation on the basis of materials gathered by the investigating officer and a further seven days period for the government to grant sanction for prosecution, having considered the report of the authority.

20. The ins and outs of the Appellant's contention is that the said timelines were not followed and, in fact, the first sanction was granted more than a year after the recommendation was moved. This contention ties into another submission that there was no independent review on the part of both recommending authority and central government, as the sanction was merely granted within a day each.

Timelines, whether directory or mandatory?

21. Let us now consider one of the primary arguments of the appellants, i.e., non-following of the statutory timelines.

22. Timelines, generally speaking, as part of statutory framework are extremely essential to an effective, efficient and focused machinery of criminal investigation, prosecution and trial. It cannot be gainsaid that all stakeholders to the smooth functioning of these procedures of law must do their part in realising such timelines. They are the essential aspects of right to speedy trial, which is enshrined under Article 21 of the Constitution of India.

23. The appellant's objections regarding timelines is two-fold. One, that there is a large gap between the first sanction and his own arrest, given that he is allegedly part of the same continuing transaction according to the respondent union, and two, that since the authority despite

having been granted a seven day period to consider the materials gathered by the investigating officers and make their recommendation, did so within barely a day, and that to in a manner which could be termed mechanical, thereby afflicting the recommendations from the vice of non-application of mind.

24. The first objection appears to us, to be superficial at best. In order to understand this objection some important dates must be referred to:

S. No.	Details	Date
1.	First Information Report (F.I.R.)	10th November 2016
2.	Chargesheet (It is noted that investigation continues against A-6)	9th January 2017
3.	Sanction against A-6	16th October 2019
4.	First Supplementary Chargesheet (A-6 is named herein; A-17 is brought in as a prosecution witness; Investigation continues still further)	21st October 2019
5.	Arrest of A-17	13th July 2020
6.	Sanction against A-17	22nd July 2020
7.	Second Supplementary Chargesheet (A-17 is named herein)	23rd July 2020

The gap between the first action against A-6 and the arrest of the appellant is a result of continuing investigation, as evidenced by the fact that the appellant was made an accused in the second supplementary chargesheet, arising out of the same FIR under which A-6 was initially named an accused. Since the investigation continued, the gap cannot be termed fatal so as to render the arrest of the appellant as unlawful or illegal. It is also to be noted that in the first supplementary chargesheet the appellant was initially a witness for the prosecution and with further investigation was made an accused thereafter.

25. In order to consider the merits of the second objection, 'application of mind' as a concept must be understood. It is trite in law that application of mind must form part of any judicial, quasi-judicial or administrative order. To demonstrate the same, consideration of material placed

before such authority must be reflected. At the same time, it being a cerebral exercise, it is not within reason to set out any formula to explain what application of mind may actually mean or look like. It is to be ascertained in the facts and circumstances of each case.

26. In the context of penal laws, authorities tasked with evaluating material prior to granting of sanction for prosecution, or the act of granting sanction itself must apply their mind to each and every facet of the material placed before it to arrive at the conclusion particularly so because the effect of the task at hand is immense. The grant/non-grant of sanction is what sets in motion the machinery of strict laws such as UAPA or the Terrorist and Disruptive Activities (Prevention) Act, 1987.[28] Given the severity of these laws and the nature of activities with which they are associated, the effect that they have on the person accused thereunder is not only within the realm of law but also drastically effects social and personal life. It is only after the authority having been handed this task, is of the considered view that sanction can be granted, should it be so done.

27. The procedures *qua* sanctions provided in such legislations are meant to be followed strictly, to the letter more so to the spirit. Even the slightest of variation from the written word may render the proceedings arising therefrom to be cast in doubt. The general principle, when the provision is couched negatively has been noticed by this court in ***Rangku Dutta*** v. ***State of Assam***[29] in the following terms:

> "**18.** It is obvious that Section 20-A(1) is a mandatory requirement of law. First, it starts with an overriding clause and, thereafter, to emphasise its mandatory nature, it uses the expression "No" after the overriding clause. Whenever the intent of a statute is mandatory, it is clothed with a negative command. Reference in this connection can be made to *G.P. Singh's Principles of Statutory Interpretation*, 12th Edn., at pp. 404-05, the learned author has stated:
>
> > "... As stated by Crawford: 'Prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides

28 Hereinafter referred as 'TADA'

29 [2011] 8 SCR 639 : (2011) 6 SCC 358

> no penalty for disobedience.' As observed by Subbarao, J.: 'Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative.' Section 80 and Section 87-B of the Code of Civil Procedure, 1908; Section 77 of the Railways Act, 1890; Section 15 of the Bombay Rent Act, 1947; Section 213 of the Succession Act, 1925; Section 5-A of the Prevention of Corruption Act, 1947; Section 7 of the Stamp Act, 1899; Section 108 of the Companies Act, 1956; Section 20(1) of the Prevention of Food Adulteration Act, 1954; Section 55 of the Wild Life (Protection) Act, 1972; the proviso to Section 33(2)(*b*) of the Industrial Disputes Act, 1947 (as amended in 1956); Section 10-A of the Medical Council Act, 1956 (as amended in 1993), and similar other provisions have therefore, been construed as mandatory. A provision requiring 'not less than three months' notice' is also for the same reason mandatory."
>
> We are in respectful agreement with the aforesaid statement of law made by the learned author."

For instance, under the TADA, it has been held that if the sanctioning authority as mentioned under Section 20-A is not the one who granted sanction and instead it was a higher authority, even then the said sanction would be illegal. Reference in this regard may be made to ***Hussein Ghadially*** v. ***State of Gujarat***[30] and ***State of Rajasthan*** v. ***Mohinuddin Jamal Alvi***.[31]

28. Now turning to the procedure for sanction provided under the UAPA, we find that a Court is enjoined from taking cognizance without previous sanction either by the Central Government or the State Government, as applicable, and such sanction shall only be given after the report of the authority appointed by the Central Government or the State Government, as the case may be, has been considered.

30 [2014] 9 SCR 364 : (2014) 8 SCC 425

31 (2016) 12 SCC 608

This authority is to make an independent review of the evidence gathered and make a recommendation to the government within a time bound manner.

28.1 What flows from the above description of Section 45 is that if any Court takes cognizance without prior sanction of the Government, Centre or State, the same shall be in contravention of the Act and therefore bad in law. This sanction is not a function of the Government alone and it can only be granted after an independent body, *albeit* appointed by the Government, makes an independent review of the evidence.

28.2 The fact that sanction has been granted is not in dispute. What is disputed by the appellant is in which the manner the same has been granted. According to the case put up by him, the authority's recommendation, and immediately thereafter the Government's grant of sanction is evidence of non-application of mind and stereotypical or 'cyclostyle' orders.

28.3 Although we have taken note of the facts leading up the present appeal, for immediate reference we may recall here that the NIA vide its letter dated 14th July 2020 recommended prosecution for further seven persons (A-13 to A-20); the Ministry vide letter dated 15th July 2020 forwarded the investigation report to the authority; the authority, the next day, i.e., 16th July 2020, recommended sanction for prosecution against the seven persons.

28.4 Rules 3 & 4 of the 2008 Rules, reproduced *supra*, grant the authority as also the Government a week's time each to recommend and then grant sanction. On the face of it, the present grant of sanction is within the stipulated time. However, as is submitted by the appellant, is the fact that the recommendation, consideration and grant of sanction took place within three days enough to vitiate the prosecution to its entirety?

28.5 One week's time, given to both the authorities is to enable them to independently evaluate, first the materials placed on record then recommend the grant of sanction; and second, to evaluate the material and the recommendation so made above, to finally ink the order of sanction. If the time so granted

is thoroughly under-utilised or if either of the two authorities overshoot the time, as stipulated in the rules, what is the fate of the sanction which was underway? We find there to be divergent views taken on this issue by the High Courts. It is a recognised principle of law that the law should apply equally to all persons which then implies that there should be uniformity, despite various jurisdictions being at play, in how the law is applied. The Law Commission of India in its 136th Report recognised that "the want of uniformity" is "an evil". The problem has been recognised stating thus :-

> "1.2 **Want of uniformity an evil.-** It is needless to point out that want of uniformity in law not only impairs the quality or the substantive or procedural law but also causes serious inconvenience to citizens in general. Those whose business is to advise persons who consult them on questions of law, find it difficult to give such advice with confidence where the decisions are conflicting. Those who are entrusted with the functions of adjudicating on questions of law must spend considerable time in between two or more possible views on a subject which falls to be considered before them, In this process, there is bound to result considerable waste of time and energy. That apart, it is not a satisfactory situation that on a given topic, the rule of law prevailing in one part of the country should be different from the rule prevailing in another part of the country when the disparity arises from conflicting judicial interpretations."

28.5.1 The High Court of Judicature at Bombay (Nagpur Bench), in Criminal Appeal Nos.136 & 137 of 2017 titled as ***Mahesh Kariman Tirki*** v. ***State of Maharashtra***' on remand from this Court (by order dated 19th April 2023 passed in SLP (Crl.)Nos.11072-11073/2022 for decision on merits as also validity of sanction), regarding timelines mentioned in the 2008 Rules, held as under:

> "153. Though the word "shall" no doubt connotes the sense of urgency, but the consequence of non-compliance in strict sense which flows from the

> wordings in the rule, has not been spelt out under the statute. Neither at an initial stage of the prosecution nor even before us the defence has projected any prejudice from strict non-compliance of time frame.
>
> 154. The very purport of the provision is to convey that the process has to be complied with and completed in an expeditious manner. Particularly, we have taken into account the contingency which may occur, if the word "shall" in the context is held mandatory. In that case, even if a single days delay would stifle the prosecution intending to curb the act of terrorism. Certainly, the legislative intent behind incorporating the term "shall" is not to stifle the prosecution on such insignificant technicality, but conveys that the process ought to be completed in an expeditious manner. We are unable to persuade ourselves to accept the contention that the term "shall" is to be strictly treated as a mandatory provision and failure to comply with the timeline strictly vitiates the process. Therefore, we respectfully defer with the view taken by the Kerala High Court in the case of Roopesh (supra) in that regard.
>
> 155. We are of the view that and accordingly hold that to achieve legislative intent the dual mandate is to be complied with in its true spirit. Though a minuscule delay would not thwart the legislative intent, but delay if writ large from the record, which is unexplained, would certainly have its own adverse impact on the process of sanction."

The import of the above extract is that the timelines mentioned in Rules 3 and 4 of the 2008 Rules, despite having the word 'shall' in them, are to be taken as directory for, if the timeline is interpreted strictly, it may thwart the purpose of the legislation which is to curb unlawful activities of a specified nature.

We notice that an appeal from the judgement extracted above, is pending before this Court. In the course of the present judgement, we make no comments on the merits thereof and clarify, that the above extract is only for the purpose of determining the question of

law, in respect of the timelines mentioned in the 2008 Rules, being either mandatory or directory in nature.

28.5.2 The Jharkhand High Court, recently, in ***Binod Kumar Ganjhu @Vinod Kumar Ganjhu @Binod Ganjhu*** v. ***Union of India***[32] made similar observations and held that the timelines in the 2008 Rules are directory. It was observed-

> "23. The decision in "Roopesh" is not a binding precedent and we do not find ourselves bound by the considerations of judicial comity and propriety. We are unable to record our agreement to the observations made by the Kerala High Court in "Roopesh" that the time-line provided under Rules 3 and 4 of the Sanction Rules is mandatory. It is indeed not an issue for debate that the expression "shall" would not always convey mandatory compliance of the provision in law. In our opinion, the Sanction Rules lay down a time-line which is in the nature of a guideline keeping in mind personal liberty of a person but such time-line cannot be held to be mandatory and, that too, in cases where serious allegations of commission of offence under UAP Act *have been made and found prima-facie true by* the NIA.
>
> 24. Long back, it has been held by the Hon'ble Supreme Court that the only principle which governs the criminal justice system is miscarriage of justice. This rule has its origin in the rules of principles of natural justice and that is why time and again the Hon'ble Supreme Court has laid stress on fair trial. Even on conclusion of the trial, the judgment rendered by a competent Court was not held illegal where a charge was not framed by the Court [refer, "Begu v. King-Emperor" ILR (1925) 6 Lah 226]. In this context, we may also refer to the provisions under sections 468 to 473 of the Code of Criminal Procedure which provide period of limitation for taking cognizance and exclusion as well as extension of period of limitation in certain cases. The scheme of the Code of Criminal Procedure thus indicates that it is not every irregularity which vitiates the trial and except in very exceptional kind of

32 W.P(Crl) 308 of 2022

> cases the Court would not step into and hold the judgment rendered illegal. The fundamental right of an accused is of fair trial in which he has sufficient opportunity to defend himself by cross-examining the prosecution witnesses to bring out falsity in the prosecution case. But beyond this, an accused has only a statutory right to establish that the procedure as prescribed under the law has not been followed and such non-adherence to the procedure prescribed has deprived him a fair opportunity to defend himself which occasioned in miscarriage of justice. As noticed above, the Court has taken cognizance of the offence under the UAP Act *and charge has also been framed for committing such offence. In our considered opinion, the Sanction Rules would have no application in the cases of this nature because a criminal prosecution cannot be frustrated on mere technicalities.*"

Though the Special Leave Petition against this Order was dismissed, however, it was clarified that the question of sanction under Section 45 of the UAPA was not considered.

28.5.3 Taking a diametrically opposite view, the Kerala High Court in ***Roopesh*** v. ***State of Kerala***,[33] held that the timeline stipulated cannot be taken to be directory, keeping in view the Legislature's express inclusion of the same, departing from the practice adopted in other similarly placed laws such as TADA or Prevention of Terrorism Act, 2002,[34] it held as under:

> **"12.** The word 'shall' used in the Rules of 2008 has a well defined texture as available from the identical 'shall' employed in the text of sub-section (1) & (2) of S.45 of the UA(P)A; and the power conferred on the Central Government by S.52 to make rules for carrying out the provisions of the Act. The Rules of 2008 prescribed the time of seven days; as spoken of in the enactment. The Act itself is enacted, to prevent unlawful activities of individuals and associations as also dealing with terrorist activities, which terms are specifically defined under the enactment itself.

33 2022 SCC OnLine Ker 1372

34 'POTA' for short.

The colour is perceivable from the context in which the enactment is saved from the challenge of having infringed the fundamental rights guaranteed under the Constitution, only on the ground of a reasonable restriction; which has to be construed very strictly. The Parliament, in bringing out the enactment and the Government, in promulgating the Rules had the prior experience of the TADA and POTA as also S.196 Cr.P.C; none of which had a time frame for issuance of sanction. UA(P)A as it was originally enacted, in its Statements of Objects and Reasons, declared it to be in the interest of the sovereignty and integrity of India, intended to bring in reasonable restrictions to (i) freedom of speech and expression, (ii) right to assemble peaceably and without arms; and (iii) right to form associations or unions. The original enactment by S.17 required a sanction from the Central Government or the authorised officer to initiate prosecution.

...

14. The Parliament, in 2008, while enacting Amending Act 35 of 2008 had consciously incorporated the provision requiring a recommendation from an Authority and retained the requirement of sanction from the appropriate Government, as provided in sub-section (1). It was by sub-section (2) that an Authority was contemplated, to make recommendations after reviewing the evidence gathered and a specific time was permitted to be prescribed by rules. The Central Government having brought out the Rules of 2008 specifying the time, within which the recommendation and sanction has to be made, the time is sacrosanct and according to us, mandatory. It cannot at all be held that the stipulation of time is directory, nor can it be waived as a mere irregularity under S.460 (e) or under S.465 Cr.P.C. S.460 saves any erroneous proceeding, *inter-alia* of taking cognizance; if done in good faith. When sanction is statutorily mandated for taking cognizance and if cognizance is taken without a sanction or on the strength of an invalid one, it cannot be said to be an erroneous proceeding taken in good faith and the act of taking cognizance itself would stand vitiated."

The State of Kerala, being aggrieved by the final conclusion that the sanction was bad in law, carried in appeal to this Court. The Special Leave Petition bearing number SLP (Crl.) Nos.6981-6983 of 2022, was dismissed as withdrawn with the question of law left open.

28.5.4 A similar view was taken by the High Court of Punjab and Haryana in ***Manjeet Singh*** v. ***State of Punjab.***[35] Although decided in the context of bail, it was held that if no decision is taken, in keeping with the timelines of the Rules 2008, the accused would be entitled to interim bail. It concurred with the view expressed by the Kerala High Court in ***Roopesh*** (supra).

29. This Court has considered the issue of time-bound sanction. While dealing with sanctions under the PC Act, it was observed by Pamidighantam Sri Narsimha J. speaking for this Court, in ***Vijay Rajmohan*** v. ***Central Bureau of Investigation (Anti-Corruption Branch)*** [36] as under:

> "**23.** Grant of sanction being an exercise of executive power, it is subject to the standard principles of judicial review such as application of independent mind; only by the competent authority, without bias, after consideration of relevant material and by eschewing irrelevant considerations. As the power to grant sanction for prosecution has legal consequences, it must naturally be exercised within a reasonable period. This principle is anyway inbuilt in our legal structure, and our constitutional courts review the legality and proprietary of delayed exercise of power quite frequently…
>
> …
>
> **29.** The sanctioning authority must bear in mind that public confidence in the maintenance of the rule of law, which is fundamental in the administration of justice, is at stake here. By causing delay in considering the request for sanction, the sanctioning authority stultifies judicial scrutiny, thereby vitiating the process of determination of the allegations against the corrupt official *Subramanian*

35 [2022] 19 SCR 563 : CRA-D-5 of 2023

36 (2023) 1 SCC 329

Swamy [*Subramanian Swamy* v. *Manmohan Singh*, (2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666] . Delays in prosecuting the corrupt breeds a culture of impunity and leads to systemic resignation to the existence of corruption in public life. Such inaction is fraught with the risk of making future generations getting accustomed to corruption as a way of life. …

…

32. In the first place, non-compliance with a mandatory period cannot and should not automatically lead to the quashing of criminal proceedings because the prosecution of a public servant for corruption has an element of *public interest* having a direct bearing on the rule of law [*Subramanian Swamy* v. *Manmohan Singh*, (2012) 3 SCC 64 : (2012) 1 SCC (Cri) 1041 : (2012) 2 SCC (L&S) 666. *Per A.K. Ganguly, J.* : (SCC p. 102, paras 76-77)"*76*. The sanctioning authority must bear in mind that what is at stake is the public confidence in the maintenance of the rule of law which is fundamental in the administration of justice. Delay in granting such sanction has spoilt many valid prosecutions and is adversely viewed in public mind that in the name of considering a prayer for sanction, a protection is given to a corrupt public official as a quid pro quo for services rendered by the public official in the past or may be in the future and the sanctioning authority and the corrupt officials were or are partners in the same misdeeds. …*77*. By causing delay in considering the request for sanction, the sanctioning authority stultifies judicial scrutiny and determination of the allegations against corrupt official and thus the legitimacy of the judicial institutions is eroded. It, thus, deprives a citizen of his legitimate and fundamental right to get justice by setting the criminal law in motion and thereby frustrates his right to access judicial remedy which is a constitutionally protected right."]. This is also a non-sequitur. It must also be kept in mind that the complainant or victim has no other remedy available for judicial redressal if the criminal proceedings stand automatically quashed. At the same time, a decision to grant *deemed sanction* may cause

> prejudice to the rights of the accused as there would also be non-application of mind in such cases."
>
> (Emphasis supplied)

30. The observations in ***Vijay Rajmohan*** (supra) regarding the power of sanction being open to the standard principle of judicial review; the same being inbuilt in our legal structure; public confidence being at stake if a rule of law is violated, are principles that in our considered view it will apply equally to sanctions under UAPA. In context of the PC Act, it has been held that non-compliance of a mandatory period cannot *ipso facto* lead to quashing of criminal proceedings. This is where a difference emerges between the PC Act and the UAPA. The implication, social as well as legal of both these acts diverges, in as much as the latter entails far graver consequences. [See: ***State of T.N.*** v. ***Sivarasan***;[37] ***Rambhai Nathabhai Gadhvi*** (supra); and ***Ashrafkhan*** (Supra)] The UAPA provides for a detailed procedure which is to be followed in granting of sanction and undoubtedly, the same must be followed in absolute letter and spirit.

Construction of 2008 Rules

31. It is well understood that penal statutes are statutes to be interpreted strictly. This canon of construction has been reiterated time and again. It is apposite here to refer to certain authorities in this context.

31.1 Maxwell in The Interpretation of Statutes (11th Edn.) has observed:

> "The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the cannons of interpretation failed to solve, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischief aimed at our, if the language permits, to be held to fall within its remedial influence"

37 [1996] Supp. 8 SCR 243 : (1997) 1 SCC 682

Observations in the twelfth edition, in this context, are also educative:

> "The strict construction of penal statutes seems to manifest itself in four ways : In the requirement of express language for the creation of an offence; in interpreting strictly words setting out the elements of an offence; in requiring the fulfillment to the letter of statutory conditions precedent to the infliction of punishment; and in insisting on the strict observance of technical provisions concerning criminal procedure and jurisdiction."

31.2 In ***Standard Chartered Bank*** v. ***Directorate of Enforcement***,[38] a Constitution Bench while discussing the interpretation of penal statutes, held as under:

> "**36.** The rule of interpretation requiring strict construction of penal statutes does not warrant a narrow and pedantic construction of a provision so as to leave loopholes for the offender to escape (see *Murlidhar Meghraj Loya* v. *State of Maharashtra* [(1976) 3 SCC 684 : 1976 SCC (Cri) 493]). A penal statute has to also be so construed as to avoid a lacuna and to suppress mischief and to advance a remedy in the light of the rule in *Heydon's case* [(1584) 3 Co Rep 7a : 76 ER 637] . A common-sense approach for solving a question of applicability of a penal statute is not ruled out by the rule of strict construction. (See *State of A.P.* v. *Bathu Prakasa Rao* [(1976) 3 SCC 301 : 1976 SCC (Cri) 395] and also *G.P. Singh on Principles of Statutory Interpretation*, 9th Edn., 2004, Chapter 11, Synopsis 3 at pp. 754 to 756.)"

31.3 In ***State of Jharkhand*** v. ***Ambay Cements***,[39] a Bench of three judges, while dealing with an issue relating to Bihar Industrial Promotion Policy, 1995, discussed the construction of penal statutes. The Court observed that:

38 [2005] Supp. 1 SCR 49 : (2005) 4 SCC 530

39 [2004] Supp. 6 SCR 125 : (2005) 1 SCC 368

> "**26.** Whenever the statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to severe consequences, such requirement would be mandatory. It is the cardinal rule of interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way. It is also settled rule of interpretation that where a statute is penal in character, it must be strictly construed and followed. Since the requirement, in the instant case, of obtaining prior permission is mandatory, therefore, non-compliance with the same must result in cancelling the concession made in favour of the grantee, the respondent herein."

31.4 The course of action to be adopted by Courts, in view of language used in the statutes has been noticed by this Court in ***Manjit Singh*** v. ***CBI***,[40] wherein it has been observed, referring to certain other authorities, that when the language of a provision is unambiguous it would not be open to Courts to adopt a hypothetical approach, leading to a different conclusion on the ground that such different conclusion would be more in sync with the objective of the statute.

31.5 In ***Priya Indoria*** v. ***State of Karnataka***,[41] the position of law was stated as under:

> "84. Maxwell in his treatise on *Interpretation of Statutes* (10 Edn.), p. 284 states that "the tendency of modern decisions on the whole is to narrow materially the difference between strict and beneficial construction". It follows that criminal statutes such as the CrPC are interpreted with rational regard to the aim and intention of the legislature. What has to be borne in the judicial mind is that the interpretation of all statutes should be favourable to personal liberty

40 [2011] 1 SCR 997 : (2011) 11 SCC 578

41 [2023] 15 SCR 525 : (2024) 4 SCC 749

> subject to fair and effective administration of criminal justice."
>
> (Emphasis supplied)

32. Rules flowing from statutory power, have the effect of a statute. Section 52 of the UAPA grants power to the Central Government to make Rules for the purpose of carrying out the provisions of the Act. Specifically, Section 52 (2)(ee) deals with the present situation, i.e., enables the Government to prescribe the time for recommendation and grant of sanction under Section 45. The 2008 Rules are unequivocal in both, using the word 'shall' as also providing a specific time period for both activities, i.e., making recommendation and granting sanction. In the views of the High Courts discussed above, two have taken the view that the timelines are directory, while the other two hold them to be mandatory. In the former view, the word 'shall' is interpreted as 'may'. At this juncture, it would be apposite to refer to certain pronouncements. Prior to going into that question, we may also refer to the well-established principles *qua* criminal statutes.

32.1 In ***Montreal Street Railway Company*** v. ***Normandin***,[42] the Judicial Committee of the Privy Council considered the question of whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or directory. The Court observed that:

> "…The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th ed., p. 596 and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote

42 LR (1917) AC 170

> the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

32.2 A Bench of five learned Judges in ***State of U.P.*** v. ***Manbodhan Lal Srivastava***,[43] while construing Article 320 of the Constitution of India, interpretated the words 'shall' and 'may' as under:

> "11. …Hence, the use of the word "shall" in a statute, though generally taken in a mandatory sense, does not necessarily mean that in every case it shall have that effect, that is to say, that unless the words of the statute are punctiliously followed, the proceeding or the outcome of the proceeding, would be invalid. On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. In that connection, the following quotation from *Crawford on Statutory Construction* — Article 261 at p. 516, is pertinent:
>
> > "The question as to whether a statute is mandatory or directory depends upon the intent of the legislature and not upon the language in which the intent is clothed. The meaning and intention of the legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other…."

32.3 In ***State of U.P.*** v. ***Babu Ram Upadhya***,[44] a Constitution Bench considered the interpretation of the word 'shall' as mandatory and observed as under:

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43 [1958] 1 SCR 533 : 1957 SCC OnLine SC 4

44 [1961] 2 SCR 679 : 1960 SCC OnLine SC 5

> "29. The relevant rules of interpretation may be briefly stated thus : When a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the Court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstance, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

32.4 In ***Bachahan Devi*** v. ***Nagar Nigam, Gorakhpur***,[45] this Court considered at length this rule of interpretation. It was observed:

> "21. The ultimate rule in construing auxiliary verbs like "may" and "shall" is to discover the legislative intent; and the use of the words "may" and "shall" is not decisive of its discretion or mandates. The use of the words "may" and "shall" may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject-matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed."

Although in this case the Court was concerned with a land dispute, the observation in respect of the use of the words 'may' and 'shall' are general principles of statutory construction and are therefore relevant to the present discussion.

45 [2008] 2 SCR 424 : (2008) 12 SCC 372

32.5 In ***Vijay Dhanuka*** v. ***Najima Mamtaj***,[46] this Court interpreted the words 'may' and 'shall' in the context of CrPC as under:

> "12. …The use of the expression "shall" prima facie makes the inquiry or the investigation, as the case may be, by the Magistrate mandatory. The word "shall" is ordinarily mandatory but sometimes, taking into account the context or the intention, it can be held to be directory. The use of the word "shall" in all circumstances is not decisive. Bearing in mind the aforesaid principle, when we look to the intention of the legislature, we find that it is aimed to prevent innocent persons from harassment by unscrupulous persons from false complaints. Hence, in our opinion, the use of the expression "shall" and the background and the purpose for which the amendment has been brought, we have no doubt in our mind that inquiry or the investigation, as the case may be, is mandatory before summons are issued against the accused living beyond the territorial jurisdiction of the Magistrate."

32.6 Crawford's Statutory Construction (1989 reprint),[47] notes as follows in regard to 'mandatory' and 'directory' words:

> "Ordinarily the words 'shall' and 'must' are mandatory, and the work 'may' is directory, although they are often used inter-changeably in legislation. This use without regard to their literal meaning generally makes it necessary for the courts to resort to construction in order to discover the real intention of the legislature. Nevertheless, it will always be presumed by the court that the legislature intended to use the words in their usual and natural meaning. If such a meaning, however, leads to absurdity, or great inconvenience, or for some other reason is clearly contrary to the obvious intention of the legislature, then words which ordinarily are mandatory in their nature will

46 [2014] 4 SCR 171 : (2014) 14 SCC 638

47 Cited in Union of India v. A.K. Pandey, (2009) 10 SCC 552

> be construed as directory, or vice versa. In other words, if the language of the statute, considered as a whole and with due regard to its nature and object, reveals that the legislature intended the words 'shall' and 'must' to be directory, they should be given that meaning. Similarly, under the same circumstances, the word 'may' should be given a mandatory meaning, and especially where the statute concerns the rights and interests of the public, or where third persons have a claim *de jure* that a power shall be exercised, or whenever something is directed to be done for the sake of justice or the public good, or is necessary to sustain the statute's constitutionality.
>
> Yet the construction of mandatory words as directory and directory words as mandatory should not be lightly adopted. The opposite meaning should be unequivocally evidenced before it is accepted as the true meaning; otherwise, there is considerable danger that the legislative intent will be wholly or partially defeated."

(Emphasis supplied)

33. In matters of strict construction, when a timeline is provided, along with the use of the word 'shall' and particularly when the same is in the context of a law such as the UAPA, it cannot be considered a mere technicality or formality. It demonstrates clear intention on the part of the Legislature. A compulsion has been imposed, and for compliance with that compulsion, a timeline has been provided. While the legislation is aimed at curbing unlawful activities and practices detrimental to national security and accordingly, provides the authorities of the Government ample power to undertake and complete all procedures and processes permissible under law to that end, at the same time the interest of accused persons must also be safeguarded and protected. It is expected of the Executive, in furtherance of the ideal of protection of national security, that it would work with speed and dispatch. The concern expressed by the Bombay High Court is that a strict interpretation of the timeline may defeat the objective of the legislation. While on first blush, such a statement is attractive, we cannot lose sight of the fact that the time

granted is only for consideration of the material collected by way of an independent review and then making a recommendation whereafter the sanctioning authority may then consider the materials as well as recommendation to finally, grant or deny the sanction. It is not for the purpose of the investigation itself, which understandably can be a time-consuming process, given the multiple variables involved. There have to be certain limitations within which administrative authorities of the Government can exercise their powers. Without such limitations, power will enter the realm of the unbridled, which needless to state is, antithetical to a democratic society. Timelines in such cases, serve as essential aspects of checks and balances and of course, are unquestionably important. If the view of the Bombay and Jharkhand High Courts is allowed to stand it would be tantamount to the Judicial Wing supplanting its view in place of the legislature which is impermissible in view of the doctrine of separation of powers. We find support for our view in the Constitution Bench decision in ***A.R. Antulay*** v. ***Ramdas Sriniwas Nayak***,[48] wherein D.A. Desai, J., held as under:

> "18. It is a well-established cannon of construction that the court should read the section as it is and cannot rewrite it to suit its convenience; nor does any cannon of construction permit the court to read the section in such manner as to render it to some extent otiose."

[See also: ***Union of India*** v. ***Deoki Nandan Aggarwal***;[49] ***Institute of Chartered Accountants of India*** v. ***Price Waterhouse***;[50]* and ***Shiv Shakti Coop. Housing Society*** v. ***Swaraj Developers***[51]]

The legislative intent is clear. Rules made by virtue of statutory powers prescribe both a mandate and a time limit. The same has to be followed. Here itself we may clarify that the conclusion arrived at by us in respect of the strict adherence to the timeline mentioned in Rules 3 & 4 of the 2008, Rules shall not affect any decision of the authorities where the same may or may not have been followed

48 [1984] 2 SCR 914 : (1984) 2 SCC 500

49 [1991] 3 SCR 873 : 1992 Supp (1) SCC 323

50 [1997] Supp. 2 SCR 267 : (1997) 6 SCC 312
*dissenting opinion of Saghir Ahmad, J.

51 [2003] 3 SCR 762 : (2003) 6 SCC 659

as on date of this judgment. For ample clarity, it is stated that the observations made in this judgment shall apply prospectively.

Independent Review

34. The bone of contention in this regard is that since both the recommending and the granting authorities took merely a day each in performing their respective functions, the requirement of an independent review which is to be undertaken by both authorities has been left unfulfilled thereby vitiating the sanction in question.

35. The meaning of the word independent, as is well understood, is that the act, or as in this case, evaluation is made in a way which is lone standing or which does not rely on any other factor, such as previous consideration or evaluation by another authority, to arrive at its conclusion.

35.1 The Cambridge dictionary defines the word independent to mean: –

> "not influenced or controlled in any way by other people, events, or things"

35.2 The Merriam Webster dictionary defines the word independent as:-

> "1: not dependent: such as
>
> **a** (1): not subject to control by others ; (2): not affiliated with a larger controlling unit
>
> **b** (1): not requiring or relying on something else : not contingent; (2): not looking to others for one's opinions or for guidance in conduct; (3): not bound by or committed to a political party
>
> **c** (1): not requiring or relying on others (as for care or livelihood); (2): being enough to free one from the necessity of working for a living
>
> d: showing a desire for freedom"

35.3 The Black's Law Dictionary defines:

> "INDEPENDENT. Not dependent; not subject to control, restriction, modification, or limitation from a given outside source."

Independence, which is the state of being independent would also be instructive in our understanding.

> "INDEPENDENCE. The state or condition of being free from dependence, subjection, or control. A state of perfect irresponsibility. Political independence is the attribute of a nation or state which is entirely autonomous, and not subject to the government, control, or dictation of any exterior power."

36. Review, as a concept is to be understood for it is the coming together of these two aspects which will form our understanding of the term 'independent review'.

36.1 The Cambridge dictionary defines the word review as:

> "to think or talk about something again, in order to make changes to it or to make a decision about it"

36.2 The Merriam Webster dictionary defines the word review to mean as:

> " …2: to examine or study again *especially* **:** to reexamine judicially
>
> …
>
> 4 a: to go over or examine critically or deliberately;
> b: to give a critical evaluation of"

36.3 The Burton's Legal Thesaurus[52] lists the following words as being similar to 'review' – analyse; comment upon; contemplari; criticize; critique; investigate; mull over; notice; critically; reconsider; reexamine; scrutinize; study and weigh.

37. The import of the term independent review as can be understood from the above is a re-examination, scrutiny or critique of something which is not dependent or subject to control by any other factor or authority. In the present facts, independent review would mean a contemplation or study of the material gathered by the investigating officer to conclude as to whether or not a sanction to proceed under the provisions of the UAPA ought to be granted. Similarly, at the next

52 Third Edition; Page 473

stage, the sanctioning authority is to mull over and critically notice both the materials gathered as also the conclusion drawn by the recommending authority, in its act of granting sanction.

38. The legislative intent in bringing about the aspect of independent review, by way of an amendment brought into effect from 31st December 2008, within Section 45 of the UAPA is required to be noticed.

39. The Minister for Home Affairs in moving the draft Bills before the Council of States, highlighted the intent behind such introduction as herein below reproduced:

> "Finally, Sir, we have incorporated a very salutary provision. To the best of our knowledge-I don't know, I may be corrected by the Law Minister or the Law Secretary later - it is the first time we are introducing this. In a prosecution under the UAPA, now, it is the executive Government which registers the case through a police officer. It is the executive Government which investigates the case through an investigating agency, namely, the police department. It is the executive Govt. which sanctions u/s. 45. Therefore, there is a fear that a vindictive or a wrong executive Govt. could register a case, investigate and sanction prosecution. There is a fear. May be, it is not a fear that is entirely justified but you cannot say that it is entirely unjustified. So what are we doing? The executive Govt. can register the case because no one else can register a case. The executive Govt., through its agency, can investigate the case. But, before sanction is granted under 45(1) we are interposing an independent authority which will review the entire evidence, gathered in the investigation, and then make a recommendation whether this is a fit case of prosecution. So, here, we are bringing a filter, a buffer, an independent authority who has to review the entire evidence that is gathered and, then, make a recommendation to the State Govt. or the Central Govt. as the case may be, a fit case for sanction. I think, this is a very salutary safeguard. All sections of the House should welcome it. This is a biggest buffer against arbitrariness which many Members spoke about. Sir, these are the features in the Bill."

In the statement extracted above, the idea, purpose and intent behind bringing in an independent authority to scrutinize the material gathered by the investigating agency prior to the government being able to issue or deny a sanction, has been clearly laid out. It was so done to have checks over the power of the executive in this regard.

40. What flows from the above is that independence of this authority is *sine qua non*, without which it would have lost its entire purpose. The question, now to be considered is as to how it may be determined that a particular process shone with independence or was the same compromised by the clouds of influence, which may compromise its character.

40.1 In ***C.S. Krishnamurthy*** v. ***State of Karnataka***,[53] the Court speaking in the context of a sanction order under PC Act held:

> **"9.** Therefore, the ratio is sanction order should speak for itself and in case the facts do not so appear, it should be proved by leading evidence that all the particulars were placed before the sanctioning authority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order…"

This was also referred to in ***State of M.P.*** v. ***Harishankar Bhagwan Prasad Tripathi***.[54]

40.2 In ***State of Maharashtra*** v. ***Mahesh G. Jain***,[55] after considering a host of authorities, including some that have been cited before in the present case, the following factors were culled out:

> "**14.1.** It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.
>
> **14.2.** The sanction order may expressly show that the sanctioning authority has perused the material placed

53 [2005] 2 SCR 1163 : (2005) 4 SCC 81

54 [2010] 9 SCR 1148 : (2010) 8 SCC 655

55 [2013] 3 SCR 850 : (2013) 8 SCC 119

before it and, after consideration of the circumstances, has granted sanction for prosecution.

14.3. The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and its satisfaction was arrived at upon perusal of the material placed before it.

14.4. Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

14.5. The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

14.6. If the sanctioning authority has perused all the materials placed before it and some of them have not been proved that would not vitiate the order of sanction.

14.7. The order of sanction is a prerequisite as it is intended to provide a safeguard to a public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hypertechnical approach to test its validity."

In the very same judgment, it was observed that "grant of sanction is a sacrosanct and sacred act" whose aim is to protect a public servant against vexatious litigation. However, when the order of sanction is (a) by a competent authority and (b) after due application of mind, it cannot be dealt with lightly or, in other words, summarily discarded.

40.3 Recently, in ***Judgebir Singh*** v. ***National Investigation Agency***,[56] while examining the application of Rules 3 & 4 of 2008 Rules, this court observed:

"50. …We place emphasis on the expression "within 7 working days of the receipt of the evidence

56 [2023] 6 SCR 1 : 2023 SCC OnLine SC 543

gathered by the investigating officer under the CrPC". This evidence which Rule 3 of the Rules, 2008 contemplates is the final report i.e., filed by the investigating agency under Section 173 of the CrPC. How can one expect the authority under sub section (2) of Section 45 to make its report containing the recommendations without looking into the chargesheet thoroughly containing the evidence gathered by the investigating officer. On the contrary, ***Rule 3 of the Rules, 2008 makes it explicitly clear that the authority under sub section (2) of Section 45 of the UAPA is obliged in law to apply its mind thoroughly to the evidence gathered by the investigating officer and thereafter, prepare its report containing the recommendations to the Central Government or the State government for the grant of sanction. The grant of sanction is not an idle formality. The grant of sanction should reflect proper application of mind***.

(Emphasis in original)

(Emphasis supplied)

40.4 In ***State of Punjab v. Mohd. Iqbal Bhatti***,[57] the position of law was stated thus:

> **"7.** Validity of an order of sanction would depend upon application of mind on the part of the authority concerned and the material placed before it. All such material facts and material evidence must be considered by it. The sanctioning authority must apply its mind on such material facts and evidence collected during the investigation. Even such application of mind does not appear from the order of sanction, extrinsic evidence may be placed before the court in that behalf. While granting sanction, the authority cannot take into consideration an irrelevant fact nor can it pass an order on extraneous consideration

57 [2009] 11 SCR 790 : (2009) 17 SCC 92

not germane for passing a statutory order. It is also well settled that the superior courts cannot direct the sanctioning authority either to grant sanction or not to do so…"

40.5 In ***State (NCT of Delhi)*** v. ***Navjot Sandhu***,[58] this Court considered in *extenso* the provisions and scheme of the TADA in connection with the '2001 Parliament Attack'. For the present judgment certain observations made in regard to sanctions are relevant. They are summarised as follows:-

40.5.1 What is to be considered is whether the material which formed the *raison d'être* of the allegations was actually placed before the authority.

40.5.2 A reiteration of the contents of the FIR or draft chargesheet does not constitute consideration or application of mind. It has to be something further than that.

40.5.3 The order of sanction or recommendation or grant of sanction, both should on their face indicate consideration of all relevant material.

40.5.4 The standard to be applied in 'judging' sanction orders is not the same as that applied to orders of quasi-judicial bodies for it is a purely an administrative function.

40.6 The observations of this Court in ***State of Bihar v. P.P. Sharma,***[59] are instructive. Relevant extract is as under:

"27. The sanction under Section 197 CrPC is not an empty formality. It is essential that the provisions therein are to be observed with complete strictness. The object of obtaining sanction is that the authority concerned should be able to consider for itself the material before the Investigating Officer, before it comes to the conclusion that the prosecution in the circumstances be sanctioned or forbidden. To comply with the provisions of Section 197 it must

58 [2005] Supp. 2 SCR 79 : (2005) 11 SCC 600

59 1992 Supp (1) SCC 222

> be proved that the sanction was given in respect of the facts constituting the offence charged. It is desirable that the facts should be referred to on the face of the sanction. Section 197 does not require the sanction to be in any particular form. If the facts constituting the offence charged are not shown on the face of the sanction, it is open to the prosecution, if challenged, to prove before the court that those facts were placed before the sanctioning authority. It should be clear from the form of the sanction that the sanctioning authority considered the relevant material placed before it and after a consideration of all the circumstances of the case it sanctioned the prosecution."
>
> (Emphasis supplied)

41. Having given our attention to the position of law as above, let us now turn to the instant facts. Simply put, the objection of the appellant arises from the short amount of time taken in recommending and granting sanction, against him which he claims to be sign of non-application of mind and lack of independent review. We are unable to accept such a contention. There is nothing on record to show that relevant material was not placed before the authorities. There is no question, as there rightly cannot be, on the competence of either of the authorities. Therefore, solely on the ground that the time taken was comparatively short or even that other orders were similarly worded cannot call the credibility of the sanction into question. As has been noted in ***Superintendent of Police (CBI)*** v. ***Deepak Chowdhary***,[60] the authorities are required only to reach a *prima facie* satisfaction that the relevant facts, as gathered in the investigation would constitute the offence or not. In ***Mahesh G. Jain*** (supra) it has been held that the prosecution is to prove that a valid sanction has been granted. This needless to state, can only be done by adducing evidence at trial, where the defence in challenge thereto, will necessarily have to be given an opportunity to question the same and put forward its case that the two essential requirements detailed above, have not been met. Furthermore,

60 [1995] Supp. 2 SCR 818 : (1995) 6 SCC 225

in ***Mohd. Iqbal M. Shaikh*** v. ***State of Maharashtra***,[61] a case under the TADA, this Court was faced with a similar situation, the sanction wherein was granted by the competent authority, i.e., the Commissioner of Police, Greater Bombay on the same day that he received the papers in that regard. The contention of non-application of mind was not accepted by the Court observing that so long as the sanction was by a competent authority and after applying its mind to all materials and the same being reflected in the order, the sanction would hold to be valid. It was further held that when an order does not so indicate, the prosecution is entitled to adduce evidence aliunde of the person who granted the sanction and that would be sufficient compliance. The Court would then, look into such evidence to arrive at a conclusion as to whether application of mind was present or absent. In conclusion, we hold that independent review as well as application of mind are questions to be determined by way of evidence and as such should be raised at the stage of trial, so as to ensure that there is no undue delay in the proceedings reaching their logical and lawful conclusion on these grounds. As a result of the conclusion drawn by this Court on the first issue, it is also to be said that if the sanction is taken exception to, on the above grounds, it has to be raised at the earliest instance and not belatedly, however, law does not preclude the same from being challenged at a later stage. It is to be noted that the scheme of the UAPA does not house a provision such as Section 19 of the PC Act[62] which protects proceedings having been initiated on the basis of sanctions which come to be questioned at a later point in time

61 [1998] 2 SCR 734 : (1998) 4 SCC 494

62 **19. Previous sanction necessary for prosecution.—**

…

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) no finding, sentence or order passed by a special Judge shall be reversed or altered by a Court in appeal, confirmation or revision on the ground of the absence of, or any error, omission or irregularity in, the sanction required under sub-section (1), unless in the opinion of that court, a failure of justice has in fact been occasioned thereby;

(b) no court shall stay the proceedings under this Act on the ground of any error, omission or irregularity in the sanction granted by the authority, unless it is satisfied that such error, omission or irregularity has resulted in a failure of justice;

(c) no court shall stay the proceedings under this Act on any other ground and no court shall exercise the powers of revision in relation to any interlocutory order passed in any inquiry, trial, appeal or other proceedings.

(4) In determining under sub-section (3) whether the absence of, or any error, omission or irregularity in, such sanction has occasioned or resulted in a failure of justice the court shall have regard to the fact whether the objection could and should have been raised at any earlier stage in the proceedings.

and, therefore, Courts ought to be careful in entertaining belated challenges. If it is raised belatedly, however, the Court seized of the matter, must consider the reasons for the delay prior to delving into the merits of such objections. This we may say so for the reason that belated challenges on these grounds cannot be allowed to act as roadblocks in trial or cannot be used as weapons in shirking away from convictions arising out of otherwise validly conducted prosecutions and trials.

An order passed by an administrative authority is not to be tested by way of judicial review on the same anvil as a judicial or quasi-judicial order. While it is imperative for the latter to record reasons for arriving at a particular decision, for the former it is sufficient to show that the authority passing such order applied its mind to the relevant facts and materials [See: ***P.P. Sharma*** (supra); ***Navjot Sandhu*** (supra) and ***Mahesh G. Jain*** (supra)] That being the accepted position we find no infirmity in the order granting sanction against A-17. It is not incumbent upon such authority to record detailed reasons to support its conclusion and, as such, the orders challenged herein, cannot be faulted with on that ground.

ISSUE No.3 – Misjoinder of Charges and Violation of CrPC

42. The appellant contends that two disjointed transactions have been taken together, to make him an accused and a member of the larger conspiracy. The respondent-Union on the other hand argues that all the transactions (First Module, Second Module, as also the one for which the Appellant was made an accused) are inter-connected and flow from the first sanction. Further, it has been alleged by the appellants that there is a gross misuse of powers by the NIA and a violation of Sections 218-224 of CrPC.

43. Section 218 features in Chapter XVII of the CrPC titled 'The Charge' and more specifically Part B thereof, which is joinder of charges. In a sense, the appellant has alleged violation of an entire part of the chapter, which submission on the face of it is difficult to accept. It

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Explanation.—For the purposes of this section,—
(a) error includes competency of the authority to grant sanction;
(b) a sanction required for prosecution includes reference to any requirement that the prosecution shall be at the instance of a specified authority or with the sanction of a specified person or any requirement of a similar nature.

requires no reiteration that a person when alleging the contravention of a section or portion of statute, has to substantiate the same by demonstrating which aspect of the section stood not complied with and how such non-compliance has prejudicially affected him. In the present case, however, we are confronted with a sweeping statement of contravention of provisions of the CrPC with little to no explanation as to how that may be the case.

43.1 Section 218 provides, first, that there should be a separate charge for each distinct offence; and secondly, that there should be a separate trial for every such charge, except in the four cases mentioned in Sections 219, 220, 221 and 223.

43.2 Section 219 provides that the three charges of three offences of the same kind committed within one year be tried together. The section contemplates a joint trial for three separate offences only when the offences are essentially of a simple kind and do not require the framing of a multitude of different charges.

43.3 Section 220 relates to the joinder of charges of offences committed by the same person. It applies to a case, when different offences form part of the same transaction, and are committed by the same person, then he may be charged with and tried at one trial for, every such offence.

43.4 Section 221 provides for cases where it is doubtful what offence has been committed. If a single act or series of acts is of such nature that it is doubtful which of several offences the facts, which can be proved will constitute, the charge can be framed for all offences or alternative charges can be framed. At the trial, if it is established that the accused has committed an offence, he may be convicted though he may not have been charged with the offence.

43.5 Section 222 applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence.

43.6 Section 223 provides for joinder of charges against more than one accused person in the same trial. It deals with the plurality of persons, who can be tried together, in other words, the joint trial of more than one person.

43.7 Section 224 deals with withdrawal of remaining charges on conviction on one of several charges.

44. Sections 218 to 222 pertain to the joinder of charges against the same person in the same trial. Section 223 deals with plurality of persons, i.e., more than one accused in the same trial. We may notice a few decisions of this Court, to put the application of these provisions, in context.

44.1 In ***Balbir*** v. ***State of Haryana***,[63] a Bench of three learned Judges observed as under:

> "11. …In both the aforesaid clauses the primary condition is that persons should have been accused either of the same offence or of different offences "committed in the course of the same transaction". The expression advisedly used is "in the course of the same transaction". That expression is not akin to saying "in respect of the same subject-matter". It is pertinent to point out that the same expression is employed in Section 220(1) of the Code also [corresponding to Section 235(1) of the old Code]. The meaning of the expression "in the course of the same transaction" used in Section 223 is not materially different from that expression used in Section 223(1) [sic 235(1)]. It is so understood by this Court in State of A.P. v. Cheemalapati Ganeswara Rao [AIR 1963 SC 1850 : (1964) 3 SCR 297] . The following observation in the said judgment is contextually quotable:
>
> > "The series of acts which constitute a transaction must of necessity be connected with one another and if some of them stand out independently, they would not form part of the same transaction but would constitute a different transaction or transactions. Therefore, even if the expression 'same transaction' alone had been used in Section 235(1) it would have

63 [1999] Supp. 4 SCR 120 : (2000) 1 SCC 285

> meant a transaction consisting either of a single act or of a series of connected acts. The expression 'same transaction' occurring in clauses (a), (c) and (d) of Section 239 as well as that occurring in Section 235(1) ought to be given the same meaning according to the normal rule of construction of statutes."
>
> 12. For several offences to be part of the same transaction, the test which has to be applied is whether they are so related to one another in point of purpose or of cause and effect, or as principal and subsidiary, so as to result in one continuous action. Thus, where there is a commonality of purpose or design, where there is a continuity of action, then all those persons involved can be accused of the same or different offences "committed in the course of the same transaction"."

44.2 In ***R. Dineshkumar*** v. ***State***,[64] this Court considered the aspect of 'transaction' in the following terms:

> "…19.3. This Court after taking note of the fact that the clause "same transaction" is not defined under the CrPC opined that the meaning of the clause should depend upon the facts of each case. However, this Court indicated that where there is a proximity of time or place or unity of purpose and design or continuity of action in respect of a series of acts, it is possible to infer that they form part of the same transaction. This Court also cautioned that every one of the abovementioned elements need not co-exist for a transaction to be regarded as the "same transaction".
>
> 20. According to us, the principle enunciated in Ganeswara Rao case [AIR 1963 SC 1850 : (1963) 2 Cri LJ 671] is that where several persons are alleged to have committed several separate offences, which,

64 [2015] 5 SCR 605 : (2015) 7 SCC 497

however, are not wholly unconnected, then there may be a joint trial unless such joint trial is likely to cause either embarrassment or difficulty to the accused in defending themselves."

44.3 In ***Nasib Singh*** v. ***State of Punjab***,[65] DY Chandrachud, J (as his Lordship then was) speaking for a three-judge Bench formulated the following principles in respect of joint or separate trials:

"**51.1.** Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with may be conducted. Similarly, under Section 223, a joint trial may be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied.

51.2. While applying the principles enunciated in Sections 218-223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or (ii) whether conducting a joint/separate trial would cause judicial delay.

51.3. The possibility of conducting a joint trial will have to be determined at the beginning of the trial and not after the trial based on the result of the trial. The appellate court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix.

51.4. Since the provisions which engraft an exception use the phrase "may" with reference to conducting a joint trial, a separate trial is usually not contrary to

65 [2021] 13 SCR 566 : (2022) 2 SCC 89

> law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice.
>
> **51.5.** A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be."

The case of appellant, as is evident from the record, falls under the latter category, i.e., multiple persons in the same trial (appellant is A-17 out of a total of 20 accused persons). It has been held that joint or separate trial is a decision to be taken by the learned trial Judge at the beginning of the trial considering (a) the possibility of prejudice; and b) causing judicial delay, if any. Further, the language of Section 223 is directory in nature, signified by the use of word 'may'.

45. ***Naseeb Singh*** (supra) holds that a separate trial would not be contrary to law unless a miscarriage of justice can be demonstrated. Similarly, we are of the view that a joint trial, if held, after having considered the two factors given above, cannot be said to be *ipso facto* prejudicial to the parties.

46. It is alleged that Dinesh Gope (A-6), who is the Chief of PLFI, extorts money from various persons and that this company (A-20) of which the present appellant is a director, is used to legitimise the proceeds of such unlawful actions. The appellant, however, contends that there is no connection between the charges levied on A-6 and the transactions because of which he has been made an accused, whereas the Prosecution submits that both A-6 and A-17 are part of the same, continuing, ongoing transactions. Whether or not actually the case is a question to be decided on the basis of evidence adduced at trial, and not at this stage, by this Court. In ***State of U.P.*** v. ***Paras Nath Singh***,[66] the Court observed as under:

> "8. …As the provision itself mandates that no finding, sanction or order by a court of competent jurisdiction becomes invalid unless it is so that a failure of justice has in fact been occasioned because of any error, omission or

66 [2009] 8 SCR 85 : (2009) 6 SCC 372

irregularity in the charge including in misjoinder of charge, obviously, the burden is on the accused to show that in fact a failure of justice has been occasioned."

Therefore, we leave it to the appellants to raise this issue before the Trial Judge, who shall, if such a question is raised, decide it promptly at the appropriate stage.

ISSUE No. 4 – Whether Section 22A applies to the Appellant?

47. Section 22A of the UAPA reads as under:

"**22A. Offences by companies**.—

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

Provided that nothing contained in this sub-section shall render any such person (including promoters) liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised reasonable care to prevent the commission of such offence.

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

Explanation.—For the purposes of this section,— (a) "company" means any body corporate and includes a firm or other association of individuals; and (b) "director", in relation to a firm, means a partner in the firm."

48. For Section 22A to apply :- (a) offence has to committed by a company; (b) all persons who at the time of the offence were in control of, or responsible for, the company's affairs shall be deemed guilty; (c) such person would be saved from guilt as under (b) if they can demonstrate that such act was (i) not in their knowledge; (ii) they had taken reasonable care to prevent such offence from taking place. The section further provides that if it can be proved that the offence committed by the company was (1) with consent; (2) in connivance of; (3) attributable to neglect on the part of any promoter, director, manager, secretary or any other officer of the company, then they shall be held guilty.

49. The case put forward by the appellant is that he, who is allegedly a director of A-20 is saved by the statutory language which provides that if a person could demonstrate and prove that the offence was committed without his knowledge, he would be exempt from prosecution. This exemption is recognized in other statutes as well. We may take support of pronouncements of this Court with reference to Sections 138 and 141 of the Negotiable Instruments Act, 1881[67] since the latter is similarly worded and phrased.

> "**141. Offences by companies**.—
>
> (1) If the person committing an offence under section 138 is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:
>
> Provided that nothing contained in this sub-section shall render any person liable to punishment if he proves that the offence was committed without his knowledge, or that he had exercised all due diligence to prevent the commission of such offence:
>
> Provided further that where a person is nominated as a Director of a company by virtue of his holding any office or employment in the Central Government or State

67 'NI Act' for short

Government or a financial corporation owned or controlled by the Central Government or the State Government, as the case may be, he shall not be liable for prosecution under this Chapter.

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

Explanation.—For the purposes of this section, —

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

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

49.1 In ***S.M.S. Pharmaceuticals Ltd.*** v. ***Neeta Bhalla***,[68] a Bench of three Judges held that only a person who is in charge of the affairs of the company, i.e., a director, manager or secretary and alongside that was connected to the criminal act being committed, would be liable under this section. Relevant portion thereof reads thus:

> "10. …What is required is that the persons who are sought to be made criminally liable under Section 141 should be, at the time the offence was committed, in charge of and responsible to the company for the conduct of the business of the company. Every person connected with the company shall not fall within the ambit of the provision. It is only those persons who were in charge of and responsible for the conduct of business of the company at the time of commission of an offence, who will be liable for criminal action. It

68 [2007] 2 SCR 862 : (2005) 8 SCC 89

> follows from this that if a director of a company who was not in charge of and was not responsible for the conduct of the business of the company at the relevant time, will not be liable under the provision. The liability arises from being in charge of and responsible for the conduct of business of the company at the relevant time when the offence was committed and not on the basis of merely holding a designation or office in a company. Conversely, a person not holding any office or designation in a company may be liable if he satisfies the main requirement of being in charge of and responsible for the conduct of business of a company at the relevant time. Liability depends on the role one plays in the affairs of a company and not on designation or status. If being a director or manager or secretary was enough to cast criminal liability, the section would have said so. Instead of "every person" the section would have said "every director, manager or secretary in a company is liable"…, etc. The legislature is aware that it is a case of criminal liability which means serious consequences so far as the person sought to be made liable is concerned. Therefore, only persons who can be said to be connected with the commission of a crime at the relevant time have been subjected to action."

49.2 This is the settled position of law which has been subsequently being reiterated in numerous judgments of this Court. Illustratively, the recent judgment in ***Susela Padmavathy Amma*** v. ***Bharti Airtel Ltd.***,[69] referring to ***S.M.S. Pharmaceuticals*** (supra) acquitted the appellant therein of the offences under Section 138 NI Act. Gavai, J., speaking for the Bench held as under:

> "21. It was held that merely because a person is a director of a company, it is not necessary that he is aware about the day-today functioning of the company. This Court held that there is no universal

69 [2024] 3 SCR 647 : 2024 SCC OnLine SC 311

rule that a director of a company is in charge of its everyday affairs. It was, therefore, necessary, to aver as to how the director of the company was in charge of day-to-day affairs of the company or responsible to the affairs of the company. This Court, however, clarified that the position of a managing director or a joint managing director in a company may be different. This Court further held that these persons, as the designation of their office suggests, are in charge of a company and are responsible for the conduct of the business of the company. To escape liability, they will have to prove that when the offence was committed, they had no knowledge of the offence or that they exercised all due diligence to prevent the commission of the offence."

[See also: ***N. Rangachari*** v. ***BSNL***;[70] ***Central Bank of India*** v. ***Asian Global Ltd.***;[71] ***Gunmala Sales (P) Ltd.*** v. ***Anu Mehta***;[72] and ***Rajesh Viren Shah*** v. ***Redington India Ltd.***[73]]

50. Turning our attention to the facts of the present case once more, we find that in opposing the stand that he is a director, the appellant submits that he, in fact, is an uneducated person who is a munshi and whose identity has been stolen by A-7 & A-14. That being the case, this Court cannot, at this stage, decide whether Section 22A applies to the appellant or not. This is once again a matter for evidence.

CONCLUSION

51. Consequent to the discussion made herein above, the conclusions drawn by this Court in respect of the questions of law for our consideration, are as under:

51.1 The validity of sanction should be challenged at the earliest instance available, before the Trial Court. If such a challenge is raised at an appellate stage it would be for the person raising the challenge to justify the reasons for bringing the same at

70 [2007] 5 SCR 329 : (2007) 5 SCC 108

71 [2010] 7 SCR 694 : (2010) 11 SCC 203

72 [2014] 10 SCR 1117 : (2015) 1 SCC 103

73 (2024) 4 SCC 305

a belated stage. Such reasons would have to be considered independently so as to ensure that there is no misuse of the right of challenge with the aim to stall or delay proceedings.

51.2 The timelines mentioned in Rules 3 & 4 of the 2008 Rules are couched in mandatory language and, therefore, have to be strictly followed. This is keeping in view that UAPA being a penal legislation, strict construction must be accorded to it. Timelines imposed by way of statutory Rules are a way to keep a check on executive power which is a necessary position to protect the rights of accused persons. Independent review by both the authority recommending sanction and the authority granting sanction, are necessary aspects of compliance with Section 45 of the UAPA.

52. For the next two questions, which depend on analysis of facts for their conclusions, their answers are as below :

52.1 Sections 218-222, CrPC, are not violated. In respect of Section 223, the position of law is the one taken in ***Paras Nath Singh*** (supra). Therefore, this Court prudently leaves it for the Trial Court to decide, if such an issue is raised before it.

52.2 Whether or not the exemption under Section 22A applies is a matter to be established by the way of evidence for the person claiming such exemption has to demonstrate that either he was not in charge of the affairs of the company which has allegedly committed the offence, or that he had made reasonable efforts to prevent the commission of the offence. This, once again, is a matter for the Trial Court to consider and not for this Court to decide at this stage, keeping in view that the trial is underway and proceeded substantially.

53. For the reasons afore-stated, the appeal lacks merit and, accordingly, is dismissed. Pending applications, if any, shall stand disposed of.

Result of the Case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 384 : 2024 INSC 774

State Bank of India
v.
India Power Corporation Limited

(Civil Appeal No. 10424 of 2024)

27 September 2024

[Dr Dhananjaya Y Chandrachud, CJI and Manoj Misra, J.]

Issue for Consideration

The issue which arises for consideration is the interpretation of Rule 50 of the National Company Law Tribunal Rules, 2016 (NCLT Rules) and Rule 22 of the National Company Law Appellate Tribunal Rules, 2016 (NCLAT Rules).

Headnotes†

National Company Law Tribunal Rules, 2016 – Rule 50 – National Company Law Appellate Tribunal Rules, 2016 – Rule 22 – Interpretation of:

Held: Rule 22(2) of the NCLAT Rules requires that every appeal shall be accompanied by a certified copy of the impugned order – Rule 50 of the NCLT Rules prescribes that the Registry shall send a certified copy of the final order free of cost and certified copies may be made available on payment of costs in terms of the Schedule of Fees in all other cases – Both the certified copy which is made available free of cost as well as the certified copy which is made available on the payment of costs, are treated as certified copies for the purpose of Rule 50 – A litigant who does not apply for a certified copy cannot then fall back and claim that he was awaiting the grant of a free copy to obviate the bar of limitation. [Para 19]

National Company Law Tribunal Rules, 2016 – Rule 50 – National Company Law Appellate Tribunal Rules, 2016 – Rule 22 – Before NCLAT, appellant filed an application for condonation of delay on the ground that the appeal was lodged with delay of 3 days beyond the 30 day period prescribed – A divergence arose between the two members of the NCLAT – The third member agreed with the judicial member in dismissing the application for condonation of delay:

Held: The Judicial Member, NCLAT held that the certified copy which was filed by the appellant was a "free of cost" copy and hence in the absence of an application for the grant of a certified copy, the delay of three days could not be condoned – The Technical Member, on the other hand, held that no distinction could be made between certified copies obtained through the payment of fee and a free copy and sufficient cause was shown for condoning the delay of three days – The third member agreed with the judicial member – In the instant case, the free copy was made available on 14.11.2023 after the decision of the NCLT was pronounced on 30.10.2023 – The appeal was lodged on 02.12.2023 – The appeal was lodged with a delay of only three days beyond the statutory period of 30 days and, therefore, fell within the condonable period of 15 days – Sufficient cause was shown for condoning the delay of three days – A Schedule of Fees is prescribed by the NCLT Rules – Entry 31 of the Schedule stipulates that the fee for obtaining true certified copies of final orders passed to parties other than the concerned parties under Rule 50 shall be Rupees five per page – The stipulation of Rupees five per page in Entry 31 excludes "the concerned parties under Rule 50" – The provisions of Rule 50 of the NCLT Rules place both the free certified copy as well as the certified copy which is applied for on payment of fees on the same footing – The appeal in the present case was filed within the condonable period of 15 days, which should have been condoned – Accordingly, the delay of three days in filing the appeal shall stand condoned. [Paras 5, 20, 21, 22, 23]

Case Law Cited

V Nagarajan v. SKS Ispat and Power Limited & Ors. [2021] 14 SCR 736 **: (2022) 2 SCC 244 – relied on.**

List of Acts

National Company Law Tribunal Rules, 2016; National Company Law Appellate Tribunal Rules, 2016; Insolvency and Bankruptcy Code, 2016.

List of Keywords

Interpretation of Rule 50 of the National Company Law Tribunal Rules, 2016; Rule 22 of the National Company Law Appellate Tribunal Rules, 2016; Section 61(2) of Insolvency and Bankruptcy Code, 2016; Condonation of delay; Certified copy of order; Free of costs; Payment of costs; Bar of limitation.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10424 of 2024

From the Judgment and Order dated 09.07.2023 of the National Company Law Appellate Tribunal, Chennai Bench in I.A. No. 158 of 2024 in Company Appeal (AT)(CH)(INS) No. 53 of 2024

Appearances for Parties

Tushar Mehta, SG, Madhav Kanoria, Ms. Surabhi Khattar, Ms. Neha Shivhare, Sriharsh Raj, M/s. Cyril Amarchand Mangaldas, Advs. for the Appellant.

Dr. Abhishek Manu Singhvi, Sr. Adv., Anirban Bhattacharya, Rajeev Chowdhary, Ms. Priyanka Bhatt, Pranjit Bhattacharya, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. On a difference between two members of the National Company Law Appellate Tribunal,[1] reflected in a split verdict on 1 May 2024, the third Member, by a judgment dated 9 July 2024, agreed with the Judicial Member in dismissing the application for condonation of delay.

2. The facts, insofar as they are relevant for the disposal of the Appeal, fall in a narrow compass.

3. The appellant, State Bank of India, instituted an application under Section 7 of the Insolvency and Bankruptcy Code 2016[2] against the respondent. The National Company Law Tribunal[3] at Hyderabad rejected the petition on the ground of maintainability by an order dated 30 October 2023.

4. The appeal before the NCLAT, Chennai was filed on 2 December 2023. The appellant filed an application for condonation of delay on the ground that the appeal had been lodged with a delay of 3 days beyond the 30 day period prescribed in Section 61(2).

1 "NCLAT"

2 "IBC"

3 "NCLT"

5. A divergence arose between the two members of the NCLAT on 1 May 2024. The Judicial Member held that the certified copy which was filed by the appellant was a "free of cost" copy and hence in the absence of an application for the grant of a certified copy, the delay of three days could not be condoned. The Technical Member, on the other hand, held that no distinction could be made between certified copies obtained through the payment of fee and a free copy and sufficient cause was shown for condoning the delay of three days.

6. The divergence was, thereafter, referred to a third Member of the NCLAT who has ruled that the free copy provided under Rule 50 of the National Company Law Tribunal Rules 2016[4] cannot be treated as a certified copy which is referred to in Rule 22(2) of the National Company Law Appellate Tribunal Rules 2016.[5]

7. The appeal has been consequently dismissed on delay on 9 July 2024.

8. The issue which arises for consideration turns on the interpretation of Rule 50 of the NCLT Rules and Rule 22 of the NCLAT Rules.

9. An appeal to the appellate authority is governed by the provisions of Section 61(2) of the IBC which provides as follows :

> "61.(2) Every appeal under sub-section (1) shall be filed within thirty days before the National Company Law Appellate Tribunal:
>
> Provided that the National Company Law Appellate Tribunal may allow an appeal to be filed after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing the appeal but such period shall not exceed fifteen days."

10. Rule 50 of the NCLT Rules provides as follows :

> "**50. Registry to send certified copy**.—The Registry shall send a certified copy of final order passed to the parties concerned free of cost and the certified copies may be made available with cost as per Schedule of fees, in all other cases."

4 "The NCLT Rules"

5 "The NCLAT Rules"

11. Rule 22 of the NCLAT Rules is in the following terms :

> "22. Presentation of appeal.—(1) Every appeal shall be presented in Form NCLAT-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
>
> (2) Every appeal shall be accompanied by a certified copy of the impugned order.
>
> (3) All documents filed in the Appellate Tribunal shall be accompanied by an index in triplicate containing their details and the amount of fee paid thereon.
>
> (4) Sufficient number of copies of the appeal or petition or application shall also be filed for service on the opposite party as prescribed.
>
> (5) In the pending matters, all other applications shall be presented after serving copies thereof in advance on the opposite side or his advocate or authorised representative.
>
> (6) The processing fee prescribed by the rules, with required number of envelopes of sufficient size and notice forms as prescribed shall be filled along with memorandum of appeal."

12. Rule 22(1) provides for

    (i) the presentation of an appeal in Form NCLAT-1;

    (ii) the person by whom the appeal may be filed; and

    (iii) the submission of the stipulated fee. Rule 22(2) stipulates that "every appeal shall be accompanied by a certified copy of the impugned order".

13. Rule 50 of the NCLT Rules governs the furnishing of certified copies. Rule 50 indicates that the Registry shall send a certified copy of the final order which has been passed to the parties concerned free of cost. It also indicates that certified copies may be made available against the payment of costs in terms of the Schedule of Fees, in

other cases. Rule 50 provides for a certified copy being provided free of cost and that a certified copy may be made available against the payment of costs, as indicated in the Schedule of Fees. The important point to note is that both the certified copy which is provided free of cost as well as the certified copy which is made on an application in that behalf are treated as certified copies for the purposes of Rule 50

14. Ms Surbhi Khattar, counsel has appeared on behalf of the appellant. The Solicitor General, Mr. Tushar Mehta, has also addressed the Court.

15. Ms Khattar has submitted that Rule 50 of the NCLT Rules places both the certified copy which is provided free of cost as well as the certified copy which is made available against the payment of costs as indicated in the Schedule of Fees on the same footing. It has been urged that as a matter of fact, the free certified copy was made available on 14 November 2023 and the appeal which was filed on 2 December 2023 was well within the condonable period of 15 days beyond the period of 30 days which is stipulated in Section 61(2).

16. On the other hand, Dr Abhishek Manu Singhvi, senior counsel appearing on behalf of the respondents placed reliance on the decision of the three Judge Bench in ***V Nagarajan Vs SKS Ispat and Power Limited & Ors***[6] (paragraphs 23 and 29).

17. In order to consider the submissions which has been urged on behalf of the respondent, it would be necessary to extract paragraphs 23 and 29 of the above decision which read as follows :

> "23. Therefore in a field which is not covered by a special law which invests NCLT with jurisdiction, the general principle for the computation of limitation for filing an appeal against an order of NCLT is governed by the statutory mandate of Section 420(3) of the Companies Act read with Rule 50 of the NCLT Rules, which enables a party to compute limitation from the date of receipt of the statutorily mandated free certified copy, without having to file its own application. However, the decision of this Court in Sagufa Ahmed [Sagufa Ahmed v. Upper Assam Plywood Products (P) Ltd., (2021) 2 SCC 317 : (2021) 2

6 [2021] 14 SCR 736 : (2022) 2 SCC 244

SCC (Civ) 178] clarifies that the statutory mandate of a free copy is not to enable litigants to take two bites at the apple where they could compute limitation from either when the certified copy is received on the litigant's application or received as a free copy from the Registry—whichever is later.

XXX XXX XXX

29. On the question of a certified copy for filing an appeal against an order passed by NCLT under IBC, Rule 22(2) of the NCLAT Rules mandates that an appeal has to be filed with a certified copy of the "impugned order":

> "22. Presentation of appeal.— (1) Every appeal shall be presented in Form Nclat-1 in triplicate by the appellant or petitioner or applicant or respondent, as the case may be, in person or by his duly authorised representative duly appointed in this behalf in the prescribed form with stipulated fee at the filing counter and non-compliance of this may constitute a valid ground to refuse to entertain the same.
>
> (2) Every appeal shall be accompanied by a certified copy of the impugned order."
>
> (emphasis supplied)

Therefore, it cannot be said that the parties can automatically dispense with their obligation to apply for and obtain a certified copy for filing an appeal. Any delay in receipt of a certified copy, once an application has been filed, has been envisaged by the legislature and duly excluded to not cause any prejudice to a litigant's right to appeal."

18. In ***V Nagarajan***, the order of the NCLT was dated 31 December 2019 and was uploaded on the website on 12 March 2020. There was a correction in the name of the Judicial Member who had passed the order on 20 March 2020. The appellant before this Court claimed to have awaited the issue of a free copy and allegedly sought a free copy on 23 March 2020 under the provisions Section 420(3) of the Companies Act 2013 read with Rule 50 of the NCLT Rules.

He claimed that the free copy had not been made available to him until that date and that in the meantime, the COVID-19 pandemic had intervened. The NCLAT, by its order dated 13 July, 2020, relied on Section 61(2) and came to the conclusion that the appeal was barred by limitation. It is in this context that this Court in paragraph 23 of its decision (extracted above) observed that the mandate of a free copy was not to enable litigants to take "two bites at the apple where they could compute limitation from either when the certified copy is received on the litigant's application or received as a free copy from the Registry—whichever is later". This Court, therefore, held that parties could not automatically dispense with their obligation to apply for and obtain a certified copy for filing an appeal.

19. Rule 22(2) of the NCLAT Rules requires that every appeal shall be accompanied by a certified copy of the impugned order. Rule 50 of the NCLT Rules prescribes that the Registry shall send a certified copy of the final order free of cost and certified copies may be made available on payment of costs in terms of the Schedule of Fees in all other cases. Both the certified copy which is made available free of cost as well as the certified copy which is made available on the payment of costs, are treated as certified copies for the purpose of Rule 50. A litigant who does not apply for a certified copy cannot then fall back and claim that he was awaiting the grant of a free copy to obviate the bar of limitation. This was the position in the decision of this Court in ***V Nagarajan***.

20. The facts of the present case are completely distinguishable. The free copy was made available on 14 November 2023 after the decision of the NCLT was pronounced on 30 October 2023. The appeal was lodged on 2 December 2023. The appeal was lodged with a delay of only three days beyond the statutory period of 30 days and, therefore, fell within the condonable period of 15 days. Sufficient cause was shown for condoning the delay of three days.

21. A Schedule of Fees is prescribed by the NCLT Rules. Entry 31 of the Schedule stipulates that the fee for obtaining true certified copies of final orders passed to parties other than the concerned parties under Rule 50 shall be Rupees five per page. The stipulation of Rupees five per page in Entry 31 excludes "the concerned parties under Rule 50".

22. The provisions of Rule 50 of the NCLT Rules place both the free certified copy as well as the certified copy which is applied for on payment of fees on the same footing. The appeal in the present case was filed within the condonable period of 15 days, which should have been condoned.

23. We accordingly allow the appeal and set aside the impugned judgment and order of the NCLAT dated 7 May 2024. The delay of three days in filing the appeal shall stand condoned. The appeal shall stand restored to the file of the NCLAT.

24. The Court would wish to record its appreciation of the meticulous manner in which Ms Surbhi Khattar, appearing for the appellant had prepared the case and made submissions.

25. Pending applications, if any, stand disposed of.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 393 : 2024 INSC 739

V. Senthil Balaji
v.
The Deputy Director, Directorate of Enforcement

(Criminal Appeal No. 4011 of 2024)

26 September 2024

[Abhay S. Oka* and Augustine George Masih, JJ.]

Issue for Consideration

Matter pertains to grant of bail to former Tamil Nadu transport minister against whom complaint was filed for offence u/s.3 PMLA, which is punishable u/s.4 PMLA for his alleged involvement in the job racket scam.

Headnotes†

Prevention of Money Laundering Act, 2002 – ss.3, 4, 45(1)(iii) – Offence of money-laundering – Appellant-former Tamil Nadu transport minister's alleged involvement in the job racket scam – Arrested by the Enforcement Directorate in connection with the Enforcement Case Information Report – Bail application in connection with the alleged offence u/s.3, which is punishable u/s.4 – Rejected by the Single Judge of the High Court – Challenge to:

Held: Appellant has been incarcerated for more than 15 months in connection with the offence punishable u/s.4 – There are more than 2000 accused in the three scheduled offences, and the number of witnesses proposed to be examined exceeds 600 – Trial of the scheduled offences and, consequently, the PMLA offence is not likely to be completed in three to four years or even more – If the appellant's detention is continued, it would amount to an infringement of his fundamental right u/Art.21 of speedy trial – Stringent provisions regarding the grant of bail, such as s.45(1)(iii), cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time – At this stage, it would be very difficult to hold that there is no prima facie case against the appellant in the complaint u/s.44(1)(b) and material relied upon therein – Furthermore, when the trial of the complaint under PMLA is likely to prolong beyond

* Author

reasonable limits, the Constitutional Courts will have to consider exercising their powers to grant bail – s.45(1)(ii) does not confer power on the State to detain an accused for an unreasonably long time, especially when there is no possibility of trial concluding within a reasonable time – Reasonable time would depend on the provisions under which the accused is being tried and other factors – If the Constitutional Courts do not exercise their jurisdiction in such cases, rights of the undertrials u/Art.21 would be defeated – In a given case, if undue delay in the disposal of the trial can be substantially attributed to accused, the Constitutional Courts can always decline to exercise jurisdiction to issue prerogative writs – Considering the apprehension of the appellant tampering with the evidence, stringent conditions imposed – Appellant to be enlarged on bail till the final disposal of the case pending before the Principal Session Judge, on the condition that he would furnish bail bonds in the sum of Rs.25,00,000/- with two sureties in the like amount; surrender passport; appear before the Enforcement Directorate, and not to directly or indirectly attempt to contact or communicate with the prosecution witnesses and victims – Constitution of India. [Paras 21, 25, 27, 29-31]

Criminal trial – Expeditious disposal – Crimes under the statutes-PMLA, Unlawful Activities (Prevention) Act, 1967 and Narcotic Drugs and Psychotropic Substances Act, 1985:

Held: Considering the gravity of the offences in such statutes, expeditious disposal of trials for the crimes under these statutes is contemplated – Expeditious disposal of the trial is also warranted considering the higher threshold set for the grant of bail – Hence, the requirement of expeditious disposal of cases must be read into these statutes – Inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together – Bail is the rule, and jail is the exception – These stringent provisions regarding the grant of bail, such as s.45(1)(iii) of the PMLA, cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time. [Paras 24, 25]

Case Law Cited

Manish Sisodia v. Directorate of Enforcement **(2024) SCC OnLine SC 1920;** *Union of India v. K.A. Najeeb* [2021] 1 SCR 443 **: (2021) 3 SCC 713 ;** *P. Dharamraj v. Shanmugam and Others* [2022] 9 SCR 972 **: (2022) 15 SCC 136;** *Y. Balaji v. Karthik*

Desari and Another [2023] 8 SCR 1026 : **(2023) SCC OnLine SC 645 – referred to.**

List of Acts

Prevention of Money Laundering Act, 2002; Code of Criminal Procedure, 1973; Unlawful Activities (Prevention) Act, 1967; Narcotic Drugs and Psychotropic Substances Act, 1985; Constitution of India.

List of Keywords

Bail; Grant of bail to former Tamil Nadu Transport minister; Job racket scam; Offence of money-laundering; Enforcement Directorate; Bail; Incarcerated for more than 15 months; Infringement of fundamental right u/Art.21; Speedy trial; Constitutional Courts; Undertrials; Enlarged on bail; Imposition of stringent conditions; Criminal trial; Expeditious disposal of trial; Inordinate delay; Justice delivery system; Clean acquittal by criminal courts; Compensation claim.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4011 of 2024

From the Judgment and Order dated 28.02.2024 of the High Court of Judicature at Madras in CRLOP No. 1525 of 2024

Appearances for Parties

Mukul Rohatgi, Siddharth Luthra, S. Prabakaran, N. R. Elango, Aditya Sondhi, Sr. Advs., Ma Gouthaman, N. Bharanikumar, Mrs. Usha Prabakaran, Maheswaran Prabakaran, Naveen M, Ms. Misha Rohatgi, Thangadurai, Agilesh Kumar S, Kartikeya Dang, Shashir Seth, Ms. Aishwarya S M, Ms. Meghna S M, G Jai Singh, Muthu Ganesa Pandian, Mrs. Harini Ramsankar, Dr. Ram Sankar (for M/s. Ram Sankar & Co.), Advs. for the Appellant.

Tushar Mehta, Solicitor General, Kanu Agrawal, Zoheb Hussain, Arkaj Kumar, Merusagar Samantaray, Ms. Sansriti Pathak, Balaji Srinivas, Arvind Kumar Sharma, Advs. for the Respondent.

S Gurukrishnakumar, Gopal Sankaranarayanan, Sr. Advs., Pranav Sachdeva, Jatin Bhardwaj, Abhay Nair, Ashwin Kumar, Ms. Neha Rathi, Balaji Srinivasan, Vishwaditya Sharma, Advs. for the Intervenors.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. Leave granted.

2. This appeal takes exception to the judgment and order dated 28th February 2024 passed by a learned Single Judge of the High Court of Judicature at Madras by which a bail application preferred by the appellant under Section 439 of the Code of Criminal Procedure, 1973 has been rejected. The bail application was filed in connection with an alleged offence under Section 3 of the Prevention of Money Laundering Act, 2002 (for short, 'the PMLA'), which is punishable under Section 4 of the PMLA.

3. Between 2011 and 2016, the appellant was holding the post of Transport Minister in the Government of Tamil Nadu. Broadly, the allegation against the appellant is that while discharging his duties as a Minister, in connivance with his personal assistant and his brother, he collected large amounts by promising job opportunities to several persons in various positions in the Transport Department. This led to the registering of three First Information Reports against the appellant and others. The said First Information Reports are FIR no.441 of 2015 dated 29th October 2015 (CC Nos. 22 and 24 of 2021), FIR No.298 of 2017 registered on 9th September 2017 (CC No.19 of 2020) and FIR no. 344 dated 13th August 2018 (CC No. 25 of 2020). In the first FIR, six charge sheets have been filed. More than 2000 accused have been named in the charge sheets. 550 witnesses have been named. In the case of the second FIR, there are 14 accused named in the chargesheet. In connection with this FIR, 24 witnesses have been cited. In the third FIR, 24 accused have been named in the charge sheet and 50 prosecution witnesses have been cited. The offences alleged in the aforementioned crimes are mainly under Sections 120B, 419, 420, 467 and 471 of the Indian Penal Code and Sections 7, 12, 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988. Section 34 of the Indian Penal Code has been invoked. These offences are scheduled offences within the meaning of Section 2(y) of the PMLA. Therefore, relying on the final reports filed in aforementioned scheduled offences, for an

offence of money laundering under Section 3 of the PMLA punishable under Section 4, the Enforcement Directorate (ED) registered an Enforcement Case Information Report (for short "ECIR") bearing ECIR No. MDSZO/21/2021 on 29th July 2021.

4. The appellant was arrested on 14th June 2023 in connection with the said ECIR and was remanded to judicial custody. A complaint was filed for the offence under Section 3 of the PMLA Act, which is punishable under Section 4, on 12th August 2023. The appellant is the only accused named in the complaint. Cognizance has been taken based on the complaint by the Special Court under the PMLA. The scheduled offences cases have been transferred to the learned Assistant Sessions Judge, Additional Special Court for Trial of Criminal Cases related to Elected Members of Parliament and Members of Legislative Assembly of Tamil Nadu (Special MPMLA Court), Chennai.

SUBMISSIONS

5. Learned senior counsel appearing in support of the appeal pointed out that in this case, ED is relying upon material collected by the investigating agencies investigating the scheduled offences. He submitted that five articles were allegedly seized during the search on 6th February 2020 in the appellant's premises. He invited our attention to the averments made in the complaint and, in particular, paragraph no.14.5, which deals with incriminating documents relating to money collected for providing jobs in the posts of Drivers, Conductors, Junior Tradesmen, Junior Engineers, Assistant Engineers, etc. He pointed out that the prosecution mainly relies upon a file named CS AC, allegedly found in the seized pen drive. The file allegedly gives details regarding the amounts received against each post. He submitted that the Tamil Nadu Forensic Science Laboratory (TNFSL)'s analysis of the seized pen drive shows that the said file CS AC was not found on the pen drive, and a file named csac.xlsx was found. As regards the allegation of the prosecution of the deposit of cash amount of Rs.1.34 crores in the appellant's bank account, the learned senior counsel urged that said amount represents the income received by way of remuneration as MLA and agriculture income. Learned senior counsel submitted that in any event, all the documents and all relevant electronic evidence have been seized in the predicate offences and statements of the witnesses under Section 50 of the

PMLA have been recorded. He submitted that the appellant has undergone incarceration under the PMLA Act for more than 14 months. He pointed out that as far as three predicate offences are concerned, charges have not even been framed. There are more than 2000 accused and 600 prosecution witnesses in the predicate offences and therefore, there is no possibility of trial of scheduled offences getting over in the near future. He submitted that unless the trials pertaining to scheduled offences are concluded, the complaint under the PMLA cannot be finally decided. He would, therefore, submit that there is no possibility of the trial for the PMLA offence concluding within five to six years and hence, the appellant deserves to be enlarged on bail. The learned senior counsel extensively relied upon a recent decision of this Court in the case of ***Manish Sisodia***[1] and especially what is observed in paragraph 54. He submitted that on facts, this case is similar to the case of ***Manish Sisodia***.[1] He also relied upon a decision of this Court in the case of ***Union of India v. K.A. Najeeb.***[2]

6. The learned Solicitor General of India and learned counsel appearing for the E.D. have made separate detailed submissions. The first submission is that there is no discrepancy in the description of file name CS AC in the pen drive and the file name of the same file in the TNFSL report dated 31st March 2023, which shows collection of the sum of Rs. 67.74 crores by the appellant for providing employment in the various posts in the Transport Department. He submitted that if the TNFSL report is perused, the document at Sr.No.24 has the same name, CS AC. He submitted that the portion ".xlsx" is only a file extension, which signifies that it is a Microsoft Excel sheet. He submitted that a printout of the Microsoft Excel spreadsheet file with the name CS AC found in the seized pen drive was certified by the Special MPMLA Court, which is relied upon in the complaint. He submitted that at this stage, there is no reason to doubt the correctness of the printout of the file CS AC provided by the Special MPMLA Court. The learned counsel appearing for ED also pointed out that there is no discrepancy in the seizure of the H.P. hard disk. The learned counsel submitted that the salary/remuneration payable to MLAs is directly credited to the bank account of the concerned

1 (2024) SCC OnLine SC 1920

2 [2021] 1 SCR 443 : (2021) 3 SCC 713

MLAs. Therefore, there is no question of any cash amount being received on the said count. He pointed out that the appellant claims that there is a cash deposit of salary to the tune of 68 lakhs in his account. He also pointed out that the appellant's agricultural income between 2014 and 2020 is to the tune of Rs. 20.24 lakhs, and therefore, the justification that a substantial part of the deposit of Rs.1.34 crores is his agricultural income must be rejected. Learned counsel pointed out that there is an unexplained cash deposit of Rs. 20.24 lakhs even in the appellant's wife's account.

7. Learned counsel also pointed out other documentary evidence indicating the appellant's involvement in the job racket scam, including the file AC1.xlsx. He pointed out that there is sufficient material on record to show that the posts of Drivers, Conductors, Junior Assistants and Technicians were priced and sold at Rs.1.5 lakhs, Rs.2.0 lakhs, Rs.1.25 lakhs and Rs.4 lakhs, respectively. He submitted that there is material on record to show that an amount of at least Rs.38 crores was collected from candidates by giving them the promise of providing jobs. He submitted that there are a large number of email communications indicating more than *prima facie* material about the involvement of the appellant. His submission is that, in fact, the twin conditions under clause (ii) of sub-section (1) of Section 45 of the PMLA have not been satisfied in this case.

8. The Learned Solicitor General of India pointed out that three rounds of litigations have travelled to this Court arising out of scheduled offences. He pointed out that the decisions of this Court indicate how the complainants were won over and how a so-called compromise between the complainants and the accused was brought about. He submitted that the appellant had been a minister for a long time in the Tamil Nadu government. He pointed out that he continued to be a Minister without portfolio, even during the first few months of his detention, and that he continues to be a Member of Legislative Assembly (MLA).

9. He submitted that observations made by this Court indicate that the appellant will be able to influence the witnesses if he is enlarged on bail. Learned Solicitor General relied upon a decision of this Court in the case of ***P. Dharamraj v. Shanmugam and others.***[3]

3 [2022] 9 SCR 972 : (2022) 15 SCC 136

He submitted that the High Court's decision to quash one of the scheduled offences based on an alleged compromise between bribe givers and bribe recipients was under scrutiny in the case. He pointed out that this Court heavily came down on such compromises in the said decision. He relied upon various paragraphs of the said decision. He submitted that the argument of learned senior counsel for the appellant in the said case that one Shri Shanmugam, who is allegedly involved, was not his personal assistant, has been expressly rejected. This Court found that he was working as a personal assistant of the appellant.

10. Learned SG relied upon a decision of this Court in the case of ***Y. Balaji v. Karthik Desari and Another.***[4] He pointed out observations made from paragraph 17 onwards of the said decision. He pointed out that this Court objected strongly to not registering offences under the Prevention of Corruption Act, 1988. He pointed out the observations of this Court regarding the compromise entered in the scheduled offence. It was observed that two teams were created just for the record, and an investigation was carried out as if it were a friendly match between the complainants and the accused. This Court further observed that it was only because of the position of the appellant as a Minister that the complainants purported to enter into a compromise. He submitted that there is very strong material on record to show the appellant's involvement in the offence punishable under Section 4 of the PMLA and the predicate offences. He submitted that the appellant brought about such an illegal settlement between bribe givers and bribe receivers. Therefore, there is no manner of doubt that once he comes out, he will influence the witnesses proposed to be examined by the prosecution, as he wields considerable influence in the State due to his political clout.

11. He submitted that though there are a large number of accused and witnesses in the scheduled offences, if a competent special public prosecutor is appointed, perhaps the prosecution may be in a position to drop a large number of witnesses. He submitted that in Misc. Application no.1381 of 2024 arising out of the decision of this Court in Criminal Appeal no.1677 of 2023, there is already a prayer made for the appointment of a special public prosecutor.

4 [2023] 8 SCR 1026 : (2023) SCC OnLine SC 645

12. We have also heard learned senior counsel for the intervenors who supported the ED.

CONSIDERATION OF SUBMISSIONS

13. We have carefully considered the submissions. The main document relied upon by the ED showing incriminatory material against the appellant is a part of the pen drive seized by the State police from the appellant's premises in connection with scheduled offences. The concerned Court dealing with the scheduled offences has provided the printed version of the soft files in the seized pen drive. There is no reason, at this stage, to doubt the authenticity of the soft files. There is also prima facie material to show a deposit of cash amount of Rs.1.34 crores in the appellant's bank account. At this stage, the contention of the appellant regarding the deposit of remuneration received as MLA and agriculture income cannot be accepted in the absence of any *prima facie* evidence to show the existence of the appellant's cash income as MLA and the appellant's agriculture income. Therefore, at this stage, it will be very difficult to hold that there is no *prima facie* case against the appellant in the complaint under Section 44 (1)(b) of the PMLA and material relied upon therein.

EFFECT OF THE DELAY IN DISPOSAL OF THE CASES

14. As of now, the appellant has been incarcerated for more than 15 months in connection with the offence punishable under Section 4 of the PMLA. The minimum punishment for an offence punishable under Section 4 is imprisonment for three years, which may extend to seven years. If the scheduled offences are under paragraph 2 of Part A of the Schedule in the PMLA, the sentence may extend to 10 years. In the appellant's case, the maximum sentence can be of 7 years as there is no scheduled offence under paragraph 2 of Part A of Schedule II alleged against the appellant.

15. We have already narrated that there are three scheduled offences. In the main case (CC Nos. 22 and 24 of 2021), there are about 2000 accused and 550 prosecution witnesses cited. Thus, it can be said that there are more than 2000 accused in the three scheduled offences, and the number of witnesses proposed to be examined exceeds 600.

16. This Bench is also dealing with MA no.1381 of 2024 seeking various reliefs such as a transfer of investigation of scheduled offences, appointment of special public prosecutor etc. The orders passed

in the said application would reveal that the sanction to prosecute all public servants, including the appellant, has now been granted. Charges have not been framed in the scheduled offences.

17. Thus, on the issue of framing of charge or discharge, a large number of accused will have to be heard. The trial of the scheduled offences will be a warrant case. Therefore, even if the trials of the scheduled offences are expedited, the process of framing charges may take a few months as many advocates representing more than 2000 accused persons will have to be heard. There are bound to be further proceedings arising out of orders on charge. After that, more than 600 witnesses will have to be examined. Documentary and electronic evidence is relied upon in the scheduled offences. Even if few witnesses are dropped, a few hundred witnesses will have to be examined. Presence of all the accused will have to be procured and their statements under Section 313 of the Code of Criminal Procedure,1973 will have to be recorded. Therefore, even in ideal conditions, the possibility of the trial of scheduled offences concluding even within a reasonable time of three to four years appears to be completely ruled out.

18. In the offence under the PMLA, the charge has not been framed. In view of Clause (d) of sub-section (1) of Section 44 of PMLA, the procedure for sessions trial will have to be followed for the prosecution of an offence punishable under Section 4 of the PMLA. In view of clause (c) of sub-section (1) of Section 44, it is possible to transfer the trial of the scheduled offences to the Special Court under the PMLA.

19. The offence of money laundering has been defined under Section 3 of the PMLA which reads thus:

> "**3. Offence of money-laundering**.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the [proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.
>
> [Explanation.—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property, in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]

20. Existence of proceeds of crime is a condition precedent for the offence under Section 3. Proceeds of crime have been defined in Section 2(u) of the PMLA which reads thus:

"2 .....

(u) "**proceeds of crime**" means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country [or abroad];

Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence;**"**

21. Hence, the existence of a scheduled offence is *sine qua non* for alleging the existence of proceeds of crime. A property derived or obtained, directly or indirectly, by a person as a result of the criminal activity relating to a scheduled offence constitutes proceeds of crime. The existence of proceeds of crime at the time of the trial of the offence under Section 3 of PMLA can be proved only if the scheduled offence is established in the prosecution of the scheduled offence. Therefore, even if the trial of the case under the PMLA proceeds, it cannot be finally decided unless the trial of scheduled offences concludes. In the facts of the case, there is no possibility of the trial of the scheduled offences commencing in the near future. Therefore, we see no possibility of both trials concluding within a few years.

22. In the case of ***K.A. Najeeb,***[2] in paragraph 17 this Court held thus:

> **"17.** It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. **Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."**
>
> (emphasis added)

23. In the case of ***Manish Sisodia v. Directorate of Enforcement***[1] in paragraphs 49 to 57, this Court held thus:

> **"49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.**

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

51. Recently, this Court had an occasion to consider an application for bail in the case of *Javed Gulam Nabi Shaikh* v. *State of Maharashtra*[6] wherein the accused was prosecuted under the provisions of the Unlawful Activities (Prevention) Act, 1967. This Court surveyed the entire law right from the judgment of this Court in the cases of *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh*,[7] *Shri Gurbaksh Singh Sibbia* v. *State of Punjab*,[8] *Hussainara Khatoon (I)* v. *Home Secretary, State of Bihar*,[9] *Union of India v. K.A. Najeeb*[10] and *Satender Kumar Antil* v. *Central Bureau of Investigation*.[11] The Court observed thus:

> "**19.** If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."

52. The Court also reproduced the observations made in *Gudikanti Narasimhulu* (supra), which read thus:

> "**10.** In the aforesaid context, we may remind the trial courts and the High Courts of what came to be observed by this Court in *Gudikanti Narasimhulu v. Public Prosecutor*, High Court reported in (1978) 1 SCC 240. We quote:
>
> *"What is often forgotten, and therefore warrants reminder, is the object to keep a person in judicial custody pending trial or disposal of an appeal. Lord Russel, C.J., said* [R *v.* Rose, *(1898) 18 Cox]:*
>
> *"I observe that in this case bail was refused for the prisoner. It cannot be too strongly impressed on the,*

magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.""

53. The Court further observed that, over a period of time, the trial courts and the High Courts have forgotten a very well-settled principle of law that bail is not to be withheld as a punishment. From our experience, we can say that it appears that the trial courts and the High Courts attempt to play safe in matters of grant of bail. The principle that bail is a rule and refusal is an exception is, at times, followed in breach. On account of non-grant of bail even in straight forward open and shut cases, this Court is flooded with huge number of bail petitions thereby adding to the huge pendency. It is high time that the trial courts and the High Courts should recognize the principle that "bail is rule and jail is exception".

54. In the present case, in the ED matter as well as the CBI matter, 493 witnesses have been named. The case involves thousands of pages of documents and over a lakh pages of digitized documents. It is thus clear that there is not even the remotest possibility of the trial being concluded in the near future. In our view, keeping the appellant behind the bars for an unlimited period of time in the hope of speedy completion of trial would deprive his fundamental right to liberty under Article 21 of the Constitution. As observed time and again, the prolonged incarceration before being pronounced guilty of an offence should not be permitted to become punishment without trial.

55. As observed by this Court in the case of *Gudikanti Narasimhulu* (supra), the objective to keep a person in judicial custody pending trial or disposal of an appeal is to secure the attendance of the prisoner at trial.

56. In the present case, the appellant is having deep roots in the society. There is no possibility of him fleeing away from the country and not being available for facing the trial. In any case, conditions can be imposed to address the concern of the State.

> **57.** Insofar as the apprehension given by the learned ASG regarding the possibility of tampering the evidence is concerned, it is to be noted that the case largely depends on documentary evidence which is already seized by the prosecution. As such, there is no possibility of tampering with the evidence. Insofar as the concern with regard to influencing the witnesses is concerned, the said concern can be addressed by imposing stringent conditions upon the appellant.
>
> ……."
>
> (emphasis added)

24. There are a few penal statutes that make a departure from the provisions of Sections 437, 438, and 439 of the Code of Criminal Procedure, 1973. A higher threshold is provided in these statutes for the grant of bail. By way of illustration, we may refer to Section 45(1)(ii) of PMLA, proviso to Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 and Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, 'NDPS Act'). The provisions regarding bail in some of such statutes start with a non-obstante clause for overriding the provisions of Sections 437 to 439 of the CrPC. The legislature has done so to secure the object of making the penal provisions in such enactments. For example, the PMLA provides for Section 45(1)(ii) as money laundering poses a serious threat not only to the country's financial system but also to its integrity and sovereignty.

25. Considering the gravity of the offences in such statutes, expeditious disposal of trials for the crimes under these statutes is contemplated. Moreover, such statutes contain provisions laying down higher threshold for the grant of bail. The expeditious disposal of the trial is also warranted considering the higher threshold set for the grant of bail. Hence, the requirement of expeditious disposal of cases must be read into these statutes. Inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together. It is a well-settled principle of our criminal jurisprudence that "bail is the rule, and jail is the exception." These stringent provisions regarding the grant of bail, such as Section 45(1)(iii) of the PMLA, cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time.

26. There are a series of decisions of this Court starting from the decision in the case of ***K.A. Najeeb,***[2] which hold that such stringent provisions for the grant of bail do not take away the power of Constitutional Courts to grant bail on the grounds of violation of Part III of the Constitution of India. We have already referred to paragraph 17 of the said decision, which lays down that the rigours of such provisions will melt down where there is no likelihood of trial being completed in a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. One of the reasons is that if, because of such provisions, incarceration of an undertrial accused is continued for an unreasonably long time, the provisions may be exposed to the vice of being violative of Article 21 of the Constitution of India.

27. Under the Statutes like PMLA, the minimum sentence is three years, and the maximum is seven years. The minimum sentence is higher when the scheduled offence is under the NDPS Act. When the trial of the complaint under PMLA is likely to prolong beyond reasonable limits, the Constitutional Courts will have to consider exercising their powers to grant bail. The reason is that Section 45(1)(ii) does not confer power on the State to detain an accused for an unreasonably long time, especially when there is no possibility of trial concluding within a reasonable time. What a reasonable time is will depend on the provisions under which the accused is being tried and other factors. One of the most relevant factor is the duration of the minimum and maximum sentence for the offence. Another important consideration is the higher threshold or stringent conditions which a statute provides for the grant of bail. Even an outer limit provided by the relevant law for the completion of the trial, if any, is also a factor to be considered. The extraordinary powers, as held in the case of ***K.A. Najeeb,***[2] can only be exercised by the Constitutional Courts. The Judges of the Constitutional Courts have vast experience. Based on the facts on record, if the Judges conclude that there is no possibility of a trial concluding in a reasonable time, the power of granting bail can always be exercised by the Constitutional Courts on the grounds of violation of Part III of the Constitution of India notwithstanding the statutory provisions. The Constitutional Courts can always exercise its jurisdiction under Article 32 or Article 226, as the case may be. The Constitutional Courts have to bear in mind while dealing with the

cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The Constitutional Courts cannot allow provisions like Section 45(1)(ii) to become instruments in the hands of the ED to continue incarceration for a long time when there is no possibility of a trial of the scheduled offence and the PMLA offence concluding within a reasonable time. If the Constitutional Courts do not exercise their jurisdiction in such cases, the rights of the undertrials under Article 21 of the Constitution of India will be defeated. In a given case, if an undue delay in the disposal of the trial of scheduled offences or disposal of trial under the PMLA can be substantially attributed to the accused, the Constitutional Courts can always decline to exercise jurisdiction to issue prerogative writs. An exception will also be in a case where, considering the antecedents of the accused, there is every possibility of the accused becoming a real threat to society if enlarged on bail. The jurisdiction to issue prerogative writs is always discretionary.

28. Some day, the courts, especially the Constitutional Courts, will have to take a call on a peculiar situation that arises in our justice delivery system. There are cases where clean acquittal is granted by the criminal courts to the accused after very long incarceration as an undertrial. When we say clean acquittal, we are excluding the cases where the witnesses have turned hostile or there is a bona fide defective investigation. In such cases of clean acquittal, crucial years in the life of the accused are lost. In a given case, it may amount to violation of rights of the accused under Article 21 of the Constitution which may give rise to a claim for compensation.

29. As stated earlier, the appellant has been incarcerated for 15 months or more for the offence punishable under the PMLA. In the facts of the case, the trial of the scheduled offences and, consequently, the PMLA offence is not likely to be completed in three to four years or even more. If the appellant's detention is continued, it will amount to an infringement of his fundamental right under Article 21 of the Constitution of India of speedy trial.

30. The decisions the learned SG relied upon indicate that the appellant's influential position in the State may have resulted in a so-called compromise between the bribe givers and the bribe takers. Considering the apprehension of the appellant tampering with the evidence, stringent conditions must be imposed.

31. Therefore, the appeal is allowed, and the appellant shall be enlarged on bail till the final disposal of CC No. 9 of 2023 pending before the Principal Session Judge, Chennai, on the following conditions:

a. The appellant shall furnish bail bonds in the sum of Rs.25,00,000/- (Rupees twenty-five lakhs only) with two sureties in the like amount;

b. The appellant shall not directly or indirectly attempt to contact or communicate with the prosecution witnesses and victims of the three scheduled offences in any manner. If it is found that the appellant directly or indirectly made even an attempt to contact any prosecution witness or victim in the scheduled as well as offences under the PMLA, it will be a ground to cancel the bail granted to the appellant;

c. The appellant shall mark his attendance every Monday and Friday between 11 am and 12 noon in the office of the Deputy Director, the Directorate of Enforcement at Chennai. He shall also appear on the first Saturday of every calendar month before the investigating officers of the three scheduled offences;

d. Before the appellant is enlarged on bail, he shall surrender his passport to the Special Court under the PMLA at Chennai;

e. The appellant shall regularly and punctually remain present before the Courts dealing with scheduled offences as well as the Special Court and shall cooperate with the Courts for early disposal of cases; and

f. If the appellant seeks adjournments on non-existing or frivolous grounds or creates hurdles in the early disposal of the cases mentioned above, the bail granted to him shall be liable to be cancelled.

32. The appeal is allowed on the above terms.

Result of the Case: Appeal allowed

[†]*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 411 : 2024 INSC 747

State of Madhya Pradesh
v.
Ramji Lal Sharma & Another

(Miscellaneous Application No. 261 of 2024 in
Criminal Appeal No. 293 of 2022)

23 September 2024

**[B.V. Nagarathna* and
Nongmeikapam Kotiswar Singh, JJ.]**

Issue for Consideration

Matter pertains to the application filed by applicant seeking his release from further jail sentence, on the ground of his juvenility on the date of the offence and has already undergone a sentence of more than four years.

Headnotes†

Juvenile Justice (Care and Protection of Children) Act, 2015 – s.94 – Presumption and determination of age – As regards incident of 17.01.2002, the applicant convicted by the Special Sessions Judge, however, acquitted by the High Court – Subsequently, this Court convicted the applicant – Thereafter the applicant underwent sentence of four years and three months in all – Subsequently, miscellaneous application filed by the applicant seeking his release from further jail sentence, on the ground of his juvenility on the date of the offence and has already undergone a sentence of more than four years:

Held: Application for claiming juvenility may be made even after the judgment and order of conviction and sentence has been granted against a person which has attained finality – On basis of the report submitted by the Sessions Judge, pursuant to the directions of this Court, it is found that the applicant was below eighteen years of age as on the date of the incident – Date of birth of the applicant has been proved to be 04.10.1984 – Thus, the claim of juvenility made by the applicant, upheld – Conviction as recorded against him set aside and he is acquitted – As he is on interim bail, his bail-bonds stand cancelled. [Para 11]

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* Author

Case Law Cited

Abuzar Hossain v. State of West Bengal **[2012] 9 SCR 244 : (2012) 10 SCC 489;** *Pramila v. State of Chhattisgarh* **Criminal Appeal No. 64/2012, dated 17.01.2004 – referred to.**

List of Acts

Juvenile Justice (Care and Protection of Children) Act, 2015; Penal Code, 1860; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

List of Keywords

Release from further jail sentence; Juvenility; Date of birth.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Miscellaneous Application No. 261 of 2024

In

Criminal Appeal No. 293 of 2022

From the Judgment and Order dated 09.03.2022 of the Supreme Court of India in Crl.A. No. 293 of 2022

Appearances for Parties

Amit Sharma, A.A.G., Yashraj Singh Bundela, Ramesh Thakur, Chanakya Baruah, Ms. Saloni, Rohan Singla, Advs. for the Petitioner.

M/s. Prashant Shukla Law Chambers, Prashant Shukla, Mrs. Anushree Shukla, Prabhat Chowdhary, Kartik Kumar, Ms. Ritika Raj, Akshat Mudgil, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

The Applicant/Respondent No. 2 herein, i.e., Brijnandan @ Brajesh Sharma has filed the present Miscellaneous Application in the disposed of Criminal Appeal No.293 of 2002. seeking his release from further jail sentence, on the ground of his juvenility on the date of the offence, i.e., on 17.01.2002.

2. Briefly stated, the facts of the case are that the Respondents in Criminal Appeal No.293 of 2022 were two of the four accused in the crime registered pursuant to FIR No.8/2002 dated 17.01.2002 at Police Station AJK Bhind, District Bhinda, Madhya Pradesh, for the offences committed under Sections 302, 307 and 34 of the Indian Penal Code, 1860 (in short "IPC"), read with Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (in short "SC/ST Act"). Pursuant to the trial in Special Case No. 74 of 2002 before the Ld. Special Judge, Bhind, the Respondents were convicted for the offences punishable under Section 302 read with Section 34 of the IPC and were awarded life imprisonment and fine of Rs. 5000/- *vide* judgment dated 24.02.2006.

3. Being aggrieved by the judgment of the Trial Court, the Respondents filed Criminal Appeal No.339 of 2006 before the High Court of Madhya Pradesh, Gwalior Bench. The High Court allowed the appeal preferred by the Respondents *vide* judgment dated 13.12.2018 and thereby set aside the conviction of the Respondents.

4. Being aggrieved by the judgment of acquittal passed by the High Court, the State preferred this Criminal Appeal No.293 of 2022 arising out of SLP (Criminal) No.1926 of 2022 before this Court. This Court, *vide* judgment dated 09.03.2022, allowed the appeal filed by the State and, resultantly, the Respondents were convicted and the sentence imposed by the Trial Court was restored. Hence, the Respondents were directed to undergo the remaining sentence as per the judgment and order of conviction passed by the Trial Court.

   It is in these circumstances that the applicant/respondent No.2 has preferred the instant application seeking his release from further jail sentence on the ground that he was a minor on the date of commission of the offence i.e. 17.01.2002 and has already undergone a sentence of more than four years.

5. During the course of submissions, learned counsel for the applicant Brijnandan alias Brajesh Sharma submitted that although by the judgment of this Court the applicant herein was convicted and serving his sentence; thereafter, on becoming aware of the law the applicant has filed this application claiming juvenility as on the date of the incident, i.e. 17.01.2002.

6. During the course of submissions, it was borne out that while the date of birth of the applicant as per the school record is 04.10.1984, it is

10.03.1984 as per the Aadhaar Card. We note that the date of the commission of offence was on 17.01.2002. It was therefore submitted at the Bar that the applicant's plea of juvenility be accepted as Applicant was a juvenile aged about 17 years and 3 months on the date of the commission of offence.

7. Considering the aforesaid inconsistency, this Court, *vide* order dated 16.05.2024, had directed the Sessions Court, District Bhind, Madhya Pradesh to conduct an enquiry with regard to the claim of juvenility made by the applicant herein and to submit a report to this Court in accordance with law. The said enquiry has been conducted and by report dated 16.07.2024, the learned Special Judge (Atrocities), Bhind, M.P. has held that the applicant's date of birth is 04.10.1984 and consequently on the date of the incident, i.e. on 17.01.2002, he was 17 years 3 months and 13 days old (though wrongly typed as 17.03.2002 and 17 years 5 months and 13 days in the order dated 16.07.2024). Therefore, the applicant being a juvenile on the date of the commission of the offence is entitled to the benefit of the provisions of Juvenile Justice (Care and Protocol of Children) Act, 2015 is the submission. Learned counsel for the applicant contended that having regard to the fact that the learned Sessions Judge has conducted a detailed enquiry by examining not only the applicant but also his mother and in-charge Head Teacher Government Primary School, Deori, Police Station Mehgaon, District Bhind, Madhya Pradesh. Finally, it was contended that the said report, which is in favour of the applicant herein, may be considered and the benefit of juvenility be granted to the applicant herein. Consequently, the conviction as against the applicant herein may be set aside.

8. *Per contra,* learned counsel for the respondent-State at the outset submitted that the plea of juvenility is highly belated inasmuch as the incident took place on 17.01.2002 but the applicant after being convicted by this Court has subsequently filed the application. The long delay in making the claim of juvenility must be accounted for at the first instance before considering other pleas made by the applicant. He also submitted that there is discrepancy in the name of the applicant in the special leave petition. The petition notes the applicant's name as Brijnandan alias Brajesh Sharma son of Ramji Lal Sharma, whereas in the school documents it is noted as Brijesh Kumar and in the Aadhaar Card it is just Brijesh. Therefore, the miscellaneous application may be dismissed.

9. By way of reply, learned counsel for the applicant placed reliance on a judgment of this Court in ***Abuzar Hossain vs. State of West Bengal* (2012) 10 SCC 489** to contend that the claim for juvenility may be made at any stage of the criminal proceedings and even after final conviction and sentence being imposed. Therefore, the said argument of the learned counsel for the respondent-State is without any substance. He further submitted that although the name of the applicant as stated by the informant and the prosecution may be slightly at variance with the name of the applicant in the school records as well as in the enquiry that has been conducted on the basis of the documents but the fact remains that the applicant is the son of Ramji Lal and there being no dispute about the same, a slight discrepency in the name would not negate his claim for juvenility.

   He further submitted that pursuant to the order of this Court a comprehensive enquiry has been conducted. The applicant, his mother and the head master of the school where the applicant was studying have all been examined. There has been no cross examination of the said witnesses in the enquiry by the respondent-State. Therefore, there can now be no objection raised by the State to the said report submitted by the learned Sessions Judge. In the circumstances, he contended that the report may be taken into consideration and relief may be granted to the applicant herein.

10. We have considered the submissions advanced at the Bar.

11. It is noted that in respect of the incident dated 17.01.2002, the applicant was convicted on 24.02.2006 by the Special Sessions Judge, Bhind. Thereafter, he was acquitted by the High Court *vide* judgment dated 13.12.2018. Subsequently, in the appeal filed by the respondent-State, this Court by judgment dated 09.03.2022, convicted the applicant. It is thereafter that the applicant has undergone sentence of four years and three months in all. Subsequently, this miscellaneous application was filed and this Court vide order dated 16.05.2024 directed that the enquiry be conducted. Subsequently, the learned Sessions Judge has passed his order on 16.07.2024 and has submitted his report to this Court. Pursuant to the order of this Court on 16.05.2024, the applicant has been released on interim bail. Therefore, on perusal of this report, we note that not only the applicant herein, but the mother as well as the Head Master of school have been examined as PW-1, PW-2 and PW-3

respectively and as many as five documents were also considered by the learned Sessions Judge. It is on consideration of the same and having regard to Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015 that the learned Sessions Judge found that the applicant was below eighteen years of age as on the date of the incident. Although the application has been filed subsequent to the conviction ordered by this Court, we have regard to the judgment of this Court as noted above and in judgment dated 17.01.2004 in Criminal Appeal No.64/2012, titled as ***Pramila vs. State of Chhattisgarh***, that an application for claiming juvenility may be made even after the judgment and order of conviction and sentence has been granted against a person which has attained finality.

Bearing in mind the aforesaid judgments and the report submitted by the learned Sessions Judge, pursuant to the directions of this Court, we find that the date of birth of the applicant has been proved to be 04.10.1984. Consequently, the claim of juvenility made by the applicant, who was arrayed as accused no.3 is upheld and the conviction as recorded against him by this Court is set-aside and he stands acquitted. As he is on interim bail, his bail-bonds stand cancelled.

Consequently, the miscellaneous application is allowed in the aforesaid terms.

Result of the Case: Miscellaneous Application Allowed

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 417 : 2024 INSC 752

Tarina Sen
v.
Union of India & Anr.

(Criminal Appeal No. 4114 of 2024)

03 October 2024

[B.R. Gavai* and K.V. Viswanathan, JJ.]

Issue for Consideration

Issue arose as to whether the continuation of the criminal proceedings against the appellants would be justified, when the matter has been compromised between the borrower and Bank.

Headnotes†

Code of Criminal Procedure, 1973 – s.482 – Exercise of power under – Criminal proceedings against the appellant u/ss.120-B, 420, 468 and 471 IPC and s.13(2) r/w s.13(1)(d) of the 1988 Act – Application u/s.482 CrPC for quashing of the criminal proceedings pending before the Special Judge – Disposed of, by the High Court by permitting the appellants to urge all the pleas raised in the application before the trial court at the appropriate stage – Correctness:

Held: Matter has been compromised between the borrowers and the Bank and upon payment of the amount under the OTS, the loan account of the borrower has been closed, as such the continuation of the criminal proceedings not justifiable – In the matters arising out of commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimonial or family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, the High Court should exercise its powers u/s.482 for giving an end to the criminal proceedings – Possibility of conviction in such cases is remote and bleak and as such, the continuation of the criminal proceedings would put the accused to great oppression and prejudice – Impugned orders passed by the High Court quashed and set aside – Criminal proceedings against the appellants pending before the Special Judge also quashed and set aside – Penal Code, 1860 – Prevention of Corruption Act, 1988. [Paras 11, 14, 15, 17]

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* Author

Case Law Cited

Central Bureau of Investigation, SPE, SIU (X), New Delhi v. Duncans Agro Industries Ltd., Calcutta [1996] Supp. 3 SCR 360 **: (1996) 5 SCC 591;** *Nikhil Merchant v. Central Bureau of Investigation and Another* [2008] 12 SCR 236 **: (2008) 9 SCC 677;** *Gian Singh v. State of Punjab and Another* [2012] 8 SCR 753 **: (2012) 10 SCC 303;** *Central Bureau of Investigation, ACB, Mumbai v. Narendra Lal Jain and Others* [2014] 3 SCR 444 **: (2014) 5 SCC 364;** *Narinder Singh and Others v. State of Punjab and Another* [2014] 4 SCR 1012 **: (2014) 6 SCC 466;** *Gold Quest International Private Limited v. State of Tamil Nadu and Others* [2014] 7 SCR 677 **: (2014) 15 SCC 235;** *Central Bureau of Investigation v. Sadhu Ram Singla and Others* [2017] 1 SCR 907 **: (2017) 5 SCC 350 – referred to.**

List of Acts

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

List of Keywords

Continuation of criminal proceedings; Compromise; Quashing of criminal proceedings; s.482, CrPC.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4114 of 2024

From the Judgment and Order dated 04.07.2023 of the High Court of Orissa at Cuttack in CRLMC No. 34 of 2022

With

Criminal Appeal No. 4115 of 2024

Appearances for Parties

Rajiv Yadav, Adv. for the Appellant.

Mukesh Kumar Maroria, Brijesh Kumar Tamber, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Leave granted.

2. The present appeals challenge the final orders dated 4th July 2023 passed by the High Court of Orissa at Cuttack in CRLMC No. 34 of 2022 and in CRLMC No. 33 of 2022, vide which the petition filed by the present appellants for quashing of criminal proceedings came to be disposed of by permitting the appellants to urge all the pleas raised in the said petition before the trial Court at the appropriate stage. The appellants had approached the High Court under Section 482 of the Code of Criminal Procedure, 1973 ("CrPC" for short) praying for quashing of the criminal proceedings in T.R. No. 28 of 2002 pending in the Court of Special Judge (CBI) Bhubaneswar ("trial Court" for short).

3. Shorn of details, the case of the prosecution is as given below.

3.1 On 14th October 2000, on the basis of information received from a reliable source, the Inspector of Police CBI/SPE Bhubaneswar registered a regular case under Section 154 of CrPC being Crime No. RCBHU 2000A0021 ("FIR" for short) against five persons namely, Ajay Kumar Behera (Accused No. 1), Surjit Sen (Accused No. 2), Kaushik Nath Ojha (Accused No.3), Tarini Sen (Accused No. 4), Shaileshree Sen (Accused No. 5) alleging commission of offences punishable under Sections 120-B, 420, 468 and 471 of Indian Penal Code 1860 ("IPC" for short) & Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act 1988 ("PC Act" for short). The present appellants are Accused No. 4 and 5.

3.2 It was alleged in the F.I.R. that Ajay Kumar Behera while being posted as the Branch Manager in Allahabad Bank, Temple Marg Branch, Bhubaneswar ("the Bank" for short) during the year 1998-1999 entered into a criminal conspiracy with the other accused persons. At that time, Surjit Sen and Kaushik Nath Ojha were the Directors of M/s Indo Global Projects Ltd., Bhubaneswar ("IGPL" for short) and the appellants herein were Partners in M/s Clarion Travels, Bhubaneswar ("Clarion Travels" for short).

3.3 It was also alleged in the F.I.R. that on 20th November 1998, a loan application was submitted on behalf of Clarion Travels for the purpose of securing funds to purchase new cars. The loan application was signed by the present appellants on behalf of Clarion Travels. Against the said loan application, on 17th December 1998, Ajay Kumar Behera sanctioned a loan of Rs. 8,40,000/- without keeping any security or post-dated cheques. No repayment was ever made, and Ajay Kumar Behera did not pursue the same.

3.4 It was also alleged in the F.I.R. that earlier in time, on 22nd August 1998, a similar loan application was submitted on behalf of IGPL for the same purpose of securing funds to purchase new cars at a cost of Rs. 11,84,600/-. Against the said loan application, on 24th August 1998, Ajay Kumar Behera sanctioned the loan for the said amount. The money was received by Accused No. 3 and 4, who were Directors of IGPL. In furtherance of the loan application, the Accused No. 3 and 4 had also deposited 36 post-dated cheques, which when they were sent for clearing, at a later stage, by the successor of Ajay Kumar Behera bounced.

3.5 It was also alleged in the F.I.R. that, the office address disclosed by both IGPL and Clarion Travels was one and the same, i.e., 168/169-A, Bapuji Nagar, Bhubaneswar. In case of IGPL, it was also alleged that the firm Indo Global Motor from where the cars were purportedly purchased by IGPL is in fact shown as a unit of IGPL and that both of them share one and the same address being 56-A, Mancheswar Industrial Estate, Bhubaneswar. Similarly, in the case of Clarion Travels, it was also alleged that the firm M/s Kalinga Auto Centre Ltd. from where the cars were purportedly purchased by Clarion Travels also has the same address 56-A, Mancheswar Industrial Estate, Bhubaneswar.

3.6 In such facts, the matter was taken up for investigation by the Central Bureau of Investigation ("CBI" for short) and the case was registered as T.R. No. 28 of 2002 in the Court of Special Judge (CBI), Bhubneswar.

3.7 On 27th August 2002, the CBI filed the charge-sheet in the trial Court against all the accused persons, including the present

appellants, for offences punishable under Sections 120B, 420, 468, 471 of IPC and Sections 13(2) read with 13(1)(d) of PC Act.

3.8 Vide order dated 2nd September 2002, the trial Court took cognizance and issued summons to the accused persons.

3.9 The Bank also filed two Original Applications being O.A. No. 53 and 57 of 2004 before the Debt Recovery Tribunal, Cuttack ("DRT" for short) for recovery of dues in respect of the loans advanced to IGPL and Clarion Travels. In the proceedings before the DRT, IGPL and Clarion Travels reached a One-Time-Settlement ("OTS" for short) with the Bank, which was accepted, and the loan account was declared as being closed vide letter dated 31st January 2011. In view of the OTS, the recovery proceedings pending before the DRT were disposed of as a full and final payment of the dues of the Bank vide orders dated 3rd May 2011.

3.10 Having settled the matter thus, the present appellants filed separate applications under Section 482 of Cr.P.C. before the High Court of Orissa seeking quashing of all the proceedings pending before the trial Court in the case registered as T.R. No. 28 of 2002. The High Court, vide the orders impugned in the present appeals *disposed of* the applications under Section 482 of Cr.P.C. by permitting the appellants herein to urge all the pleas raised in their application before the trial Court at the appropriate stage. Being aggrieved thereby, the present appeal arises.

4. We have heard Shri Dama Seshadri Naidu, learned Senior Counsel for the appellants and Shri Vikramjeet Banerjee learned Additional Solicitor General ("ASG" for short) appearing for the common respondent No.1-Union of India and Mr. Brijesh Kumar Tamber, learned counsel for common respondent No.2.

5. Shri Naidu submits that the appellants before this Court had no active role to play. It is submitted that the Appellant in Criminal Appeal arising out of Special Leave Petition (Criminal) No. 1415 of 2024 (Accused No.4) and the Appellant in Criminal Appeal arising out of Special Leave Petition (Criminal) No. 1416 of 2024 (Accused No.5) are women. Accused No. 4 is the wife of Surojit Sen, who was Accused No.2. Accused No. 5 is the wife of the brother of the

Accused No. 2. Both the appellants had no active role to play and have been roped in as they are related to the Accused No.2.

6. Shri Naidu further submits that in the proceedings before the DRT, the firm run by the appellants reached to an amicable settlement with the Bank, which was accepted, and the entire debt was discharged on 31st January 2011. An amount of Rs.7,50,000/- was deposited with the Bank as a full and final settlement of the Bank's dues.

7. It is further submitted that OA before the DRT was disposed of on 3rd May 2011 in light of the settlement and, therefore, the continuance of the proceedings against the appellants would be an exercise in futility.

8. Shri Naidu in support of his submissions relied on the following judgments of this Court in the cases of:

(i) ***Central Bureau of Investigation, SPE, SIU (X), New Delhi v. Duncans Agro Industries Ltd., Calcutta***;[1]

(ii) ***Nikhil Merchant v. Central Bureau of Investigation and another***;[2]

(iii) ***Gian Singh v. State of Punjab and another***;[3]

(iv) ***Central Bureau of Investigation, ACB, Mumbai v. Narendra Lal Jain and others***;[4]

(v) ***Narinder Singh and others v. State of Punjab and another***;[5]

(vi) ***Gold Quest International Private Limited v. State of Tamil Nadu and others***;[6] and

(vii) ***Central Bureau of Investigation v. Sadhu Ram Singla and others***.[7]

9. Mr. Brijesh Kumar Tamber, learned counsel for the respondent No.2 Bank confirms the fact regarding the settlement entered into between the Bank and the borrowers.

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1 [1996] Supp. 3 SCR 360 : (1996) 5 SCC 591

2 [2008] 12 SCR 236 : (2008) 9 SCC 677

3 [2012] 8 SCR 753 : (2012) 10 SCC 303

4 [2014] 3 SCR 444 : (2014) 5 SCC 364

5 [2014] 4 SCR 1012 : (2014) 6 SCC 466

6 [2014] 7 SCR 677 : (2014) 15 SCC 235

7 [2017] 1 SCR 907 : (2017) 5 SCC 350

10. Shri Vikramjeet Banerjee, learned ASG, appearing on behalf of the CBI, however, submits that merely because the matter is settled between the Bank and the borrowers, it does not absolve the accused persons of their criminal liability. It is submitted that the learned Chief Justice of the High Court has rightly, upon consideration of the legal position, dismissed the petition under Section 482 of the CrPC. The learned ASG, therefore, prays for dismissal of the present appeals.

11. The facts in the present case are not in dispute. It is not disputed that the matter has been compromised between the borrowers and the Bank. It has also not been in dispute that, upon payment of the amount under the OTS, the loan account of the borrower has been closed.

12. Therefore, the only question would be, as to whether the continuation of the criminal proceedings against the present appellants would be justified or not.

13. At the outset, we may state that we are only considering the cases of two women i.e. Accused Nos. 4 and 5, wherein Accused No.4 is the wife of Accused No.2. It is also not in dispute that the original Accused Nos. 2 and 3 have since died.

14. By a separate judgment of the even date in Criminal Appeal arising out of Special Leave Petition (Criminal) No.4353 of 2018 wherein similar facts arose for consideration, we have held that when the matter has been compromised between the borrower and Bank, the continuation of the criminal proceedings would not be justifiable.

15. Relying on the earlier judgments of this Court, we have held that in the matters arising out of commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or family disputes where the wrong is basically private or personal in nature and the parties have resolved their entire dispute, the High Court should exercise its powers under Section 482 CrPC for giving an end to the criminal proceedings. We have held that the possibility of conviction in such cases is remote and bleak and as such, the continuation of the criminal proceedings would put the accused to great oppression and prejudice.

16. We find that for the aforesaid reasons the present appeals also deserve to be allowed.

17. In the result, we pass the following order.

(i) Criminal Appeal arising out of Special Leave Petition (Criminal) No.1415 of 2024 is allowed.

(ii) The impugned order dated 4th July 2023 passed by the High Court of Orissa at Cuttack in CRLMC No.34 of 2022 is quashed and set aside.

(iii) Criminal Appeal arising out of Special Leave Petition (Criminal) No.1416 of 2024 is allowed.

(iv) The impugned order dated 4th July 2023 passed by the High Court of Orissa at Cuttack in CRLMC No.33 of 2022 is quashed and set aside

(v) The criminal proceedings against the appellants in T.R. No. 28 of 2002 pending in the Court of Special Judge (CBI) Bhubaneswar is also quashed and set aside.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 425 : 2024 INSC 757

Banshidhar Construction Pvt. Ltd.
v.
Bharat Coking Coal Limited & Others

(Civil Appeal No. 11005 of 2024)

04 October 2024

[Bela M. Trivedi* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Issue arose whether the respondent was justified in rejecting the technical bid of the appellant, while accepting the technical bid of the respondent no. 8-Company, and declaring it to be successful bidder, though the respondent no. 8 had not complied with the mandatory requirement of submitting the important documents relating to the qualification criteria as contained in Clause 10 of the Notice Inviting Tender-NIT.

Headnotes†

Government Contracts – Judicial Intervention – Scope of – Tender for mega project – Respondent no. 1-BCCL, a public sector undertaking floated tender – Appellant participated in the Tender, however, declared to be technically disqualified on the ground that it did not comply with the Clause 10 of NIT, as regards power of attorney for signing of bid – Respondent no. 8 Company declared successful bidder – Aggrieved, appellant filed the writ petition on the ground that the respondent no.8 had not submitted the scanned copies of the Audited balance sheets required to be submitted as per Clause 10 NIT in relation to the financial capacity, while submitting/uploading the tender documents and it was only when clarification was sought from the respondent No.8 about the shortfall of documents, the said Audited balance sheets were submitted after the technical bids were opened – High Court dismissed the writ petition, confirming the decision of the technical bid committee of the respondent rejecting the technical bid of the appellant, while accepting the technical bid of the respondent no. 8 – Challenge to:

* Author

Held: Government bodies/instrumentalities are expected to act in absolutely fair, reasonable and transparent manner, particularly in the award of contracts for Mega projects – Any element of arbitrariness or discrimination may lead to hampering of the entire project which would not be in the public interest – Court does not sit as a Court of Appeal in the matter of award of contracts and it merely reviews the manner in which the decision was made; and that the Government and its instrumentalities must have a freedom of entering into the contracts – However, the decision of the government/instrumentalities must be free from arbitrariness and must not be affected by any bias or actuated by malafides – Right to equality u/Art.14 abhors arbitrariness – Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process and that the entire bidding process is carried out in absolutely transparent manner – On facts, the power of attorney was duly executed in favour of the donee, the signatory of the documents, and was duly not arised before its submission along with other important documents required to be submitted as per the NIT by the appellant, before the last date of submission fixed by the respondent – Hence, no legal or justifiable ground to reject the technical bid of the appellant – Action of the respondent in rejecting the technical bid of the appellant on absolutely extraneous ground and accepting the technical bid of the respondent no.8 though submitted in utter non-compliance of the mandatory requirement of Clause 10 NIT, and subsequently calling upon the respondent no.8 to furnish the shortfall of documents after the opening of technical bids of the bidders, totally arbitrary and illegal – Furthermore, it cannot be said that the project being Infrastructure project and also one of the Mega projects, this Court may not interfere more particularly in view of the fact that agreement has already been entered into between the respondent and the Special Purpose Vehicle of respondent no.8 – Impugned decision of the respondent rejecting the technical bid of the appellant and further declaring the respondent no.8 as successful bidder grossly arbitrary, illegal, discriminatory and violative of Art.14, thus, set aside – Any action/process undertaken or agreement entered into pursuant to the said decision also set aside. [Paras 19-21, 29, 30]

**Banshidhar Construction Pvt. Ltd. v.
Bharat Coking Coal Limited & Others**

Case Law Cited

Sterling Computers Limited v. M/s. M & N Publications Limited and Others [1993] 1 SCR 81 **: (1993) 1 SCC 445;** *Tata Cellular v. Union of India* [1994] Supp. 2 SCR 122 **: (1994) 6 SCC 651;** *ABL International Limited and Another v. Export Credit Guarantee Corporation of India Limited and Others* **(2004) 3 SCC 553;** *Jagdish Mandal v. State of Orissa and Others* [2006] Supp. 10 SCR 606 **: (2007) 14 SCC 517;** *Mihan India Ltd. v. GMR Airports Ltd. and Others* [2022] 19 SCR 523 **: (2022) SCC Online SC 574;** *Central Coalfields Limited and Another v. SLL-SML (Joint Venture Consortium) and Others* [2016] 4 SCR 890 **: (2016) 8 SCC 622 – referred to.**

List of Acts

Power of Attorney Act, 1882.

List of Keywords

Tender; Technical bid; Successful bidder; Eligibility criteria; Government Contract; Judicial Intervention; Tender for mega project; Technically disqualified; Audited balance sheets; Submitting/uploading tender documents; Technical bid committee; Government bodies/instrumentalities; Award of contracts for Mega projects; Free from arbitrariness, bias or actuated by malafides; Government bodies; Public authorities; Contractual matters; Right to equality; Bidding process; Financial capacity; Audited Annual Reports; Power of Attorney; Opening of technical bids.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 11005 of 2024

From the Judgment and Order dated 18.07.2024 of the High Court of Jharkhand at Ranchi in WPC No. 2896 of 2024

Appearances for Parties

Ravi Shankar Prasad, Naviniti Singh, Sr. Advs., Pankaj Bhagat, Advs. for the Appellants.

Tushar Mehta, Solicitor General, Vikramjit Banerjee, A.S.G., Balbir Singh, Anupam Lal Das, Sr. Advs., Ankur Kashyap, Amit Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Bela M. Trivedi, J.

1. Leave granted.

2. The short question that falls for consideration before this Court is whether the Respondent Bharat Coking Coal Limited (BCCL) was justified in rejecting the Technical bid of the Appellant, while accepting the Technical bid of the Respondent no. 8-Company, and declaring it to be successful bidder, though the Respondent no. 8 had not complied with the mandatory requirement of submitting the important documents relating to the qualification criteria as contained in Clause 10 of the Notice Inviting Tender (NIT) dated 16.08.2023, and thereby had failed to qualify the Eligibility criteria laid down therein?

3. The Appellant-Banshidhar Construction Private Limited has assailed the Judgment and Order dated 18.07.2024 passed by the High Court of Jharkhand at Ranchi in Writ Petition (Civil) No. 2896 of 2024, whereby the High Court has dismissed the said writ petition, confirming the impugned decision dated 06.05.2024 of the Technical Bid Committee of the Respondent-BCCL rejecting the Technical bid of the Appellant.

4. The Respondent no.1-BCCL is a subsidiary of Coal India Limited and the Respondent Nos. 2-7 are the authorities/employees of the BCCL. On 16.08.2023 the Respondent no. 1 floated a Tender bearing reference No. NIT no. BCCL/CMC/MDO-RS/SIMLABAHAL/BASTACOLLA Area/2023/318 for the project to "Re-open, salvage, rehabilitate, develop, construct and operate for excavation I extraction of coal from Amalgamated East Bhuggatdih Simlabahal Coal Mine and delivery thereof to the Authority at Bastacolla Area of BCCL" on revenue sharing basis, for a period of twenty-five years. The Appellant-company vide Board Resolution dated 07.11.2023 resolved to authorise its Director Lalti Devi for the purpose of participating in the said Tender and also executed a Power of Attorney in the prescribed format in her favour. The said Power of Attorney was notarized on 14.11.2023. Accordingly, the Appellant participated in the said Tender by submitting its bid on 29.11.2023.

5. The Technical bids of the said Tender were opened on 04.12.2023 and after the evaluation of the same, the Appellant was declared to

be technically disqualified on 06.05.2024. As per the Tender Summary Reports dated 07.05.2024, the Technical bid of the Appellant was stated to have been rejected on the ground that it did not comply with the Clause 10 of NIT (Part I/Cover I other important documents (OID) Point No. 02 Appendix II (Power of Attorney for signing of bid.)

6. The Financial bids of the two technically qualified bidders were opened on 07.05.2024 and the Respondent no. 8-Company was declared to be the successful bidder. The Appellant being aggrieved by the said decision of the respondent-BCCL, had filed the Writ Petition before the High Court, which has been dismissed by the High Court vide the impugned order.

7. On 23.08.2024 the Court had issued Notices to the Respondents and the learned counsel appearing for Respondents on caveat, had orally assured the Court that they shall not proceed further with the project in question. In order to have clarity on the decision taken by the Tender Recommendation Committee of the BCCL on 06.05.2024, we had called for the original file in respect of the entire tender proceedings from the Respondents nos.1 to 7 vide the order dated 17.09.2024 and the same was produced for our perusal.

SUBMISSION BY THE LEARNED ADVOCATES: -

8. Learned Senior Advocate Mr. Ravi Shankar Prasad appearing for the Appellant vehemently submitted that the reason for rejecting the Appellant's Technical bid was grossly arbitrary and discriminatory in as much as not only the bid of Respondent No. 8 was accepted though it was not accompanied by important documents, but it was allowed to subsequently file the said documents to make up the lack of eligibility. He further submitted that the Appellant had complied with all the conditions of the NIT, however The Technical bid of the Appellant was rejected on the extraneous ground by the Technical Bid Committee of the Respondent-BCCI that the bid documents were signed on 13.11.2023, and other documents including Power of Attorney were notarized on 14.11.2023. According to him the bid documents were uploaded/filed on 29.11.2023 i.e. within the stipulated time, which complied with all the mandatory requirements of Clause 10 of the NIT. Mr. Prasad has relied upon various decisions of this Court to submit that the decision of the Government and its instrumentalities must not only be tested by the application of Wednesbury principle of reasonableness but also must be free

from arbitrariness. Invoking the Public Trust Doctrine, Mr. Prasad lastly submitted that Appellant's bid was much more competitive and favourable (Rs. 700 crores approx.) to the Respondent BCCL, and by allotting the tender to the Respondent no. 8 which even otherwise was ineligible, a commensurate loss was caused to the public through the Respondent BCCL.

9. However, the learned Solicitor General Mr. Tushar Mehta, learned senior counsel Mr. Anupam Lal Das and Mr. Vikramjit Banerjee, ASG appearing for Respondent no. 1 to 7 justifying the decision of Tender Evaluation Committee rejecting the Technical Bid of the Appellant, submitted that the Power of Attorney was dated 07.11.2023, which was notarized on 14.11.2023, whereas the mandatory bid documents were executed on 13.11.2023, which was not in consonance with clause 10 Part I/Cover 1 (OID) of NIT. According to them, the mandatory bid documents were executed on 13.11.2023, when the Executant had no authority to execute the said bid documents. A person submitting the bid was required to have a valid Power of Attorney in his favour at least on the date on which he was signing and executing the bid documents, and therefore the Appellant did not meet with the Eligibility criteria prescribed under the terms of the NIT. They further submitted that during the course of evaluation the Respondent BCCL could seek shortfall documents from the Bidders, but could not permit them to replace the bid documents. So far as Respondent no.8-Company was concerned, the Tender Committee had sought clarification on 09.04.2024 regarding the Audited Annual Reports, which approach and methodology of the Committee was consistent with the other bidders also who were similarly situated as the Respondent no. 8. The learned Counsels also submitted that as per the settled legal position the project being infrastructure project and of national importance, and the scope of judicial review in the matter of award of Contracts being very limited, the Court may not interface with the same, even if the Court finds that there was total arbitrariness or that the tender was granted in a *malafide* manner. The ld. Counsels have relied upon catena of decisions to buttress their submissions, which shall be dealt with hereinafter as may be necessary.

10. The learned senior counsel Mr. Balbir Singh appearing for Respondent no. 8 while adopting the submissions made on behalf of Respondent nos. 1 to 7 submitted that the Respondent no. 8 was declared as

successful bidder on 10.06.2024 and thereafter the Respondent no.1-BCCL and M/s. Simlabahal Coal Mines Private Limited (a Special Purpose Vehicle constituted by the respondent no. 8-company) have also entered into a Coal Mining Agreement dated 27.06.2024. He further submitted that there was no pleading of *malafide* raised in the Appeal by the Appellant and as per the settled legal position, the Courts should not use magnifying glass while scanning the decision-making process of the authorities to make small mistake to appear like a big blunder.

ANALYSIS: -

11. The undisputed facts as discernible from the pleadings and the documents on record and from the submissions made by the learned Counsels for the parties are that the Notice Inviting Tender for the project in question was issued by the Respondent BCCL on 16.08.2023, in response to which, the Appellant and the Respondent No.8 had submitted their respective bid documents. The Appellant Company vide the Board Resolution dated 07.11.2023 had authorised its Director Lalti Devi for the purpose of participating in the tender and a Power Of Attorney dated 07.11.2023 was executed in her favour. The said Power Of Attorney was notarised before the Notary on 14.11.2023. It is also not disputed that the Appellant submitted/ uploaded the bid documents on 29.11.2023, that is before the last date of submission, 01.12.2023. It is also not disputed that the Technical bids were opened on 04.12.2023 and the Appellant was declared technically disqualified on 06.05.2024. The extract of Tender Summary Report dated 07.05.2024 stated in the Column 'Remarks' that the Appellant 'Did not comply with Clause No. 10 of NIT (Part I/ Cover I Other Important Documents (OID) Point No. 02 Appendix II (Power of attorney for signing of bid)."

12. It is also not disputed that the Respondent No.8 had not submitted the scanned copies of the Audited balance sheets required to be submitted as per Clause 10 of the NIT in relation to the financial capacity, while submitting/ uploading the tender documents and that it was only when a clarification was sought from the Respondent No.8 about the shortfall of documents, the said Audited balance sheets were submitted on 17.04.2024, after the Technical bids were opened on 04.12.2023. It is further not disputed that the Financial bids of the eligible two technically qualified bidders were opened on

07.05.2024 and the Respondent No.8 Company was found to be the successful bidder.

13. In the instant case the entire controversy centres around the interpretation of the Clause 10 of the NIT dated 16.08.2023, hence the same is reproduced for the sake of convenience.

> **"10.** For substantiating the Financial Capacity, the Bidders are required to furnish the following information online:
>
> (a) Value of Net Worth (to be submitted in Indian Rupees and in the format provided at Annex III of Appendix I of RFB);
>
> (b) Value of Total Income in the last 3 (three) financial years as chosen by the Bidder (to be submitted in Indian Rupees and in the format provided at Annex III of Appendix I of RFB);
>
> (c) Membership number of the chartered accountant,[£] where applicable; and
>
> (d) Scanned copies of the documents as specified in Paragraph 10 of the NIT, in relation to the Financial Capacity.
>
> **Note:** In case the Bidder is a Consortium, the aforesaid certificates and information shall be submitted in respect of all the Members and the Financial Capacity of the Consortium will be assessed by adding the information so furnished.
>
> Bidders shall submit the information in an objective manner confirmed by the uploaded documents. The documents related to the information furnished online, based on which the auto evaluation takes place, will only be considered. If a Bidder uploads any other document, it will not be given any cognizance.
>
> A scanned copy of the following documents shall be submitted online by the Bidders in support of the

£ Any approximate equivalent of a chartered accountant may provide the relevant certificates required under this RFB. Jurisdictions which do not have a license/ certification/ membership requirement for accountants to describe themselves or to practice as chartered accountants (or any approximate equivalent), any qualified accountant may provide the certificates required under this RFB.

information/declaration furnished by the Bidder at the time of submission of their Bids:

Sl. No.	**Submission of documents related to qualification criteria**	**Scanned copy of documents (self-certified and notarized/certified®) to be uploaded by Bidders in support of information/ declaration furnished online by the Bidder against each qualification criteria (CONFIRMATORY DOCUMENT)**
1.	Bidder's Covering Letter and acceptance of bid conditions	Copy of the Bidder's Covering Letter, acceptance of the Bid conditions and making commitments on the Bidder's letter head as per proforma (provided at Appendix I of RFB) **Note: In case the Bidder is a Consortium, the above documents are to be signed by all the Members.**
2.	Financial Capacity	i) Certificate having UDIN number specifying the Net Worth of the Bidder as at the close of the latest financial year among the 3 (three) financial years as chosen by the Bidder, from a chartered accountant based on the financial statements audited by statutory auditor∞ exhibiting the information submitted by the Bidder and confirming that the methodology adopted for calculating the Net Worth conforms to the provisions of the Bidding Documents; ii) Certificate having UDIN number specifying the average Total Income of the Bidder during the last 3 (three) financial years, as chosen by the Bidder, from a chartered accountant based on the financial statements audited by statutory auditor∞ exhibiting the information submitted by the Bidder online and also specifying the methodology adopted for calculating the average Total Income;

® For a power of attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the power of attorney is being issued. However, the power of attorney provided by Bidders/ Members from countries that have signed the Hague Convention, 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate.

∞ In jurisdictions that do not have statutory auditors, the firm of auditors which audits the annual accounts of the Bidder may provide the certificates required under this RFB.

		iii) Audited annual reports of the Bidder for the last 3 (three) financial years, as chosen by the Bidder, comprising of the audited balance sheets and profit and loss accounts of the Bidder. iv) A duly filled in Annex III (provided at Appendix I of RFB). **Notes:** **i. For the purpose of Financial Capacity, the Bidder can choose any 3 (three) financial years from the 4 (four) immediately completed consecutive financial years as on the date of invitation of Bids. However, the 3 (three) financial years chosen by the Bidder shall be the same for each Member (in case of Consortium) and the Associate(s), whose Financial Capacity is furnished and relied upon by the Bidder.** **ii. In case the Bidder is a Consortium, the above documents are to be submitted in respect of all the Members.** **iii. The Bidder shall submit the documents reflecting the Net Worth of the Associate(s) whose Technical Capacity and/or Financial Capacity is furnished and relied upon.**
3.	Integrity pact	Duly signed and witnessed integrity pact as per proforma provided at Appendix VIII of RFB. **Note: In case the Bidder is a Consortium, the integrity pact is to be signed by all the Members.**
4.	Authorization for Digital Signature Certificate **("DSC")**	a) If the Bidder itself is the DSC holder bidding online, then self-declaration of the Bidder to this effect; or b) If the DSC holder is bidding online on behalf of the bidder then the power of attorney[β] granted by the Bidder, evidencing authorization granted to the DSC holder to submit the Bid on behalf of the Bidder.

5.	Undertaking in Support of the authenticity of submitted information and documents and other commitments	An undertaking is to be given by the Bidder as per the format given at Enclosure I of this NIT, confirming the genuineness of the information furnished online, authenticity of scanned copy of documents uploaded and such other declarations. Note: In case the Bidder is a Consortium, the undertaking is to be signed by all the Members. (Original undertaking shall be submitted as per the provisions of NIT)
6. Any other document to support the qualification information as submitted by the Bidder online.		
Note: Only one file in .pdf format can be uploaded against each qualification criteria. Any additional/ other relevant documents to support the information/declaration furnished by Bidder online against qualification criteria may also be added by the Bidder in the same file (in .pdf format) to be uploaded against respective qualification criteria.		

Part-1/Cover-1-Other Important Documents ("OID")

Sl. No.	Criteria	Scanned copy of documents (self-certified and notarized/ certified®) to be uploaded by Bidder in support of information/ declaration furnished online by the Bidder against each criteria (CONFIRMATORY DOCUMENT)
1.	Legal status of the Bidder	Documents to be submitted as applicable: 1. Affidavit or any other document to prove the proprietorship/ individual status of the Bidder (applicable only where the Bidder is an individual or sole proprietor); 2. Partnership deed/ agreement containing name of partners and Certificate of Incorporation (applicable only where the Bidder is a partnership firm or a limited liability partnership); 3. Memorandum and Articles of Association with certificate of incorporation containing name of Bidder or any similar charter/ constitutional documents (applicable where the Bidder is a company); 4. Appropriate documents as applicable for any other Bidder not mentioned above. 5. Annex I (Appendix I of RFB) duly filled in and uploaded

		6.In case of Consortium: (i) Details of all Member(s) as at 1/2/3 (as applicable) above, (ii) Joint Bidding Agreement as per format provided at Appendix IV of RFB: (iii) Annex I (Appendix I of RFB) duly filled in and uploaded; (iv) Annex IV (Appendix I of RFB) duly filled in and uploaded 7.An undertaking in the format given in Enclosure-III with respect to the ultimate beneficial ownership of the Bidder/Members, in light of the General Financial Rules, 2017 read with the OM No. F. No. 6/18/2019- PPD dated 23rd July 2020 the Consolidated FDI Policy (effective from 15th October 2020) and the Press Note No. 3 (2020 Series) dated 17th April 2020 issued by the Department for Promotion of Industry and Internal Trade (FDI Policy Section), Ministry of Commerce and Industry, Government of India, each as amended or supplemented from time to time. 8. GST registration certificate.
2.	Power of attorney[β]	As per the format annexed as Appendix II (as applicable) and Appendix III (in case the Bidder is a Consortium)
3.	Mandate Form for Electronic Fund Transfer	Copy of mandate form duly filled in as per proforma provided at Enclosure II of this NIT
4.	**Any other document to support the qualification information as submitted by the Bidder online.**	

14. It is pertinent to note that the Request For Bid (RFB) annexed to the NIT, contained "Instructions to Bidders" in Section II thereof. The Clause 2.1.6 of the said Instructions stated that non-compliance with any of the bidding instructions may lead to rejection of the Bid. Further, Clause 2.2.5 thereof specifically stated that the Bidder shall furnish the requisite documents listed in Paragraphs 9 and Paragraphs 10 of NIT.

15. From the bare perusal of the afore stated Clause 10, it clearly transpires that the Bidders were required to furnish the information and the scanned copies of the documents relating to qualification criteria particularly to substantiate their Financial capacity. For the purpose of substantiating Financial Capacity, the Bidders were obliged to submit the scanned copies (self-certified and notarised/ certified) of the Audited Annual Reports for the last three financial years as chosen by the Bidder, comprising of the audited balance sheets and profit and loss accounts of the Bidder, along with other documents as stated therein. This was the mandatory requirement of the NIT, the same being related to the qualification criteria as also transpiring from Clause 2.2.5 of the RFB.

16. Admittedly, the Respondent No.8 had not submitted the scanned copies of its audited Annual Reports for the last three financial years, at the time of submitting/uploading the bid documents, before the last date fixed i.e 01.12.2023 and the same were submitted on 17.04.2024 only when the clarification was sought from the Respondent No.8, after the Technical bids were opened on 04.12.2023.

17. When the Technical bid of the Appellant was rejected by the Respondents on 06.05.2024 on the ground that it did not comply with the Clause 10 of the NIT namely Part I/ Cover I Other Important Documents (OID) Point No. 02 Appendix II (Power of attorney for signing of bid), there was no justification on the part of the Respondent authorities for accepting the Technical bid of the Respondent No.8, which clearly was not in compliance with the same mandatory Clause 10 of NIT. The Respondent BCCL has miserably failed to justify as to how the Technical bid of the Respondent no.8 was accepted when it had not submitted the requisite important documents related to the qualification criteria as mentioned in Clause 10 of the NIT.

18. A lame submission was made on behalf of the Respondent BCCL that the Tender Evaluation Committee could call for the shortfall of documents and could not allow replacement of the documents, and that the Respondent no.8 was asked to submit the shortfall documents only. We are neither impressed nor can accept the said submissions. Further, apart from the fact that the Technical bid of the Respondent no.8 deserved to be rejected at the threshold for non-compliance of Clause 10 of NIT, there was also no legal and justifiable reason for rejecting the Technical bid of the Appellant. Admittedly when the

tender documents were submitted by the Appellant, the Power Of Attorney authorising the concerned signatory to act on behalf of the Appellant was duly notarised. Merely because the bid documents were signed on 13.11.2023 by the authorized signatory Ms. Lalti Devi on the basis of the Power of Attorney executed in her favour on 07.11.2023, and the said Power Of Attorney was notarised on 14.11.2023, it could not be said that the said representative of the Appellant Company did not possess the requisite authority to submit the documents on the day when the bid documents were submitted, nor could it be said that there was any non-compliance of the mandatory requirement of the Clause 10 of the NIT as sought to be projected by the Respondent BCCL. It was nowhere stated in the NIT that the Power Of Attorney had to be notarised before signing the bid documents. As per Part-1/Cover I of Clause 10 of NIT, pertaining to the other important documents, the only requirement was to furnish the scanned copies of documents (self certified and notarised/certified) to be uploaded by the bidder in support of the information/declaration furnished online by the Bidder against each criteria, and against the criteria for Power Of Attorney, it was stated that it should be as per the format annexed. The Power Of Attorney submitted by the Appellant was as per the format and duly notarised on 14.11.2023, and all the requisite documents along with notarised POA were submitted before the last date fixed for submission.

19. It would be apposite to note that as per Section 2 of the Power Of Attorney Act, 1882, the donee of a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. In the instant case, the POA was duly executed in favour of the donee, the signatory of the documents, and was duly notarised before its submission along with other important documents required to be submitted as per the NIT by the Appellant, before the last date of submission fixed by the Respondent BCCL. Hence, there was no legal or justifiable ground to reject the Technical bid of the Appellant.

20. Thus, the said action of the Respondent BCCL in rejecting the Technical bid of the Appellant on absolutely extraneous ground and

accepting the Technical bid of the Respondent no.8 though submitted in utter non-compliance of the mandatory requirement of Clause 10 of the NIT, and subsequently calling upon the Respondent no.8 to furnish the shortfall of documents after the opening of technical bids of the Bidders, was totally arbitrary and illegal.

21. There cannot be any disagreement to the legal proposition propounded in catena of decisions of this Court relied upon by the learned counsels for the Respondents to the effect that the Court does not sit as a Court of Appeal in the matter of award of contracts and it merely reviews the manner in which the decision was made; and that the Government and its instrumentalities must have a freedom of entering into the contracts. However, it is equally well settled that the decision of the government/ its instrumentalities must be free from arbitrariness and must not be affected by any bias or actuated by *malafides.* Government bodies being public authorities are expected to uphold fairness, equality and public interest even while dealing with contractual matters. Right to equality under Article 14 abhors arbitrariness. Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process and that the entire bidding process is carried out in absolutely transparent manner.

22. At this juncture, we may reiterate the well-established tenets of law pertaining to the scope of judicial intervention in Government contracts.

23. In ***Sterling Computers Limited vs. M/s. M & N Publications Limited and Others,***[1] this Court while dealing with the scope of judicial review of award of contracts held: -

> "**18.** While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of *Chief Constable of the North Wales Police* v. *Evans* [(1982) 3 All ER 141] where it was said that: (p. 144a)

1 [1993] 1 SCR 81 : (1993) 1 SCC 445

> "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, *Chief Constable of the North Wales Police* v. *Evans* [(1982) 3 All ER 141] the courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

24. In ***Tata Cellular vs. Union of India***,[2] this Court had laid down certain priniciples for the judicial review of administrative action.

> **"94.** The principles deducible from the above are:
>
> (1) The modern trend points to judicial restraint in administrative action.
>
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
>
> (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

2 [1994] Supp. 2 SCR 122 : (1994) 6 SCC 651

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

25. It has also been held in ***ABL International Limited and Another vs. Export Credit Guarantee Corporation of India Limited and Others,***[3] as under: -

"53. From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution."

26. In ***Jagdish Mandal vs. State of Orissa and Others,***[4] this Court after discussing number of judgments laid down two tests to determine the extent of judicial interference in tender matters. They are: -

"**22.** (*i*) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision

3 (2004) 3 SCC 553

4 [2006] Supp. 10 SCR 606 : (2007) 14 SCC 517

is such that no responsible authority acting reasonably and in accordance with relevant law could have reached;"

(*ii*) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

27. In ***Mihan India Ltd. vs. GMR Airports Ltd. and Others***,[5] while observing that the government contracts granted by the government bodies must uphold fairness, equality and rule of law while dealing with the contractual matters, it was observed in Para 50 as under:-

"**50.** In view of the above, it is apparent that in government contracts, if granted by the government bodies, it is expected to uphold fairness, equality and rule of law while dealing with contractual matters. Right to equality under Article 14 of the Constitution of India abhors arbitrariness. The transparent bidding process is favoured by the Court to ensure that constitutional requirements are satisfied. It is said that the constitutional guarantee as provided under Article 14 of the Constitution of India demands the State to act in a fair and reasonable manner unless public interest demands otherwise. It is expedient that the degree of compromise of any private legitimate interest must correspond proportionately to the public interest."

28. It was sought to be submitted by the learned Counsels for the Respondents relying upon the observations made in ***Central Coalfields Limited and Another vs. SLL-SML (Joint Venture Consortium) and Others***,[6] that whether a term of NIT is essential or not is a decision taken by the employer which should be respected. However, in the said judgment also it is observed that if the employer

5 [2022] 19 SCR 523 : (2022) SCC Online SC 574

6 [2016] 4 SCR 890 : (2016) 8 SCC 622

has exercised the inherent authority to deviate from the essential term, such deviation has to be made applicable to all the bidders and potential bidders. It was observed in Para 47 and 48 as under:-

> "**47.** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216].
>
> **48.** Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court

would be taking over the function of the tender issuing authority, which it cannot."

29. The submissions made by the learned Counsels for the Respondents that the project in question being Infrastructure project and also one of the Mega projects, this Court may not interfere more particularly in view of the fact that agreement has already been entered into between the Respondent BCCL and the Special Purpose Vehicle of the Respondent no.8, cannot be accepted, when we have found that the impugned decision of the Respondent BCCL was grossly arbitrary, illegal, discriminatory and violative of Article 14 of the Constitution of India. As held earlier, the Government bodies/ instrumentalities are expected to act in absolutely fair, reasonable and transparent manner, particularly in the award of contracts for Mega projects. Any element of arbitrariness or discrimination may lead to hampering of the entire project which would not be in the public interest.

30. In that view of the matter, the impugned decision of the Respondent – BCCL dated 06.05.2024 rejecting the Technical bid of the Appellant and further declaring the Respondent no.8 as successful bidder is set aside. Any action/ process undertaken or agreement entered into pursuant to the said decision also stand set aside. It shall be open for the Respondent – BCCL to initiate fresh tender process for the Project and to process the same in question in accordance with law.

31. The Appeal is allowed accordingly.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 10 S.C.R. 445 : 2024 INSC 751

Khalsa University and Another
v.
The State of Punjab and Another

(Civil Appeal No. 10999 of 2024)

03 October 2024

[B.R. Gavai* and K.V. Viswanathan, JJ.]

Issue for Consideration

The High Court dismissed the writ petition filed by the appellants inter-alia seeking a writ in the nature of certiorari praying for quashing "The Khalsa University (Repeal) Act, 2017" dated 17th July 2017. The issues which arises for consideration are: Whether an enactment for giving out a differential treatment to a single entity is valid in law or not; whether the Impugned Act is liable to be struck down on the ground of manifest arbitrariness.

Headnotes†

Khalsa University (Repeal) Act, 2017 – Whether an enactment for giving out a differential treatment to a single entity is valid in law or not:

Held: It is a settled position of law that though a legislation affecting a single entity or a single undertaking or a single person would be permissible in law, it must be on the basis of reasonable classification having nexus with the object to be achieved – There should be a reasonable differentia on the basis of which a person, entity or undertaking is sought to be singled out from the rest of the group – Further, if a legislation affecting a single person, entity or undertaking is being enacted, there should be special circumstances requiring such an enactment – Such special circumstances should be gathered from the material taken into consideration by the competent legislature and shall include the Parliamentary/Legislative Debates – Also, wherever this Court has upheld the legislation affecting the single entity, institution or undertaking, it found that it was done in emergent and extreme circumstances preceded by enquiries, parliamentary debates, etc. – It was done when the legislature took into consideration the relevant material and found it expedient to do so – In the instant

* Author

case, the impugned Act is a single entity legislation repealing the 2016 Act by which the Khalsa University was established – The Khalsa University has specifically averred that it has been singled out by the State Government amongst 16 Universities – It has also been averred that there is absolutely no reason or justification whereby the Khalsa University could be ordered to be shut down in such a discriminatory manner – The reply filed by the respondent no.1 does not deal with the submissions made by the appellants on the ground of discrimination – No material is placed on record as to what was the compelling and emergent situation so as to enact a law which could affect the Khalsa University (appellant No.1) – No material is placed on record to show that there were any discussions prior to the Impugned Act being passed or as to what material was placed and taken into consideration by the competent legislature – Since the Khalsa University had specifically pleaded a ground regarding discrimination, it was incumbent upon the respondents to have dealt with the said challenge – Therefore, the Impugned Act singled out the Khalsa University (appellant No.1) amongst 16 private Universities in the State and no reasonable classification has been pointed out to discriminate the Khalsa University (appellant No.1) against the other private Universities – The Impugned Act therefore would be discriminatory and violative of Article 14 of the Constitution. [Paras 48, 53, 58, 59]

Khalsa University (Repeal) Act, 2017 – Constitution of India – Art.14 – Whether the Impugned Act (Khalsa University (Repeal) Act, 2017) is liable to be struck down on the ground of manifest arbitrariness:

Held: The only reasoning given in the Statement of Objects and Reasons of the Impugned Act is that the Khalsa College has, over a period of time, become a significant icon of Khalsa heritage and the University established in 2016 is likely to shadow and damage its character and pristine glory – It is to be noted that the Khalsa College which was established in 1892 is not a part of the Khalsa University – During the course of hearing, a specific statement has been made by the appellants that the Khalsa College would not be affiliated with the Khalsa University – The maps have been placed on record which show the placement of Khalsa College in the campus along with the other institutions – The perusal of the

said map would clearly reveal that it is only the Khalsa College established in 1892 which is a heritage one – All other buildings have been subsequently constructed having no resemblance with the Khalsa College building – It can thus be seen that the very foundation that Khalsa University would shadow and damage the character and pristine glory of Khalsa College which has, over a period of time, become a significant icon of Khalsa heritage is on a non-existent basis – It could thus be seen that the Impugned Act, which was enacted with a purpose which was non-existent, would fall under the ambit of manifest arbitrariness and would therefore be violative of Article 14 of the Constitution – Therefore, this Court is of the considered view that the Impugned Act is also liable to be set aside on the same ground. [Paras 64, 65]

Khalsa University (Repeal) Act, 2017 – Khalsa University Act, 2016 – Punjab Private Universities Policy, 2010 – Whether Khalsa University (Repeal) Act, 2017 is unconstitutional:

Held: Khalsa University (Repeal) Act, 2017 is struck down as being unconstitutional – The consequent direction is also issued to the effect that the Khalsa University Act, 2016 would be deemed to be in force and status quo as it obtained on 29.05.2017 would stand restored. [Para 66(iii)]

Constitution of India – Art.14 – Differential treatment to a single entity – Charanjit Lal Chowdhury v. Union of India [1950] 1 SCR 869 – discussed. [Paras 26-39]

Case Law Cited

Chiranjit Lal Chowdhuri v. Union of India **[1950] 1 SCR 869 : 1950 SCC 833 : AIR 1951 SC 41;** *D.S. Reddy v. Chancellor, Osmania University and Others* **[1967] 2 SCR 214 : 1966 INSC 259;** *S.P. Mittal v. Union of India and Others* **[1983] 1 SCR 729 : (1983) 1 SCC 51 : 1982 INSC 81;** *Shayara Bano v. Union of India and Others (Ministry of Women and Child Development Secretary and Others* **[2017] 9 SCR 797 : (2017) 9 SCC 1 : 2017 INSC 785 – followed.**

Chandan Banerjee and Others v. Krishna Prosad Ghosh and Others **[2021] 11 SCR 720 : (2022) 15 SCC 453 : 2021 INSC 516;** *State of Tamil Nadu and Another v. National South Indian River Interlinking Agriculturist Association* **[2021] 7 SCR 479 :**

(2021) 15 SCC 534 : 2021 INSC 777; *Dharam Dutt and Others v. Union of India and Others* **[2003] Supp. 6 SCR 151 : (2004) 1 SCC 712 : 2003 INSC 667;** *P. Venugopal v. Union of India* **[2008] 8 SCR 1 (2008) 5 SCC 1 : 2008 INSC 607;** *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* **[2012] 9 SCR 311 : (2012) 10 SCC 1;** *Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others* **[1981] 2 SCR 79 : (1981) 1 SCC 722 : 1980 INSC 218;** *Ram Krishna Dalmia v. Justice S.R. Tendolkar* **[1959] 1 SCR 279 : [AIR 1958 SC 538 : 1959 SCR 279];** *Raja Bira Kishore Deb v. State of Orissa* **[1964] 7 SCR 32 – referred to.**

List of Acts

Khalsa University (Repeal) Act, 2017; Khalsa University Act, 2016; Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950; The Sholapur Mill Act; Companies Act; Essential Supplies Act; Osmania University (Second Amendment) Act, 1966; Auroville (Emergency Provisions) Act, 1980; Indian Council of World Affairs Act, 2001; Societies Registration Act, 1860; All-India Institute of Medical Sciences Act, 1956; Delhi Special Police Establishment Act, 1946; Constitution of India.

List of Keywords

Khalsa University (Repeal) Act, 2017; Differential treatment; Reasonable classification; reasonable differentia; Parliamentary/ Legislative Debates; Arbitrariness; Article 14 of the Constitution; Special treatment; Discriminatory character; Equal protection; Mismanagement; Maladministration.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 10999 of 2024

From the Judgment and Order dated 01.11.2017 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 17150 of 2017

Appearances for Parties

P.S. Patwalia, Sr.Adv., Ashok K. Mahajan, Advs. for the Appellants.

Shadan Farasat, A.A.G., Siddhant Sharma, Abhishek Babbar, Ms. Sheetal Dubey, Ravinder Agarwal, Lekh Raj Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Leave granted.

2. The present appeal challenges the final judgment and order dated 1st November 2017 passed by the Division Bench of the High Court of Punjab and Haryana at Chandigarh in C.W.P. No. 17150 of 2017 (O&M), whereby the High Court dismissed the writ petition filed by the appellants *inter-alia* seeking a writ in the nature of certiorari praying for quashing "The Khalsa University (Repeal) Act 2017" dated 17th July 2017.

FACTS:

3. The facts giving rise to this appeal lie in a narrow compass.

3.1 In the year 2010, the State of Punjab framed the Punjab Private Universities Policy, 2010.[1]

3.2 The Khalsa College Charitable Society, Amritsar,[2] (appellant No.2 herein), which was in existence since 1892, submitted a proposal to the State Government for setting up a self-financing University in the State of Punjab on the basis of the 2010 Policy.

3.3 On 5th March 2011, the Higher Education Department, Government of Punjab, after examining the proposal, issued a Letter of Intent to Khalsa Society for establishing and running the Khalsa University, Amritsar.[3]

3.4 On 7th November 2016, the Punjab Vidhan Sabha passed The Khalsa University Act, 2016[4] (Punjab Act No. 44 of 2016). The 2016 Act received the assent of the Hon'ble Governor of Punjab on 7th November 2016 and the same was published in the Punjab Government Gazette Extraordinary on 17th November 2016.

1 Hereinafter referred to as the "2010 Policy"

2 Hereinafter referred to as the "Khalsa Society"

3 Hereinafter referred to as "Khalsa University"

4 Hereinafter referred to as "2016 Act"

3.5 The Khalsa University (appellant No.1 herein), after its establishment, was imparting courses in 26 programmes and 215 students were admitted for the Academic Session 2016-17.

3.6 On 18th January 2017, the Registrar of Khalsa University communicated to the Principal Secretary, Department of Higher Education, Government of Punjab, that they have enacted the Statutes of the Khalsa University in consonance with the 2010 Policy, the 2016 Act and University Grants Commission[5] guidelines.

3.7 On 6th April 2017, the Superintendent of Higher Education Department, Government of Punjab, communicated to Khalsa University that no admission process will be started till the Statues of the University are approved by the State Government. The same was reiterated by another communication dated 17th May 2017.

3.8 On 30th May 2017, the State Government promulgated an Ordinance thereby repealing the 2016 Act. Shortly thereafter, the Punjab Vidhan Sabha passed The Khalsa University (Repeal) Act 2017.[6] The Impugned Act received assent of the Hon'ble Governor on 4th July 2017 and the same was published in the Punjab Government Gazette Extraordinary on 17th July 2017.

3.9 Aggrieved by the communications dated 6th April 2017 and 17th May 2017, the promulgation of the Ordinance and passing of the Impugned Act, the Khalsa University and Khalsa Society (hereinafter referred to as "appellants") filed a Writ Petition being C.W.P. No. 17150 of 2017 (O&M) before the Punjab and Haryana High Court.

3.10 Vide final judgment and order dated 1st November 2017, the High Court *dismissed* the Writ Petition filed by the appellants. Being aggrieved thereby, the present appeal arises.

SUBMISSIONS:

4. We have heard Shri P.S. Patwalia, learned Senior Counsel appearing on behalf of the appellants and Shri Shadan Farasat, learned

5 Hereinafter referred to as "UGC"

6 Hereinafter referred to as the "Impugned Act"

Additional Advocate General (AAG) appearing on behalf of the respondents.

5. Shri Patwalia, learned Senior Counsel appearing on behalf of the appellants submits that the Impugned Act is patently arbitrary, mala fide, discriminatory and violative of Article 14 of the Constitution of India.

6. Shri Patwalia submits that the mala fides in passing of the Impugned Act are apparent inasmuch as the statements made by Captain Amarinder Singh, who at the relevant time was in the opposition, would clearly show that he was opposed to the establishment of the Khalsa University. It is submitted that Captain Amarinder Singh had made public statements that he was "touchy" about the Khalsa College, that he would not permit the ruling party to tinker with the status of the same and that, after he comes to power, he will reverse the decision. It is submitted that immediately after Captain Amarinder Singh became the Chief Minister of Punjab in 2017, an Ordinance was promulgated repealing the 2016 Act, and shortly thereafter, the said Ordinance got the imprimatur of the legislature by the passing of the Impugned Act dated 17th July 2017.

7. Shri Patwalia further submitted that the State of Punjab had come up with the 2010 Policy and under the said Policy, 16 Universities were established, however, it was only the Khalsa University which was picked up and abolished. He submitted that picking up a single University out of 16 Universities which were established as per the 2010 Policy is patently arbitrary, discriminatory and violative of Article 14 of the Constitution.

8. Shri Patwalia further submitted that the Impugned Act is passed on a non-existent factual matrix. He submitted that the Statement of Objects and Reasons[7] of the Impugned Act shows that the only reason for passing it is to "protect the heritage character of Khalsa College". He submitted that the SOR shows that the Impugned Act was passed on the basis that the Khalsa College has, over a period of time, become a significant icon of Khalsa Heritage and the Khalsa University established in 2016 was likely to shadow and damage its character and pristine glory. He submitted that the Khalsa College

7 Hereinafter referred to as "SOR"

was established in 1892 and the appellants had clearly given an undertaking that the establishment of the Khalsa University would not touch the Khalsa College. He submitted that the Khalsa Society comprises of various other establishments apart from Khalsa College and that the Khalsa University was established to provide affiliation for only three colleges namely Khalsa College of Pharmacy, Khalsa College of Education and Khalsa College for Women. He submits that all the three institutions were started after more than half a century of establishment of Khalsa College. It is submitted that Khalsa University (appellant No.1) had also planned/established various other colleges or institutions which would be affiliated to it, however, the same was to be done without in any way affecting the Khalsa College. As such, it is submitted that the reasoning given in the SOR that the Impugned Act was being passed only to protect the heritage character of Khalsa College is formed on a factually erroneous matrix.

9. Shri Patwalia further submitted that the Impugned Act was patently arbitrary, discriminatory and violative of Article 14 of the Constitution. It is submitted that the Constitution Bench of this Court in the case of ***Shayara Bano v. Union of India and Others (Ministry of Women and Child Development Secretary and Others)***[8] has held that the ground of manifest arbitrariness is also available for examining the validity of a legislation. It is submitted that if it is found that the legislative enactment is not based on an intelligible differentia, then such a classification would not be permissible and the enactment would be liable to be struck down on the ground of manifest arbitrariness.

10. Per contra, Shri Farasat, learned AAG appearing on behalf of the respondents submits that a reasonable classification having a nexus with the object to be achieved is permissible under Article 14 of the Constitution. He submits that merely because Khalsa University (appellant No.1) has been singled out as against the other Universities established under the 2010 Policy cannot be a ground for holding the Impugned Act to be invalid.

11. The learned AAG submits that there is a presumption with regard to the validity of a legislative action. He submits that the burden with

8 [2017] 9 SCR 797 : (2017) 9 SCC 1 : 2017 INSC 785

regard to invalidity is on the person who challenges it. It is submitted that the classification is based on the fact that the Khalsa College had, over a period of century, received a heritage status. The name "Khalsa" was identified with the Khalsa College. He submitted that the establishment of Khalsa University tinkered with the heritage status of Khalsa College.

12. The learned AAG further submitted that the Khalsa University and the Khalsa College have been established in the same premises and therefore there is a possibility of confusion being caused in the minds of a general observer. He further submitted that it was, over a period of time, the Khalsa College had earned a huge reputation and was playing a leading role in Punjabi socio-religious society. It is submitted that the establishment of a private University could diminish its nature. It is submitted that there was further a possibility that Khalsa Society (appellant No.2) would allocate greater attention and resources to the private university and neglect Khalsa College which has a historic value. To buttress his submissions, he relies on the judgments of this Court in the cases of ***Chandan Banerjee and Others v. Krishna Prosad Ghosh and Others***[9] and ***State of Tamil Nadu and Another v. National South Indian River Interlinking Agriculturist Association***.[10]

13. Shri Farasat further submitted that the appellants had no vested right in their status as a University. It is submitted that shortly after the 2016 Act was enacted, the Impugned Act came to be enacted. During that short period, a few students were admitted, however, the Impugned Act also took care of the said students inasmuch as the colleges where they were studying were affiliated with the other Universities. He therefore submits that there is no merit in the appeal and the appeal deserves to be dismissed.

CONSIDERATION:

14. The facts in the present case are not in dispute. The Government of Punjab, Department of Higher Education had come up with the 2010 Policy. The 2010 Policy was framed in order to attract high quality private sector investment and expertise in the realm of higher

9 [2021] 11 SCR 720 : (2022) 15 SCC 453 : 2021 INSC 516

10 [2021] 7 SCR 479 : (2021) 15 SCC 534 : 2021 INSC 777

education and provides for establishment and incorporation of private self-financed Universities in the State of Punjab. By the 2010 Policy, it was decided to permit establishment of self-financed universities which shall not receive any grant or aid from the State Government. However, it provided for laying down a rationale proposal and well-defined conditions for the establishment of such universities in order to safeguard the interest of the stakeholders, ex-students, staff members and genuine promoters.

15. In furtherance of the 2010 Policy, Khalsa Society (appellant No.2) applied to the State Government for establishing Khalsa University. The State Government vide communication dated 5th March 2011 issued Letter of Intent to the Khalsa Society on various conditions mentioned therein.

16. Subsequently, the 2016 Act came to be enacted on 7th November 2016. It will be relevant to refer to the SOR of the 2016 Act, which read thus:

"**STATEMENT OF OBJECTS AND REASONS**

As the Punjab Private Universities Policy - 2010 has been formulated to provide greater access and to ensure quality in higher education, the Government of Punjab wishes to allow the establishment of self financed private universities to supplement the efforts of the State Universities. The object of the Khalsa University is to impart comprehensive education at all levels to achieve excellence and to promote research and teaching in areas of Education, Engineering and Technology, Languages, Laws, Life Sciences and other courses under the general heads of the Arts and Humanities, Social Sciences etc.

2. As the establishment of such private self financed universities requires a broadly uniform set of guidelines for ensuring academic standards, prevention of commercialization and mismanagement etc., it deemed, therefore, expedient to provide for promulgation of 'The Khalsa University Bill- 2016."

17. Subsequent to the enactment of the 2016 Act, Khalsa University (appellant No.1) received a communication dated 15th February 2017 from the UGC informing it that, in view of its establishment, its name

has been included in the list maintained by the UGC. It was also informed to it that it was required to follow the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003.

18. It appears that thereafter there was a change of regime in the Government of Punjab. It further appears that from April, 2017 onwards, Khalsa University started receiving communications that it should not admit any more students till the Statutes of the University were approved by the State Government.

19. Thereafter on 30th May 2017, the State Government promulgated an Ordinance thereby repealing the 2016 Act. The Impugned Act came to be passed by Punjab Vidhan Sabha, which received the assent of the Hon'ble Governor on 4th July 2017 and published in the Punjab Government Gazette (Extraordinary) on 17th July 2017.

20. The SOR of the Impugned Act read thus:

"**STATEMENT OF OBJECTS AND REASONS**

The Khalsa University (Repeal) Ordinance, 2017 aims to repeal the Khalsa University Act, 2016 with a view to protect heritage character of Khalsa College, Amritsar. The Khalsa College, Amritsar has, over a period of time, become a significant icon of Khalsa Heritage and the University established in 2016 is likely to shadow and damage its character and pristine glory. Therefore, the Act ibid is proposed to be repealed."

21. The Impugned Act, which consists of three sections, reads thus:

"Be it enacted by the Legislature of the State of Punjab in the Sixty-eight year of the Republic of India as follows: -

1. (1) This Act may be called the Khalsa University (Repeal) Act, 2017.

(2) It shall be deemed to have come into force with effect from the 30th day of May, 2017.

2. The Khalsa University Act, 2016 (Punjab Act No.44 of 2016), is hereby repealed: -

Provided that admission to the affected students shall be given in other appropriate educational institutions of the

State of Punjab as per their eligibility, so that the interests of the students are not prejudicially affected.

3. The Khalsa University (Repeal) Ordinance, 2017 (Punjab Ordinance No. I of 2017), is also hereby repealed."

22. It is thus clear that by the 2016 Act under the 2010 Policy of the State Government, Khalsa University was established as one of the private universities. The Impugned Act has been enacted with the sole purpose of repealing the 2016 Act by which the Khalsa University was established. It is also clear that the Impugned Act deals with only a single entity/institution i.e. the Khalsa University.

23. At the outset, we clarify that we do not propose to go into the question with regard to the allegation of mala fides attributed to any individual involved in the passing of the Impugned Act. In fact, the former Chief Minister of Punjab Captain Amarinder Singh was arrayed as respondent No.2 in the present appeal, however, by an order dated 8th August 2018, the name of Captain Amarinder Singh was deleted. Be that as it may, for the purpose of the present appeal, we propose to examine only two questions.

24. The first question is, whether an enactment for giving out a differential treatment to a single entity is valid in law or not and secondly, whether the Impugned Act is liable to be struck down on the ground of manifest arbitrariness.

A. Whether an enactment for giving out a differential treatment to a single entity is valid in law or not?

25. For considering the first issue, we propose to examine certain landmark judgments of this Court on the issue.

26. In the case of ***Chiranjit Lal Chowdhuri v. The Union of India and Others,***[11] the Constitution Bench of this Court was faced with a situation where the Governor General of India had promulgated an Ordinance on the basis of a finding that, on account of mismanagement and neglect, a situation had arisen concerning the affairs of the Sholapur Spinning and Weaving Company Ltd.[12] which had not only prejudicially affected the production of an essential commodity but

11 [1950] 1 SCR 869 : 1950 INSC 36

12 Hereinafter referred to as "Sholapur Mill"

also had caused serious unemployment amongst a certain section of the community. On account of such an emergency, a situation had arisen which rendered it necessary to make a special provision for the proper management and administration of the Sholapur Mill. The aforesaid Ordinance was subsequently re-enacted in the form of an Act of the Legislature called the *Sholapur Spinning and Weaving Company (Emergency Provisions) Act, 1950.*[13] The net result of the Sholapur Mill Act was that the Managing Agents of the Sholapur Mill were dismissed and the Directors holding the office automatically vacated their office.

27. The Sholapur Mill Act was challenged on various grounds. One of the grounds was that since the application of the said Act was found to affect only one person, it was, therefore, plainly discriminatory in character and within the constitutional inhibition of Article 14 of the Constitution. The said ground was rejected by the Constitution Bench by a majority of 3:2.

28. One of the arguments that was made before this Court was that there would be other companies wherein similar allegations of mis-management and neglect would be available. It was sought to be argued that the provisions of the Companies Act were sufficient to deal with the said situation. However, the passing of an enactment whereby the Sholapur Mill was singled out for giving a "special treatment" was not permissible under Article 14 of the Constitution. While rejecting the said contention, Saiyid Fazl Ali, J. (one of the Judges forming part of the majority) observed thus:

> "…….The Government of India, as a matter of precaution and lest it should be said that they were going to interfere unnecessarily in the affairs of the Company and were not allowing the existing provisions of the law to take their own course, consulted other interests and placed the matter before the Standing Committee of the Industrial Advisory Council where a large number of leading industrialists of the country were present, and ultimately it was realised that this was a case where the Government could rightly and properly intervene and there would be no occasion for any criticism coming from any quarter. It appears

13 Hereinafter referred to as "Sholapur Mill Act".

from the discussion on the floor of the House that the total number of weaving and spinning mills which were closed down for one reason or the other was about 35 in number. Some of them are said to have closed for want of cotton, some due to overstocks, some for want of capital and some on account of mismanagement. **The Minister for Industry, who sponsored the Bill, in explaining what distinguished the case of Sholapur Mill from the other mills against whom there might be charges of mismanagement, made it clear in the course of the debate that "certain conditions had to be fulfilled before the Government can and should intervene", and he set out these conditions as follows:**

(1) The undertaking must relate to an industry which is of national importance. Not each and every undertaking which may have to close down can be taken charge of temporarily by the Government.

(2) The undertaking must be an economic unit. If it appears that it is completely uneconomic and cannot be managed at all, there is no sense in the Government taking charge of it. If anything, it will mean the Government will have to waste money which belongs to the taxpayer on an uneconomic unit.

(3) There must be a technical report as regards the condition of the plants, machinery, etc., which either as they stand, or after necessary repairs and reconditioning can be properly utilised.

(4) Lastly, and this is of considerable importance, there must be a proper enquiry held before the Government takes any action. The enquiry should show that managing agents have so misbehaved that they are no longer fit and proper persons to remain in charge of such an important undertaking. [*Parliamentary Debates*, Vol. III, No. 14, 31-3-1950 at pp. 2394-95]

It appears from the same proceedings that Sholapur Mill is one of the largest mills in Asia and employs 13,000 workers. Per shift, it is capable of producing 25 to 30 thousand pounds of yarn, and also one lakh yards of cloth. It was working two shifts when it was closed down on 29-8-1949. The closure of the Mill meant a loss of 25 lakhs yards of cloth and one-and-a-half lakhs pounds of yarn per month. Prior to 1947, the highest dividend paid by the Company was Rs 525 per share and the lowest Rs 100, and, in 1948, when the management was taken over by the managing agents who have been removed by the impugned Act, the accounts showed a loss of Rs 30 lakhs, while other textile companies had been able to show very substantial profits during the same period.

Another fact which is brought out in the proceedings is that the managing agents had acquired control over the majority of the shares of the Company and a large number of shareholders who were dissatisfied with the management had been rendered powerless and they could not make their voice heard. By reason of the preponderance of their strength, the managing agents made it impossible for a Controller under the Essential Supplies Act to function and they also made it difficult for the Company to run smoothly under the normal law.

It was against this background that the Act was passed, and it is evident that the facts which were placed before the legislature with regard to Sholapur Mill were of an extraordinary character, and fully justified the Company being treated as a class by itself. There were undoubtedly other mills which were open to the charge of mismanagement, but the criteria adopted by the Government which, in my opinion, cannot be said to be arbitrary or unreasonable, is not applicable to any of them. As we have seen, one of the criteria was that a mere allegation of mismanagement should not be enough and no drastic step such as is envisaged in the Act should be taken without there being a complete

enquiry. In the case of Sholapur Mill, a complete enquiry had been made and the revelations which were made as a result of such enquiry were startling."

[emphasis supplied]

29. It can thus be seen that Fazl Ali, J. found that before the Act was passed, the matter was placed before the Standing Committee of the Industrial Advisory Council where a large number of leading industrialists of the country were present. It was ultimately realized that, that was a case where the Government could rightly and properly intervene. It was further found that when the matter was discussed on the floor of the House, it emerged that there were about 35 weaving and spinning mills which were closed for one reason or the other. Some of them were closed for want of cotton, some due to overstock, some for want of capital and some on account of mismanagement. However, while singling out the Sholapur Mill, the Parliament had taken into consideration various factors. One of them was that the undertaking was related to an industry which was of national importance. It was found that the Sholapur Mill was one of the largest mills in Asia and employed 13,000 workers. Another factor was that it was an economic unit and was working in two shifts before it was closed down. It was further found that prior to 1947, the highest dividend paid by the Company was Rs. 525/- per share and the lowest was Rs. 100/-. It was further noticed that only when the management was taken over by the Managing Agents, Sholapur Mill started showing losses. It was further found that the Managing Agents had acquired the control over the majority of the shares of the Sholapur Mill and a large number of shareholders who were dissatisfied with the management had been rendered powerless. It was further found that, by reason of the preponderance of their strength, the managing Agents made it impossible for a Controller under the Essential Supplies Act to function. In the totality of the circumstances, the Court found that a situation of an extraordinary character had arisen which fully justified the Sholapur Mill being treated as a class by itself. It was further found that though the other companies were also open to the charge of mismanagement, however, the criterion made applicable by the Government to Sholapur Mill for singling out could not be said to be arbitrary or unreasonable. It could further be noticed that 4 reasons were given by the Government for singling out the Sholapur Mill.

30. It will also be pertinent to note the observations made by Mukherjea, J. (who again formed a part of the majority) in the said judgment, which read thus:

> "**It must be admitted that the guarantee against the denial of equal protection of the laws does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions.** As has been said by the Supreme Court of America, "equal protection of laws is a pledge of the protection of equal laws [*Yick Wo* v. *Hopkins*, 30 L Ed 220 : 118 US 356 at p. 369 (1886) : 1886 SCC OnLine US SC 188] " (L Ed p. 226), and this means "subjection to equal laws applying alike to all in the same situation [*Southern Railway Co.* v. *Greene*, 54 L Ed 536 : 216 US 400 at p. 412 (1910) : 1910 SCC OnLine US SC 59] " (L Ed p. 539). **In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. I am unable to accept the argument of Mr Chari that a legislation relating to one individual or one family or one body corporate would per se violate the guarantee of the equal protection rule. There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character [Willis : *Constitutional Law* at p. 580.] . It would be bad law: "if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations, and visits a penalty upon them which is not imposed upon others guilty of like delinquency** [*Gulf, Colorado and Santa Fe Railway Co.* v. *Ellis*, 41 L Ed 666 : 165 US 150 at 159 (1897) : 1897 SCC OnLine US SC 20] …." (L Ed p. 669 : US p. 159) The legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial

distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid [*Southern Railway Co.* v. *Greene*, 54 L Ed 536 : 216 US 400 at p. 412 (1910) : 1910 SCC OnLine US SC 59].

The question is whether judged by this test the impugned Act can be said to have contravened the provision embodied in Article 14 of the Constitution. Obviously, the Act purports to make provisions which are of a drastic character and against the general law of the land as laid down in the Indian Companies Act, in regard to the administration and management of the affairs of one Company in Indian territory. The Act itself gives no reason for the legislation but the Ordinance, which was a precursor of the Act, expressly stated why the legislation was necessary. It said that owing to mismanagement and neglect, a situation had arisen in the affairs of the Company which prejudicially affected the production of an essential commodity and caused serious unemployment amongst a certain section of the community. Mr Chari's contention in substance is that there are various textile companies in India situated in a similar manner as Sholapur Company, against which the same charges could be brought and for the control and regulation of which all the reasons that are mentioned in the Preamble to the Ordinance could be applied. Yet, it is said, the legislation has been passed with regard to this one Company alone. The argument seems plausible at first sight, but on a closer examination I do not think that I can accept it as sound. It must be conceded that the legislature has a wide discretion in determining the subject-matter of its laws. It is an accepted doctrine of the American courts and which seems to me to be well founded on principle, that the presumption is in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a transgression of constitutional principles. As was said by the Supreme Court of America in *Middleton* v. *Texas Power and Light Co.* [*Middleton* v. *Texas Power*

and Light Co., 63 L Ed 527 : 249 US 152, 157 (1919) : 1919 SCC OnLine US SC 50] : (L Ed p. 531) "… [It must be presumed] that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds." (US p. 157) **This being the position, it is for the petitioner to establish facts which would prove that the selection of this particular subject by the legislature is unreasonable and based upon arbitrary grounds. No allegations were made in the petition and no materials were placed before us to show as to whether there are other companies in India which come precisely under the same category as Sholapur Spinning and Weaving Company and the reasons for imposing control upon the latter as mentioned in the Preamble to the Ordinance are applicable to them as well.** Mr Chari argues that these are matters of common knowledge of which we should take judicial notice. I do not think that this is the correct line of approach. **It is quite true that the legislature has, in this instance, proceeded against one company only and its shareholders; but even one corporation or a group of persons can be taken as a class by itself for the purpose of legislation, provided it exhibits some exceptional features which are not possessed by others.** The courts should prima facie lean in favour of constitutionality and should support the legislation if it is possible to do so on any reasonable ground, and it is for the party who attacks the validity of the legislation to place all materials before the court which would go to show that the selection is arbitrary and unsupportable. Throwing out of vague hints that there may be other instances of similar nature is not enough for this purpose. We should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own, and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a

prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interests of the community at large. **The combination of circumstances which are present here may be of such unique character as could not be existing in any other institution.** But all these, I must say, are matters which require investigation on proper materials which we have not got before us in the present case. In these circumstances **I am constrained to hold that the present application must fail on the simple ground that the petitioner made no attempt to discharge the prima facie burden that lay upon him and did not place before us the materials upon which a proper decision on the point could be arrived at.** In my opinion, therefore, the attack on the legislation on the ground of the denial of equal protection of law cannot succeed. **We have not even before us any statement on oath by the petitioner that what has been alleged against this particular Company may be said against other companies as well. If there was any such statement, the respondents could have placed before us the whole string of events that led up to the passing of this legislation.** If we are to take judicial notice of the existence of similar other badly managed companies, we must take notice also of the facts which appear in the parliamentary proceedings in connection with this legislation which have been referred to by my learned Brother, Fazl Ali, J. in his judgment and which would go to establish **that the facts connected with this corporation are indeed exceptional and the discrimination that has been made can be supported on just and reasonable grounds.** I purposely refrain from alluding to these facts or basing my decision thereon as we had no opportunity of investigating them properly during the course of the hearing. As matters stand, no proper materials have been placed before us by either

side and as I am unable to say that the legislature cannot be supported on any reasonable ground, I think it to be extremely risky to overthrow it on mere suspicion or vague conjectures. If it is possible to imagine or think of cases of other companies where similar or identical conditions might prevail, it is also not impossible to conceive of something "peculiar" or "unusual" to this corporation which led the legislature to intervene in its affairs. As has been laid down by the Supreme Court of America, "The Legislature is free to recognise degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest [*Radice* v. *New York*, 68 L Ed 690 : 264 US 292 (1924) : 1924 SCC OnLine US SC 62] ." (L Ed p. 695). We should bear in mind that a corporation, which is engaged in production of a commodity vitally essential to the community, has a social character of its own, and it must not be regarded as the concern primarily or only of those who invest their money in it. If its possibilities are large and it had a prosperous and useful career for a long period of time and is about to collapse not for any economic reason but through sheer perversity of the controlling authority, one cannot say that the legislature has no authority to treat it as a class by itself and make special legislation applicable to it alone in the interests of the community at large. The combination of circumstances which are present here may be of such unique character as could not be existing in any other institution. But all these, I must say, are matters which require investigation on proper materials which we have not got before us in the present case. In these circumstances I am constrained to hold that the present application must fail on the simple ground that the petitioner made no attempt to discharge the prima facie burden that lay upon him and did not place before us the materials upon which a proper decision on the point could be arrived at. In my opinion, therefore, the attack on the legislation on the ground of the denial of equal protection of law cannot succeed."

[emphasis supplied]

31. It can be seen that His Lordship rejected the arguments that the legislation relating to one individual or one family or one body corporate would violate the guarantee of the equal protection rule. His Lordship further held that there can be certainly a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character. However, it would be bad law if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations, and visits a penalty upon them which is not imposed upon others guilty of like delinquency. The contention of the appellants therein as recorded by His Lordship was that there were various textile companies in India situated in a similar manner as the Sholapur Mill, but the legislation was passed only with regard to one Company i.e. the Sholapur Mill. While dealing with the said contention, His Lordship observed that neither any allegations were made in the petition nor any materials were placed before the Court to show as to whether there were other companies in India which came precisely under the same category as that of Sholapur Mill. His Lordship found that the legislature can enact a law in respect of one undertaking or a group of persons by treating them as a class by itself provided it exhibits some exceptional features which are not possessed by others. His Lordship further observed that the courts should prima facie lean in favour of constitutionality and support the legislation if it is possible to do so on any reasonable ground. It has been held that it is for the party who attacks the validity of the legislation to place all materials before the court which would go to show that the selection was arbitrary and unsupportable. His Lordship specifically noticed that leave aside placing any material on record, there was not even any allegation/statement placed on record by the petitioner therein.

32. Patanjali Sastri and Das, JJ. disagreed with the majority in the said case. Sastri, J. observed thus:

> "**It is obvious that the legislation is directed solely against a particular Company and shareholders and not against any class or category of companies and no question, therefore, of reasonable legislative classification arises. If a law is made applicable to a class of persons or things and the classification is based upon differentia having a rational relation to the object sought to be attained, it can be no objection to**

its constitutional validity that its application is found to affect only one person or thing. For instance, a law may be passed imposing certain restrictions and burdens on joint stock companies with a share capital of, say, Rs 10 crores and upwards, and it may be found that there is only one such Company for the time being to which the law could be applied. If other such companies are brought into existence in future the law would apply to them also, and no discrimination would thus be involved. **But the impugned Act, which selects this particular Company and imposes upon it and its shareholders burdens and disabilities on the ground of mismanagement and neglect of duty on the part of those charged with the conduct of its undertaking, is plainly discriminatory in character and is, in my judgment, within the constitutional inhibition of Article 14.** Legislation based upon mismanagement or other misconduct as the differentia and made applicable to a specified individual or corporate body is not far removed from the notorious parliamentary procedure formerly employed in Britain of punishing individual delinquents by passing bills of attainder, and should not, I think, receive judicial encouragement.

It was next urged that the burden of proving that the impugned Act is unconstitutional lay on the petitioner, and that, inasmuch as he has failed to adduce any evidence to show that the selection of this Company and its shareholders for special treatment under the impugned Act was arbitrary, the application must fail. Whilst all reasonable presumption must undoubtedly be made in support of the constitutional validity of a law made by a competent legislature, the circumstances of the present case would seem, to my mind to exclude such presumption. **Hostile discrimination is writ large over the face of the impugned Act and it discloses no grounds for such legislative intervention.** For all that appears no compelling public interests were involved. Even the Preamble to the original Ordinance was omitted. Nor did Respondents 1 and 2 file any counter-statement in this proceeding explaining the circumstances which led to the enactment of such an

extraordinary measure. There is thus nothing in the record even by way of allegation which the petitioner need take steps to rebut. Supposing, however, that the impugned Act was passed on the same grounds as were mentioned in the Preamble to the repealed Ordinance, namely, mismanagement and neglect prejudicially affecting the production of an essential commodity and causing serious unemployment amongst a section of the community, the petitioner could hardly be expected to assume the burden of showing, not that the Company's affairs were properly managed, for that is not his case, but that there were also other companies similarly mismanaged, for that is what, according to the respondents, he should prove in order to rebut the presumption of constitutionality. In other words, he should be called upon to establish that this Company and its shareholders were arbitrarily singled out for the imposition of the statutory disabilities. How could the petitioner discharge such a burden? Was he to ask for an investigation by the Court of the affairs of other industrial concerns in India where also there were strikes and lockouts resulting in unemployment and cessation of production of essential commodities? Would those companies be willing to submit to such an investigation? And even so, how is it possible to prove that the mismanagement and neglect which is said to have prompted the legislation in regard to this Company was prevalent in the same degree in other companies? In such circumstances, to cast upon the petitioner a burden of proof which it is as needless for him to assume as it is impracticable to discharge is to lose sight of the realities of the case."

[emphasis supplied]

33. His Lordship Sastri, J. found that the enactment dealing with the single entity i.e., Sholapur Mill was plainly discriminatory in character and within the constitutional inhibition of Article 14 of the Constitution. His Lordship observed that if a law is made applicable to a class of persons or things and the classification is based upon differentia having a rational relation to the object sought to be attained, there can be no objection to its constitutional validity. In such cases, even legislation dealing with single entity would be valid.

34. While disagreeing with the majority view with regard to burden of proving that the impugned enactment was unconstitutional lay on the petitioner and that the petitioner had failed to adduce any evidence in that regard, His Lordship observed that though all reasonable presumption must be made in support of the constitutional validity of a law made by a competent legislature, the facts and circumstances of the said case would seem to exclude such a presumption.

35. His Lordship further observed that hostile discrimination was writ large over the face of the impugned enactment and it disclosed no grounds for such legislative intervention. It was further observed that asking the petitioner therein to establish that the Sholapur Mill and its shareholders were arbitrarily singled out for imposition of statutory disabilities cast upon the petitioner a burden of proof which was needless for him to assume and impracticable to discharge and was to lose sight of the realities of the case.

36. Das, J., while giving separate dissenting opinion, observed thus:

> "..... But if mismanagement affecting production and resulting in unemployment is to be the basis of a classification for making a law for preventing mismanagement and securing production and employment, the law must embrace within its ambit all companies which now are or may hereafter become subject to the vice. This basis of classification by its very nature cannot be exclusively applicable to any particular company and its shareholders but is capable of wider application and, therefore, the law founded on that basis must also be wide enough so as to be capable of being applicable to whoever may happen at any time to fall within that classification. Mismanagement affecting production can never be reserved as a special attribute peculiar to a particular company or the shareholders of a particular company. **If it were permissible for the legislature to single out an individual or class and to punish him or it for some delinquency which may equally be found in other individuals or classes and to leave out the other individuals or classes from the ambit of the law the prohibition of the denial of equal protection of the laws would only be a meaningless and barren**

form of words. The argument that the presumption being in favour of the legislature, the onus is on the petitioner to show there are other individuals or companies equally guilty of mismanagement prejudicially affecting the production of an essential commodity and causing serious unemployment amongst a certain section of the community does not, in such circumstances, arise, for the simple reason that here there has been no classification at all and, in any case, the basis of classification by its very nature is much wider and cannot, in its application, be limited only to this Company and its shareholders and, that being so, there is no reason to throw on the petitioner the almost impossible burden of proving that there are other companies which are in fact precisely and in all particulars similarly situated. In any event, the petitioner, in my opinion, may well claim to have discharged the onus of showing that this Company and its shareholders have been singled out for discriminating treatment by showing that the Act, on the face of it, has adopted a basis of classification which, by its very nature, cannot be exclusively applicable to this Company and its shareholders but which may be equally applicable to other companies and their shareholders and has penalised this particular Company and its shareholders, leaving out other companies and their shareholders who may be equally guilty of the alleged vice of mismanagement and neglect of the type referred to in the preambles. In my opinion the legislation in question infringes the fundamental rights of the petitioner and offends against Article 14 of our Constitution."

[emphasis supplied]

37. It can be seen that His Lordship observed that if the mismanagement affecting production and resulting in unemployment is to be the basis of a classification for making a law for preventing mismanagement and securing production and employment, then the law must embrace within its ambit all companies which now are or may hereafter become subject to the vice. His Lordship held that the basis of classification by its very nature cannot be exclusively applicable to any particular company and its shareholders but was capable of wider application

and, therefore, the law founded on that basis must also be wide enough so as to be capable of being applicable to whoever may happen at any time to fall within that classification. His Lordship observed that the basis of classification by its very nature was much wider and that there would be no classification at all and, therefore, there was no reason to throw on the petitioner the almost impossible burden of proving that there were other companies which were in fact precisely and in all particulars similarly situated. His Lordship observed that in the facts of the said case, the petitioner could very well claim to have discharged the onus of showing that the Company and its shareholders had been singled out for discriminating treatment, by showing that the Act, on the face of it, had adopted a basis of classification which, by its very nature, could not have been exclusively applicable to the Company and its shareholders, but which could also be equally applicable to the other companies and their shareholders.

38. It can thus be seen that though there appears to be disagreement on other aspects but all the opinions unanimously hold that even a legislation dealing with a single entity or an undertaking would be permissible in law, if it is based on a reasonable classification having nexus with the object to be achieved. The classification should be such wherein an entity or an undertaking to whom a special treatment is provided can be singled out on the basis of some reasonable classification from the others in the same class.

39. However, there appears to be disagreement with regard to the discharge of burden. Whereas the majority is of the view that there is a presumption with regard to validity of the enactment and that the burden is on the person who challenges the validity thereof, the minority holds that in such cases wherein an entity has been singled out, then once the petitioner points out that he has been singled out from a class similarly circumstanced, the same should be taken as having discharged the burden. It has been held by the minority that asking the petitioner to discharge the burden by placing the evidence in such cases would be asking him to do an impossibility. However, even from the majority view, it appears that in the facts and circumstances of the said case, the majority found that quite apart the petitioner placing any material on record to discharge the burden, there was not even a single statement on affidavit with regard to discrimination.

40. In the case of ***D.S. Reddy v. Chancellor, Osmania University and Others***,[14] the Constitution Bench of this Court was considering the constitutional validity of Section 5 of the Osmania University (Second Amendment) Act, 1966 which introduced Section 13A into the original Act. The challenge of the petitioner therein was that, by virtue of Section 13A, a differentiation was made between the appellant who was a Vice-Chancellor on the date of the commencement of the said Act and other persons who were to be appointed Vice-Chancellors thereafter. It was argued that the differentiation was without any basis and that such a classification did not have any reasonable relation to the main object of the legislation.

41. It will be relevant to refer to the observations of the Constitution Bench in the said case, which read thus:

> "There can be no controversy that Section 13-A, introduced by Section 5 of the Second Amendment Act, deals only with the appellant. In fact, the stand taken on behalf of the respondents in the counter affidavit filed before the High Court, was to the effect that the legislature had chosen to treat the Vice-Chancellor holding office at the time of the commencement of the Second Amendment Act, as a class by himself and with a view to enable the Chancellor to make fresh appointments, Section 13-A of the Act was enacted.
>
> Therefore, it is clear that Section 13-A applies only to the appellant. Though, no doubt, it has been stated, on behalf of the respondents, that similar provisions were incorporated, at about the same time, in two other Acts, relating to two other Universities viz. the Andhra University and the Sri Venkateswara University, and though this circumstance has also been taken into account by the learned Judges of the High Court, in our opinion, those provisions have no bearing in considering the attack levelled by the appellant on Section 13-A of the Act.
>
> **This is a clear case where the statute itself directs its provisions by enacting Section 13-A, against one**

14 [1967] 2 SCR 214 : 1966 INSC 259

individual viz. the appellant; and before it can be sustained as valid, this Court must be satisfied that there is a reasonable basis for grouping the appellant as a class by himself and that such reasonable basis must appear either in the statute itself or must be deducible from other surrounding circumstances according to learned Counsel for the appellant, all Vice-Chancellors of the Osmania University come under one group and can be classified only as one unit and there is absolutely no justification for grouping the appellant under one class and the Vice-Chancellors to be appointed in future under a separate class. In any event, it is also urged that the said classification has no relation or nexus to the object of the enactment.

……

In our view, the Vice-Chancellor, who is appointed under the Act, or the Vice-Chancellor who was holding that post on the date of the commencement of the Second Amendment Act, form one single group or class. Even assuming that the classification of these two types of persons as coming under two different groups can be made nevertheless, it is essential that such a classification must be founded on an intelligible differentia which distinguishes the appellant from the Vice-Chancellor appointed under the Act. We are not able to find any such intelligible differentia on the basis of which the classification can be justified.

……..

For the above reasons, we accept the contentions of the learned Counsel for the appellant, and hold that Section 5 of the Second Amendment Act (Act 11 of 1966), introducing Section 13-A in the Act, is discriminatory and violative of Article 14 of the Constitution and, as such, has to be struck down as unconstitutional. The result is that the appeal is allowed, and the appellant will be entitled to his costs in the appeal, payable by the respondents, here and in the High Court."

[emphasis supplied]

42. It can thus be seen that the Constitution Bench found that Section 13A was applied only to the appellant therein. The Court further found that the Vice-Chancellor, who was appointed under the said Act or the Vice-Chancellor who was holding that post on the date of the commencement of the Second Amendment Act, formed one single group or class. The Court found that though the classification of these two types of persons as coming under two different groups could be made, however, the same could not be made unless the classification was founded on an intelligible differentia which distinguished the appellant from the Vice-Chancellor appointed under the Act. The Court found that before upholding an enactment applicable to one individual, this Court must be satisfied that there is a reasonable basis for grouping such an individual as a class by himself and that such reasonable basis must appear either in the statute itself or must be deducible from other surrounding circumstances. The Court found that there was no such intelligible differentia on the basis of which such classification could be justified.

43. In the case of ***S.P. Mittal v. Union of India and Others***,[15] the Constitution Bench of this Court was considering the provisions of Auroville (Emergency Provisions) Act, 1980. In the said case also, an argument was advanced that a legislation singling out Sri Aurobindo Society amounted to hostile treatment. Dealing with the said argument, speaking for the majority, R.B. Misra, J. observed thus:

> "**163.** It was further contended by Mr Venugopal that if the management of the institution had been taken over by the Government on the ground of mismanagement, there could be other institutions where similar situation might be prevailing. There should have been a general legislation rather than singling out Sri Aurobindo Society for hostile treatment.
>
> **164.** The argument cannot be accepted for two reasons. Firstly, because it has not been pointed out which were the other institutions where similar situations were prevailing. Besides, there is a uniqueness with this institution inasmuch as the Government is also involved. **Even a single institution may be taken as a class. The situation**

15 [1983] 1 SCR 729 : (1983) 1 SCC 51 : 1982 INSC 81

> **prevailing in the Auroville had converted the dream of the Mother into a nightmare. There had arisen acute law and order situation in the Auroville, numerous cases were pending against various foreigners, the funds meant for the Auroville had been diverted towards other purposes and the atmosphere was getting out of hand. In the circumstances the Government intervened and promulgated the Ordinance and later on substituted it by the impugned enactment.** It cannot be said that it is violative of Article 14 on that account…..
>
> **...**.....
>
> **171.** We are afraid the argument has no substance. Obviously, there were serious irregularities in the management of the said Society as has been pointed out in the earlier part of the judgment. There has been misutilisation of funds and their diversion to other purposes. This is evident from the audit report. There was no material change in the situation on the date of the impugned Ordinance or the Act, rather the situation had grown from bad to worse and the sordid situation prevailing in the Auroville so pointed out by the parties fully justified the promulgation of the Ordinance and the passing of the enactment. Of course, each party tried to apportion the blame on the other. Whosoever be responsible, the fact remains that the prevailing situation in the Auroville was far from satisfactory. The amount donated for the construction of the cultural township Auroville and other institutions was to the tune of Rs 3 crores. It was the responsibility of the Government to see that the amount was not misutilised and the management was properly carried out. So, the basis of the argument that the facts as pointed out in the Preamble were non est is not correct."
>
> **[emphasis supplied]**

44. No doubt that the Court held that even a single institution may be taken as a class, in the facts of the said case, the Court found that from the Preamble of the impugned enactment itself, it was clear that there were serious irregularities in the management of the society. The Court found that there had arisen acute law and order situation in the

Auroville, numerous cases were pending against various foreigners, the funds meant for the Auroville had been diverted towards other purposes and the atmosphere was getting out of hand. It was found that in such circumstances, the intervention of the Government by promulgating the Ordinance and later on substituted it by the impugned enactment could not be held to be violative of Article 14 of the Constitution.

45. In the case of ***Dharam Dutt and Others v. Union of India and Others,***[16] the Court was considering the validity of Indian Council of World Affairs Act, 2001. In the said case, again a similar argument was advanced before the Division Bench of this Court. Rejecting the said argument, the Court observed thus:

> "**56.** Article 14 of the Constitution prohibits class legislation and not reasonable classification for the purpose of legislation. The requirements of the validity of legislation by reference to Article 14 of the Constitution are : that the subject-matter of legislation should be a well-defined class founded on an intelligible differentia which distinguishes that subject-matter from the others left out, and such differentia must have a rational relation with the object sought to be achieved by the legislation. The laying down of intelligible differentia does not, however, mean that the legislative classification should be scientifically perfect or logically complete.
>
> **57. We have already pointed out in an earlier part of this judgment that in the present case successive Parliamentary Committees found substance in the complaints received that an institution of national importance was suffering from mismanagement and maladministration. The Central Government acted on such findings. Circumstances warranting an emergent action satisfied the President of India, resulting in his promulgating ordinances which earlier could not culminate in legislative enactments on account of fortuitous circumstances.** At the end Parliament exercised its legislative power under Article 245 of the

16 [2003] Supp. 6 SCR 151 : (2004) 1 SCC 712 : 2003 INSC 667

Constitution read with Entries 62 and 63 of List I. The legislation cannot be said to be arbitrary or unreasonable.

58. It was further submitted that the provisions of the Societies Registration Act, 1860 were effective enough which, if invoked, could have taken care of the alleged grievances. If there was any truth or substance therein the same could have been found on enquiries being held. In our opinion, in a given set of facts and circumstances, merely because an alternative action under the Societies Registration Act, 1860 could have served the purpose, a case cannot be and is not made out for finding fault with another legislation if the same be within the legislative competence of Parliament, which it is, as will be seen hereinafter.

59. A similar submission was made and repelled in *S.P. Mittal case* [(1983) 1 SCC 51] . The contention there was that provisions in the Societies Registration Act were available to meet the situation in Auroville and that the law and order situation could be controlled by resorting to provisions of the Code of Criminal Procedure. The Constitution Bench held : (SCC p. 116, para 169)

"*169*. Whether the remedies provided under the Societies Registration Act were sufficient to meet the exigencies of the situation is not for the Court to decide but it is for the Government and if the Government thought that the conditions prevailing in the Auroville and the Society can be ameliorated not by resorting to the provisions of the Societies Registration Act but by a special enactment, that is an area of the exercise of the discretion of the Government and not of the Court."

The Constitution Bench also observed that assuming the facts brought to the notice of the legislature were wrong, it will not be open to the Court to hold the Act to be bad on that account.

60. It was then submitted that the institution ICWA was singled out and though there were several other institutions run by societies or other organizations which were in the grip

of more serious mismanagement and maladministration, they were not even touched and Parliament chose to legislate as to one institution only. This submission too holds no merit. Firstly, no other institution is named or particularized so as to be comparable with ICWA. Secondly, there can be a legislation in respect of a single institution as is clear from the language itself of Entries 62 and 63 of List I. **A single institution is capable of being treated as a class by itself for the purpose of legislation if there are special circumstances or reasons which are applicable to that institution and such legislation would not incur the wrath of Article 14.** In *S.P. Mittal* [(1983) 1 SCC 51] the impugned legislation brought with the object and purpose of taking away the management of Auroville from the Aurobindo Society and to bring it under the management of the Central Government under the provisions of the impugned Act was held to be valid. The exercise of legislative power by Parliament was sought to be justified as falling within the field of Entry 63 of List I. Their Lordships referred to several decisions wherein the constitutional validity of similar legislations was upheld. In *Ram Krishna Dalmia* v. *Justice S.R. Tendolkar* [AIR 1958 SC 538 : 1959 SCR 279] legislation relating to a single "individual", in *Raja Bira Kishore Deb* v. *State of Orissa* [AIR 1964 SC 1501 : (1964) 7 SCR 32] legislation in respect of a single "temple" and in *Charanjit Lal Chowdhury* v. *Union of India* [1950 SCC 833 : AIR 1951 SC 41 : 1950 SCR 869] a separate law enacted for one company were held not to offend Article 14 of the Constitution on the ground that there were special reasons for passing such legislation."

[emphasis supplied]

46. It can thus clearly be seen that in the said case also, the Court took note of the successive Parliamentary Committees finding substance in the complaints received that an institution of national importance was suffering from mismanagement and maladministration. It was found that the Central Government acted on such findings. It was also found that the circumstances warranted an emergent action. Relying on the case of ***S.P. Mittal*** (supra), the Court found that a single institution was capable of being treated as a class by itself

for the purpose of legislation if there were special circumstances or reasons which were applicable to that institution and in such circumstances, the legislation would not incur the wrath of Article 14 of the Constitution.

47. In the case of ***P. Venugopal v. Union of India***,[17] this Court was considering the proviso to Section 11 (1-A) of the All-India Institute of Medical Sciences Act, 1956 vide which the tenure of the petitioner therein was sought to be curtailed. Relying on the other judgments of this Court, the Court held the said proviso to Section 11 (1-A) unconstitutional and ultra vires. It was found that the facts of the said case were similar to that of ***D.S. Reddy*** (supra).

48. It is thus a settled position of law that though a legislation affecting a single entity or a single undertaking or a single person would be permissible in law, it must be on the basis of reasonable classification having nexus with the object to be achieved. There should be a reasonable differentia on the basis of which a person, entity or undertaking is sought to be singled out from the rest of the group. Further, if a legislation affecting a single person, entity or undertaking is being enacted, there should be special circumstances requiring such an enactment. Such special circumstances should be gathered from the material taken into consideration by the competent legislature and shall include the Parliamentary/Legislative Debates.

49. In the case of ***Chiranjit Lal Chowdhuri*** (supra), this Court found that the Sholapur Mill was an undertaking of national importance employing 13,000 people, it was found that till the Managing Agents took over, it was running in profits and only thereafter, it started running in losses**.** It was further found that the Managing Agents were indulging in serious mismanagement and irregularities. The Court found that before the enactment was passed, the matter was placed before the Standing Committee of the Industrial Advisory Council where a large number of leading industrialists of the country were present. It was further found that before such an enactment was passed, it was persuaded by wide-scale consultations with the stakeholders. The Court also took note of the 4 factors taken into consideration by the Government for singling out the petitioner therein from the other industries facing mismanagement. They were: (i) that the undertaking

17 [2008] 8 SCR 1 : (2008) 5 SCC 1 : 2008 INSC 607

was of national importance; (ii) the undertaking was an economic unit; (iii) the technical report showed that the condition of the plants, machinery etc., which either as they stand, or after necessary repairs and reconditioning can be properly utilized; and (iv) there was a proper enquiry held before the Government took any action. It was further found that the enquiry had shown that the Managing Agents had so mismanaged that they were no longer fit and proper persons to remain in charge of such an important undertaking.

50. Insofar as the case of ***S.P. Mittal*** (supra) is concerned, this Court found that not only there was serious mismanagement in the society but the situation had become precarious and had also led to law and order situation wherein the Government found it necessary to take emergent and extreme steps.

51. Similarly, in the case of ***Dharam Dutt*** (supra), this Court found that the Indian Council of World Affairs was an institute of national importance and the Parliamentary Committee Report found that there was mismanagement and as such, it was necessary to take an emergent action.

52. Per contra, in the case of ***D.S. Reddy*** (supra), the Court held that a legislation pertaining to a single individual which was not based on a reasonable basis for grouping one person as a class by itself and that such a classification was not founded on an intelligible differentia and as such was violative of Article 14 of the Constitution. Similarly, in the case of ***P. Venugopal*** (supra), the Court struck down a legislation which was made singly applicable to the appellant therein being violative of Article 14 of the Constitution.

53. It can thus be seen that wherever this Court has upheld the legislation affecting the single entity, institution or undertaking, it found that it was done in emergent and extreme circumstances preceded by enquiries, parliamentary debates, etc. It was done when the legislature took into consideration the relevant material and found it expedient to do so.

54. It is also settled by this Court that there will be a presumption with regard to the validity of the enactment and the burden would be on the person who challenges the same. In the case of ***Chiranjit Lal Chowdhuri*** (supra), the majority found that quite apart from not discharging the burden of hostile discrimination, the petitioners therein had not even averred with regard to such a discrimination by

a statement on affidavit. No doubt that Shastri and Das, JJ. disagreed and held that in such cases asking the petitioner to discharge the burden would be asking him to do an impossibility.

55. In the light of the aforesaid legal position, we have to examine the present case.

56. Undisputedly, the Impugned Act is a single entity legislation repealing the 2016 Act by which the Khalsa University was established. The only reasoning as could be found in the SOR of the Impugned Act is that the Khalsa College, Amritsar has, over a period of time, become a significant icon of Khalsa Heritage and the appellant was likely to shadow and damage its character and pristine glory.

57. In the writ petition filed before the High Court, the appellants have specifically placed on record their challenge on the ground of discrimination which reads thus:

> "There are 16 apart from the petitioner private Universities are operating in the State of Punjab. These are detailed as under: -
>
> (i) Shri Guru Granth Sahib World University, Fatehgarh Sahib.
>
> (ii) Chandigarh University, Chandigarh.
>
> (iii) Desh Bhagat University, Mandi Gobindgarh.
>
> (iv) RIMT University, Mandi Gobindgarh.
>
> (v) Rayat Bahara University, Mohali.
>
> (vi) Adesh Medical University, Bathinda.
>
> (vii) Akal University Bathinda.
>
> (viii) Guru Kanshi University, Bathinda.
>
> (ix) Thapar University, Patiala
>
> (x) CT University, Ludhiana .
>
> (xi) Chitkara University, Rajpura
>
> (xii) Khalsa University, Amritsar
>
> (xiii) Shri Guru Ramdas Medical University, Amritsar.

(xiv) LPU, Jalandhar.

(xv) D.A.V. Jalandhar.

(xvi) GNA University, Phagwara.

(xvii) Baba Bhag Singh University, Padhiana Sahib, Phagwara.

All the private Universities apart from the Thapar University, Lovely Professional University have been established in the past 10 years. It is only the petitioner University which is being singled out by the State Government. There is absolutely no reason or justification whereby the petitioner University can be ordered to be shut down in such a discriminatory manner.

Still further it is respectfully submitted that in the Malwa region of Punjab with population share of 52 per cent there are 22 Universities. In the Doaba region with 19 per cent population there are 7 Universities; but in the Majha region with 29 per cent population there are only 3 Universities one being the Guru Nanak Dev University, Amritsar, the second being Sri Guru Ramdas University wherein only B.D.S., M.B.B.S., M.D., M.D.S. and Nursing courses are imparted and the third being the petitioner Khalsa University which by virtue of the impugned Act today stands shut down. The action is thus violative of Article 14 of the Constitution of India as well."

58. It can thus clearly be seen that the Khalsa University has specifically averred that it has been singled out by the State Government amongst 16 Universities. It has also been averred that there is absolutely no reason or justification whereby the Khalsa University could be ordered to be shut down in such a discriminatory manner. The Khalsa University has also made specific averments with regard to discrimination inasmuch as there are more number of Universities in Malwa region and Doaba region as against the Majha region.

59. Though a detailed reply has been filed on behalf of respondent No.1 before the High Court, the reply does not deal with the submissions made by the appellants on the ground of discrimination. In any case, no material is placed on record as to what was the compelling and

emergent situation so as to enact a law which could affect the Khalsa University (appellant No.1). No material is placed on record to show that there were any discussions prior to the Impugned Act being passed or as to what material was placed and taken into consideration by the competent legislature. Even going by the law laid down by the majority in the case of ***Chiranjit Lal Chowdhuri*** (supra), since the Khalsa University had specifically pleaded a ground regarding discrimination, it was incumbent upon the respondents to have dealt with the said challenge. We therefore find that the Impugned Act singled out the Khalsa University (appellant No.1) amongst 16 private Universities in the State and no reasonable classification has been pointed out to discriminate the Khalsa University (appellant No.1) against the other private Universities. The Impugned Act therefore would be discriminatory and violative of Article 14 of the Constitution.

B. Whether the Impugned Act is liable to be struck down on the ground of manifest arbitrariness?

60. The next ground on which the Impugned Act is challenged is that the Impugned Act suffers from manifest arbitrariness. Reliance in this respect is placed on the Constitution Bench judgment of this Court in the case of ***Shayara Bano*** (supra). In the said case, R.F. Nariman, J., speaking for himself and Uday U. Lalit, J., after referring to various earlier judgments, in para 70 onwards, observed thus:

> "**95. On a reading of this judgment in *Natural Resources Allocation case* [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1] , it is clear that this Court did not read *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] as being an authority for the proposition that legislation can never be struck down as being arbitrary. Indeed the Court, after referring to all the earlier judgments, and *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] in particular, which stated that legislation can be struck down on the ground that it is "arbitrary" under Article 14, went on to conclude that "arbitrariness" when applied to legislation cannot be used loosely.** Instead, it broad based the test, stating that if a constitutional infirmity is found, Article 14 will interdict such infirmity. And a constitutional infirmity is found in Article 14

itself whenever legislation is "manifestly arbitrary" i.e. when it is not fair, not reasonable, discriminatory, not transparent, capricious, biased, with favouritism or nepotism and not in pursuit of promotion of healthy competition and equitable treatment. Positively speaking, it should conform to norms which are rational, informed with reason and guided by public interest, etc.

96. Another Constitution Bench decision in *Subramanian Swamy* v. *CBI* [*Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36] dealt with a challenge to Section 6-A of the Delhi Special Police Establishment Act, 1946. This section was ultimately struck down as being discriminatory and hence violative of Article 14. A specific reference had been made to the Constitution Bench by the reference order in *Subramanian Swamy* v. *CBI* [*Subramanian Swamy* v. *CBI*, (2005) 2 SCC 317 : 2005 SCC (L&S) 241] and after referring to several judgments including *Ajay Hasia* [*Ajay Hasia* v. *Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258], *Mardia Chemicals* [*Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311], *Malpe Vishwanath Acharya* [*Malpe Vishwanath Acharya* v. *State of Maharashtra*, (1998) 2 SCC 1] and *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709], the reference, inter alia, was as to whether arbitrariness and unreasonableness, being facets of Article 14, are or are not available as grounds to invalidate a legislation.

97. After referring to the submissions of the counsel, and several judgments on the discrimination aspect of Article 14, this Court held: (*Subramanian Swamy case* [*Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36] , SCC pp. 721-22, paras 48-49)

> "*48*. In *E.P. Royappa* [*E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165], it has been held by this Court that the basic principle which informs both Articles 14 and 16 are equality and inhibition against discrimination. This Court observed in para 85 as under: (SCC p. 38)

> '*85*. ... From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.'

Court's approach

49. Where there is challenge to the constitutional validity of a law enacted by the legislature, the Court must keep in view that there is always a presumption of constitutionality of an enactment, and a clear transgression of constitutional principles must be shown. The fundamental nature and importance of the legislative process needs to be recognised by the Court and due regard and deference must be accorded to the legislative process. Where the legislation is sought to be challenged as being unconstitutional and violative of Article 14 of the Constitution, the Court must remind itself to the principles relating to the applicability of Article 14 in relation to invalidation of legislation. The two dimensions of Article 14 in its application to legislation and rendering legislation invalid are now well recognised and these are: (*i*) discrimination, based on an impermissible or invalid classification, and (*ii*) excessive delegation of powers; conferment of uncanalised

> and unguided powers on the executive, whether in the form of delegated legislation or by way of conferment of authority to pass administrative orders—if such conferment is without any guidance, control or checks, it is violative of Article 14 of the Constitution. The Court also needs to be mindful that a legislation does not become unconstitutional merely because there is another view or because another method may be considered to be as good or even more effective, like any issue of social, or even economic policy. It is well settled that the courts do not substitute their views on what the policy is."

98. Since the Court ultimately struck down Section 6-A on the ground that it was discriminatory, it became unnecessary to pronounce on one of the questions referred to it, namely, as to whether arbitrariness could be a ground for invalidating legislation under Article 14. Indeed the Court said as much in para 98 of the judgment as under: (*Subramanian Swamy case* [*Subramanian Swamy* v. *CBI*, (2014) 8 SCC 682 : (2014) 6 SCC (Cri) 42 : (2014) 3 SCC (L&S) 36] , SCC p. 740)

> "*98*. Having considered the impugned provision contained in Section 6-A and for the reasons indicated above, we do not think that it is necessary to consider the other objections challenging the impugned provision in the context of Article 14."

99. However, in *State of Bihar* v. *Bihar Distillery Ltd.* [*State of Bihar* v. *Bihar Distillery Ltd.*, (1997) 2 SCC 453], SCC at para 22, in *State of M.P.* v. *Rakesh Kohli* [*State of M.P.* v. *Rakesh Kohli*, (2012) 6 SCC 312 : (2012) 3 SCC (Civ) 481] , SCC at paras 17 to 19, in *Rajbala* v. *State of Haryana* [*Rajbala* v. *State of Haryana*, (2016) 2 SCC 445], SCC at paras 53 to 65 and in *Binoy Viswam* v. *Union of India* [*Binoy Viswam* v. *Union of India*, (2017) 7 SCC 59] , SCC at paras 80 to 82, *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] was read as being an absolute bar to the use of "arbitrariness" as

a tool to strike down legislation under Article 14. As has been noted by us earlier in this judgment, *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] itself is per incuriam, not having noticed several judgments of Benches of equal or higher strength, its reasoning even otherwise being flawed. The judgments, following *McDowell* [*State of A.P.* v. *McDowell and Co.*, (1996) 3 SCC 709] are, therefore, no longer good law.

100. To complete the picture, it is important to note that subordinate legislation can be struck down on the ground that it is arbitrary and, therefore, violative of Article 14 of the Constitution. In *Cellular Operators Assn. of India* v. *TRAI* [*Cellular Operators Assn. of India* v. *TRAI*, (2016) 7 SCC 703] , this Court referred to earlier precedents, and held: (SCC pp. 736-37, paras 42-44)

> "*Violation of fundamental rights*
>
> *42*. We have already seen that one of the tests for challenging the constitutionality of subordinate legislation is that subordinate legislation should not be manifestly arbitrary. Also, it is settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. [See *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] , SCC at p. 689, para 75.]
>
> *43*. The test of "manifest arbitrariness" is well explained in two judgments of this Court. In *Khoday Distilleries Ltd.* v. *State of Karnataka* [*Khoday Distilleries Ltd.* v. *State of Karnataka*, (1996) 10 SCC 304] , this Court held: (SCC p. 314, para 13)
>
> > '*13*. It is next submitted before us that the amended Rules are arbitrary, unreasonable and cause undue hardship and, therefore, violate Article

14 of the Constitution. Although the protection of Article 19(1)(*g*) may not be available to the appellants, the Rules must, undoubtedly, satisfy the test of Article 14, which is a guarantee against arbitrary action. However, one must bear in mind that what is being challenged here under Article 14 is not executive action but delegated legislation. *The tests of arbitrary action which apply to executive actions do not necessarily apply to delegated legislation. In order that delegated legislation can be struck down, such legislation must be manifestly arbitrary; a law which could not be reasonably expected to emanate from an authority delegated with the law-making power*. In *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] , this Court said that a piece of subordinate legislation does not carry the same degree of immunity which is enjoyed by a statute passed by a competent legislature. *A subordinate legislation may be questioned under Article 14 on the ground that it is unreasonable; "unreasonable not in the sense of not being reasonable, but in the sense that it is manifestly arbitrary*". Drawing a comparison between the law in England and in India, the Court further observed that in England the Judges would say, "Parliament never intended the authority to make such

> rules; they are unreasonable and ultra vires". *In India, arbitrariness is not a separate ground since it will come within the embargo of Article 14 of the Constitution. But subordinate legislation must be so arbitrary that it could not be said to be in conformity with the statute or that it offends Article 14 of the Constitution*.'
>
> *44*. Also, in *Sharma Transport* v. *State of A.P.* [*Sharma Transport* v. *State of A.P.*, (2002) 2 SCC 188] , this Court held: (SCC pp. 203-04, para 25)
>
> > '*25*. … The tests of arbitrary action applicable to executive action do not necessarily apply to delegated legislation. In order to strike down a delegated legislation as arbitrary it has to be established that there is manifest arbitrariness. In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression "arbitrarily" means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone.' "
>
> (emphasis in original)

101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd.* v. *Union of India*,, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for

challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

[emphasis supplied]

61. It is to be noted that Nariman, J. wrote the judgment for himself and Lalit, J., and concurred with the judgment delivered by Kurian Joseph, J. As such, the views expressed by Nariman, J. would be part of the majority view.

62. It can thus be seen that in the said case, it was held that the test of manifest arbitrariness as laid down by this Court in various judgments would also apply to invalidate legislation as well as subordinate legislation under Article 14. It was held that manifest arbitrariness must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. It further goes on to hold that when something is done which is excessive and disproportionate, such a legislation would be manifestly arbitrary. It, in unequivocal terms, held that arbitrariness in the sense of manifest arbitrariness would apply to negate legislation under Article 14 of the Constitution. In para 95, it was observed that the case of ***Natural Resources Allocation, In re, Special Reference No. 1 of 2012***,[18] did not lay down a proposition that legislation can never be struck down as being arbitrary. This Court, after referring to all the earlier judgments including ***Ajay Hasia and Others v. Khalid Mujib Sehravardi and Others***,[19] stated that legislation can be struck down on the ground

18 [2012] 9 SCR 311 : (2012) 10 SCC 1

19 [1981] 2 SCR 79 : (1981) 1 SCC 722 : 1980 INSC 218

that it is arbitrary under Article 14 of the Constitution. However, arbitrariness when applied to legislation cannot be used loosely.

63. In touchstone of the aforesaid parameters, let us examine the Impugned Act.

64. The only reasoning given in the SOR of the Impugned Act is that the Khalsa College has, over a period of time, become a significant icon of Khalsa heritage and the University established in 2016 is likely to shadow and damage its character and pristine glory. It is to be noted that the Khalsa College which was established in 1892 is not a part of the Khalsa University. The only colleges which were affiliated with the Khalsa University are the Khalsa College of Education, Amritsar established in 1954, Khalsa College for Women, Amritsar established in 1968 and Khalsa College of Pharmacy, Amritsar established in 2009. Apart from that, the appellants have given a specific undertaking stating thus:

> "It is accordingly respectfully submitted that the majestic façade and visual appeal of the building of the Khalsa College has not been touched or adversely affected by the establishment of the Khalsa University in any way what so ever. The Khalsa University has been established by converting the pre-existing 3 colleges viz College of Pharmacy, College for Women and College of Education into departments in the Khalsa University."

65. Though it is the stand of the appellants that they were in the process of establishing new institutions for getting them affiliated with the Khalsa University, a specific undertaking was given that the Khalsa College would not be touched or adversely affected by the establishment of the Khalsa University. Even during the course of hearing, a specific statement has been made by the appellants that the Khalsa College would not be affiliated with the Khalsa University. The maps have been placed on record which show the placement of Khalsa College in the campus along with the other institutions. The perusal of the said map would clearly reveal that it is only the Khalsa College established in 1892 which is a heritage one. All other buildings have been subsequently constructed having no resemblance with the Khalsa College building. It can thus be seen that the very foundation that Khalsa University would shadow and damage the character and pristine glory of Khalsa College which has, over a

period of time, become a significant icon of Khalsa heritage is on a non-existent basis. It could thus be seen that the Impugned Act, which was enacted with a purpose which was non-existent, would fall under the ambit of manifest arbitrariness and would therefore be violative of Article 14 of the Constitution. We are therefore of the considered view that the Impugned Act is also liable to be set aside on the same ground.

66. In the result, we pass the following order:

(i) The appeal is allowed;

(ii) The impugned judgment and order dated 1st November 2017 passed by the High Court of Punjab and Haryana at Chandigarh in C.W.P. No. 17150 of 2017 (O&M) is quashed and set aside;

(iii) Writ Petition being C.W.P. No. 17150 of 2017 (O&M) is allowed and the Khalsa University (Repeal) Act, 2017 is struck down as being unconstitutional. The consequent direction is also issued to the effect that the Khalsa University Act, 2016 would be deemed to be in force and status quo as it obtained on 29th May 2017 would stand restored; and

(iv) In the facts and circumstances of the case, no order as to costs.

67. We place on record our appreciation for the valuable assistance provided by Shri P.S. Patwalia, learned Senior Counsel and Shri Shadan Farasat, Additional Advocate General for the State of Punjab.

68. Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 10 S.C.R. 493 : 2024 INSC 753

Sukanya Shantha
v.
Union of India & Ors.

(Writ Petition (C) No. 1404 of 2023)

03 October 2024

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

Issue for Consideration

Matter pertains to caste-based discrimination in the prisons in the country.

Headnotes†

Constitution of India – Arts.14, 15, 17, 21, and 23 – Prisons in India – Caste-based discrimination – Writ petition seeking directions for repeal of the offending provisions in State Prison Manuals – Petitioner's case that various State Prison Manuals sanction unconstitutional practices, violative of Arts 14, 15, 17, 21, and 23; that caste-based discrimination continues to persist in the prisons with respect to division of manual labour; segregation of barracks; and provisions discriminate against prisoners belonging to denotified tribes and "habitual offenders"; that the Model Prison Manual, 2016 does not address the impugned provisions related to caste discrimination; and sought direction to the Home Departments of the States to clarify the definition of "Habitual Offenders" in their respective Prison Manuals so as to prevent its misuse against the denotified tribes in prisons:

Held: Impugned provisions are unconstitutional for being violative of Arts.14, 15, 17, 21, and 23 – In accordance with the instant judgment, all States and Union Territories to revise their Prison Manuals/Rules within the stipulated period; that Union government to make necessary changes, to address caste-based discrimination in the Model Prison Manual 2016 and the Model Prisons and Correctional Services Act 2023; that references to "habitual offenders" in the prison manuals/Model Prison Manual to be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislatures; that all other

* Author

references or definitions of "habitual offenders" in the impugned prison manuals/rules unconstitutional; that the "caste" column and any references to caste in undertrial and/or convicts' prisoners' registers inside the prisons to be deleted; that the Police to follow the guidelines issued in Arnesh Kumar's case and Amanatullah Khan's case to ensure that members of Denotified Tribes are not subjected to arbitrary arrest; that this Court to take suo motu cognizance of the discrimination inside prisons; that all States and the Union government to file a compliance report on this judgment, on the first hearing of the suo motu petition; and that NALSA to file joint status report after compiling reports of inspection conducted by DLSAs and Board of Visitors and of SLSAs before this Court. [Paras 161-231]

Prisons – Prison Manuals – Plea that Prison Manuals cast disparate burdens on prisoners based on their caste-identity, if violative of Art.14 – Caste, if an intelligible and rational principle of classification and has a rational nexus with the object of the classification:

Held: Caste can be an intelligible principle of classification as it has been used to create protective policies for the marginalized castes – Constitution recognises caste as a proscribed ground of discrimination u/Art.15(1), and envisions a society free from caste-prejudices – However, caste cannot be a ground to discriminate against members of marginalized castes – Any use of caste as a basis for classification must withstand judicial scrutiny to ensure it does not perpetuate discrimination against the oppressed castes – While caste-based classifications are permissible under certain constitutional provisions, they are strictly regulated to ensure they serve the purpose of promoting equality and social justice – Classification of prisoners has been considered both from the point of view of security and discipline as well as reform and rehabilitation – However, there is no nexus between classifying prisoners based on caste and securing the objectives of security or reform – Limitations on inmates that are cruel, or irrelevant to rehabilitation are per se unreasonable, arbitrary and constitutionally suspect – Differentia between inmates that distinguishes on the basis of "habit", "custom", "superior mode of living", and "natural tendency to escape", is unconstitutionally vague and indeterminate – Objective of classification for labour for treatment and for conferment of entitlements such as

remissions has to be maximisation of the reformatory potential of prisons – Such classification should be based solely on the correctional needs of the individual prisoner – Thus, Rules that discriminate among individual prisoners on the basis of their caste specifically or indirectly by referring to proxies of caste identity are violative of Art. 14 on account of invalid classification and subversion of substantive equality – Constitution of India – Arts.14, 15(1). [Paras 164-170, 196]

Prisons – Prison Manuals – Plea that provisions thereunder, discriminate against marginalized castes and act to the advantage of certain castes, by assigning cleaning and sweeping work to marginalized castes, while allowing the high castes to do cooking, which is direct discrimination u/Art.15(1):

Held: Manuals/rules suffer from indirect discrimination by using broad terms which act to the disadvantage of the marginalized castes – Phrases such as "menial" jobs to be performed by castes "accustomed to perform such duties" may appear to be facially neutral, but refer to marginalized communities, given the history of systemic discrimination against them – Such indirect usages of phrases, which target the so-called 'lower castes', cannot be permitted in the constitutional framework – Phrases, carry an embedded bias that disadvantages marginalized communities by reinforcing historical patterns of labour based on caste – These provisions disproportionately harm marginalized castes, perpetuate caste-based labour divisions and reinforce social hierarchies – Manuals/rules are also based on and reinforce stereotypes against the marginalized castes as also denotified tribes – These stereotypes not only demean and stigmatize marginalized communities and denotified tribes but also serve to maintain and legitimize a social hierarchy that goes against the constitutional values of equality – Tendency to treat members of denotified tribes as habitual to crime or having bad character reinforces a stereotype, which excludes them from meaningful participation in social life – Discrimination against denotified tribes is prohibited under the ground of "caste" in Art. 15(1), as the colonial regime considered them as belonging to separate hereditary castes – Thus, the impugned provisions violative of Art. 15 – Constitution of India – Art.15. [Paras 171-175, 196]

Prisons – Prison Manuals – Plea that provisions thereunder, "practice" of untouchability, division of work on the basis of caste, is a practice of untouchability prohibited under the Constitution:

Held: Prison manuals allot tasks of a barber to individuals from a certain caste, while sweeping work is allowed to Mehtar/Hari/ Chandal or similar castes – This is a caste-based delegation of work based on the perceptions of the caste system that certain castes are meant to do jobs of sweeping – Rule that a prisoner of a high caste be allowed to refuse the food cooked by other castes is a legal sanction by the State authorities to untouchability and the caste system – Provisions that "men of wandering tribes" or "criminal tribes" have a "strong natural tendency to escape" or are by "habit" accustomed to theft reflects a stereotype that has its basis in the colonial understanding of India's caste system – These stereotypes not only criminalize entire communities but also reinforce caste-based prejudices – They resemble a form of untouchability, as they assign certain negative traits to specific groups based on identity, perpetuating their marginalization and exclusion – Once labelled a criminal tribe, individuals from these communities faced systematic discrimination in employment, education, and social services – Provision that "non-habitual" prisoner is "by social status" and "habit of life accustomed to superior mode of living" is another caste-based construct – It is only an injustice but also reinforced existing power structures, ensuring that marginalized groups were trapped in cycles of poverty and discrimination, unable to transcend the stigmatization they faced – Thus, impugned provisions violative of Art.17 – Constitution of India – Art.17. [Paras 181, 183-184, 196]

Prisons – Prison Manuals – Right to overcome caste prejudices u/Art.21 – Provisions under Prison Manuals, fostering the antiquated notions of fitness of a particular community for a certain designated job, reinforcing occupational immobility of prisoners belonging to certain castes, if violative of Art.21:

Held: Art.21 provides for the right to overcome caste barriers as a part of the right to life of individuals from marginalized communities – Protection provided by Art.21 can be seen as a constitutional guarantee that individuals from marginalized communities should have the freedom to break free from these traditional social restrictions – It extends beyond mere survival to

ensure that they can flourish in an environment of equality, respect, and dignity, without being subjected to caste-based discrimination which stifles their personal growth – When caste prejudices manifest in institutional settings, such as prisons, they create further restrictions on the personal development and reformation of individuals from marginalized communities – When Prison Manuals restrict the reformation of prisoners from marginalized communities, they violate their right to life – When prisoners from marginalized communities are subjected to discriminatory practices based on caste, their inherent dignity is violated – Thus, the impugned provisions violative of Art.21 – Constitution of India – Art.21. [Paras 185-188, 196]

Prisons – Prison Manuals – Plea that provisions as regards caste-based division of labour/work, forced labour and violative of Art.23:

Held: Persons from specific communities performing honourable tasks, while those from marginalized communities are forced into undesirable work leads to unfair distribution of labour within the prison system – It perpetuates the idea that some individuals are inherently suited to low-status labour based solely on their birth, reinforcing deep-rooted caste inequalities – Imposing labour or work, which is considered impure or low-grade like cleaning latrines and sweeping work, upon members of marginalized communities amounts to forced labour u/Art.23 – Forced to undertake the menial tasks simply because of their caste background robs prisoners of the element of choice that other prisoners enjoy and constitutes form of coercion – Art.23 was incorporated to protect the members of oppressed castes from exploitative practices, where their labour is taken advantage of, and without any adequate return – However, prison rules, by exploiting labour of the oppressed castes, perpetuate the same injustice to guard against which Art.23 was inserted – Assigning labour based on caste background strips individuals of their liberty to engage in meaningful work, and denies them the opportunity to rise above the constraints imposed by their social identity – Thus, impugned provisions violative of Art.23 – Constitution of India – Art.23. [Paras 189, 191-196]

Prisons – Prison Manuals – Plea as regards existing discrimination and continued targeting of the members of the Denotified Tribes, and classification of "habitual offender":

Held: Classification of "habitual offender" emerged prior to repeal of the Criminal Tribes Act – After repeal several States enacted new habitual offender laws in their jurisdictions – Most States adopted an identical definition of "habitual offenders", referring to a person who has been sentenced on conviction for at least three occasion to "a substantive term of imprisonment" for any of more of the specified offences – However, in some States, they were used to refer to members belonging to criminal tribes/denotified tribes, and applying that logic, several Prison Manuals/Rules have also referred to "habitual offender" to mean members of Denotified Tribes or wandering tribes, which cannot be accepted – Whole community ought not to have either been declared criminal tribe in the past or habitual offender in the present – Classification of "habitual offender" has been used to target members of Denotified Tribes – State governments to reconsider the usage of various habitual offender laws-whether such laws are needed in a constitutional system – In the meantime, definition of "habitual offender" in the prison manuals/rules to be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislature, subject to any constitutional challenge against such legislation in the future – In case, there is no habitual offender legislation in State, references to habitual offenders directly or indirectly, struck down as unconstitutional – Union and State governments to make necessary changes in the prison manuals in line with this judgment. [Paras 213-219]

Prisons – Prison reforms – Role of Legal Service Authorities in prisons:

Held: In order to ensure that the fundamental rights of prisoners are not violated, role of legal services authorities crucial – Right to free legal aid and inspection by Legal Services Authorities including by a Board of Visitors, essential ingredient. [Paras 220, 227]

Prisons – Prison Manuals – History of "Caste" in Prison Manuals – Stated. [Paras 151-160]

Constitution of India – Nature of:

Held : It is an emancipatory document – It provides equal citizenship to all citizens of India – Constitution is not just a legal document, but gave a dignified identity to all citizens of India – It eliminated the legality of caste-based discrimination, thereby raising the human dignity of the marginalised communities – Constitution mandates

the replacement of fundamental wrongs with fundamental rights – Through its provisions, it displaced a centuries-old caste-based hierarchical social order that did not recognize the principle of individual equality – It negated the ideals of social hierarchy – Constitution is the embodiment of the aspirations of the millions of caste-oppressed communities, which hoped for a better future in independent India – Chapter on fundamental rights places the provisions on equality, non-discrimination, equality of opportunity, affirmative action, abolition of untouchability, freedom of speech and expression, right to life, and prohibition of forced labour together – Constitution thus complements the basic principles of constitutionalism with provisions designed specifically to address India's social problems – Constitution thus stands as a testament to the fight against historical injustices and for the establishment of an egalitarian social order – It aims to prevent caste-based discrimination – It empowers the State to enact appropriate legislation or take executive measures to tackle caste-based discrimination. [Paras 14, 15, 17, 23]

Constitution of India – Art. 14 – Classification under – Constitutional standards:

Held : Constitution permits classification if there is intelligible differentia and reasonable nexus with the object sought – Classification test cannot be merely applied as a mathematical formula to reach a conclusion – Challenge u/Art.14 has to take into account the substantive content of equality which mandates fair treatment of an individual – In undertaking classification, a legislation or subordinate legislation cannot be manifestly arbitrary, courts must adjudicate whether the legislature or executive acted capriciously, irrationally and/or without adequate determining principle, or did something which is excessive and disproportionate – In applying this constitutional standard, courts must identify the "real purpose" of the statute rather than the "ostensible purpose" presented by the State – Provision can be found manifestly arbitrary even if it does not make a classification – Different constitutional standards have to be applied when testing the validity of legislation as compared to subordinate legislation. [Paras 25, 34]

Constitution of India – Art. 15 – Non-Discrimination under – Interpretation:

Held: Discrimination is against citizens on any of several grounds, including "caste" prohibited, because it has several

repercussions on human lives – Discrimination arises due to a feeling of superiority/inferiority, bias, contempt, or hatred against a person or a group – Discrimination also lowers the self-esteem of the person being discriminated against – It can lead to unfair denial of opportunities and constant violence against a set of people – Discrimination can also be done by continuously ridiculing or humiliating someone, who is on the weaker side of the social spectrum – Discrimination also includes stigmatizing the identity or existence of a marginalized social group – Certain anti-discrimination principles emerge u/Art.15(1) – Discrimination can be either direct or indirect, or both – Facially neutral laws may have an adverse impact on certain social groups, that are marginalized – Stereotypes can further discrimination against a marginalized social group – State is under a positive obligation to prevent discrimination against a marginalized social group – Discriminatory laws based on stereotypes and causing harm or disadvantage against a social group, directly or indirectly, are not permissible under the constitutional scheme – Courts are required to examine the claims of indirect discrimination and systemic discrimination. [Paras 35, 36, 48]

Constitution of India – Art.17 – Ban on untouchability – Mandate of Art. 17:

Held: Art.17 provides that Untouchability is abolished and its practice in any form is forbidden – Constitution puts an end to the socially discriminatory practice of untouchability – Untouchability and caste discrimination led to severe social and economic disabilities and cultural and educational backwardness" of the untouchables – Enforcement of any disability arising out of Untouchability is a criminal offense as per the law – It is a provision that can be implemented both against the State and non-state actors such as the citizens – Moreover, the framers of the Constitution did not refer to any religion or community in the text of the provision – Injunction against untouchability u/Art.17 is further strengthened by taking away the subject-matter from State domain and placing it as an exclusive legislative head to Parliament – Art.17 enunciates that everyone is born equal – There cannot be any stigma attached to the existence, touch or presence of any person – From time to time, to implement the mandate of Art.17, Parliament has enacted several legislations which aim to provide dignity to the affected individuals. [Paras 49-51, 54]

Constitution of India – Art.21 – Right to live with dignity under:

Held: Dignity forms a part of the basic structure of the Constitution – Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence – Human dignity is a constitutional value and a constitutional goal – Human dignity is intrinsic to and inseparable from human existence – Implicit in this right u/Art.21 is the right to protection against torture or cruel, inhuman or degrading treatment – There also exists a close relationship between dignity and the quality of life – Dignity u/Art.21 is an integral aspect of life, which requires sustenance of one's being to the fullest – Right to dignity encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value – Nation must prioritize human dignity ensuring that every person, regardless of their background or identity, is able to live with respect, equality, and freedom – Thus, human dignity forms the bedrock of social justice and a just, compassionate society – Even prisoners are entitled to the right to dignity – Jurisprudence which emerges on the rights of prisoners u/Art.21 is that even the incarcerated have inherent dignity – They are to be treated humanely and without cruelty – Police officers and prison officials cannot take any disproportionate measures against prisoners – Prison system must be considerate of the physical and mental health of prisoners. [Paras 55-58, 67]

Constitution of India – Art.23 – Prohibition of forced labour and human trafficking under – Scope:

Held: Scope of Art.23 is wide, as it has left the term "begar" undefined, and supplemented by the phrase 'other similar forms' of forced labour – Framers of the Constitution consciously left the terms undefined so that future interpretation is not restrictive – Intellectual background of Art.23 lies to facilitate the citizens in exercising their fundamental rights – Exploitative socio-economic practices can hinder the right to live a dignified life – Begar or bonded labour was entrenched in India's social system, against which Art.23 makes a blow – Broad scope of Art.23 can be invoked to challenge practices where no wages are paid, non-payment of minimum wages takes place, social security measures for workers are not adopted, rehabilitation for bonded labour does not happen, and in similar unfair practices – State shall be held accountable even in cases where the violation of Art. 23 is done by private

entities or individuals – Art.23 can also be applied to situations inside prisons, if prisoners are subjected to degrading labour or other similar oppressive practices. [Paras 68, 69, 85]

Constitution of India – Constitutional interpretation – Elucidated. [Paras 6-13]

Constitution of India – Future of substantive equality and institutional discrimination – Caste Discrimination – Non-eradication of the evil of caste discrimination, despite 75 years since independence:

Held: There is a need for a national vision for justice and equality, which involves all citizens – Real and quick steps needed to identify the instances of existing inequalities and injustices in the society – Compassionate approach needed – Institutional approach needed where people from marginalized communities could share their pain and anguish about their future collectively – There is a need to reflect and do away with institutional practices, which discriminate against citizens from marginalized communities or treat them without empathy – Identification of systemic discrimination in all spaces by observing patterns of exclusion needed. [Paras 228, 229]

Criminal Tribes Act – Scope and object – Repeal of Criminal Tribes Act – Discussed. [Paras 97-113, 120-126]

Model Prison Manual 2016 – Scope and object of:

Held: Model Prison Manual 2016 was prepared "to reflect the understanding behind constitutional provisions, Supreme Court directions on prison administration – It covers a range of aspects relating to prisons, including institutional framework, custodial management, medical care, education and training of prisoners, maintenance of prisoners, emergency situations, remission, parole, premature releases and inspection of prisons, among other things – Manual of 2016 also focuses on "prison computerization, special provisions for women prisoners, after care services, rights of prisoners sentenced to death, repatriation of prisoners from abroad, and on prison correctional staff" – New chapters on legal aid and inspection of prisons also incorporated. [Para 200]

Model Prison Manual 2016 – Manual of 2016 – Certain ambiguities – Elucidation:

Held: Manual 2016 suffers from several lacunae specifically as regards its classification of "habitual offenders" and caste based discrimination – Manual mandates the classification of undertrial prisoners in three categories, wherein habitual offenders are tagged along with "Gangsters, hired Assassins, dacoits, serial killers/rapists/violent robbers, drug offenders, communal fanatics and those highly prone to escapes/ previous escapees/attack on police and other dangerous offenders/including those prone to self-harm/posing threat to public order" – Habitual offenders are tagged in the same category in relation to classification of high risk offenders and for determination of the level of security for effective surveillance – Similarly, regarding the women prisoners, it has been provided that "Habitual offenders shall be separated from casual prisoners" and that "Habitual offenders, prostitutes and brothel keepers must also be confined separately" – Phrase "habitual offender" in several prison manuals refers to people from denotified or wandering tribes – Therefore, this definition cannot be left to be interpreted and applied "in accordance with the provisions of applicable law or rules" – Secondly, Manual does not explicitly prohibit physical caste-based segregation of prisoners, except in prisons for women – Third, the Manual does not prohibit division of work on the basis of caste, except in cooking – Manual 2016 should have taken into account such practices and provided specifically for their prohibition – Fourth, Manual does not refer to the provisions of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, which prohibit manual scavenging – Said Act has a binding effect even on prisons – Fifth, caste-based privileges provided to certain prisoners are not forbidden – No special treatment shall be given to any group of persons or individuals on the basis of caste in any scenario. [Paras 201-208]

Model Prisons and Correctional Services Act, 2023 – Scope and object of – Problematic provisions:

Held: Model Act is a comprehensive document which covers all relevant aspects of prison management-security, safety, scientific and technological interventions, segregation of prisoners, special provision for women inmates, taking appropriate action against criminal activities of prisoners in the prison, grant of parole and furlough to prisoners, their education, vocational training and skill development, etc – It is for the respective State Governments to make use of the guidance provided in the Act of 2023 and

enact a suitable legislation on Prisons in their jurisdictions for bringing improvement in prison management and administration of prisoners – Model Act does not contain reference to prohibition of caste-based discrimination – Provision to that effect should be inserted in the Model Act – It should ban segregation or division of work based on caste – Definition of "Habitual Offender" u/s. 2(12) that habitual Offender means a prisoner who is committed to prison repeatedly for a crime also problematic – Phrase "committed to prison repeatedly" vague and over-broad – It can be used to declare anyone as a habitual offender, even if they have not been convicted for a crime – Model Act also provides that "habitual offenders" may be housed in a high security prison – In addition thereto the Act creates a category of "recidivist", which means "any prisoner who is convicted for a crime more than once" – "Habitual/recidivist prisoners" may be classified separately and segregated in prisons – Also, Chapter IX dealing with "Protection of Society from Criminal Activities of High-Risk Prisoners, Habitual Offenders and Hardened Criminals", seems to be over-board. [Paras 209-212]

Social Protection – Scheduled Castes, Scheduled Tribes and Denotified Tribes – Prevention of discrimination and atrocities – Jurisprudence on social protection in Post-Independence India – Stated. [Paras 127-144]

Suo motu – Suo motu cognizance – Initiation of suo motu cognizance of the discrimination inside prisons on the ground of caste, gender, disability – Case to be titled as In Re: Discrimination Inside Prisons in India. [Para 231 (vi)]

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List of Keywords

Caste-based discrimination; Prisons; State Prison Manuals; Division of manual labour; Segregation of barracks; Discrimination against prisoners belonging to denotified tribes and habitual offenders; Model Prison Manual, 2016; Discrimination in kitchens; Habitual Offenders; Denotified tribes in prisons; Model Prisons and Correctional Services Act 2023; Caste column; Caste in

undertrial and/or convicts' prisoners' registers; Guidelines issued in Arnesh Kumar's case and Amanatullah Khan's case; Marginalized castes; High castes; Direct discrimination; Untouchability; Caste prejudices; Caste based division of labour/work; Intelligible and rational principle of classification; Rational nexus; Rehabilitation; Segregating prisoners; Social hierarchy; Non-habitual prisoner; Occupational immobility of prisoners; Restriction on labour; Discrimination and continued targeting of members of Denotified Tribes; Classification of habitual offender; Role of Legal Service Authorities in Prisons; Right to free legal aid; Non-Discrimination u/Art.15; Ban on untouchability in Art. 17; Right to live with dignity; Prohibition of forced labour and human trafficking; Criminal Tribes Act; Repeal of Criminal Tribes Act; Prevention of discrimination and atrocities; Jurisprudence on social protection in Post-Independence India; Manual Scavengers; Prison management; Women inmates; Habitual/recidivist prisoners; Substantive equality and institutional discrimination; Suo motu cognizance; In Re: Discrimination Inside Prisons in India.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (C) No. 1404 of 2023

(Under Article 32 of The Constitution of India)

Appearances for Parties

Dr. S. Muralidhar, Sr. Adv., Prasanna S., Ms. Disha Wadekar, Ms. Apoorva Singh, M. A. Karthik, Maitreya Subramaniam, Ms. Pallak Bhagat, Advs. for the Petitioner.

Ms. Aishwarya Bhati, ASG, Tapesh Kumar Singh, Sr. AAG, Mani Munjal, Ashok Panigrahi, B.K. Satija, Rajat Nair, Arvind Kumar Sharma, Pradeep Misra, Daleep Dhyani, Ms. Aarohi Bhalla, Himanshu Chakravarty, Ms. Astha Sharma, Ms. Ripul Swati Kumari, Mahfooz Ahsan Nazki, Subhasish Mohanty, Vishnu Sharma, Ms. Madhusmita Bora, Pawan Kishore Singh, Dipankar Singh, Dr. Ravindra Chingale, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, D.L. Chidananda, Ishan Roy Chowdhury, Anuj Saxena, Durgesh Ramchandra Gupta, Anuj Ruhela, Shubham Sagar, Mrs. Payal Gaikwad, Prakash Sharma, Pratham Arora, Ms. Prerna Singh, Guntur Pramod Kumar, Keshav Singh, Sabarish Subramanian, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

Contents*

* Ed. Note: Pagination as per the original Judgment.

I. The Writ Petition

1. The petitioner, Sukanya Shantha, a journalist, wrote an article "From Segregation to Labour, Manu's Caste Law Governs the Indian Prison System", which was published on 10 December 2020. The article highlighted caste-based discrimination in the prisons in the country. The petitioner has sought directions for repeal of the offending provisions in State prison manuals. By an order dated 10 July 2024, judgment was reserved. We have heard a broad diversity of viewpoints from across India. Besides counsel for the petitioner and the intervenor, the Additional Solicitor General (ASG) of India appeared for the Union of India. The States of Jharkhand, Uttar Pradesh, West Bengal, Maharashtra, Orissa, Karnataka, Andhra Pradesh, and Tamil Nadu appeared through counsel.

II. Submissions

2. Dr. S. Muralidhar, Senior Advocate, appearing for the petitioner highlighted the issue of caste-based discrimination in the prisons in India. It was argued that various State prison manuals sanction blatantly unconstitutional practices, which are violative of Articles 14, 15, 17, 21, and 23 of the Constitution of India. Ms. Disha Wadekar referred to a chart of provisions from different State prison manuals/ rules to highlight various forms of discrimination in the prisons. She highlighted that caste-based discrimination continues to persist in the prisons in the country with respect to: (i) The division of manual labour; (ii) Segregation of barracks; and (iii) Provisions that discriminate against prisoners belonging to Denotified tribes and "habitual offenders". She further argued that the Model Prison Manual, 2016 does not address the impugned provisions related to caste discrimination inside prisons other than the discrimination in kitchens, and that it is not "model" when it comes to addressing caste discrimination. In the written submissions, the petitioner's side has further submitted that the Home Departments of the Respondent States may also be directed to clarify the definition of "Habitual Offenders" in their respective prison manuals so as to prevent its misuse against the denotified tribes in prisons.

3. Ms. Aishwarya Bhati, Learned ASG, submitted a written note arguing that the Ministry of Home Affairs prepared the Model Prison Manual for the Superintendence and Management of Prisons in India, 2003

and The Model Prison Manual, 2016, and circulated it to all States and Union Territories (UTs) in May 2016 explicitly prohibiting caste and religion based discrimination practices. She also referred to the Advisory dated 26 February 2024 issued by the Ministry of Home Affairs, through the Deputy Secretary (PR & ATC) to the Principal Secretary (Home/Jails) of all states and UTs and the DG/IG Prisons of all States and UTs to ensure that the State Prison Manual/Prison Act should not contain any discriminatory provisions. She further argued that "prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein" as a subject fall under the domain of the States under Entry 4, List II of the Seventh Schedule of the Constitution.

4. Ms. Ashtha Sharma, counsel for the State of West Bengal, stated that the discrimination on the basis of caste/creed/ religion as envisaged in the provisions of West Bengal Jail Code Rules, 1967 (Rules No. 741, 793, 860 and 1117) are not in force/ practice within the Correctional Homes of West Bengal since long, and that a proposal for deletion/ alteration/ amendment of the four Rules has been already sent to the appropriate authority. Mr. Anuj Saxena, counsel for the intervenor, has prayed for deletion of "caste" column and any references to caste in undertrial and/or convicts' prisoners' registers.

III. Constitutional Interpretation

5. As we deal with the present petition, we must refer to the values of the Constitution and the interpretation we must adopt. After all, the impugned provisions of the various prison manuals, highlighted in this petition, demonstrate that the values of the Constitution are at stake.

6. The Constitution reflects the vision of its founders to give India a collective future based on the values of liberty, equality, and fraternity. The Constitution mandates a more just and inclusive society, where every citizen has the opportunity to thrive. It envisages that the values embedded in its provisions are not just aspirations but lived realities. Any interpretation of the Constitution must be reflective of the blueprint laid down by its founders. The Constitution is – as Granville Austin put it— a "social document" and a "modernizing force", with its provisions embodying "humanitarian sentiments".[1]

1 Granville Austin, The Indian Constitution: Cornerstone of a Nation, Oxford University Press (1999), at pages 50, xii-xiii

7. The interpretation of the Constitution is not static. It has evolved with time to give recognition to a broader spectrum of rights to the citizens, as well as to impose additional safeguards against excesses of the State or even private entities, as the case may be. Over the last seventy-five years, the Supreme Court has recognized new rights such as the right to education,[2] the right to privacy,[3] and the right against the adverse impact of climate change,[4] among others. These rights, though not explicitly mentioned in the original text, have been interpreted as inherent to the broader principle of the right to life which the Constitution enshrines. The Constitution must serve as a robust framework for safeguarding the rights of citizens and maintaining the delicate balance between authority and individual freedom.

8. The Constitution recognizes the dignity and individual autonomy inherent in all citizens and their right to life and personal liberty. Liberty and autonomy advance the cause of human dignity.[5] Individual autonomy is the ability to make decisions on matters that impact one's life.[6] When individuals are granted the freedom to make choices about their own lives, they are empowered to take control of their destinies, and express their identities, in the "pursuit of happiness"[7] without undue interference. This freedom fosters a sense of self-worth and respect, thereby recognizing individual dignity. By safeguarding these principles, we ensure that the intrinsic worth of every human being is recognized and upheld. The right to life cannot be restricted except through a law which is "substantively and procedurally fair, just and reasonable".[8]

9. Our interpretation of the Constitution must fill the silences in its text. The framers of the Constitution could not have anticipated every situation that might arise in the future. They also intentionally

2 Unni Krishnan v. State of Andhra Pradesh (1993) 1 SCC 645

3 Justice (Retd.) K.S. Puttaswamy v. Union of India (2017) 10 SCC 1

4 K Ranjitsinh v. Union of India, 2024 INSC 280

5 Common Cause v. Union of India (2018) 4 SCALE 1

6 Justice (Retd.) K S Puttaswamy v. Union of India (2017); Common Cause v. Union of India (2018).

7 American Declaration of Independence, original transcript available at https://www.archives.gov/founding-docs/declaration-transcript

8 Shafin Jahan v. Asokan K.M. (2018) 16 SCC 368

left certain decisions to the discretion of future generations. However, the choices we make today must align with the broader constitutional framework and values. In filling the gaps, whenever they arise, our interpretation must enhance the foundational values of the Constitution such as equality, dignity, liberty, federalism and institutional accountability. Our interpretation must adhere to the postulate that "civil and political rights and socio-economic rights do not exist in a state of antagonism."[9] Our analysis must be based on a holistic reading of the provisions of the Constitution.[10]

10. The Constitution envisages that courts act as institutions which discharge the responsibility of protecting constitutionally entrenched rights. Courts are neutral institutions, whose primary function is to apply the law fairly and consistently. Transparency in processes also enhances public confidence in the system.[11] In their role as neutral institutions, courts also act as a check on the other branches of government, ensuring that their actions conform to constitutional and legal standards.

11. The Constitution mandates that laws enacted in the colonial era should align with its provisions.[12] Constitutional interpretation emphasizes the "need to reverse the philosophy of the colonial regime, which was founded on the subordination of the individual to the state".[13] The "assumptions which lay at the foundation of colonial rule have undergone a fundamental transformation for a nation of individuals governed by the Constitution".[14] By recognizing the injustices in the colonial and pre-colonial era, "we can certainly set the course for the future".[15] "In the transformation of society" against colonial and pre-colonial ideology, the Constitution "seeks to assure the values of a just, humane and compassionate existence to all her citizens".[16]

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9 Justice (Retd.) K S Puttaswamy v. Union of India (2017)

10 Maneka Gandhi v. Union of India, 1978 INSC 16

11 CPIO, Supreme Court of India v. Subhash Chandra Agarwal, 2019 (16) SCALE 40

12 Article 13(1) of the Indian Constitution provides: "All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void."

13 Kalpana Mehta v. Union of India [2018] 4 SCR 1

14 Ibid

15 Navtej Singh Johar v. Union of India, 2018 INSC 790 [Justice Chandrachud]

16 Ibid

12. Criminal laws of the colonial era continue to impact the postcolonial world. As a scholar noted, "while the pre-determined and codified nature of the diverse criminal justice rules provided the moral superiority and political legitimacy to colonial rule, the Imperial power was safeguarded by their coercive content, particularly in procedural matters." [17] Criminal laws in modern times thus, as "the strongest expression of the State's power" must "ensure that they do not deny equality before the law and the equal protection of laws".[18] Criminal laws must not endorse colonial or pre-colonial philosophy.

13. In a post-constitutional society, "the law must take affirmative steps to achieve equal protection of law to all its citizens".[19] Any discussion on the Constitution must therefore take a conscious view of the lived realities of citizens. It requires evaluating how constitutional provisions translate into meaningful outcomes in their lives. We must discuss this aspect of the Indian Constitution further, before we examine the impugned provisions.

IV. The Constitution of Emancipation, Equality, and Dignity

14. The Constitution of India is an emancipatory document. It provides equal citizenship to all citizens of India. The Constitution is not just a legal document, but in India's social structure, it is a quantum leap. In one stroke, it gave a dignified identity to all citizens of India. On 26 January 1950, the Constitution eliminated the legality of caste-based discrimination, thereby raising the human dignity of our marginalised communities.

15. Describing the vision of the framers, constitutional historian Granville Austin stated:

> "India's founding fathers and mothers established in the Constitution both the nation's ideals and the institutions and processes for achieving them. The ideals were national unity and integrity and a democratic and equitable society. The new society was to be achieved through a social-economic revolution pursued with a democratic spirit

17 B.B. Pande, "Expanding Horizons of Criminal Procedure Law", SCC Journal (2021), https://www.scconline.com/blog/post/2021/07/07/expanding-horizons-of-criminal-procedure-law/

18 Navtej Singh Johar v. Union of India, 2018 INSC 790 [Justice Chandrachud]

19 Ibid

> using constitutional, democratic institutions. I later came to think of unity, social revolution, and democracy as three strands of a seamless web. The founders believed that none of these goals was to be pursued, nor could any be achieved, separately. They were mutually dependent and had to be sought together."[20]

Marc Galanter noted in this regard:

> "Independent India embraced equality as a cardinal value against a background of elaborate, valued and clearly perceived inequalities. Her constitutional policies to offset these proceeded from an awareness of the entrenched and cumulative nature of group inequalities."[21]

The Constitution mandates the replacement of fundamental wrongs with fundamental rights.[22] Through its provisions, it displaced a centuries-old caste-based hierarchical social order "that did not recognize the principle of individual equality".[23] It negated the ideals of social hierarchy. The Constitution is the embodiment of the aspirations of the millions of caste-oppressed communities, which hoped for a better future in independent India. To summarize, the "Constitution, by its very existence, was a social revolutionary statement."[24]

16. Some of the speeches in the Constituent Assembly give expression to this vision. On behalf of the Adivasi community, Jaipal Singh Munda shared the following sentiments and expectations from the Constitution:

> "Mr. Chairman, Sir, I rise to speak on behalf of millions of unknown hordes-yet very important-of unrecognised warriors of freedom, the original people of India who have variously been known as backward tribes, primitive tribes, criminal tribes and everything else, Sir, I am proud to be a *Jungli*, that is the name by which we are known in my part of the country... Sir, if there is any group of Indian people

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20 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), p. xi

21 Marc Galanter, *Law and Society in Modern India,* Oxford University Press (1989), 2018 Reprint, p. 185

22 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), p. xii

23 Granville Austin, *Working A Democratic Constitution: The Indian Experience*, Oxford University Press (1999), p. 7

24 Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press (1966), p. xii

> that has been shabbily treated it is my people. They have been disgracefully treated, neglected for the last 6,000 years… You cannot teach democracy to the tribal people; you have to learn democratic ways from them. They are the most democratic people on earth… We want to be treated like every other Indian."[25]

H.J. Khandekar, a leader from the Dalit community, raised the plight of the so-called "criminal tribes":

> "We have been given according to this Constitution freedom of speech and freedom of movement and so on. But there is no freedom of movement for one crore of unfortunate people in this country. That is, the Criminal Tribes. Nothing is said about them in this Constitution. Will the Government repeal the Criminal Tribes Act and give every freedom to the Criminal Tribes?"[26]

Dakshayani Velayudhan, the lone Dalit woman in the Constituent Assembly, noted:

> "The working of the Constitution will depend upon how the people will conduct themselves in the future, not on the actual execution of the law. So I hope that in course of time there will not be such a community known as Untouchables and that our delegates abroad will not have to hang their heads in shame if somebody raises such a question in an organisation of international nature."[27]

Dr Ambedkar, as Chairman of the Drafting Committee, remarked in his last address to the Constituent Assembly:

> "On the 26th of January 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one value. How

25 Constituent Assembly Debates (19 December 1946)

26 Constituent Assembly Debates (21 November 1949)

27 Constituent Assembly Debates (29 November 1948)

> long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."[28]

The vision laid down by Dr. Ambedkar, Jaipal Singh Munda, H.J. Khandekar, and Dakshayani Velayudhan, among others, emphasizes that there shall be no discrimination in the country. The Constitution envisions a society where there is no room for anyone to feel superior to another citizen.

17. The chapter on fundamental rights places the provisions on equality, non-discrimination, equality of opportunity, affirmative action, abolition of untouchability, freedom of speech and expression, right to life, and prohibition of forced labour together. This has been done for a special reason. The framers of the Constitution conceptualized that without the provisions on the prohibition of discrimination, abolition of untouchability, and prohibition on forced labour, the imagination of broader rights such as equality before law, freedom of speech and expression, and the right to life would remain incomplete. The Constitution thus complements the basic principles of constitutionalism with provisions designed specifically to address India's social problems.

18. This underlying philosophy of the Constitution has been highlighted by this Court in several judgments. Chief Justice S.M. Sikri, in his opinion in **Kesavananda Bharati v. State of Kerala**,[29] held that the objective of various provisions of the Constitution is to build "a welfare State and an egalitarian social order in our country", and "to bring about a socio-economic transformation based on principles of social justice". Referring to Part III of the Constitution, the judgment stated that the founders were "anxious that it should be a society where the citizen will enjoy the various freedoms and such rights as are the basic elements of those freedoms without which there can be no dignity of individual".

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28 Constituent Assembly Debates (25 November 1949)

29 [1973] Supp. 1 SCR 1 : (1973) 4 SCC 225

19. Justice Krishna Iyer in his concurring opinion in **State of Kerala v. N.M. Thomas**[30] called the Constitution "a great social document, almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy". In **Indian Medical Association v. Union of India**,[31] the Court held that "various aspects of social justice, and an egalitarian social order, were also inscribed, not as exceptions to the formal content of equality but as intrinsic, vital and necessary components of the basic equality code itself".

20. This Court held in **Justice K.S. Puttaswamy v. Union of India**[32] that the "vision of the founding fathers was enriched by the histories of suffering of those who suffered oppression and a violation of dignity both here and elsewhere". One of us (Justice DY Chandrachud) authored the plurality opinion, holding that the interpretation of the Constitution must keep evolving to facilitate justice for the citizens.

21. In **Navtej Singh Johar v. Union of India**,[33] the Court while dealing with the validity of a colonial provision (Section 377 of the Penal Code), held that the Constitution envisages that "every person enjoys equal rights which enable him/her to grow and realize his/her potential as an individual".[34] The Court also acknowledged that "throughout history, socio-cultural revolts, anti-discrimination assertions, movements, literature and leaders have worked at socializing people away from supremacist thought and towards an egalitarian existence." [35] In that backdrop, the Indian Constitution "was an attempt to reverse the socializing of prejudice, discrimination, and power hegemony in a disjointed society".[36]

22. The Court, in **Indian Young Lawyers Association v. State of Kerala**,[37] described the anti-caste vision of the Constitution. One of us (Justice DY Chandrachud) wrote a concurring opinion, noting that:

30 [1976] 1 SCR 906 : (1976) 2 SCC 310

31 [2011] 6 SCR 599 : (2011) 6 SCALE 86

32 [2015] 9 SCR 99 : (2017) 10 SCC 1

33 [2018] 7 SCR 379 : 2018 INSC 790

34 Ibid [Chief Justice Dipak Misra and Justice Khanwilkar]

35 Ibid [Justice Chandrachud]

36 Ibid

37 [2018] 9 SCR 561 : (2019) 11 SCC 1

> "Besides the struggle for independence from the British rule, there was another struggle going on since centuries and which still continues. That struggle has been for social emancipation. It has been the struggle for the replacement of an unequal social order. It has been a fight for undoing historical injustices and for righting fundamental wrongs with fundamental rights. The Constitution of India is the end product of both these struggles. It is the foundational document, which in text and spirit, aims at social transformation, namely, the creation and preservation of an equal social order. The Constitution represents the aspirations of those, who were denied the basic ingredients of a dignified existence. It contains a vision of social justice and lays down a roadmap for successive governments to achieve that vision. The document sets out a moral trajectory, which citizens must pursue for the realisation of the values of liberty, equality, fraternity and justice. It is an assurance to the marginalised to be able to rise to the challenges of human existence..."

The Court emphasized the need to scrutinize social practices to keep them in consonance with the egalitarian values of the Constitution:

> "The Constitution embodies a vision of social transformation. It represents a break from history marked by the indignation and discrimination attached to certain identities and serves as a bridge to a vision of a just and equal citizenship. In a deeply divided society marked by intermixing identities such as religion, race, caste, sex and personal characteristics as the sites of discrimination and oppression, the Constitution marks a perception of a new social order. This social order places the dignity of every individual at the heart of its endeavours… Existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour is to produce a society marked by compassion for every individual."
>
> (emphasis added)

23. The Constitution thus stands as a testament to the fight against historical injustices and for the establishment of an egalitarian

social order. It aims to prevent caste-based discrimination. This commitment is not limited to preventing discriminatory actions by the State alone. It extends to the actions of citizens and private entities as well. It empowers the State to enact appropriate legislation or take executive measures to tackle caste-based discrimination. At the same time, it mandates the decision-makers to take every step to end discrimination in Indian society. The pervasive influence of caste necessitates continuous efforts to ensure equality and justice for all citizens. The manifestations of caste are too numerous to exhaustively enumerate.[38] They can manifest in various forms and across different sectors of society, from education and employment to social interactions and access to resources. As has been observed:

> "Continued to be attributed typically to the rural hinterlands and assumed to be limited only to the discussions on reservation policy and electoral politics, caste has mutated and diversified during the past three decades. Today, its presence is visible in urban housing, its markets and businesses, higher educational institutions, and public sector offices as well as the private sector working spaces, which were projected to be secular and privilege class over caste, and the various socio-economic and political institutions that interface with everyday lived experiences."[39]

The fight against caste-based discrimination is not a battle that can be won overnight; it requires sustained effort, dedication, and the willingness to confront and challenge societal norms that perpetuate inequality. When faced with practices of caste-based discrimination, this Court must take an active stand. In entertaining the current petition, this Court is making its contribution to the ongoing struggle to dismantle caste-based discrimination.

24. Based on this constitutional philosophy, we shall now refer to constitutional provisions under which the impugned provisions have been challenged.

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38 Isabel Wilkerson, *Caste: The Origins of Our Discontents,* Penguin Random House (2020), p. 167

39 Rahul Choragudi, et al, *Caste Matters in Public Policy: Issues and Perspectives,* Routledge (2024), Reprint, p. 2

V. The Contours of Article 14

25. Article 14 guarantees that the "State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." Equality is a crucial aspect of the constitutional vision. Immediately after the adoption of the Constitution, this Court laid down the standard to test the validity of laws against Article 14. In a Constitution Bench decision in **Chiranjit Lal Chowdhuri v. Union of India**,[40] Justice B.K. Mukherjea articulated that a classification under Article 14 "should never be arbitrary". It was held that such classification must always "rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made". If a classification is "made without any substantial basis", it should be "regarded as invalid". The principle of classification was reiterated in a subsequent Constitution Bench decision in **State of Bombay v. F. N. Balsara**.[41]

26. Later, a seven-judge Bench decision in **State of West Bengal v. Anwar Ali Sarkar**[42] solidified the requirement of the twin test under Article 14. Speaking for the Court, Justice S.R. Das held:

> "In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia, which is the basis of the classification, and the object of the act are distinct things, and what is necessary is that there must be a nexus between them. In short, while the Article forbids class legislation in the sense of making improper discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liability proposed to be imposed, it does not forbid classification for the purpose of legislation,

40 [1950] SCR 869

41 1951 SCR 682

42 [1952] 1 SCR 284 : (1952) 1 SCC 1

> provided such classification is not arbitrary in the sense I have just explained.."

27. Adding to the above principles, Justice S.R. Das, in **Ram Krishna Dalmia v. Justice S.R. Tendolkar**,[43] held that the classification "may be founded on different bases, namely, geographical, or according to objects or occupations or the like", but it needs to have a reasonable nexus with the object of the statute. It was held that "Article 14 condemns discrimination not only by a substantive law but also by a law of procedure". Furthermore, the Court "may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation". The Court further reiterated that:

> "A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances, or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination…"

28. Subsequently, in **E.P. Royappa v. State of Tamil Nadu**,[44] a Constitution Bench of this Court added a crucial principle of non-arbitrariness to the discourse of equality under Article 14. The Court was adjudicating the validity of an administrative order. The Court held that:

> "Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14…"

43 [1959] SCR 279

44 [1974] 2 SCR 348 : (1974) 4 SCC 3

29. The principle of non-arbitrariness and reasonableness was then emphasized in the seven-judge Bench decision in **Maneka Gandhi v. Union of India**.[45] It was held:

> "Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

30. To test the validity of laws, the twin test of intelligible differentia and reasonable nexus held ground. Whether the test of arbitrariness is a valid principle under Article 14 led to a conflicting set of decisions.[46] In **Shayara Bano v. Union of India**,[47] in testing the validity of Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 which validates the triple talaq, Justice R.F. Nariman endorsed the test of manifest arbitrariness. It was held:

> "The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

45 [1978] 2 SCR 621 : (1978) 1 SCC 248

46 The conflicting judgments have been summarized in *Association for Democratic Reforms v. Union of India*, 2024 INSC 113

47 [2017] 9 SCR 797 : (2017) 9 SCC 1

31. A formalistic understanding of the classification test was then critiqued by this Court in **Navtej Singh Johar v. Union of India**.[48] The Court was dealing with a challenge to the constitutionality of Section 377 of the Indian Penal Act, 1860, to the extent that it criminalized consensual sexual conduct between adults. In his concurring opinion, one of us (Justice DY Chandrachud) held:

> "Equating the content of equality with the reasonableness of a classification on which a law is based advances the cause of legal formalism. The problem with the classification test is that what constitutes a reasonable classification is reduced to a mere formula: the quest for an intelligible differentia and the rational nexus to the object sought to be achieved. In doing so, the test of classification risks elevating form over substance. The danger inherent in legal formalism lies in its inability to lay threadbare the values which guide the process of judging constitutional rights. Legal formalism buries the life-giving forces of the Constitution under a mere mantra. What it ignores is that Article 14 contains a powerful statement of values—of the substance of equality before the law and the equal protection of laws. To reduce it to a formal exercise of classification may miss the true value of equality as a safeguard against arbitrariness in State action. As our constitutional jurisprudence has evolved towards recognising the substantive content of liberty and equality, the core of Article 14 has emerged out of the shadows of classification. Article 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence."

The judges declared that Section 377 is manifestly arbitrary. The doctrine of manifest arbitrariness was also adopted in the Constitution Bench decision in **Joseph Shine v. Union of India**.[49]

48 [2018] 7 SCR 379 : (2018) 10 SCC 1

49 (2019) 3 SCC 39

32. Referring to the decisions in **Shayara Bano**, **Navtej Johar**, and **Joseph Shine**, a Constitution Bench in **Association for Democratic Reforms (ADR) v. Union of India**[50] summarized the doctrine of manifest arbitrariness in the following words:

> "Courts while testing the validity of a law on the ground of manifest arbitrariness have to determine if the statute is capricious, irrational and without adequate determining principle, or something which is excessive and disproportionate. This Court has applied the standard of "manifest arbitrariness" in the following manner:
>
> > a. A provision lacks an "adequate determining principle" if the purpose is not in consonance with constitutional values. In applying this standard, Courts must make a distinction between the "ostensible purpose", that is, the purpose which is claimed by the State and the "real purpose", the purpose identified by Courts based on the available material such as a reading of the provision; and
> >
> > b. A provision is manifestly arbitrary even if the provision does not make a classification."

The Constitution Bench further elucidated the standards of manifest arbitrariness to test the validity of a plenary legislation with those of subordinate legislation:

> "The above discussion shows that manifest arbitrariness of a subordinate legislation has to be primarily tested vis-a-vis its conformity with the parent statute. Therefore, in situations where a subordinate legislation is challenged on the ground of manifest arbitrariness, this Court will proceed to determine whether the delegate has failed "to take into account very vital facts which either expressly or by necessary implication are required to be taken into consideration by the statute or, say, the Constitution." In contrast, application of manifest arbitrariness to a plenary legislation passed by a competent legislation requires

50 [2024] 2 SCR 420 : 2024 INSC 113

> the Court to adopt a different standard because it carries greater immunity than a subordinate legislation. We concur with Shayara Bano (supra) that a legislative action can also be tested for being manifestly arbitrary. However, we wish to clarify that there is, and ought to be, a distinction between plenary legislation and subordinate legislation when they are challenged for being manifestly arbitrary."

33. The Court recently in **State of Punjab v. Davinder Singh**[51] dealt with whether sub-classification among the Scheduled Castes is permissible under Article 14. The seven-judge bench reiterated that the State is allowed to classify in a manner that is not discriminatory. The Court summarized the twin-test of classification as follows:

> "The Constitution permits valid classification if two conditions are fulfilled. First, there must be an intelligible differentia which distinguishes persons grouped together from others left out of the group. The phrase "intelligible differentia" means difference capable of being understood. The difference is capable of being understood when there is a yardstick to differentiate the class included and others excluded from the group. In the absence of the yardstick, the differentiation would be without a basis and hence, unreasonable. The basis of classification must be deducible from the provisions of the statute; surrounding circumstances or matters of common knowledge. In making the classification, the State is free to recognize degrees of harm. Though the classification need not be mathematical in precision, there must be some difference between the persons grouped and the persons left out, and the difference must be real and pertinent. The classification is unreasonable if there is "little or no difference". Second, the differentia must have a rational relation to the object sought to be achieved by the law, that is, the basis of classification must have a nexus with the object of the classification."

34. The constitutional standards laid down by the Court under Article 14 can be summarized as follows. First, the Constitution permits classification if there is intelligible differentia and reasonable nexus

51 2024 INSC 652

with the object sought. Second, the classification test cannot be merely applied as a mathematical formula to reach a conclusion. A challenge under Article 14 has to take into account the substantive content of equality which mandates fair treatment of an individual. Third, in undertaking classification, a legislation or subordinate legislation cannot be manifestly arbitrary, i.e. courts must adjudicate whether the legislature or executive acted capriciously, irrationally and/or without adequate determining principle, or did something which is excessive and disproportionate. In applying this constitutional standard, courts must identify the "real purpose" of the statute rather than the "ostensible purpose" presented by the State, as summarized in **ADR**. Fourth, a provision can be found manifestly arbitrary even if it does not make a classification. Fifth, different constitutional standards have to be applied when testing the validity of legislation as compared to subordinate legislation.

VI. Non-Discrimination under Article 15

35. Clauses 1 and 2 of Article 15 provide that:

> "**Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.—**
>
> (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
>
> (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—
>
> (a) access to shops, public restaurants, hotels and places of public entertainment; or
>
> (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public."

Article 15(1) imposes an enforceable obligation on the State to not discriminate against citizens on any of several grounds, including "caste". If the State itself discriminates against a citizen under any of the mentioned grounds, then it is discrimination of the highest form. After all, the State is expected to prevent discrimination, not

perpetuate it. That is why our Constitution prohibits the State from discriminating against any citizen. Besides, Article 15(2) was adopted to specifically prohibit the discrimination faced by certain marginalized communities in accessing public services and resources. Historically, the so-called untouchable community was not allowed to use public resources such as water tanks and wells. This provision has a unique imprint of Dr Ambedkar, as he consistently advocated for such a provision for decades.[52] Not only does Article 15(2) prohibit the State from discriminating, it also restricts the citizens or private entities from discriminating against other citizens on the grounds mentioned therein.

36. Discrimination is prohibited, because it has several repercussions on human lives. Discrimination arises due to a feeling of superiority/inferiority, bias, contempt, or hatred against a person or a group. In history, such feelings have led to the genocide of certain communities. Discrimination also lowers the self-esteem of the person being discriminated against. It can lead to unfair denial of opportunities and constant violence against a set of people. Discrimination can also be done by continuously ridiculing or humiliating someone, who is on the weaker side of the social spectrum. It can cause trauma to a person with which they may be affected their entire life. Discrimination also includes stigmatizing the identity or existence of a marginalized social group. Discrimination can also happen based on certain stereotypes against a marginalized group. As a society that divided people into a hierarchy, we must remain conscious of the forms and kinds of discrimination against marginalized groups. Discriminatory laws enacted before the Constitution of India came into force need to be scrutinized and done away with.

37. In India, there have been several instances of laws being enacted based on certain stereotypes against certain groups of people. Our citizens have brought challenges before the constitutional courts against the validity of such laws. In **Anuj Garg v. Hotel Association of India**,[53] the validity of Section 30 of the Punjab Excise Act, 1914 was challenged. The provision prohibited the employment of women and men under the age of 25 years in premises where liquor or other intoxicating drugs were consumed by the public. In adjudicating the

52 Anurag Bhaskar, *The Foresighted Ambedkar: Ideas that Shaped Indian Constitutional Discourse,* Penguin (2024), pp. 68-87.

53 [2007] 12 SCR 991 : (2008) 3 SCC 1

case, this Court applied the principle that "[l]egislation should not be only assessed on its proposed aims but rather on the implications and the effects". It struck down the provision, holding that it "suffers from incurable fixations of stereotype morality and conception of sexual role." It was held that "[n]o law in its ultimate effect should end up perpetuating the oppression of women".

38. In **National Legal Services Authority v. Union of India**,[54] this Court recognised hijras, eunuchs, apart from binary gender, as "third gender" and extended the protection of Articles 15 and 16 to them. It was held that discrimination on the ground of "sex" under Articles 15 and 16 includes "discrimination on the ground of gender identity". The Court declared that the expression "sex" used in Articles 15 and 16 "is not just limited to the biological sex of male or female, but intended to include people who consider themselves to be neither male or female." This Court concluded that "discrimination on the basis of sexual orientation or gender identity includes any discrimination, exclusion, restriction or preference, which has the effect of nullifying or transposing equality by the law or the equal protection of laws guaranteed under our Constitution".

39. However, the judgment of a two-judge bench in **Rajbala v. State of Haryana**[55] rejected a challenge founded on the claim of discriminatory impact. A state legislation introduced conditions to contest panchayati elections, as a result of which, a significant section of Scheduled Castes was debarred from contesting elections. The Bench held that a statute cannot be held unconstitutional on the ground that it is "arbitrary". The Court held, "If it is constitutionally permissible to debar certain classes of people from seeking to occupy the constitutional offices, numerical dimension of such classes, in our opinion should make no difference for determining whether prescription of such disqualification is constitutionally permissible unless the prescription is of such nature as would frustrate the constitutional scheme by resulting in a situation where holding of elections to these various bodies becomes completely impossible". However, this reasoning *prima facie* is contrary to the decisions in **Shayara Bano**, **Navtej Singh Johar**, and **Joseph Shine**, which upheld manifest arbitrariness as a ground to strike down a law. At the same time, the impact of

54 [2014] 5 SCR 119 : (2014) 5 SCC 438

55 [2015] 12 SCR 1106 : 2015 INSC 912

the law on the Scheduled Caste population is an example of "indirect discrimination", a constitutional test which has been applied by the Court in subsequent decisions.

40. In **Karma Dorjee v. Union of India**,[56] the Court emphasized that "[t]he Governments, both at the centre and the states have a non-negotiable obligation to take positive steps to give effect to India's commitment to racial equality". The Court was hearing a public interest petition seeking guidelines to be set down to curb acts of discrimination against persons from the north-eastern states. It directed the Union Government to take "proactive steps to monitor the redressal of issues pertaining to racial discrimination faced by citizens of the nation drawn from the north-east".

41. A Constitution Bench in **Navtej Singh Johar**[57] gave a broader interpretation to Article 15, while striking down Section 377 of the Indian Penal Code insofar as it decriminalizes homosexual intercourse amongst consenting adults, on the ground that it was discriminatory. In a concurring opinion written by one of us (Justice DY Chandrachud), it was held that discrimination, whether direct or indirect, "founded on a stereotypical understanding of the role of the sex" is prohibited by Article 15. The Court held, "If certain characteristics grounded in stereotypes, are to be associated with entire classes of people constituted as groups by any of the grounds prohibited in Article 15(1), that cannot establish a permissible reason to discriminate." It was further held that a provision challenged as being ultra vires the prohibition of discrimination on the grounds only of sex under Article 15(1) "is to be assessed not by the objects of the State in enacting it, but by the effect that the provision has on affected individuals and on their fundamental rights". The Court discussed the principle that even if the law or action by the State is facially neutral, it "may have a disproportionate impact upon a particular class". Though facially neutral, the effect of Section 377 was seen to target members of the LGBTQIA+ community.

42. Another Constitution Bench in **Joseph Shine**[58] struck down Section 497 of the Indian Penal Code, which related to adultery. It was held

56 [2016] 9 SCR 968 : (2017) 1 SCC 799

57 [2018] 7 SCR 379 : (2018) 10 SCC 1

58 (2019) 3 SCC 39

that the premise of "Section 497 is a gender stereotype that the infidelity of men is normal, but that of a woman is impermissible", and hence, it violates the non-discrimination principle embodied in Article 15. The provision, the Court held, "builds on existing gender stereotypes and bias and further perpetuates them", by giving "legal recognition to socially discriminatory and gender-based norms". The Court held that a "provision of law must not be viewed as operating in isolation from the social, political, historical and cultural contexts in which it operates".

43. In **Indian Young Lawyers Association v. The State of Kerala**[59], this Court dealt with the validity of a rule excluding menstruating women between the ages of 10 and 50 from entry in a temple in Kerala, based upon a custom. In his concurring opinion, Justice Nariman held that the said rule is hit by Article 15(1), as it "discriminates against women on the basis of their sex only". One of us (Justice DY Chandrachud) who was also a part of the judgment held, "Exclusion of women between the age groups of ten and fifty, based on their menstrual status, from entering the temple in Sabarimala can have no place in a constitutional order founded on liberty and dignity".

44. In **Secretary, Ministry of Defence v. Babita Puniya**,[60] a two-judge Bench upheld the claims of women engaged on Short Service Commissions in the Army to seek parity with their male counterparts in obtaining Permanent Commissions. It was held that "Arguments founded on the physical strengths and weaknesses of men and women and on assumptions about women in the social context of marriage and family do not constitute a constitutionally valid basis for denying equal opportunity to women officers." The Court gave several directions to the Union Government to grant Permanent Commission to women officers in the Army and consequential benefits.

45. The issue of Permanent Commissions to women officers once again came before the Court in **Lt. Col. Nitisha v. Union of India**.[61] The petitioners challenged the evaluation criteria applied by the Army as unjust and arbitrary as "the women officers who are in the age group of 40-50 years of age are being required to conform to the

59 [2018] 9 SCR 561 : 2018 INSC 908

60 [2020] 3 SCR 833 : 2020 INSC 198

61 [2021] 4 SCR 633 : (2021) 15 SCC 125

medical standards that a male officer would have to conform to at the age of 25 to 30 years, among other factors". In deciding the case, the Court discussed the principles of substantive equality, indirect discrimination, and anti-stereotyping under Articles 14 and 15(1). The Court defined indirect discrimination as follows:

> "We must clarify here that the use of the term 'indirect discrimination' is not to refer to discrimination which is remote, but is, instead, as real as any other form of discrimination. Indirect discrimination is caused by facially neutral criteria by not taking into consideration the underlying effects of a provision, practice or a criterion."

The Court distinguished between direct and indirect discrimination in the following formulation:

> "… as long as a court's focus is on the mental state underlying the impugned action that is allegedly discriminatory, we are in the territory of direct discrimination. However, when the focus switches to the effects of the concerned action, we enter the territory of indirect discrimination. An enquiry as to indirect discrimination looks, not at the form of the impugned conduct, but at its consequences. In a case of direct discrimination, the judicial enquiry is confined to the act or conduct at issue, abstracted from the social setting or background fact-situation in which the act or conduct takes place. In indirect discrimination, on the other hand, the subject matter of the enquiry is the institutional or societal framework within which the impugned conduct occurs. The doctrine seeks to broaden the scope of antidiscrimination law to equip the law to remedy patterns of discrimination that are not as easily discernible."

The Court however held that "[i]n order to conceptualize substantive equality, it would be apposite to conduct a systemic analysis of discrimination that combines tools of direct and indirect discrimination", and not just the claim of either of the two. To evaluate the claim of discrimination, the Court laid down the following test:

> "A particular discriminatory practice or provision might often be insufficient to expose the entire gamut of discrimination that a particular structure may perpetuate. Exclusive reliance on tools of direct or indirect discrimination may

> also not effectively account for patterns arising out of multiple axles of discrimination. Therefore, a systemic view of discrimination, in perceiving discriminatory disadvantage as a continuum, would account for not just unjust action but also inaction. Structures, in the form of organizations or otherwise, would be probed for the systems or cultures they produce that influence day-today interaction and decision-making. The duty of constitutional courts, when confronted with such a scheme of things, would not just be to strike down the discriminatory practices and compensate for the harm hitherto arising out of them; but also structure adequate reliefs and remedies that facilitate social redistribution by providing for positive entitlements that aim to negate the scope of future harm…
>
> Therefore, an analysis of discrimination, with a view towards its systemic manifestations (direct and indirect), would be best suited for achieving our constitutional vision of equality and antidiscrimination. Systemic discrimination on account of gender at the workplace would then encapsulate the patriarchal disadvantage that permeates all aspects of her being from the outset, including reproduction, sexuality and private choices which operate within an unjust structure."

Applying the above principles, the Court concluded that the process adopted by the Army to grant Permanent Commissions to women officers "did not redress the harms of gendered discrimination that were identified by this Court in **Babita Puniya**". The Court found the evaluation process to be an instance of "indirect discrimination" and "systemic discrimination", which "disproportionately affects women". "This discrimination", it was held, "has caused an economic and psychological harm and an affront to their dignity".

46. The petitioner in **Nipun Malhotra v. Sony Pictures Films India (P) Ltd**,[62] was aggrieved by the manner in which persons with disabilities have been portrayed in a movie and approached the Court seeking directions for the inclusion of an expert on disability within the Central Board of Film Certification and its advisory panel constituted under Sections 3 and 5 of the Cinematograph Act, among other reliefs.

62 [2024] 7 SCR 246 : 2024 INSC 465

This Court recapitulated "the impact of stereotypes on discrimination and the enjoyment of fundamental rights". It reiterated that the anti-discrimination code under Article 15 prevents stereotyping. Regarding the safeguards against stereotyping of persons with disabilities, the Court held:

> "… language that disparages persons with disabilities, marginalises them further and supplements the disabling barriers in their social participation, without the redeeming quality of the overall message of such portrayal must be approached with caution. Such representation is problematic not because it offends subjective feelings but rather, because it impairs the objective societal treatment of the affected groups by society. We believe that representation of persons with disabilities must regard the objective social context of their representation and not marginalise persons with disability…"

47. The jurisprudence evolved by this Court shows that discriminatory laws have no place in our democracy. Discriminatory laws based on stereotypes against a social group were stuck down in judgments like **Anuj Garg**, **Navtej Johar**, **Joseph Shine,** and **Indian Young Lawyers Association**. Through judgments like **NALSA** and **Babita Puniya**, this Court recognized the dignity and aspirations of social groups which have traditionally faced exclusion from equal rights. This Court recognized indirect discrimination and systemic discrimination in **Lt. Col. Nitisha**, emphasized the responsibility of the State to curb discrimination in **Karma Dorjee**, and provided safeguards against discriminatory stereotypes in **Nipun Malhotra**.

48. Based on the analysis of the judgments, certain anti-discrimination principles emerge under Article 15(1). First, discrimination can be either direct or indirect, or both. Second, facially neutral laws may have an adverse impact on certain social groups, that are marginalized. Third, stereotypes can further discrimination against a marginalized social group. Fourth, the State is under a positive obligation to prevent discrimination against a marginalized social group. Fifth, discriminatory laws based on stereotypes and causing harm or disadvantage against a social group, directly or indirectly, are not permissible under the constitutional scheme. Sixth, courts are required to examine the claims of indirect discrimination and

systemic discrimination; and seventh, the test to examine indirect discrimination and systemic discrimination has been laid down in judgments of the Court such as **Lt. Col. Nitisha**.

VII. The Ban on Untouchability in Article 17

49. Article 17 of the Constitution provides that: ""Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law." This provision has a special place in the Constitution. It puts an end to the socially discriminatory practice of "untouchability".

50. Dr Ambedkar described the impact of "untouchability" as follows:

> "The word untouchable is an epitome of their ills and sufferings. Not only has untouchability arrested the growth of their personality but also it comes in the way of their material well-being. It has also deprived them of certain civil rights… The untouchable is not even a citizen."[63]

Untouchability and caste discrimination led to "severe social and economic disabilities and cultural and educational backwardness" of the untouchables.[64] Throughout history, "the oppressive nature of the caste structure has denied to those disadvantaged castes the fundamentals of human dignity, human self-respect and even some of the attributes of the human personality".[65] As a system, it enforced "disabilities, restrictions, conditions and prohibitions on Dalits for access to and the use of places of public resort, public means, roads, temples, water sources, tanks, bathing ghats, etc., entry into educational institutions or pursuits of avocation or profession which are open to all and by reason of birth they suffer from social stigma."[66] Article 17 is a constitutional sanction against discrimination. It "strikes at caste-based practices built on superstitions and beliefs that have no rationale or logic."[67]

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63 B.R. Ambedkar, "Evidence Before the Southborough Committee", in Dr Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 256

64 Soosai v. Union of India, 1985 Supp SCC 590

65 Ibid

66 State of Karnataka v. Appa Balu Ingale (1995) Supp 4 SCC 469

67 Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu (2016) 2 SCC 725

51. Article 17 has several components.[68] It abolishes the practice of "untouchability". At the same time, it prohibits "its practice in any form". Furthermore, "enforcement of any disability" arising out of "Untouchability" is a criminal offense as per the "law". The meaning of "law" is any legislation enacted to tackle any practice or disability arising out of "untouchability".[69] It is a provision that can be implemented both against the State and non-state actors such as the citizens.[70] Moreover, the framers of the Constitution did not refer to any religion or community in the text of the provision.[71] "The injunction against untouchability under Article 17" is further "strengthened by taking away the subject-matter from State domain and placing it as an exclusive legislative head to Parliament."[72]

52. In his concurring opinion in **State of Karnataka v. Appa Balu Ingale**,[73] Justice K. Ramaswamy discussed the basis of Article 17. "The thrust of Article 17", it was held, "is to liberate the society from blind and ritualistic adherence and traditional beliefs which lost all legal or moral base". Furthermore, Article 17 "seeks to establish a new ideal for society — equality to the Dalits, on a par with general public", which would give them "a sense of being a participant in the mainstream of national life".[74]

53. The constitutional vision behind Article 17 and its impact was extensively discussed in the concurring opinion authored by one of us (Justice DY Chandrachud) in **Indian Young Lawyers Association v. State of Kerala**.[75] It was held that Article 17 was made a part of fundamental rights to fulfil the constitutional mandate of equality:

> "Article 17 is the constitutional promise of equality and justice to those who have remained at the lowest rung of a traditional belief system founded in graded inequality… It has been placed on a constitutional pedestal of enforceable

68 Indian Young Lawyers Association v. State of Kerala (2019) 11 SCC 1 [Justice Chandrachud]

69 Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

70 Kaushal Kishor v. State of Uttar Pradesh (2023) 4 SCC 1

71 Janhit Abhiyan v. Union of India (2023) 5 SCC 1 [Dissenting opinion of Justice Ravindra Bhat on behalf of Chief Justice Lalit and himself]

72 Ibid

73 [1992] Supp. 3 SCR 284 : 1994 SCC (Cri) 1762

74 1994 SCC (Cri) 1762

75 [2018] 9 SCR 561 : (2019) 11 SCC 1

> fundamental rights, beyond being only a directive principle, for two reasons. First, "untouchability" is violative of the basic rights of socially backward individuals and their dignity. Second, the Framers believed that the abolition of "untouchability" is a constitutional imperative to establish an equal social order. Its presence together and on an equal footing with other fundamental rights, was designed to "give vulnerable people the power to achieve collective good". Article 17 is a reflection of the transformative ideal of the Constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation."

The judgment stated that "untouchability" is "a symptom" of the "caste system" and the interconnected notions of "purity and pollution", which are rejected by Article 17. It was noted:

> "While the top of the caste pyramid is considered pure and enjoys entitlements, the bottom is considered polluted and has no entitlements. Ideas of "purity and pollution" are used to justify this distinction which is self-perpetuality. The [so-called] upper castes perform rituals that, they believe, assert and maintain their purity over lower castes. Rules of purity and pollution are used to reinforce caste hierarchies. The notion of "purity and pollution" influences who people associate with, and how they treat and are treated by other people."

Article 17 rejects such notions of purity and pollution. It strikes at the heart of the caste system, which manifests in discriminatory practices based on the notions of purity and pollution. It was further held:

> "The incorporation of Article 17 into the Constitution is symbolic of valuing the centuries' old struggle of social reformers and revolutionaries. It is a move by the Constitution makers to find catharsis in the face of historic horrors. It is an attempt to make reparations to those, whose identity was subjugated by society. Article 17 is a revolt against social norms, which subjugated individuals into stigmatised hierarchies. By abolishing "untouchability", Article 17 protects them from a repetition of history in

> a free nation. The background of Article 17 thus lies in protecting the dignity of those who have been victims of discrimination, prejudice and social exclusion. Article 17 must be construed from the perspective of its position as a powerful guarantee to preserve human dignity and against the stigmatization and exclusion of individuals and groups on the basis of social hierarchism."

The concurring opinion examined the Constituent Assembly Debates to conclude that the framers deliberately left the term "untouchability" in Article 17 undefined, as they wanted to give the provision a broad scope:

> "The Constitution has carefully eschewed a definition of "untouchability". The draftspersons realised that even a broadly couched definition may be restrictive. A definition would become restrictive if the words used or the instances depicted are not adequate to cover the manifold complexities of our social life through which prejudice and discrimination is manifest. Hence, even though the attention of the Framers was drawn to the fact that "untouchability" is not a practice referable only to the lowest in the caste ordering but also was practised against women (and in the absence of a definition, the prohibition would cover all its forms), the expression was designedly left undefined… The Constitution as a constantly evolving instrument has to be flexible to reach out to injustice based on untouchability, in any of its forms or manifestations. Article 17 is a powerful guarantee against exclusion. As an expression of the anti-exclusion principle, it cannot be read to exclude women against whom social exclusion of the worst kind has been practised and legitimised on notions of purity and pollution."

Article 17 was interpreted broadly to declare that the practice of excluding menstruating women from visiting the temple is based on the notions of purity and pollution, which arise from the caste system, and the practice was thus unconstitutional.

54. Article 17 enunciates that everyone is born equal. There cannot be any stigma attached to the existence, touch or presence of any person. By way of Article 17, our Constitution strengthens the

equality of status of every citizen. From time to time, to implement the mandate of Article 17, Parliament has enacted several legislations such as the Untouchability (Offenses) Act, 1955 (later renamed as Protection of Civil Rights Act, 1955), Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter "**PoA Act**"), Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993, and Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013. This Court, in a number of cases, has upheld the validity of these laws.[76] It has held that offences enumerated under PoA Act "arise out of the practice of 'untouchability'."[77] The Court also held that the practice of "manual scavenging" prohibited under the 2013 Act is "squarely rooted in the concept of the caste-system and untouchability."[78] The laws enacted under Article 17 aim to provide dignity to the affected individuals.

VIII. Article 21: Of Life and Dignity

55. Article 21 provides that "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law". In a number of judgments, the Court has expanded the meaning of "life". It has been held that the right to life enshrined in Article 21 "cannot be restricted to mere animal existence" and "means something much more than just physical survival".[79] It includes the right to live with dignity.[80] In fact, dignity forms a part of the basic structure of the Constitution.[81] The "references" to dignity are "found in the guarantee against arbitrariness (Article 14), the lamps of freedom (Article 19) and in the right to life and personal liberty (Article 21)."[82] Thus, dignity is the "core" which "unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity

76 State of M.P. v. Ram Kishna Balothia (1995) 3 SCC 221; State of Maharashtra v. Union of India; Prathvi Raj Chauhan v. Union of India (2020) 4 SCC 727

77 State of M.P. v. Ram Kishna Balothia (1995) 3 SCC 221

78 Safai Karamchari Andalon v. Union of India [2014] 4 SCR 197; See also Balram Singh v. Union of India, 2023 INSC 950

79 Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608

80 Bandhua Mukti Morcha v. Union of India (1984) 3 SCC 161

81 Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225

82 K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 (Privacy-9J.)

of existence".[83] In that sense, human dignity is a constitutional value and a constitutional goal.[84]

56. The Court has authoritatively ruled, "[t]o live is to live with dignity".[85] Human dignity is intrinsic to and inseparable from human existence.[86] Implicit in this right under Article 21 is "the right to protection against torture or cruel, inhuman or degrading treatment".[87] There also exists "a close relationship between dignity and the quality of life".[88] Dignity of human existence is fully realized only when one leads a quality life.[89]

57. Dignity under Article 21 is an integral aspect of life, which requires sustenance of one's being to the fullest.[90] One can truly embrace their identity, whether on the basis of caste, race, gender, sexual orientation, or ethnicity, only if they are given dignity. An individual's dignity is fundamental to their sense of self and autonomy. Thus, the right to dignity "encapsulates the right of every individual to be treated as a self-governing entity having intrinsic value".[91] Above all, "there is a growing recognition that the true measure of development of a nation is not economic growth; it is human dignity."[92] A nation must prioritize human dignity—ensuring that every person, regardless of their background or identity, is able to live with respect, equality, and freedom. Thus, human dignity forms the bedrock of social justice and a just, compassionate society.

58. The right to live with dignity extends even to the incarcerated. Not providing dignity to prisoners is a relic of the colonizers and pre-colonial mechanisms, where oppressive systems were designed to dehumanize and degrade those under the control of the State. Authoritarian regimes of the pre-constitutional era saw prisons not only as places of confinement but as tools of domination. This Court, focusing on the changed legal framework brought out by the

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83 Ibid

84 Jeeja Ghosh v. Union of India (2016) 7 SCC 761

85 Ibid

86 M. Nagaraj v. Union of India [M. Nagaraj v. Union of India (2006) 8 SCC 212

87 Francis Coralie Mullin v. Administrator, Union Territory of Delhi (1981) 1 SCC 608

88 Common Cause v. Union of India (2018) 5 SCC 1 [Justice Chandrachud]

89 Ibid

90 Navtej Singh Johar v. Union of India (2018) 10 SCC 1

91 X2 v. State (NCT of Delhi) (2023) 9 SCC 433

92 National Legal Services Authority v. Union of India (2014) 5 SCC 438

Constitution, has recognized that even prisoners are entitled to the right to dignity.

59. A Constitution bench of this Court in **Sunil Batra (I) v. Delhi Administration**[93] took serious note of the treatment meted out to undertrials, convicts, and those awaiting the death penalty. Justice Krishna Iyer, in his opinion, expounded: "The humane thread of jail jurisprudence that runs right through is that no prison authority enjoys amnesty for unconstitutionality, and forced farewell to fundamental rights is an institutional outrage in our system where stone walls and iron bars shall bow before the rule of law." He emphasized the need to re-look at the prison conditions:

> "A prison is a sound-proof planet, walled from view and visits regulated, and so, rights of prisoners are hardly visible, checking is more difficult and the official position of the repository of power inspires little credibility where the victims can be political protesters, unpopular figures, minority champions or artless folk who might fail to propitiate arrogant power of minor minions."

Justice Krishna Iyer advocated for a humane system within prisons:

> "In every country, this transformation from cruelty to compassion within jails has found resistance from the echelons and the Great Divide between pre-and-post Constitution penology has yet to get into the metabolism of the Prison Services. And so, on the national agenda of prison reform is on-going education for prison staff, humanisation of the profession and recognition of the human rights of the human beings in their keep."

The Court admonished the usage of iron fetters and held that the practice of solitary confinement and cellular segregation as inhuman and irrational:

> "I hold that bar fetters are a barbarity generally and, like whipping, must vanish. Civilised consciousness is hostile to torture within the walled campus. We hold that solitary confinement, cellular segregation and marginally modified

93 [1979] 1 SCR 392 : (1978) 4 SCC 494

> editions of the same process are inhuman and irrational. More dangerous are these expedients when imposed by the unturned and untrained power of a jail superior who has, as part of his professional equipment, no course in human psychology, stressology or physiology, who has to depend on no medical or psychiatric examination prior to infliction of irons or solitary, who has no obligation to hear the victim before harming him, whose "reasons" are in English on the history-tickets and therefore unknowable and in the Journal to which the prisoner has no access… The law is not abracadabra but at once pragmatic and astute and does not surrender its power before scary exaggerations of security by prison bosses... Social justice cannot sleep if the Constitution hangs limp where its consumers most need its humanism."

60. In **Charles Sobraj v. Supdt., Central Jail**,[94] this Court upheld the constitutionally guaranteed fundamental rights of prisoners against the undue harshness of prison practices. Justice Krishna Iyer observed:

> "a prison system may make rational distinctions in making assignments to inmates of vocational, educational and work opportunities available, but is constitutionally impermissible to do so without a functional classification system. The mere fact that a prisoner is poor or rich, high-born or ill-bred, is certainly irrational as a differentia in a 'secular, socialist republic'... The reason is, prisoners retain all rights enjoyed by free citizens except those lost necessarily as an incident of confinement. Moreover, the rights enjoyed by prisoners under Articles 14, 19 and 21, though limited, are not static and will rise to human heights when challenging situations arise."

61. In **Sunil Batra (II) v. Delhi Administration**,[95] this Court emphasized that a person in prison does not cease to be a human being or lose all human rights, and that it is the duty of the State to take care of justifiable needs and requests. It was held that "in the eye of law, prisoners are persons, not animals", and that courts must "punish

94 [1979] 1 SCR 512 : (1978) 4 SCC 104

95 (1980) 3 SCC 488

the deviant 'guardians' of the prison system where they go berserk and defile the dignity of the human inmate". Speaking for the Court, Justice Krishna Iyer held:

> "Prison houses are part of Indian earth and the Indian Constitution cannot be held at bay by jail officials "dressed in a little, brief authority", when Part III is invoked by a convict. For when a prisoner is traumatized, the Constitution suffers a shock…
>
> Whether inside prison or outside, a person shall not be deprived of his guaranteed freedom save by methods "right, just and fair"…
>
> Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure."

The Court also noted down various injustices which may be committed against a prisoner:

> "Inflictions may take many protean forms, apart from physical assaults. Pushing the prisoner into a solitary cell, denial of a necessary amenity, and, more dreadful sometimes, transfer to a distant prison where visits or society of friends or relations may be snapped, allotment of degrading labour, assigning him to a desperate or tough gang and the like, may be punitive in effect. Every such affliction or abridgment is an infraction of liberty or life in its wider sense and cannot be sustained unless Article 21 is satisfied."

62. The Court in **Kishore Singh Ravinder Dev v. State of Rajasthan**[96] reiterated that the infliction of physical torture on the undertrial prisoner

96 [1981] 1 SCR 995 : (1981) 1 SCC 503

is a violation of Article 21. It was held that "the State must re-educate the constabulary out of their sadistic arts and inculcate a respect for the human person — a process which must begin more by example than by precept if the lower rungs are really to emulate". The Court ruled that if any escort policemen are found guilty of misconduct, the authorities must not allow a sense of police solidarity or internal camaraderie to shield the wrongdoing. There is no greater harm to our constitutional values than a State official acting recklessly and violating fundamental rights. The Court expressed hope that the root causes enabling police brutality will be addressed by the government with the seriousness it deserves. The Court posed the question: "Who will police the police?"

63. In **Francis Coralie Mullin v. Administrator, Union Territory of Delhi**,[97] the Court struck down a rule which regulated the right of a detenu to have interviews with a legal adviser of his choice as violative of Articles 14 and 21. The Court held that "as part of the right to live with human dignity" and "as a necessary component of the right to life", a detenu "would be entitled to have interviews with the members of his family and friends" and "to have interview with his legal adviser at any reasonable hour during the day after taking appointment from the Superintendent of the Jail". Such appointment, it was held, "should be given by the Superintendent without any avoidable delay." Correspondingly, when **Sheela Barse**,[98] a freelance journalist, sought permission to interview prisoners, this Court held that the press and citizens are entitled to interview prisoners in order to ensure the availability of their rights under Article 21, subject to reasonable restrictions. It was noted, "Prison administrators have the human tendency of attempting to cover up their lapses and so shun disclosure thereof… Interviews become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated."

64. In **Nilabati Behera v. State of Orissa**,[99] this Court emphasized "great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life".

97 [1981] 2 SCR 516 : (1981) 1 SCC 608

98 Sheela Barse v. State of Maharashtra (1987) 4 SCC 373

99 [1993] 2 SCR 581 : (1993) 2 SCC 746

While confinement inherently restricts a person's liberty, the limited freedom they retain becomes all the more valuable. The State has a strict duty of care in such situations, without exception. This Court declared that if a person in police custody is deprived of life, except according to the procedure established by law, the wrongdoer is held accountable, and the State is ultimately responsible.

65. This Court laid down guidelines on arrest and detention in **D.K. Basu v. State of West Bengal**,[100] while highlighting the constitutional violations caused due to custodial violence and deaths in police lock-ups. It noted, "If the functionaries of the Government become law-breakers, it is bound to breed contempt for law and would encourage lawlessness and every man would have the tendency to become law unto himself thereby leading to anarchism". In **Mehmood Nayyar Azam v. State of Chhattisgarh**,[101] it was noted that a person in custody has "his basic human rights" and human dignity, and that the police officers cannot treat him in an inhuman manner. It was held that even "any treatment meted out to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity".

66. In **Shabnam v. Union of India**,[102] this Court elucidated the principle that human dignity should be preserved even when a prisoner is sentenced to death. The Court held, "the process/procedure from confirmation of death sentence by the highest court till the execution of the said sentence, the convict is to be treated with human dignity to the extent which is reasonable and permissible in law". Similarly, in **'X' v. State of Maharashtra**,[103] the Court while holding that "post conviction severe mental illness will be a mitigating factor" in commuting the death sentence, emphasized that the "right to dignity of an accused does not dry out with the Judges' ink, rather, it subsists well beyond the prison gates and operates until his last breath".

67. Thus, the jurisprudence which emerges on the rights of prisoners under Article 21 is that even the incarcerated have inherent dignity. They are to be treated in a humanely and without cruelty. Police

100 [1996] Supp. 10 SCR 284 : (1997) 1 SCC 416

101 [2012] 8 SCR 651 : (2012) 8 SCC 1

102 [2015] 8 SCR 289 : (2015) 6 SCC 702

103 [2019] 6 SCR 1 : (2019) 7 SCC 1

officers and prison officials cannot take any disproportionate measures against prisoners. The prison system must be considerate of the physical and mental health of prisoners. For instance, if a prisoner suffers from a disability, adequate steps have to be taken to ensure their dignity and to offer support.

IX. Article 23: Prohibition of Forced Labour and Human Trafficking

68. Article 23 provides that:

> "**Prohibition of traffic in human beings and forced labour.—**
>
> (1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
>
> (2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Article 23(1) provides an enforceable fundamental right against social and economic exploitation. It aims to prohibit human trafficking, "begar", and "other similar forms of forced labour". Like Articles 15(2) and 17, it is enforceable both against the State and non-state actors. At the same time, the scope of the provision is wide, as it has left the term "begar" undefined, and supplemented by the phrase "other similar forms of forced labour". The "other similar forms" can be many. The framers of the Constitution consciously left the terms undefined so that future interpretation is not restrictive.

69. Interestingly, the foundations of Article 23 were laid even prior to the discussions in the Constituent Assembly. In his work titled "States and Minorities" (1947),[104] Dr Ambedkar conceptualized the interlinkages between one's economic condition and their ability to exercise fundamental rights. He wrote, "The fear of starvation, the

104 B.R. Ambedkar, "States and Minorities", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 393, https://www.mea.gov.in/Images/CPV/Volume1.pdf [See Article II, Section I, Clause 9].

fear of losing a house, the fear of losing savings if any, the fear of being compelled to take children away from school, the fear of having to be a burden on public charity, the fear of having to be burned or buried at public cost are factors too strong to permit a man to stand out for his Fundamental Rights."[105] In his view, "The unemployed are thus compelled to relinquish their Fundamental Rights for the sake of securing the privilege to work and to subsist."[106] Dr. Ambedkar proposed that the rights of individuals should be protected from exploitation by adopting a favourable constitutional framework.[107] The intellectual background of Article 23 lies in what Dr Ambedkar was explaining – to facilitate the citizens in exercising their fundamental rights.[108] Exploitative socio-economic practices can hinder the right to live a dignified life.

70. In adopting Article 23(1) in the Constitution, the framers were conscious of oppressive practices such as Slavery in the United States as well as domestic practices of exploiting labour of the Bahujan castes and poor sections of society.[109] Several members of the Constituent Assembly, who came from the Scheduled Caste communities expressed their support for Article 23, as they believed that such a provision would prevent economic exploitation of their community. V.I. Muniswamy Pillai stated, "If there is any labour required for common purposes in the village, this most unfortunate fellow, the Harijan [Scheduled Caste], is always caught hold of to do all menial and inferior service."[110] By the provision, he was confident that the country would be "elevating a community that has been outside the pale of society". S. Nagappa gave examples of how "begar" was imposed on the Scheduled Castes:

> "Sir, whenever cattle die; the owner of the cattle wants these poor Harijans to come and remove the dead cattle, remove the skins, tan them and make chappals and supply them free of cost. For this, what do they get?

105 Ibid, pp. 409-410

106 Ibid, p. 410

107 Ibid

108 Anurag Bhaskar, *The Foresighted Ambedkar: Ideas That Shaped Indian Constitutional Discourse,* Penguin (2024), pp. 176-191.

109 B. Shiva Rao, *Framing of India's Constitution,* Vol. 5, pp. 249-257.

110 Constituent Assembly Debates (8 November 1948)

> Some food during festival days. Often, Sir, this forced labour is practised even by the government. For instance, if there is any murder, after the postmortem, the police force these people to remove the dead body and look to the other funeral processes. I am glad that hereafter this sort of forced labour will have no place. Then, Sir, this is practised in zamindaries also. For instance, if there is a marriage in the zamindar's family, he will ask these poor people, especially the Harijans, to come and white wash his whole house, for which they will be given nothing except food for the day…
>
> … whenever the big zamindar's lands are to be ploughed, immediately he will send word for these poor people, the Harijans, the previous day, and say: "*All your services are confiscated for the whole of tomorrow; you will have to work throughout the day and night. No one should go to any other work*." In return, the zamindar will give one morsel of food to these poor fellows. Sir, this sort of forced labour is in practice in the 20th century in our so called civilised country."[111]
>
> (emphasis added)

71. Another member from the Scheduled Caste community, H.J. Khandekar, expressed his happiness "to see in the Constitution that *begar* and forced labour are abolished and the curse on untouchables from whom the *begar* and forced labour were taken has gone".[112] Raj Bahadur also gave examples how "begar" was practiced:

> "I know how some of the Princes have indulged in their pomp and luxury, in their reckless life, at the expense of the ordinary man, how they have used the down-trodden labourers and dumb ignorant people for the sake of their pleasure. I know for instance how for duck shooting a very large number of people are roped in forcibly to stand all day long in mud and slush during cold chilly wintry days. I know how for the sake of their game and people have

111 Constituent Assembly Debates (3 December 1948)

112 Constituent Assembly Debates (21 November 1949)

> been roped in large numbers for beating the lion so that the Princes may shoot it. I have also seen how poor people are employed for domestic and other kinds of labour, no matter whether they are ailing or some members of their family are ill. These people are paid nothing or paid very little for the labour extorted from them."

He stated that Article 23 will free "downtrodden millions" from the handcuffs of exploitation. T.T. Krishnamachari said that "some form of forced labour does exist in practically all parts of India, call it 'begar' or anything like that and in my part of the country, the tenant often times is more or less a helot attached to the land and he has certain rights and those are contingent on his continuing to be a slave."

72. While the framers did not define the term "begar", they largely referred to those practices, where the workers were either unpaid or paid very little for their jobs. "Begar" or bonded labour was entrenched in India's social system, against which Article 23 makes a blow. Over the years, this Court has taken a strict view against bonded labour in existence in society.

73. The Court in **People's Union for Democratic Rights v. Union of India**[113] considered the scope of the terms "begar" and "forced labour" under Article 23(1). The Court entertained a letter as a writ petition, which sought compliance with the provisions of labour laws in relation to workmen employed in the construction work of projects connected with the Asian Games. The petitioner contended that the labourers were also not paid their minimum daily wages, and were not provided with proper living conditions. The Court observed that the issue related to a "breach of a fundamental right" under Article 23.

74. The judgment noted that the framers of the Constitution adopted Article 23 to put an enforceable obligation on the State to end bonded labour, which was "the relic of feudal exploitative society" and "incompatible with the new egalitarian socio-economic order". It was further stated that the term "begar" is of Indian origin, referring loosely to "labour or service which a person is forced to give without receiving any remuneration for it". The judgment held that the phrase "forced labour" is of wide amplitude and would cover instances "where

113 [1983] 1 SCR 456 : (1982) 3 SCC 235

a person provides labour or service to another for remuneration which is less than the minimum wage". "Forced labour" may manifest in many forms. It was held that labour provided as a result of any kind of force or compulsion would be counted as "forced labour" under Article 23(1). It was held:

> "What Article 23 prohibits is "forced labour" that is labour or service which a person is forced to provide and "force" which would make such labour or service "forced labour" may arise in several ways. It may be physical force which may compel a person to provide labour or service to another or it may be force exerted through a legal provision such as a provision for imprisonment or fine in case the employee fails to provide labour or service or it may even be compulsion arising from hunger and poverty, want and destitution. Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be "forced labour". Where a person is suffering from hunger or starvation, when he has no resources at all to fight disease or to feed his wife and children or even to hide their nakedness, where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair and where no other employment is available to alleviate the rigour of his poverty, he would have no choice but to accept any work that comes his way, even if the remuneration offered to him is less than the minimum wage. He would be in no position to bargain with the employer; he would have to accept what is offered to him. And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour".

It was held that non-payment of minimum wage to workmen in the Asian Games project was a violation of their fundamental right under Article 23. The judgment also laid down an important constitutional principle that when fundamental rights such as under Articles 17 or 23 are violated by private individuals, then "it is the constitutional obligation of the State to take necessary steps for the purpose of

interdicting such violation and ensuring observance of the fundamental right by the private individual who is transgressing the same".

75. The interpretation of Article 23 laid down in **PUDR** was relied upon in a subsequent decision in **Sanjit Roy v. State of Rajasthan**.[114] A writ petition was filed seeking payment of minimum wages to women workers belonging to Scheduled Castes, who were engaged in a construction project of the Rajasthan government, under the Minimum Wages Act, 1948. It was argued by the State government that the construction project was a famine relief work, and payment of minimum wages in such projects was exempted by the Rajasthan Famine Relief Works Employees (Exemption Act from Labour Law) Act, 1964. The Court declared the Exemption Act, in so far as it excluded the applicability of the Minimum Wages Act 1948 to workmen employed on famine relief work and permitted the payment of less than the minimum wage to such workmen as violative of Article 23. It was held:

> "The State cannot be permitted to take advantage of the helpless condition of the affected persons and extract labour or service from them on payment of less than the minimum wage. No work of utility and value can be allowed to be constructed on the blood and sweat of persons who are reduced to a state of helplessness on account of drought and scarcity conditions. The State cannot under the guise of helping these affected persons extract work of utility and value from them without paying them the minimum wage."

Justice Pathak wrote a concurring opinion, holding the Exemption Act to be violative of Article 14. The Court directed the State government to pay the arrears of the difference between the minimum wage and the actual wage paid to the construction workers.

76. It was pointed out to this Court in **Labourers Working on Salal Hydro Project v. State of Jammu & Kashmir**[115] that a large number of migrant workmen from different States working on a hydro-electric project were denied the benefit of labour laws and were exploited by

114 [1983] 2 SCR 271 : (1983) 1 SCC 525

115 [1983] 2 SCR 473 : (1983) 2 SCC 181

the contractors. This Court directed the Union government to ensure that its senior officers carry out thorough inspections of the project at regular intervals to verify whether the labour laws are being properly followed, particularly concerning workmen employed, either directly or indirectly, by the contractors or sub-contractors.

77. In **Bandhua Mukti Morcha v. Union of India**,[116] the petitioner had highlighted the issue of bonded labourers in stone quarries of Faridabad district and and their inhuman living conditions. Referring to the provisions of the Bonded Labour System (Abolition) Act 1976, the judgment discussed the meaning of "bonded labour". According to the Act, a bonded labourer is someone who has incurred or is presumed to have incurred a bonded debt.[117] A bonded debt refers to an advance received or presumed to have been received by a bonded labourer under or in pursuance of the bonded labour system.[118] The inference of this definition, according to the State government, was that bonded labourers must first prove that they are providing forced labour in consideration of an advance or other economic consideration received by them. The Court rejected this reasoning, stating that it would be "cruel to insist" that a bonded labourer "should have to go through a formal process of trial with the normal procedure for recording of evidence." It was further observed that "a bonded labourer can never stand up to the rigidity and formalism of the legal process due to his poverty, illiteracy and social and economic backwardness and if such a procedure were required to be followed, the State Government might as well obliterate this Act from the statute book". The Court also noted that statistically, "most of bonded labourers are members of Scheduled Castes and Scheduled Tribes or other backward classes".

78. The judgment held that whenever a labourer is made to provide forced labour, the presumption would be that it is consideration of an advance or other economic consideration received by him, and he is thus a bonded labourer. This presumption may, however, be rebutted by the employer or the State Government by providing satisfactory material. The Court reiterated the constitutional obligation of the

116 [1984] 2 SCR 67 : (1984) 3 SCC 161

117 Section 2(f), Bonded Labour System (Abolition) Act 1976

118 Section 2(d), Bonded Labour System (Abolition) Act 1976

Union government and the State government to ensure observance of various social welfare and labour laws enacted for the benefit of the workmen. The State government was directed "to take up the work of identification of bonded labour as one of their top priority tasks and to map out areas of concentration of bonded labour". The concurring opinion regarded Article 23 as "a vital constituent of the Fundamental Rights".

79. Pursuant to this Court's decision in **Bandhua Mukti Morcha**, 135 bonded labourers were released from bondage in stone quarries of Faridabad district, under the provisions of the Bonded Labour System (Abolition) Act, 1976. However, they were not rehabilitated even after a lapse of several months. This inaction of the State government was brought before this Court in **Neeraja Chaudhary v. State of Madhya Pradesh**.[119] The Court directed the State government to provide rehabilitative assistance to these 135 freed bonded labourers within one month. It noted with compassion, "They have waited too long; they cannot wait any longer". This Court also directed the State government to ascertain within its territory whether there were any more bonded labourers or not**,** by applying the principle laid down in **Bandhua Mukti Morcha**. It was reiterated, "Whenever it is found that any workman is forced to provide labour for no remuneration or nominal remuneration, the presumption would be that he is a bonded labourer unless the employer or the State Government is in a position to prove otherwise by rebutting such presumption."

80. The issue of bonded labourers in stone quarries in several districts of Andhra Pradesh was highlighted before this Court in **P. Sivaswamy v. State of Andhra Pradesh**.[120] The Court emphasized on "effective rehabilitation" of bonded labourers. It was stated, "Uprooted from one place of bonded labour conditions the persons are likely to be subjected to the same mischief at another place". The Court appealed for "requisite social consciousness", where it is "the obligation of every citizen to cooperate" to bring an end to bonded labour.

81. In **State of Gujarat v. Hon'ble High Court of Gujarat**,[121] a three-judge Bench dealt with the question whether prisoners, who are required to

119 (1984) 3 SCC 243

120 [1988] Supp. 2 SCR 346 : (1988) 4 SCC 466

121 AIR 1998 SC 3164

do labour as part of their punishment should be paid minimum wages for such work. This Court held that jail authorities are "enjoined by law to impose hard labour" on convicted prisoners who were sentenced to rigorous imprisonment, irrespective of "whether he consents to do it or not". However, undertrials, detainees with simple imprisonment, or even detenus who are kept in jails as preventive measures cannot be "asked to do manual work during their prison term." Justice KT Thomas, speaking for the Court, held that "a directive from the court under the authority of law to subject a convicted person (who was sentenced to rigorous imprisonment) to compulsory manual labour gets legal protection under the exemption provided in Clause (2) of Article 23 of the Constitution, as it "serves a public purpose" of reforming the convict and rehabilitating them in future with savings earned from such labour. The Court held that a prisoner "should be paid equitable wages for the work done by them". It directed the State to fix the quantum of equitable wages payable to prisoners, which would be calculated after deducting the expenses incurred for food and clothes of the prisoners from the minimum wage rates.

82. However, in his concurring opinion, Justice D.P. Wadhwa differed with Justice Thomas' invocation of Article 23. According to him, "there will be no violation of Article 23 if prisoners doing hard labour when sentenced to rigorous imprisonment are not paid wages". He, however, observed that the State is free to enact legislation for granting wages to prisoners subject to hard labour under courts' orders, for their beneficial purpose or otherwise. Justice M.M. Punchhi, in his concurrence with Justice Thomas, made no comment on the application of Article 23.

The inference of this judgment, however, is not that imposing mandatory labour on convicts is entirely immune from the operation of Article 23. Reading Article 23 with Article 21 and the decision in **Sunil Batra (II)**,[122] a convict cannot be subjected to "allotment of degrading labour".

83. In **Public Union for Civil Liberties v. State of Tamil Nadu**,[123] when the issue of bonded labourers and their exploitation was again brought to the notice of this Court, a two-judge Bench issued a fresh set of

122 [1980] 2 SCR 557 : 1979 INSC 271

123 [2012] 9 SCR 579 : (2013) 1 SCC 585

directives to the State. Among other directions the bench directed proper and effective implementation of the Minimum Wages Act, the Workmens' Compensation Act, the Inter-State Migrant Workmen Act, and the Child Labour (Prohibition and Regulation) Act.

84. A three-judge Bench of this Court in **Gujarat Mazdoor Sabha v. State of Gujarat**[124] adjudicated a challenge to two notifications issued by the Gujarat government under section 5 of the Factories Act, 1948, during the COVID19 pandemic. These notifications exempted factories from observing some of the obligations which employers have to fulfil towards the workmen employed by them. According to the notifications, among other provisions, all factories registered under the Act were exempted "from various provisions relating to weekly hours, daily hours, intervals for rest, etc. for adult workers". One of us (Justice DY Chandrachud) authored the judgment, declaring that the notifications issued by the government during the pandemic were ultra vires and against the fundamental rights of labourers. The Court stated that "[t]o a worker who has faced the brunt of the pandemic and is currently laboring in a workplace without the luxury of physical distancing, economic dignity based on the rights available under the statute is the least that this Court can ensure them." It was held that "[t]he notifications, in denying humane working conditions and overtime wages provided by law, are an affront to the workers' right to life and rights against forced labour that are secured by Articles 21 and 23 of the Constitution."

85. What emerges from the above discussion is that the broad scope of Article 23 can be invoked to challenge practices where no wages are paid, non-payment of minimum wages takes place, social security measures for workers are not adopted, rehabilitation for bonded labour does not happen, and in similar unfair practices. The State shall be held accountable even in cases where the violation of fundamental rights such as Article 23 is done by private entities or individuals. Article 23 can also be applied to situations inside prisons, if the prisoners are subjected to degrading labour or other similar oppressive practices.

86. Having analysed the philosophy of the Constitution and the principles under Articles 14, 15, 17, 21, and 23, we must now reflect on the

124 [2020] 13 SCR 886 : (2020) 10 SCC 459

patterns of discrimination against the Scheduled Castes, Scheduled Tribes, and Denotified Tribes. This exercise is necessary to examine and understand the systemic discrimination based on caste against these communities, of which the impugned provisions are an instance. The counsel for the petitioner has argued that the impugned provisions are an example of State-sanctioned caste-based discrimination. Analysing the systemic discrimination not only requires looking at the colonial era, but also the pre-colonial era. Doing so will present before us the exact patterns of discrimination against Scheduled Castes, Scheduled Tribes, and Denotified Tribes over the course of history, which the Constitution seeks to remedy.

X. A History of Discrimination in the Pre-Colonial Era

87. The history of India has witnessed centuries of discrimination towards the oppressed castes. Violence, discrimination, oppression, hatred, contempt, and humiliation, towards these communities were the norm. The caste system entrenched these social injustices deeply within society, creating an environment where the principles of natural justice were blatantly disregarded. In this hierarchical system, neutrality was virtually non-existent, and there was an inherent and pervasive bias against those belonging to the oppressed castes. This bias manifested in numerous ways, including exclusion from social, economic, and political opportunities. The caste system ensured that the oppressed castes remained marginalized and deprived of their basic rights and dignity.

88. The foundational principle of equality for all individuals was absent in the social framework defined by caste. The caste system operated as a mechanism that thrived on the labour of Bahujan communities, ultimately eroding their identity. In other words, the story of the caste system is, therefore, a story of enduring injustice. It is a narrative of how millions of Indians, relegated to the bottom of the social ladder, faced relentless discrimination and exploitation. The lower castes were systematically denied access to education, land and employment, further entrenching their disadvantaged position in society.

89. The caste system led to harrowing practices of discrimination and subjugation, rooted in the notions of purity and pollution, where some communities were deemed impure, and their presence was considered contaminated. The penal sanctions and discriminatory

practices under the caste system have been well-documented in several scholarly works. Dr. Ambedkar referred to this as the "law of caste" in his writings.[125]

90. The caste system was based on four varnas or groupings. Dr. Ambedkar described the caste system in the following words:

> "One striking feature of the caste system is that the different castes do not stand as an horizontal series all on the same plane. It is a system in which the different castes are placed in a vertical series one above the other… the Brahmin is placed at the first in rank. Below him is the Kshatriya. Below Kshatriya is the Vaishya. Below Vaishya is the Shudra and Below Shudra is the Ati-Shudra (the Untouchables). This system of rank and gradation is, simply another way of enunciating the principle of inequality…. This inequality in status is not merely the inequality that one sees in the warrant of precedence prescribed for a ceremonial gathering at a King's Court. It is a permanent social relationship among the classes to be observed— to be enforced—at all times in all places and for all purposes…."[126]

In his classic "Annihilation of Caste", Dr. Ambedkar stated that:

> "the Varnavyavastha is like a leaky pot or like a man running at the nose. It is incapable of sustaining itself by its own virtue and has an inherent tendency to degenerate into a caste system unless there is a legal sanction behind it which can be enforced against every one transgressing his Varna."[127]

Castes were considered "self-enclosed units",[128] which could not be changed. That is, was assigned to individuals at birth, with each caste linked to a specific profession, and all castes organized into a hierarchical structure.

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125 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 16; B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 54.

126 B.R. Ambedkar, "Philosophy of Hinduism", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 3, pp. 25-26.

127 B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 86

128 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 18

91. Dr Ambedkar also theorized that an essential aspect of the caste system was the control over the sexuality of women. In "*Castes in India*", he stated: "Sati, enforced widowhood and girl marriage are customs that were primarily intended to solve the problem of the surplus man and surplus woman in a caste and to maintain its endogamy. Strict endogamy could not be preserved without these customs, while caste without endogamy is a fake."[129]

92. Scholars have also stated that "the idea of criminal tribe"[130] existed even before the British colonisers. Anthropologist Anastasia Piliavsky noted, "while colonial uses of the stereotype add up to a lurid history of violence against people branded as congenital criminals in colonial law, the stereotype itself has a history stretching back far beyond British colonialism."[131]

93. The caste system permeated itself in several ways. First, it was based on a hierarchy of four caste-based groupings, where the *Shudras* occupied the lowest level. Second, the castes outside these four groupings were treated as "untouchables". Third, the caste system controlled the sexuality or agency of women to maintain the sanctity of caste. Fourth, the caste structure considered certain castes and tribal communities as professional criminals. Fifth, penal sanctions were imposed on those who violated the "law of caste".

94. The rules of caste continued in medieval history. The law of caste manifested in several ways– with each manifestation causing a form of violence against the oppressed communities.

XI. The Colonial Suppression of Marginalized Castes and Tribes

95. The colonial history indicates that the British reproduced the systems of social hierarchy in their legal framework. Following several revolts from indigenous communities in India, in particular their participation in the 1857 revolt, the British focused on restricting their activities. The British increased surveillance upon them by the Thuggee Act (XXX of 1836) and Dacoity Act (XXIV of 1843).

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129 B.R. Ambedkar, "Castes in India", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 14

130 Anastasia Pilavsky, "The 'Criminal Tribe' in India before the British", *Comparative Studies in Society and History* 57, no. 2 (2015): 323–54, at p. 327

131 Ibid, p. 325

96. Reference must be drawn to the statement of J. F. Stephen, legal member of the Viceroy's Council, who in the early 1870s, stated:

> "The caste system is India's distinguishing trait. By virtue of this system, merchants are constituted in a caste, a family of carpenters will remain a family of carpenters for a whole century from now, or five centuries from now, if it survives that long. Let us bear that in mind and grasp quickly what we mean here by professional criminals. We are dealing here with a tribe whose ancestors have been criminals since the very dawn of time, whose members are sworn by the laws of their caste to commit crime... for it is his vocation, his caste, I would go to the extent of saying his faith, to commit crimes (from Fourcade 2003: 146)."[132]

These caste-based stereotypes were given the form of the Criminal Tribes Act of 1871.

i. Criminal Tribes Acts

97. The legislation of 1871 empowered the government to declare any community as "criminal tribe".[133] The Act provided for the "registration, surveillance and control" of "criminal tribes" and "eunuchs". The major part of the Act operated in the North-Western province, Punjab and Oudh.[134] The Act allowed the local government, with due permission of the Governor General in Council, to designate any "tribe, gang or class of persons" as "criminal tribes" if they were deemed to be "addicted to systematic commission of non-bailable offences".[135] The local government needed to give a comprehensive report to the Governor General giving reasons for declaring any tribe as criminal and also provide a manner in which these tribes would earn their livelihood.[136]

98. The Act authorized the local government to term a "wandering tribe" having no fixed place of residence as criminals, except in cases

132 Anastasia Pilavsky, "The 'Criminal Tribe' in India before the British", *Comparative Studies in Society and History* 57, no. 2 (2015): 323–54, at p.326

133 Section 2, Criminal Tribes Act 1871.

134 Section 1, Criminal Tribes Act, 1871.

135 Section 2, Criminal Tribes Act, 1871.

136 Section 3, Criminal Tribes Act, 1871.

where they can identify a "lawful occupation" of the tribe.[137] The government was allowed to settle such tribes in a specified place.[138] Subsequently, with the authorization of the Governor General, the local government will publish the declaration of criminal tribes in the local gazette in form of a notification.[139] Such notification acted as conclusive proof of the applicability of the provisions of the Act on the tribe and debarred any judicial review irrespective of any procedural non-compliance.[140]

99. Members of the designated criminal tribes were required to mark their presence in a register made by the magistrate, failing which they were subjected to penalties in accordance with the provision of the Indian Penal Code.[141] Such a register was kept in the custody of the District Superintendent of Police.[142] A person aggrieved by any entry in the register could request alteration by filing a complaint before the Magistrate, who had the final say.[143] The designated criminal tribes were forced to either settle or move to another place chosen by the local government,[144] or could be moved to any reformatory settlement.[145] Headmen, village-watchmen and landowners or occupiers of the village were informed about the designated criminal tribes.[146] They were subjected to frequent checks, and their movements were closely monitored.[147] The local government could restrict their movement within a territorial limit.[148] The designated criminal tribes required permission to move from one place to another.[149] They were mandated to carry "passes" which had permission to move to another specified place.[150] The Act allowed

137 Section 4, Criminal Tribes Act, 1871.
138 Section 4, Criminal Tribes Act, 1871.
139 Section 5, Criminal Tribes Act, 1871.
140 Section 6, Criminal Tribes Act, 1871.
141 Section 9, Criminal Tribes Act, 1871.
142 Section 10, Criminal Tribes Act, 1871.
143 Section 12, Criminal Tribes Act, 1871.
144 Sections 13, 14, Criminal Tribes Act, 1871.
145 Section 17, Criminal Tribes Act, 1871.
146 Section 18(ii), Criminal Tribes Act, 1871.
147 Section 18 (viii), Criminal Tribes Act, 1871.
148 Section 18 (iv), Criminal Tribes Act, 1871.
149 Section 18(v), Criminal Tribes Act, 1871.
150 Section 18(v), Criminal Tribes Act, 1871.

the government to employ the individuals from designated criminal tribes "placed in a reformatory settlement".[151]

100. The Act included provisions for punitive measures against members of the criminal tribes, including rigorous imprisonment extending from six months (in first breach) to one year (in second breach), whipping, or fine, if they were found violating the Act's provisions.[152] It gave extensive powers to any police officer, or village watchman to arrest without warrant a person of a designated criminal tribe, if they move beyond any prescribed limits of residence without a pass.[153] The Act mandated "every village-headman and village-watchman", and "every owner or occupied of land" to inform the police about the absence of a person from a designated criminal tribe or the arrival in the village of such persons "who may reasonably be suspected of belonging" to a criminal tribe.[154]

101. The Act also mandated creation of "a register of the names and residence of all eunuchs residing" in the territorial jurisdiction of the Act, "who are reasonably suspected of kidnapping or castrating children, or of committing offences under section [377] of Indian Penal Code, or of abetting the commission of any of the said offences".[155] The "eunuchs" were required to give information of their property.[156] The Act further provided for arrest and punishment, including imprisonment up to two years, or fine, or both, of a "eunuch", "who appears dressed or ornamented like a woman, in a public street" or even in a private space visible from a public street, or "dances or plays music, or takes part in any public exhibition, in a public street or place of for hire in a private house".[157] The Act imposed a penalty on a "eunuch", if a boy under 16 years of age was found in his house or "under his control".[158] The Act also prohibited "eunuchs" of "being or acting as guardian to any minor", "making a gift", "making a will", or "adopting a son".[159]

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151 Section 18(xii), Criminal Tribes Act, 1871.

152 Section 19, Criminal Tribes Act, 1871.

153 Section 20, Criminal Tribes Act, 1871.

154 Section 21, Criminal Tribes Act, 1871.

155 Section 24(a), Criminal Tribes Act, 1871.

156 Section 24(b), Section 30, Criminal Tribes Act, 1871.

157 Section 26, Criminal Tribes Act, 1871.

158 Section 27, Criminal Tribes Act, 1871.

159 Section 29, Criminal Tribes Act, 1871.

102. The provisions of the CTA were based on a stereotype which considered several marginalized communities as born criminals. By declaring them as born criminals and assuming that they are addicted to the commission of a crime, the Act restricted their life and identity in a negative way. The Act imposed unnecessary and disproportionate restrictions on their movement. It also took away the opportunity from them to settle in a place, as it was prescribed that they could be forced to move to another place decided by the government. This was forced nomadism. The Act, further, subjected the criminal tribes to heightened surveillance, as their movements were frequently and closely monitored. It also led to social discrimination, as it imposed a stigma of born criminality. At the same time, it gave extensive powers to local village headmen (generally higher caste) to collaborate with the police to report their movements. The Act was also based on a stereotype and further reinforced that "eunuchs" are suspected of kidnapping or castrating children. Thus, the impact of CTA was discriminatory and punitive.

103. The Act was first amended in 1876 to extend its operation to Bengal.[160] The agents of landowners were also given the duty to inform the police about the presence or absence of any individual from a criminal tribe.[161] The Act was then modified in 1897 to make the penalties more stringent Penalties for second and third convictions of individuals from the designated criminal tribes for specified offenses were imposed.[162] The amendment also empowered the local governments "to separate children of the Criminal Tribes between the ages of 4 and 18 years from their irreclaimable parents" and "place them" in specially established "reformatory settlements".[163]

104. In 1908, the Criminal Tribes Settlement Act was passed, "permitting the various provincial governments of India to make plans whereby tribes suspected of living by crime could be registered and supervised by the police, and those members of criminal tribes which had been convicted could be placed in settlements."[164]

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160 Criminal Tribes (Lower Provinces) Act Extension Act, 1876

161 Ibid

162 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 5

163 Ibid

164 John Lewis Gillin, *Taming the Criminal: Adventures in Penology*, Macmillan Company (1931), p. 110

105. The Criminal Tribes Act 1911 repealed the earlier Act of 1871 and the amendments of 1876 and 1897. The application of the Criminal Tribes Act was extended to the whole of British India.[165] The Act amended the law relating to the registration, surveillance, and control of criminal tribes. It strengthened the power of the local government to declare any community as a "criminal tribe" without having to seek permission of any higher authority.[166] However, the local government was still required to take orders from the Governor General if it wanted to restrict the movements of any criminal tribe to any specified area or settle them in any place of residence.[167]

106. The 1911 amendment gave additional powers to the district magistrate or any officer to order finger-impressions of a registered member of the designated tribe.[168] The individuals belonging to such tribes were required to inform "any change or intended change of residence and any absence or intended absence from his residence".[169] Further, the 1911 Act reinforced the provisions for the registration of the members of the designated criminal tribes with the authorities[170] and regular reporting.[171] Similarly, the Act reiterated the "duty" of "every village-headman and village-watchman" and landowners to check the activities of these individuals.[172]

107. The Act also provided that the criminal tribes could be placed in any "industrial, agricultural, or reformatory settlements" to restrict their movements.[173] The local government was also allowed to "separate and remove" children (between 6 and 18 years of age) from their parents or guardians and place them in any "established industrial, agricultural or reformatory schools".[174] These children were deemed as "youthful offenders" under Reformatory Schools Act,

165 Section 1(2), Criminal Tribes Act, 1911.

166 Section 3, Criminal Tribes Act, 1911.

167 Section 11, Criminal Tribes Act, 1911.

168 Section 5(c), Section 9, Criminal Tribes Act, 1911.

169 Section 10 (b), Criminal Tribes Act, 1911.

170 Section 5, Criminal Tribes Act, 1911.

171 Section 14, Criminal Tribes Act, 1911.

172 Section 26, Criminal Tribes Act, 1911.

173 Section 16, Criminal Tribes Act, 1911.

174 Section 17 (3), Criminal Tribes Act, 1911.

1897.[175] Furthermore, the adults working in industries or children in reformatory schools could be transferred to any other similar establishment in any part of British India.[176] A person of a criminal tribe found beyond the prescribed territorial limit or having escaped from an industrial, agricultural or reformatory settlement or school was liable for punishment.[177]

108. Moreover, the Act introduced stringent penalties for non-compliance with its provisions as well as rules framed by the local government.[178] This included imprisonment that extended to three years in certain cases, and fines extending to five hundred rupees, which was significantly high at that time. Additionally, in case of a previous conviction for offences under the Schedule of the Act, punishment could vary from seven years to transportation of life.[179] The Act also prescribed punishment to an individual of a designated criminal tribe, if the court was satisfied that "he was about to commit, or aid in the commission of, theft or robbery" or "was waiting for an opportunity to commit theft or robbery".[180] Like the previous Act, courts had no jurisdiction to decide on the validity of the notifications issued by the local government.[181]

109. In 1919, based on the requests of local governments, the "Indian Jails Committee" was appointed by the Government of India to analyze the working of settlements constituted under the 1911 Act and make recommendations for better administration. The Committee stated that "the ultimate aim of the settlements should be the absorption of the settlers into the general body of the community".[182] Thereafter, the Act was amended in 1923 to make certain additions. The criminal tribes notified by the local government of a province could be restricted or settled in another province with the approval of the

175 Under the Reformatory Schools Act, 1897, "youthful offender" means any boy who has been convicted of any offence punishable with transportation or imprisonment and who, at the time of such conviction, was under the age of fifteen years.

176 Section 19, Criminal Tribes Act, 1911.

177 Section 25, Criminal Tribes Act, 1911.

178 Section 21, 22, Criminal Tribes Act, 1911.

179 Section 23, Criminal Tribes Act, 1911.

180 Ibid.

181 Section 28, Criminal Tribes Act, 1911.

182 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, 6

government of that province.[183] Before the internment of any criminal tribe in a settlement, a formal enquiry was required to ascertain the necessity of restricting that tribe in the settlement.[184] The amendment also empowered the local government to deport criminal tribes to any princely states, provided the states consented and appropriate arrangements were made to restrict the movements of the criminal tribes.[185]

110. The law relating to criminal tribes was then consolidated as the Criminal Tribes Act of 1924.[186] Another amendment to the Act happened in 1925 to clarify that if an individual from a designated criminal tribe moved to another district in the same province or to another province, he shall still be treated as a criminal tribe in that district or province.[187]

111. Several Indian States of pre-independent India had enacted their own local laws for the surveillance of criminal tribes. According to the Criminal Tribes Manual of Gwalior, an individual from a criminal tribe could be convicted with rigorous imprisonment up to one year, if he kept an arm or "means of locomotion such as horses, ponies, camels, donkeys, bicycles".[188] The general public was prohibited from selling any arms or means of locomotion to the criminal tribes, giving shelter to an individual from a criminal tribe not having a valid pass, or lending any cash to them.[189] Absence of an individual of a criminal tribe from his specified residence without a pass was punishable with rigorous imprisonment from one to two years or whipping with 20 to 30 stripes.[190] Other States' manuals also prohibited criminal tribes from possessing any means of locomotion.[191] The Rewa Wandering Criminal Tribes Act, 1925, applied in Vindhya Pradesh, required

183 Section 6, Criminal Tribes (Amendment) Act 1923 https://164.100.163.187/repealedfileopen?rfilename=A1923-1.pdf

184 Section 8, Criminal Tribes (Amendment) Act 1923

185 Section 12, Criminal Tribes (Amendment) Act 1923

186 Act No. 06 of 1924

187 Criminal Tribes (Amendment) Act, 1925.

188 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 71

189 Ibid

190 Ibid

191 Ibid, 72-73.

members of wandering criminal tribes to report at all nearest police stations in their way of travel.[192] Failure to do so was punishable with whipping and rigorous imprisonment upto three months.[193] The Bhopal government compelled both men and women from criminal tribes settled in different colonies to answer the roll call and give attendance to a police constable four times at night— 6 PM, 12 midnight, 4 AM, ad 6 AM.[194]

112. The Act notified around 150 tribes and castes in India as criminals. This provided an affirmation of the State that any person who belonged to such a tribe was born as a criminal. Between the period 1871 and 1949, a large number of communities were registered as "criminal tribes".

113. The separation of children from their families led to the destruction of their childhood and deprived them of their innocence. They were considered as young offenders. The criminal tribes were subjected to inhuman living conditions, as they were required to mark their attendance even during late nights. The idea of rehabilitation of the so-called criminal tribes also led to the exploitation of their labour. Ostensibly meant to "reform", the settlements provided for institutionalized incarceration. The compulsive stay in "settlement camps" led to many nomadic groups leaving their traditional livelihoods involuntarily. These camps, created by the Act, distanced the criminal tribes from mainstream society. Harsh provisions on punishment for members of the criminal tribes were imposed.

114. American sociologist John Lewis Gillin travelled across India to document the situation of settlement camps. He noted:

> "There are four types of settlements besides the institutions for children and loose women: (a) Industrial settlements near some large industrial plant such as a cotton mill, railroad shops, or a large tea plantation; (b) agricultural settlements. In these settlements lands are provided by the government which the settlers are allowed to cultivate at a certain rental; (c) forest settlements where the settlers

192 Ibid, 79

193 Ibid

194 Ibid, p. 80

> work in the woods getting out timber and reforesting land either for the government or for private owners. So far as the Bombay Presidency and the Punjab are concerned, these are mostly government forests; (d) reformatory settlements. The last are intended for those who cannot be trusted and who attempt to escape… In 1919 all of British India had settlements for criminal tribes except Burma, Assam, the Central Provinces, and the Northwest Frontier Province. It is uncertain from the reports whether all of the native states have them. In the Punjab in 1919 there were twenty-six settlements besides the reformatory settlement at Amritsar. Of these, twelve were industrial, one semi-agricultural, three old agricultural, and seven new agricultural, together with three old settlements which had no supervising staffs."[195]

ii. Caste Discrimination in Colonial India

115. Several leaders led the fight against caste discrimination in colonial India. These included Jotiba Phule, Babasaheb Ambedkar, E.V. Ramasami 'Periyar', Narayan Guru, among many others. They challenged the system of caste and exploitation from multiple fronts.

116. In his submissions before the Southborough Committee in 1919, Dr Ambedkar highlighted how the "untouchables" faced the worst form of social disabilities:

> "The untouchables are usually regarded as objects of pity but they are ignored in any political scheme on the score that they have no interests to protect. And yet their interests are the greatest. Not that they have large property to protect from confiscation. But they have their very persona confiscated. The socio religious disabilities have dehumanized the untouchables and their interests at stake are therefore the interests of humanity. The interests of property are nothing before such primary interests."[196]

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195 John Lewis Gillin, *Taming the Criminal: Adventures in Penology*, Macmillan Company (1931), pp. 115-16, 122.

196 B.R. Ambedkar, "Evidence Before the Southborough Committee (1919)", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 255

He described how "untouchability" is a form of slavery:

> "If one agrees with the definition of slave as given by Plato, who defines him as one who accepts from another the purposes which control his conduct, the untouchables are really slaves. The untouchables are so socialized as never to complain of their low estate. Still less do they ever dream of trying to improve their lot, by forcing the other classes to treat them with that common respect which one man owes to another. The idea that they have been born to their lot is so ingrained in their mind that it never occurs to them to think that their fate is anything but irrevocable. Nothing will ever persuade them that men are all made of the same clay, or that they have the right to insist on better treatment than that meted out to them."[197]

He then explained how "untouchability" led to the denial of civil and political rights of the caste-oppressed communities:

> "The right of representation and the right to hold office under the State are the two most important rights that make up citizenship. But the untouchability of the untouchables puts these rights far beyond their reach. In a few places they do not even possess such insignificant rights as personal liberty and personal security, and equality before law is not always assured to them. These are the interests of the untouchables. And as can be easily seen they can be represented by the untouchables alone. They are distinctively their own interests and none else can truly voice them."[198]

117. Before the Simon Commission in 1928, Dr Ambedkar raised the demand of representation of caste-oppressed communities in government services. Dr Ambedkar also confronted the British government in the Round Table Conferences during 1930-32. He stated that there was no change in the material condition of the oppressed castes in the colonial period. He thundered:

197 Ibid, pp. 255-256

198 Ibid, p. 256

> "When we compare our present position with the one which it was our lot to bear in Indian society of the pre-British days, we find that, instead of marching on, we are only marking time. Before the British, we were in the loathsome condition due to our untouchability. Has the British Government done anything to remove it ? Before the British, we could not enter the temple. Can we enter now ? Before the British, we were denied entry into the Police Force. Does the British Government admit us in the Force? Before the British, we were not allowed to serve in the Military. Is that career now open to us? To none of these questions can we give an affirmative answer… there is certainly no fundamental change in our position. Indeed, so far as we were concerned, the British Government has accepted the social arrangements as it found them, and has preserved them faithfully... Our wrongs have remained as open sores and they have not been righted, although 150 years of British rule have rolled away."[199]
>
> (emphasis added)

In his classic "Annihilation of Caste", he stated:

> "Caste System is not merely division of labour. It is also a division of labourers. Civilized society undoubtedly needs division of labour. But in no civilized society is division of labour accompanied by this unnatural division of labourers into water-tight compartments. Caste System is not merely a division of labourers which is quite different from division of labour—it is an heirarchy in which the divisions of labourers are graded one above the other."[200]

118. Like Dr Ambedkar, other scholars have documented how the British reinforced the caste system by not interfering in the matters of caste-based customs. While in enacting the Criminal Tribes Act, the British directly applied the logic of caste, in courts, they facilitated caste oppression directly or directly. In this regard, Marc Galanter noted:

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199 "Dr. Ambedkar at the Round Table Conferences", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 2, p. 504

200 B.R. Ambedkar, "Annihilation of Caste", in Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 1, p. 47

> "… from the early days of the "British" legal system a group of matters that might roughly be described as family law - marriage and divorce, adoption, joint family, guardianship, minority, legitimacy, inheritance, and succession, religious endowments - were set aside and left subject to the laws of the various religious communities; i.e., the applicable law in these fields was "personal" rather than territorial. In these family and religious matters Hindus were ruled by dharmasastra not by the ancient texts as such, but as interpreted by the commentators accepted in the locality. At first the courts relied on Brahmin pundits or sastris to advise them on the applicable rules and their interpretation…"[201]

He highlighted the practice of British non-interference as follows:

> "The cases show widespread acquiescence by local authorities in the enforcement of these disabilities and suggest that active governmental support of these practices at a local level was at least not uncommon. It should be emphasized however, that these prescriptive rights and disabilities received their greatest governmental support not from direct judicial enforcement but from the recognition of caste autonomy i.e., from the refusal of the courts to interfere with the right of caste groups to apply sanctions against those who defied these usage."[202]

119. Galanter also highlighted how caste discrimination received direct support from British courts in certain cases:

> "Caste groups did enjoy active support of the courts in upholding their claims for precedence and exclusiveness. Courts granted injunctions to restrain members of particular castes from entering temples - even ones that were publicly supported and dedicated to the entire Hindu community. Damages were awarded for purificatory ceremonies necessitated by the pollution caused by the presence of lower castes; such pollution was actionable as a trespass on the person of the higher caste worshippers. It was

201 Marc Galanter, "Law and Caste in Modern India", *Asian Survey* (1963), Vol. 3, No. 11, pp. 544–59, at p. 545.

202 Ibid, at p. 548

> a criminal offence for a member of an excluded caste knowingly to pollute a temple by his presence."[203]

British criminal law became intertwined with pre-colonial notions of who should be disciplined and punished.

iii. Repeal of Criminal Tribes Act

120. When the Objectives Resolution was placed in the Constituent Assembly, HJ Khandekar stated, on 21 January 1947:

> "One thing is wanting in the Resolution, and, if the mover agrees, it can be modified. The Resolution promises safeguards and rights to all the minorities. But unfortunately there are 10 million people in India who, without any fault on their part, are described as criminal tribes from their very birth. Hundreds of thousands of men and women in India were declared as criminal tribes according to the current law. To deprive them of their rights they are declared so. No matter whether they are criminals or not, from their very birth they are made criminals. Some provision to abolish this law must be embodied in this Resolution."

Khandekar raised the concerns of the persons who were declared as criminal tribes.

121. In 1947, an amendment to the Act abolished the punishment imposed on criminal tribes for second and third convictions under specified offences.[204] As some provinces had concurrent jurisdiction on this issue, they could amend or repeal the Act in its application to their territories.[205] The Madras government enacted the Criminal Tribes (Madras Repeal) Act, 1947 to end the application of the Act in its territory. Similarly, the Bombay government also repealed the application of the Act to its territory in 1949.[206]

122. By a resolution dated 28 September 1949, the Government of independent India appointed "The Criminal Tribes Act Enquiry

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203 Marc Galanter, "Untouchability and the Law", *Economic and Political Weekly* (1969), Vol. 4, No. 1/2, pp. 131–170, at p. 131.

204 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 7

205 ibid

206 Ibid, p. 8

Committee" under the chairmanship of Ananthasayanam Ayyangar. The resolution stated:

> "There has been a persistent demand in the Central Legislature in recent years that the Criminal Tribes Act, 1924, should be repealed as its provisions which seek to classify particular classes of people as Criminal Tribes, are inconsistent with the dignity of free India. Some of the Provinces have already repealed the Act in its application to their areas and replaced it by other legislation, e.g., Habitual Offenders' Acts. The Government of India consider that the question whether the Act should be modified or repealed altogether on an all-India basis should be considered after an enquiry into the working of the Act in the Provinces."[207]

123. The Committee submitted its report in 1951, after the Constitution of India came into force. After doing field inspections of several regions, the Committee concluded that "[e]xcept a few hardened criminals the other persons, belonging to these tribes, are as good as the people belonging to other communities of the same economic and social status, and desire to live an honourable life."[208] The Committee further noted, "Wherever we went we heard one single cry from all the criminal tribes that whereas India obtained freedom, they continue to be in bondage and their demand for setting them free by repealing the Act was insistent".[209] The stigma attached to a community declared as a criminal tribe was highlighted.[210]

124. The Committee noted that "criminality is not hereditary".[211] It was observed that the stigma and discrimination against communities declared as criminal by birth was violative of the equality framework adopted in the Indian Constitution in 1950. It was stated:

> "Untouchability proved oppressive and its practice is now made illegal under the Constitution, as it involves social injustice and perpetuates discrimination. More so is the stigma of criminality by birth. Under section 3 of the Criminal

207 Ibid, p. 1

208 Ibid, p. 81

209 Ibid

210 Ibid

211 Ibid, p. 82

> Tribes Act, 1924, any tribe, gang or class of persons or any part of a tribe, gang or class who is addicted to the systematic commission of non-bailable offences can be notified to be a Criminal Tribe. As a result of this, many tribes or parts of tribes including families who have never criminal, have been notified as criminal tribes. The children born in these notified tribes automatically become members of the criminal tribes so notified, and the members of such tribes, who may never have committed or aided in commission of any offence or even suspected of having done so, as well as newly born children of these people are thus branded as criminal and denied equality before the law and thus a discrimination is imposed against them on the ground that they belong to a tribe or a part of a tribe, which has been notified as a Criminal Tribe. In this respect, this section would appear to go against the spirit of our Constitution… Moreover, this section gives powers to the executive to declare any tribe, part of tribe or gang or part of gang or a class of persons as a Criminal Tribe and it is provided in section 29 of this Act that no court shall question the validity of any notification issued under section 3 and that every such notification shall be a conclusive proof that it has been issued in accordance with law. We feel that it is not proper to give such wide powers to the executive. The Act also gives powers to restrict the movements of the Criminal Tribes or to place them in settlements to the executive and by making suitable rules under the Act to take work from settlers on pain of punishment. This would virtually amount to "begar" or forced labour which is an offence under the Indian Penal Code and is opposed also to Article 23 of the Constitution."[212]

125. The Committee recommended the repeal of the Act:

> "The Criminal Tribes Act, 1924, should be replaced by a Central legislation applicable to all habitual offenders without any distinction based on caste, creed or birth and the newly formed States included in Parts B and C

212 Ibid, p. 82

> of the First Schedule of the Constitution, which have local laws for the surveillance of the Criminal Tribes, should be advised to replace their laws in this respect by the Central legislation for habitual offenders, when passed."[213]

The Act was repealed in 1952. The criminal tribes were then denotified, as a result of which they were known as "Denotified Tribes".

126. It must be noted under the Criminal Tribes Act, several marginalized "castes" were also declared as criminal "tribes". It is for this reason Article 341(1) of the Constitution employs the words "castes" and "tribes" while defining the Scheduled Castes.[214] After the repeal of the Act, some of the castes earlier declared as criminal tribes, have been accordingly notified as Scheduled Castes.

XII. Jurisprudence on Social Protection in Post-Independence India

127. Parliament enacted legislation to prevent discrimination and atrocities against the Scheduled Castes and the Scheduled Tribes. In **State of Karnataka v. Appa Balu Ingale**,[215] Justice Ramaswamy noted that Parliament enacted the stringent provisions of the PoA Act, 1989 when "the mandate of Article 17 was being breached with impunity, and commission of atrocities on Dalits and Tribes continued unabated".

128. The Court in **State of Madhya Pradesh v. Ram Krishna Balothia**[216] held that the offences under PoA Act "constitute a separate class and cannot be compared with offences under the Penal Code". These offences are "committed to humiliate and subjugate members of Scheduled Castes and Scheduled Tribes with a view to keeping them in a state of servitude", and "prevent them from leading a life of dignity and self-respect". The Court quoted the Statement of Objects and Reasons of the Act to highlight that "when members of the Scheduled Castes and Scheduled Tribes assert their rights and

213 Ibid, p. 104

214 Article 341(1) provides: "The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be."

215 [1992] Supp. 3 SCR 284 : AIR 1993 SC 1126

216 [1995] 1 SCR 897 : 1995 INSC 99

demand statutory protection, vested interests try to cow them down and terrorise them" if they are on anticipatory bail. For this reason, the Court dismissed a challenge to Section 18 of the PoA Act, which debarred the opportunity to seek anticipatory bail in respect of offences committed under the Act.

129. In **Safai Karamchari Andolan v. Union of India**,[217] the Court noted that "the practice of manual scavenging has to be brought to a close". Making a "member of a Scheduled Caste or a Scheduled Tribe to do manual scavenging or employing or permiting the employment of such member for such purpose" is a criminal offence under the PoA Act.[218] The Court took a step further, and held that "entering sewer lines without safety gears should be made a crime even in emergency situations". The Court declared that for a death in sewer lines, "compensation of Rs. 10 lakhs should be given to the family of the deceased". It was emphasized that "Persons released from manual scavenging should not have to cross hurdles to receive" compensation or rehabilitation "due under the law".

130. The Court showed a deep concern about non-implementation of the PoA Act in **National Campaign on Dalit Human Rights v. Union of India**.[219] It remarked that "there has been a failure on the part of the authorities concerned in complying with the provisions" of the PoA Act. Calling out the "indifferent attitude of the authorities", the Court directed the State and the Union governments to strictly do their role in implementing the Act.

131. These rulings emphasized that the PoA Act is a significant legislative measure designed to protect the fundamental rights and freedoms of the Scheduled Castes and Scheduled Tribes, ensuring their dignity and safety against discrimination and violence. However, the subsequent judgment in **Subhash Kashinath Mahajan v. State of Maharashtra**[220] marked a departure from this protective stance.

132. Dealing with a criminal appeal, the judgment in **Subhash Mahajan** expressed a "concern that working of the Atrocities [PoA] Act should not result in perpetuating casteism which can have an adverse

217 [2014] 4 SCR 197 : (2014) 11 SCC 224

218 Section 3(j), Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989

219 [2016] 9 SCR 122 : AIR 2017 SC 132

220 [2018] 4 SCR 877 : 2018 INSC 248

impact on integration of the society and the constitutional values". It held that there is "no absolute bar against grant of anticipatory bail" by the concerned court "in cases under the Atrocities [PoA] Act if no prima facie case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide". The Court issued the following guidelines:

> "(iii) In view of acknowledged abuse of law of arrest in cases under the Atrocities Act, arrest of a public servant can only be after approval of the appointing authority and of a non-public servant after approval by the S.S.P. which may be granted in appropriate cases if considered necessary for reasons recorded. Such reasons must be scrutinized by the Magistrate for permitting further detention;
>
> (iv) To avoid false implication of an innocent, a preliminary enquiry may be conducted by the DSP concerned to find out whether the allegations make out a case under the Atrocities Act and that the allegations are not frivolous or motivated;
>
> (v) Any violation of direction (iii) and (iv) will be actionable by way of disciplinary action as well as contempt."

133. The directions in **Subhash Mahajan** were later recalled in the review petition in **Union of India v. State of Maharashtra**.[221] In doing so, the Court noted that the Scheduled Castes and the Scheduled Tribes "are still making the struggle for equality and for exercising civil rights in various areas of the country". It remarked that there is "no presumption that the members of the Scheduled Castes and Scheduled Tribes may misuse the provisions of law as a class". Instead, "members of the Scheduled Castes and Scheduled Tribes due to backwardness hardly muster the courage to lodge even a first information report, much less, a false one". The Court further declared that treating the Scheduled Castes and the Scheduled Tribes as "prone to lodge false reports under the Scheduled Castes and Scheduled Tribes Act for taking revenge" or monetary gain, especially when they themselves are victims of such offenses, contradicts fundamental principles of human equality.

221 [2019] 12 SCR 1125 : 2019 INSC 1102

134. The review judgment also observed that guidelines issued in **Subhash Mahajan** "may delay the investigation of cases". The judgment termed the directions as "discriminatory", as "it puts the members of the Scheduled Castes and Scheduled Tribes in a disadvantageous position", compared to complaints lodged by members of upper castes, where no such preliminary investigation is required. The Court also found the directions to be "without statutory basis", as they are in conflict with PoA Act, and amounts to "encroaching on a field which is reserved for the legislature". The Court however clarified that "if prima facie case has not been made out attracting the provisions" of PoA Act, "the bar created under section 18 on the grant of anticipatory bail is not attracted".

135. Before the review judgment was delivered, Parliament amended the PoA Act, undoing the effect of the guidelines issued in **Subhash Mahajan**. The amendment was unsuccessfully challenged in **Prathvi Raj Chauhan v. Union of India**.[222]

136. The hurdles faced by the Scheduled Castes and the Scheduled Tribes were highlighted by this Court in **Hariram Bhambhi v. Satyanarayan**.[223] The Court cancelled the bail of an accused on the ground that the statutory requirement of Section 15A[224] of PoA Act was not fulfilled in the case. Authoring the judgment, one of us (Justice DY Chandrachud) noted:

> "Scheduled Castes and Scheduled Tribes specifically suffer on account of procedural lapses in the criminal justice system. They face insurmountable hurdles in accessing justice from the stage of filing the complaint to the conclusion of the trial. Due to the fear of retribution from members of upper caste groups, ignorance or police apathy, many victims do not register complaints in the first place. If victims or their relatives muster up the courage to approach the police, the police officials are reluctant to register complaints or do not record allegations accurately.

222 [2020] 2 SCR 727 : (2020) 4 SCC 727

223 [2021] 8 SCR 855 : 2021 INSC 701

224 Section 15A(5) of the Act provides: "A victim or his dependent shall be entitled to be heard at any proceeding under this Act in respect of bail, discharge, release, parole, conviction or sentence of an accused or any connected proceedings or arguments and file written submission on conviction, acquittal or sentencing."

> Eventually, if the case does get registered, the victims and witnesses are vulnerable to intimidation, violence and social and economic boycott. Further, many perpetrators of caste based atrocities get away scot-free due to shoddy investigations and the negligence of prosecuting advocates. This results in low conviction rates under the SC/ST Act giving rise to the erroneous perception that cases registered under the Act are false and that it is being misused. On the contrary, the reality is that many acquittals are a result of improper investigation and prosecution of crime, leading to insufficient evidence. This is evident from the low percentage of cases attracting the application of the provisions of the Penal Code relating to false complaints as compared to the rate of acquittals."
>
> (emphasis added)

The Court observed that the provisions of the PoA Act, in particular Section 15A, "enable a member of the marginalized caste to effectively pursue a case and counteract the effects of defective investigations".

137. In **Patan Jamal Vali v. State of Andhra Pradesh**,[225] this Court expanded the scope of jurisprudence relating to Section 3(2)(v) of the PoA Act. The case dealt with the offence of rape of a woman from the Scheduled Caste community, who was blind by birth. Prior to the amendment in 2016, Section 3(2)(v) provided, "Whoever not being a member of a Scheduled Caste or Scheduled Tribe … commits any offence under the Indian Penal Code punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine". The Court observed that in such cases, "an intersectional lens enables us to view oppression as a sum of disadvantage resulting from multiple marginalized identities." It was held that "A true reading of Section 3(2)(v) would entail that conviction under this provision can be sustained as long as caste identity is one of the grounds for the occurrence of the offence." The Court observed:

225 [2021] 3 SCR 470 : 2021 INSC 272

> "To deny the protection of Section 3 (2) (v) on the premise that the crime was not committed against an SC & ST person solely on the ground of their caste identity is to deny how social inequalities function in a cumulative fashion. It is to render the experiences of the most marginalized invisible. It is to grant impunity to perpetrators who on account of their privileged social status feel entitled to commit atrocities against socially and economically vulnerable communities."

138. In **Dr. Balram Singh v. Union of India**,[226] while dealing with the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013, the Court directed the Union government to take "appropriate measures" and "issue directions, to all statutory bodies, including corporations, railways, cantonments, as well as agencies under its control, to ensure that manual sewer cleaning is completely eradicated in a phased manner". The Court also instructed that guidelines and directions should be issued to prevent the need for individuals to enter sewers, even when sewer cleaning work is outsourced or carried out by contractors or agencies. The Court held that "where minimum protective gear and cleaning devices are not provided to hazardous workers, the employment of hazardous workers amounts to forced labour", prohibited under the Constitution. Hence, the Court held that "the provisions for protective gear and cleaning devices are not mere statutory rights or rules, but are entitlements" guaranteed under the Constitution.

139. On a number of occasions, this Court has expressed concern about the non-implementation of the PoA Act and the legislation prohibiting manual scavenging. The Court has also expressed concern about the false implication of people from nomadic/denotified tribes in criminal cases. In **NALSA**, the Court noted that the colonial-era Criminal Tribes Act "deemed the entire community of Hijras as innately 'criminal'". In **Ankush Maruti Shinde v. State of Maharashtra**,[227] the High Court confirmed the conviction and death penalty of six accused for the offence of rape and murder. Their appeal was previously dismissed by this Court. However, in a review petition, the Court

226 [2023] 14 SCR 1083 : 2023 INSC 950

227 [2019] 4 SCR 709 : 2019 INSC 305

restored the appeal and acquitted all the accused, finding that they were falsely implicated. Taking account of the fact that the accused belonged to nomadic tribes, the Court noted that "there was no fair investigation and fair trial" and the "serious lapse on the part of the investigating agency". As five of the accused spent 16 years in jail on false implication and all "were facing the hanging sword of death penalty", the Court granted them monetary compensation for violating their rights under Article 21.

140. In a recent decision in **Amanatullah Khan v. The Commissioner of Police, Delhi**,[228] the petitioner sought "quashing of opening/approval of the History Sheet declaring him as bad character and consequential entries in the Surveillance Register being exercised" by the respondents. The Court reiterated that "History Sheet is only an internal police document and it shall not be brought in public domain". Further, it emphasized that "extra care and precaution", needs to be observed "by a police officer while ensuring that the identity of a minor child is not disclosed as per the law". It directed that Delhi Police "shall periodically audit/review the contents of the History Sheets and will ensure confidentiality and a leeway to delete the names of such persons/juveniles/children who are, in the course of investigation, found innocent and are entitled to be expunged from the category of "relations and connections"' in a History Sheet".

141. The crucial aspect of the above decision is that the Court exercised its *suo motu* powers to give directions to the police in other states to not act arbitrarily against the marginalized communities. It noted:

> "Having partially addressed the grievance of the appellant, we now, in exercise of our suo motu powers, propose to expand the scope of these proceedings so that the police authorities in other States and Union Territories may also consider the desirability of ensuring that no mechanical entries in History Sheet are made of innocent individuals, simply because they happen to hail from the socially, economically and educationally disadvantaged backgrounds, along with those belonging to Backward Communities, Scheduled Castes & Scheduled Tribes. While we are not sure about the degree of their authenticity,

228 [2024] 5 SCR 927 : 2024 INSC 383

> but there are some studies available in the public domain that reveal a pattern of an unfair, prejudicial and atrocious mindset. It is alleged that the Police Diaries are maintained selectively of individuals belonging to Vimukta Jatis, based solely on caste-bias, a somewhat similar manner as happened in colonial times… We must bear in mind that these pre-conceived notions often render them 'invisible victims' due to prevailing stereotypes associated with their communities, which may often impede their right to live a life with self-respect."
>
> (emphasis added)

The Court expected that the State governments "take necessary preventive measures to safeguard such communities from being subjected to inexcusable targeting or prejudicial treatment". It directed all the States/Union territories to revisit their policies to adopt a "periodic audit mechanism overseen by a senior police officer" to scrutinize the entries made in history sheets. It was noted that "[t]hrough the effective implementation of audits, we can secure the elimination of such deprecated practices and kindle the legitimate hope that the right to live with human dignity" will be protected.

142. The Court has also warned the police on misusing the power to arrest. In **Arnesh Kumar v. State of Bihar**,[229] a three-judge Bench adverted to the misapplication of the provision for arrest by the police. It was noted:

> "Arrest brings humiliation, curtails freedom and cast scars forever. Law makers know it so also the police. There is a battle between the law makers and the police and it seems that police has not learnt its lesson; the lesson implicit and embodied in the Code of Criminal Procedure. It has not come out of its colonial image despite six decades of independence, it is largely considered as a tool of harassment, oppression and surely not considered a friend of public. The need for caution in exercising the drastic power of arrest has been emphasized time and again by Courts but has not yielded desired result. Power to arrest

229 [2014] 8 SCR 128 : 2014 INSC 463

> greatly contributes to its arrogance so also the failure of the Magistracy to check it. Not only this, the power of arrest is one of the lucrative sources of police corruption. The attitude to arrest first and then proceed with the rest is despicable. It has become a handy tool to the police officers who lack sensitivity or act with oblique motive."
>
> (Emphasis added)

143. In **Mallada K. Sri Ram v. State of Telangana**,[230] the Court, speaking through one of us (Justice DY Chandrachud), highlighted the constitutional mandate to prevent arbitrary exercise of prevention detention:

> "the personal liberty of an accused cannot be sacrificed on the altar of preventive detention merely because a person is implicated in a criminal proceeding. The powers of preventive detention are exceptional and even draconian. Tracing their origin to the colonial era, they have been continued with strict constitutional safeguards against abuse. Article 22 of the Constitution was specifically inserted and extensively debated in the Constituent Assembly to ensure that the exceptional powers of preventive detention do not devolve into a draconian and arbitrary exercise of state authority."

The exercise of the power to arrest or detain may become reflective of a colonial mindset, if not exercised with caution. The misuse of the power of arrest not just violates rights, but it can prejudice generations of innocent citizens, especially marginalized communities such as the Denotified Tribes. Arrests can create a stigma of criminality if not done diligently. Innocent people, if arrested on the grounds of stereotypes and mere suspicion, may face barriers in securing employment and earning a dignified livelihood. Entering the mainstream becomes impossible when those who have suffered incarceration find themselves unable to secure livelihoods, housing, and the necessities of life.

144. Discrimination against the Scheduled Castes, Scheduled Tribes, and Denotified Tribes has continued in a systemic manner. Remedying

230 [2022] 3 SCR 5 : 2022 INSC 386

systemic discrimination requires concrete multi-faceted efforts by all institutions. In discharge of their role, courts have to ensure that while there should be proper implementation of the protective legislation such as the PoA Act, there should not be unfair targeting of members from marginalized castes under various colonial-era or modern laws. With this nuanced approach, we shall now examine the prison manuals.

XIII. Impugned Provisions

(i) Prison Act

145. At the outset, we must clarify that the Prison Act 1984 is not under challenge. Accordingly, we shall not be dealing with the validity of the Act. We are referring to its provisions to understand the background of prison manuals/rules.

146. The Act was enacted to amend the law relating to prisons and to provide for the regulation of prisons. The Statement of Objects and Reasons stated that four different Acts were in force for the regulation of prisons, which were different on important points such as the enumerated jail offences and their punishments, and were thus resulting in divergent jail management systems across provinces, non-uniform enforcement of sentences, and lack of administrative uniformity.

147. The Act provided for various aspects of prison administration including maintenance of prisons, officers of prisons, duties of prison officers, admission, removal and discharge of prisoners, discipline, food and other amenities for civil and non-convicted prisoners, employment of prisoners, health of prisoners, visits to prisons, and prison offences. Chapter II provides for the duties of prison officers. All officers are supposed to obey the directions of the Superintendent and act in accordance with the directions of the Jailer (and sanctioned by the Superintendent) and in line with the rules under Section 59 of the Act. The officers are proscribed from dealing with the prisoners, or to have an interest in the contracts for supply of the prison. The Superintendent is responsible for managing the prison in matters relating to discipline, labour, expenditure, punishment and control, subject to the orders of the Inspector General.[231] The Chapter

231 Section 11, Prisons Act, 1894.

further provides for provisions regarding jailers, medical officers and subordinate officers, including convict officers. Chapter V of the Act contains provisions regarding 'Discipline of Prisoners'. It provides for separation of prisoners based on gender, age, conviction and civil or criminal imprisonment[232] and the confinement of convicts in association or by segregation. The Act further provides for employment of prisoners under Chapter VII. It provides that civil prisoners may be permitted to follow any trade or profession and that certain safeguards need to be observed in engaging criminal prisoners in labour.[233] Chapter VIII and IX pertain to the health of prisoners and visits to prisoners respectively. Chapter X and XI provide for offences in relation to prisons and prison offences respectively. The miscellaneous chapter contains provisions regarding extramural custody, control and employment of prisoners, confinement in irons for safe custody, and the power to make rules.

148. In a constitutional set-up, the Act is governed by constitutional principles. Though the Act was enacted in the colonial era, its provisions and subsequent manuals/rules enacted therein are subject to constitutional provisions.

(ii) Prison manuals/rules

149. The impugned prison manuals and rules are listed below:

The Uttar Pradesh Jail Manual, 2022

- 158. Remission to convicts on scavenging duty - Subject to good work and conduct in jail, convicts of the scavenger class working as scavengers in jails, or convicts who on administrative grounds it is not found expedient to promote to the grades of convict officers, shall, though they may not be appointed convict officers, be titled to receive ordinary remissions at the scales sanctioned in the preceding paragraph for convict night watchmen and convict overseers, respectively, with effect from the first day of the month following the one on which they would, but for this rule, be eligible for promotion to those grades.
- 267. Classification necessary in the case of every convict- The Superintendent shall see that every convicted prisoner has been

232 Ibid, Section 27

233 Ibid, Section 34.

classified as habitual or casual in accordance with the form of classification furnished by the convicting court.

- 269. In a jail where prisoners of more than one class are confined, the Superintendent shall make arrangements, as far as possible, for the complete segregation of different classes in separate circles, enclosures or barracks in accordance with the requirements of section 27 of the Prisons Act, 1894 and the rules contained in this chapter.
- 270. Segregation of casual from habitual prisoners - Casual convicts shall as far as possible, be kept separate from habitual convicts.
- 271. There shall, as far as possible, be separate wards for nonprofessional and professional sub-categories of habitual prisoners. Prisoners belonging to the latter sub-category should be kept entirely separate from all other categories of prisoners.
- 289. Rules for observance - A convict sentenced to simple imprisonment, -(a) shall rise and retire to rest at such hours as may be prescribed by the Superintendent ;(b) shall be permitted to wear his own clothes, which if insufficient for decency or warmth shall be supplemented by such jail clothing, not exceeding the scale provided for convicts sentenced to rigorous imprisonment, as may be necessary to make up the deficiency, but shall wear the ordinary convict's clothing if he elects to labour and is employed on extra-mural labour;(c) shall clean his own cell, barrack or yard and keep his bedding and clothing in a clean and orderly condition;(d) shall, with the approval of the Superintendent, be allowed to possess and use his own books and periodicals in addition to those available from the prison library;(e) shall not be allowed to purchase his own food;(f) shall not be shaved unless he desires it or under the orders of the Medical Officer on grounds of health;(g) shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties; but may be required to carry water for his own use provided he belongs to the class of society the members of which are accustomed to perform such duties in their own homes.

The West Bengal Jail Code Rules for Superintendence and Management of Jail in West Bengal, 1967

- 404. Qualification for eligibility of a convict overseer for appointment as a night guard – A convict overseer may be appointed to be a night guard provided—

  (a) that he has served as a convict overseer for three months;

  (b) that he does not belong to any class that may have a strong natural tendency to escape, such as men of wandering tribes and those whose homes are outside India; and

  (c) that his antecedents have been verified through the Superintendent of Police.

- 694. Non-interference with religious practices or caste prejudices- (a) Interference with genuine religious practices or caste prejudices of prisoners should be avoided. But no relaxation of the working rules shall be allowed. Prisoners shall be permitted to perform their devotions at suitable times and in suitable places. Care should be taken to see that this principle is not made the cloak for frivolous complaints or for attempts to escape from jail labour or discipline. If the Superintendent feels any doubt as to the validity of any plea advanced by a prisoner on the grounds of caste or religion he should refer the matter for the orders of the Inspector General whose decision shall be final.

- 741. Sickness in cells - In case of sickness immediate notice shall be given by the guard to the Head Warder on duty by passing the ward from sentry to sentry. The Head Warder shall at once report the case to the Medical Subordinate, who shall visit the cell, and, if necessary, remove the prisoner to hospital, and inform the Superintendent, Medical Officer and Jailor of the circumstance at their next visit. Two prisoners shall, under no circumstances whatever, be confined in one cell except in the case of female prisoners condemned to death. If male condemned prisoners or dangerous lunatics have to be watched by convicts, they must remain outside the grated door of the cell. Convict sweepers, cooks and watermen may enter the cells when necessary, accompanied by a warder. Food shall

be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer.

- 793. percentage of prisoners employed as jail servants - The total number of prisoners employed regularly in essential jail services as cooks, barbers, water-carriers, sweepers, etc., shall not exceed 10 per cent. of the whole number of prisoners in Central and 1st or 2nd class District jails and 12 percent. in 3rd class District jails. (For the proportion of cooks, sweepers and hospital attendants to the number of prisoners to be attended to, see Rule 789.) The appointment of cooks is regulated by Rule 1117. The barber should belong to the A class. Sweepers should be chosen from the Mether or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work. Hospital attendants should be selected from prisoners passed for light work or those who have completed at least half their sentences. Hospital attendants shall wear a plain square red badge, 5 cm. x 5 cm., on the left breast of the kurta. Prisoners in the "convalescent and infirm" gang may be put to this duty under the Medical Officer's orders. If there is a large number of serious cases in hospital, the proportion of one attendant to 10 patients may be temporarily exceeded; with this exception, Superintendents must see that no more than the authorised percentage of prisoners is employed as jail servants or as convict officers. If any convict employed in an essential jail service has not enough work to occupy his whole time, he should be placed upon some other work for the remainder of his time.

- 1117. Selection of cooks - The cooks shall be of the A class except at the Presidency Jail where well-behaved 'B' class prisoners may be employed as such. Any prisoner in a jail who is of so high a caste that he cannot eat food cooked by the existing cooks shall be appointed a cook and be made to cook for the full complement of men. Individual convicted prisoners shall under no circumstances be allowed to cook for themselves exception being made in the cases of Hindu widows who, if they desire it, may be allowed, at the discretion of the

Superintendent, to cook for themselves if it does not interfere with their work and discipline.

Madhya Pradesh Jail Manual, 1987

- 36. Latrine Parade - While the latrine parade is being carried out, the mehtars attached to each latrine shall be present, and shall call the attention of the convict overseer to any prisoner who does not cover up his dejecta with dry earth. The mehtars shall empty the contents of the small receptacle into large iron drums and replace the receptacles in the latrine after having cleaning them.

- 411. Habitual and non-habitual criminals - 411. All convicted criminal prisoners shall be classified and placed in one or other of the following categories, namely:- (a) Habitual Criminals. (b) Non-habitual Criminals. Note.-For Convenience of reference, prisoner falling in the first of the above categories are referred to as "habitual'', and those falling in the second category are described as "non-habitual" or "casuals". The following persons shall be liable to be classified habitual criminals-(i) Any person convicted of an offence whose previous conviction, or convictions under Chapters XII, XVI, XVII or XVIII of the Indian Penal Code taken by themselves or with the facts of present case show that he habitually commits in offence or offences punishable under any or all of those Chapters;

  (ii) Any person committed to or detained in prison under section 123 (read with section 109 or section 110) of the Code or Criminal Procedure;

  (iii) Any person convicted of any of the offences specified in (i) above when it appears from the facts of the case. Even although no previous conviction has been proved that he is by habit member of a gang of dacoits, or of thieves or a dealer in slaves or in stolen property.

  (iv) Any member of denotified tribe subject to the discretion of the State Government concerned.

  (v) Any person convicted by a Court or tribunal acting outside India under the general or special authority of the Government of India of an offence which should have rendered him liable

to be classified as a habitual criminal if he had been convicted in a court established in India.

Explanation.- For the purpose of these definition the word "conviction" shall include an order made under section 118 read with section 110 of the Criminal Procedure Code.

- 563. Cooking of food, cleanliness of vessels etc. – The cooks shall perform all preparations and processes necessary after issue of the daily supplied to them, and shall cook the food with due care and attention. The dough for chapaties shall be 'slowly and thoroughly kneaded and then rolled to a uniform thickness on a table by a rolling pin, not patted by hands; a circular curter shall be used to make the cakes of one size; and the cooking must be done slowly on a gently heated plate; so as not to burn the outside whilst the inner part remains Uncooked. All cooking utensils must be kept scrupulously clean and bright, and the cook-house and feeding places as clean and tidy as it is possible to make them. Any breach of this rule shall subject the cooks to such punishment, within the limits fixed by these rules, as the Superintendent may after due and proper enquiry award.

Andhra Pradesh Prison Rules, 1979

- 217. Definition of habitual – The following persons shall be liable to be classified as "habitual criminals", namely:— (i) Any person convicted of an offence punishable under chapters XII, XVII and XVIII of the Indian Penal Code whose previous conviction or convictions, taken in conjuction with the facts of the present case, show that he is by habit a robber, housebreaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery;

  (ii) Any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code, whose previous conviction or convictions taken in conjunction with the facts of the present case, show that he habitually commits offences against the person;

  (iii) Any person committed to or detained in prison under section 122 read with section 109 or section 110 of the Code of Criminal Procedure;

(iv) Any person convicted of any of the offences specified in i) above when it appears from the facts of the case, even though no previous conviction has been proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property;

(v) Any habitual offender as defined in the Andhra Pradesh Habitual Offenders Act, 1962;

(vi) Any person convicted by a court or tribunal acting outside India under the general or special authority of the Central Government or any State Government of by any court or tribunal which was before the commencement of the constitution acting under the general or special authority of an offence which would have rendered him liable to be classified as a habitual criminal if he had been convicted in a court established in India.

EXPLANATION:- For the purpose of this definition the word "conviction" shall include an order mate under section 117, read with section 110 of the Criminal Procedure Code.

- 440. Allowance for caste prejudice – The prison tasks including conservancy work shall be allotted at the discretion of the Superintendent with due regard to capacity of the prisoner, his education, intelligence and attitude and so far as may be practicable with due regard to his previous habits.

- 448. Restrictions on extramural employment of convicts–

(1) Without the sanction of the Inspector General, no convict shall, at any time, be employed on any labour outside the walls of the prison, or be permitted to pass out of the prison for employment of the purpose of being so employed:—

(a) Unless he has undergone not less than one-fourth of the substantive term of imprisonment to which he has been sentenced;

(b) If the unexpired term of substantive sentence together with imprisonment (if any) awarded in lieu of fine, still to be undergone, exceeds two years;

(c) If his appeal (if any) is undisposed of:

d) If any other charge or charges are pending against him or he has to undergo a period of police surveillance on the expiry of his sentence;

(e) If he is a resident of foreign territory; and

(f) If he is a member of a wandering or criminal tribe, or is of a bad or dangerous character, or has, at any time, escaped of attempted to escape from lawful custody.

(2) Not withstanding anything contained in sub-rule (1) of this rule, every prisoner, who has not more than twelve months of sentence remaining, may be employed on extramural labour irrespective of the portion of sentence already passed in prison.

(3) In every case in which a convict is employed on any labour outside the walls of the prison or is permitted to pass out of the prison for the purpose of being so employed, it shall be subject to the condition that the Superintendent has sanctioned his employment outside the prison and recorded the fact of his having done so in the Prisoner's History Ticket.

NOTE:- When there are more prisoners eligible, for employment outside the prison than are actually required, casuals and men with the shortest unexpired terms should be selected in preference to others.

- 1036. Classes of convicted prisoners and their treatment – (1): As mentioned in rule 216 supra, convicted prisoners are divided into three divisions namely classes A, B and C.

  (2) Prisoners shall be treated as "A" Class if-

  (i) They are non-habitual prisoners of good character;

  (ii) They by social status, education and habit of life have been accustomed to a superior mode of living; and

  (iii) They have not been convicted of- (a) Offenses involving elements of cruelty, moral degradation or personal greed;

  (b) Serious or premeditated violence;

  (c) Serious offences against women and children;

  (d) Serious offences against property;

(e) Offences relating to the possession of explosives, fire-arms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed;

(f) Abetment or incitement of offences falling within these sub-rules.

(3) Prisoners shall be treated as "B" Class if —(i) They, by social status, education and habit of life have been accustomed to superior mode of living; and

(ii) They have not been convicted of:

(a) Offences involving elements of cruelty, moral degradation or personal greed;

(b) Serious or premeditated violence;

(c) Serious offence against women and children;

(d) Serious offences against property;

(e) Offences relating to the possession of explosives, firearms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed

(f) Abetment or incitement of offences falling within these sub-rules.

NOTE:— Habitual prisoners may be included under this class or grounds of character and antecedents.

(4) (i) If no orders about classification are passed by the sentencing court, it should be assumed that a prisoner belongs to "C" Class. A reference should be made in doubtful cases but it should not be presumed in the absence of specific orders that the prisoner belongs to a class higher than "C".

Odisha Model Jail Manual Rules for the Superintendence and Management of Jails in Odisha, 2020

- 3. Definitions - (t) "Habitual offender" means an offender who has been convicted in a particular offence for more than one occasion.
- 4. Criteria for establishment of prisons.— (1) The State Government shall as far as possible establish sufficient numbers

of prisons and provide minimum needs essential to maintain standards of living in consonance with human dignity.

(2) Prison administration shall ensure that the prisoners human rights are respected.

(3) Prison administration shall ensure separation of the following categories of prisoners, namely :-- (a) Civil Prisoners; (b) Under-trials; (c) Female Prisoners; (d) Convicted Prisoners; (e) Young Offenders; (f) First Offenders; (g) Habitual Offenders; (h) High Security Prisoners; (i) Detenue; (j) Geriatric and infirmed prisoners;(k) Transgender Prisoners; (l) Psychiatric Prisoners;(m) Higher Division Prisoners; and (n) Political Prisoners

(4) There shall be a separate prison for high security prisoners.

(5) The prisons' regime shall take care to prepare prisoners to lead a law-abiding, self supporting, reformed and socially rehabilitated life.

- 515. Division of Police registered prisoners into two classes.— (1)The first class consists of prisoners who are to be transferred before release to the Jails of the districts in which their homes are situated.

  (2) This class shall be described in the Admission Register provided in Form No.17 and Release Diaries provided in Form No 23 as P.R./T Prisoners.

  Explanation :— The letter P.R. standing for "Police Registered", and the letter T, signifying 'transfer'.

  (3) The prisoners stated in sub-rule (2) shall include prisoners in respect of whom the sentencing court may have recorded an order under section 565 of the Code of Criminal Procedure, 1973 (2 of 1974)and any such prisoner shall be described in the Admission Register and Release Diaries as "Police Registered Transfer -565" prisoners.

  (4) The second class consists of prisoners who are not to be transferred, but are to be released from the jails in which they are confined at the time of the expiry of their sentences and this class shall be described in the Admission Registers and Release Diaries as Police Registered prisoners.

(5) If any prisoner known to be a member of a criminal tribe is not police-registered, his case shall be brought to the notice of the Superintendent of Police.

(6) When intimation respecting a prisoner's Police-registration is received from the police after his name has been entered in Admission Register and Release Diaries, the letter Police-Registered, Police-Registered/Transfer, Police Registered Transfer "565", as the case maybe, shall be added in red ink.

(7) Entries on the back of the P.R. form relating to the Finger Impression, viz., "F.I. taken" or "tested" shall be similarly added.

(8) The police P.R. form intimating the fact that a prisoner is on the police register shall be attached to and kept with, the warrant, and sent with him to the jail to which he may be transferred.

(9) On the death or escape of a Police Registered Prisoner of either class, the Police P.R. form attached to his warrant shall be returned to the Superintendent of Police of his district with an endorsement, showing the date of his death or escape.

(10) All other P.R. slips shall be sent to the Superintendent of Police of the district, a fortnight before the release is due.

Note:— The number and name of P.R./T and P.R.T/565 prisoners shall be noted in red ink in the Release Diaries four months before the date of probable release, any remission likely to be earned being taken into account.

- 784. Prison Industries and Work Programmes.— (1) The work programmes shall also include essential institutional maintenance services like culinary, sanitary and hygienic services, prison hospital, other prison services, repairs and maintenance services… (25) Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work.

The Kerala Prison Rules 1958

- 201. Definition of habitual criminals — The following persons shall be liable to be classified as "Habitual Criminals" namely:-

(1) any person convicted of an offence punishable under Chapters XII, XVII and XVIII of the Indian Penal Code, whose facts of the present case, show that he is by habit a robber, house breaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery;

(2) any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code, whose previous conviction or convictions taken in conjunction with the facts of the present case show that he habitually commits offences against the person;

(3) any person committed to or detained in prison under Section 123 (read with Section 109 or Section 110) of the Code of Criminal Procedure;

(4) any person convicted of any of the offence specified in (i) above when it appears from the facts of the case, even though no previous conviction has been proved, that he is by habit a member of a gang of dacoit, or of thieves or a dealer in slaves or in stolen property;

(5) any person of a Criminal tribe subject to the discretion of the Government.

Explanation.—For the purpose of the definition the word "conviction" shall include an order made under Section 118, read with Section 110 of the Code of Criminal Procedure.

The Tamil Nadu Prison Rules, 1983

- 214. Separation of categories – Subject to the availability of accommodation, the prisoners; shall be segregated as follows:

  (a) "A" class prisoners from "B" class prisoners;

  (b) Civil prisoner from Criminal prisoners;

  (c) Female prisoners from male prisoners;

  (d) Adult prisoners from adolescents;

  (e) Convicted prisoners from undertrial prisoners;

  (f) Habitual prisoners from non-habitual prisoners;

(g) Prisoners suffering from communicable diseases;

(h) Prisoners suspected to be suffering from mental disorders;

(i) Homosexuals;

(j) Sex perverts;

(k) Drug addicts and traffickers in narcotics;

(l) Inmates having suicidal tendencies;

(m) Inmates exhibiting violent and aggressive tendencies;

(n) Inmates having escape discipline risks; and

(o) known bad characters.

- 219. Definition of habitual criminal – The following persons shall be liable to be classified as habitual criminals, namely:

  (i) Any person convicted of an offence punishable under chapters XII, XVII, XVIII of the Indian Penal Code (Central Act XIIV of whose previous conviction or convictions taken in conjunction with the facts of the present case shows that he is by habit a robber, dacoit thief or receiver of stolen property or that he habitually commits extortion cheating, counterfeiting coin, currency notes or stamps or forgery.

  (ii) Any person convicted of an offence punishable under Chapter XVI of the Indian Penal Code (Central Act XIV (1860) or under the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Central Act 104 of 1956) whose previous conviction or convictions, taken in conjunction with the facts of the present case, show that he habitually commits offences against the person or is habitually engaged in immoral traffic in women or girls;

  (iii) Any person committed to or detained in prison under section 122 read with sections 109 or 110 of the Code or Criminal Procedure,1973 (Central, Act 2 of 1974);

  (iv) Any person convicted of any of the offences specified in clauses (1) and (2) above when at appears from the facts of the case, even though no previous conviction has been, proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property, or a tracker in women or girls for immoral purposes;

(v) Any person convicted of an offence and sentenced to imprisonment under the corresponding sections of the Indian Penal Code (Central Act XIV of 1860) and the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

(vi) Any person convicted by a Court or tribunal acting outside India, of an offence which would have rendered him liable to be classified as a habitual offender if he had been convicted in a Court established in India.

(vii) Any person who is a habitual offender under the Tamil Nadu Restriction of Habitual Offenders Act, 1948 (Tamil Nadu Act VI of 1948) or other corresponding Acts:

(viii) If a prisoner was previously classified as habitual prisoner by a court he shall be continued to be classified as habitual prisoner whatever be the nature of offences for which he is later convicted.

Explanation.- For the purposes of this definition the word conviction shall include an order made under section 117 read with 110 of the Code of Criminal Procedure,1973 (Central Act 2 of 1974).

- 225. Classes of prisoners: (1) As mentioned in rule 217, convicted prisoners are divided into two divisions or classes, A and B.

  (i) prisoners shall be eligible for class A, if they by social status, education or habit of life have been accustomed to a superior mode of living, Habitual prisoners may at the discretion of the classifying authority , be included under this class on grounds of character and anstecedents.

  (ii) Class B shall consist of prisoners who ate not classified in Class A.

  (iii) Notwithstanding anything contained in sub-rule (i), any person convicted of an offence involving gross indecency or exhibiting grave depravity of character may not be placed in class A.

The Rules for the Superintendence and Management of Jails in the Bombay State, 1954

- Chapter XLI, Section II: Rule 3: Habitual women prisoners; prostitutes and procuress and young women prisoners shall be segregated.

The Karnataka Prisons and Correctional Services Manual - 2021

- 418. Classification of convicted prisoners – Convicted prisoners are divided into two classes as Class I (Class-A)and Class II (Class-B).–

  i. Prisoners will be eligible for Class I (Class-A) if.–

  a) They are non-habitual prisoners of good character;

  b) They by social status, education and habit of life have been accustomed to a superior mode of living; and

  c) They have not been convicted of.–

  1) Offences involving elements of cruelty moral degradation or personal greed;

  2) Serious premeditated violence;

  3) Serious offence against women and children;

  4) Serious offences against property;

  5) Offences relating to the possession of explosives, fire arms and other dangerous weapons with the object of committing an offence or of enabling an offence to be committed;

  6) An offence under the suppression of immoral traffic Act;

  7) Abetment or incitement of offences;

  ii. Class II (Class-B) will consist of prisoners who are not classified as Class I (Class-A)

  iii. Notwithstanding anything contained in any person convicted of an offence involving gross indecency or exhibiting gross depravity of character may not be placed in Class I (Class-A).

Rajasthan Prisons Rules, 2022

- 681. Prison Industries and Work Programmes. Rule (22) Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work.

Prison Manual 2021 for the Superintendence and Management of the Jails in Himachal Pradesh

- 26.69. State Government shall lay down dietary scales for women prisoners keeping in view their calorie requirements as per medical norms. The diet shall be in accordance with the prevailing dietary preferences and tastes of the local area in which the prison is located. Cooked food shall be brought to the female enclosure by a convict-cook accompanied by a warder and placed outside the enclosure gate from where it shall be taken inside by the female warder or a female prisoner. The menial during shall, whenever possible, be performed by the female prisoners and the refuse etc., placed outside the enclosure, to be removed by paid sweeper. If there are no females of suitable caste for conservancy work paid-sweepers shall be taken into the enclosure in charge of a wander and under the conditions laid down in paragraph 214.

XIV. Prison Manuals and the Legacy of Discrimination

150. We shall begin the analysis of the manuals/rules by examining whether caste was a ground of classification before the Constitution came into force.

(i) History of "Caste" in Prison Manuals

151. According to the Committee on Prison Discipline 1836-38, to force a man of 'higher caste' to work at any trade would 'disgrace him' and his family, and would be viewed as cruelty.[234] Convicts from communities lower in the caste hierarchy were expected to continue with their customary occupations in jail. The caste hierarchy outside the prison was replicated within the prison.

152. The Committee's recommendations for including a common mess instead of food allowances for prisoners to cook their own meals, which was greater accommodation of caste, were shelved. In the 1840s, prisoners were granted food allowances and they could prepare their own meals, duly observing their caste practices. To replace this, a stricter mess system was introduced in some prisons. However, prisoners were divided along caste lines and each group was assigned a different prisoner cook. Among Europeans outside

234 Committee on Prison Discipline to the Governor General of India in Council, 1838, page 106.

the prison system, "there was bewilderment, even rage, at the extent to which caste had been 'basely and indecently succumbed to in our Indian jails'".[235]

153. But the British prison administration broadly agreed that caste must be respected even inside prisons. An 1862 Report of the Inspector of Prisons in Oudh showed that in Lucknow Central Jail, these prejudices were entertained to the extent that Brahmin inmates would be allowed to bathe before they ate and to mark out a designated area where they would receive their food and where no one would be allowed to enter.[236] David Arnold wrote about the complexity of managing caste in Indian prisons and the administration's fears:

> "With regard to caste and community, the issue was more complex. Physical labour was the mark of the lowest Hindu castes (and their Muslim counter parts), while such ritually polluting tasks as shoemaking, which involved handling leather, or the removal of human urine and excrement, were regarded as the stigmatising occupations of the very lowest castes, the untouchables. Was it, therefore, legitimate penal practice to force high-caste Hindus, or well-born (ashraf) Muslims, to toil as if they were from labouring or untouchable castes? Was denial of caste status a morally justified attribute of prison life, even a fitting deterrent against further criminal acts? The British were particularly wary on this score because of the intense resistance to common messing in north Indian jails in the 1840s and 1850s, which, by denying high-caste prisoners the right to cook their own food, provoked fierce prison demonstrations and contributed to the rash of jailbreaks during the opening phase of the 1857–58 uprising. Colonial authorities also recognized the strength of Indian feeling against any measures (whether in the jails, the army, or the courts) that appeared to attack caste or favour the imposition of Christianity."[237]

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235 David Arnold and David Hardiman (eds.), Subaltern Studies VIII: Essays in Honour of Ranajit Guha, Oxford University Press (1994), pp. 148-187, at p. 172

236 Report of the Inspector of Prisons, Oudh, 1826, p. 33 as cited in David Arnold (1994), p. 172.

237 David Arnold, "Labouring for the Raj: Convict Work Regimes in Colonial India, 1836–1939", in Christian G Vito and Alex Lichtenstein (eds), *Global Convict Labour,* Brill (2015), pp. 199-221, at p. 209.

154. In line with their overall approach, the colonial administrators linked caste with prison administration of labour, food, and treatment of prisoners. They emboldened the occupational hierarchy with legal policy and imported the vice of caste-based allocation of labour into the prison, due to pressure from the oppressor castes. Responding to the doubts raised by Inspector General of Madras in 1871, the Government of India responded that prisoners shall not be put into labour that "really causes the loss of caste" and that the management should not give an impression that the government wished to destroy caste of the native inmates.[238] Similarly, the Madras Jail Manual, 1899 stated that "In allotting labour to convicts reasonable allowance shall be made for caste prejudice, e.g., no Brahmin or caste Hindu shall be employed in chucklers' [cobblers'] work. Care shall, however, be taken that caste prejudice is not made an excuse for avoiding heavy forms of labour".[239]

155. Thus, the supposedly polluting occupations were allocated to the communities placed lower in the caste hierarchy. Not only were certain communities expected to carry out their "hereditary trades" within prisons, the supposed higher caste prisoners' caste privileges were preserved.

156. The 1919-1920 Indian Jail Committee Report suggested classification in prisons should ensure that the young and inexperienced offenders were not contaminated by the influence of the more experienced, habitual offenders. This classification and resultant segregation were deemed essential primarily as a means of achieving sound prison administration.[240]

157. Caste was used as a ground for differentiating prisoners. The nature of the Manuals could be seen from Rule 825 of the Uttar Pradesh Jail Manual, 1941 which provided: "The Superintendent shall not inflict the punishment of whipping on a superior class convict except with previous permission of the State Government." Rule 719 provided,

238 Secretary, India, Home (Judicial), to Chief Secretary, Madras, 8 July 1871, Madras Judicial Proceedings, no. 98, 24 October 1871] – as cited in David Arnold (2015), p. 210.

239 As cited in David Arnold (2015), p. 210

240 Report of The Indian Jails Committee, 1919-1920, at p. 34: "We are satisfied as to the evil influence which can be exercised in a prison by the habitual or professional criminal, and we regard the adoption of proper methods of classification and the provision of adequate means of separation as the third essential factor in sound prison administration." See https://jail.mp.gov.in/sites/default/files/Report%20of%20the%20%20Indian%20Jail%20Committee,%201919-1920.pdf

"Reasonable respect shall be paid to religious scruples and caste prejudices of the prisoners in all matters as far as it is compatible with discipline."

158. Even after independence, Rule 37 of the Rajasthan Prison Rules 1951, until recently, provided as follows: "Separate receptacles shall be provided in all latrines for solid and liquid excreta, and the use of them shall be fully explained to all prisoners by the members. The Mehtars shall put a layer of dry earth at least 1 inch thick Into each receptacle for solid excreta before it is used, and every prisoner after he uses a receptacle shall cover his dejecta with a scoopful of dry earth. Vessels for urine shall be one-third filled with water." Rule 67 provided, "The cooks shall be of the non-habitual class. Any Brahmin or sufficiently high caste Hindu prisoner from this class is eligible for appointment as cook. All prisoners who object on account of high caste to eat food prepared by the existing cooks shall be appointed a cook and be made to cook for the full complement of men. Individually criminal prisoners shall, under no circumstances, be allowed to cook for themselves".

159. In 1987, the RK Kapoor Committee made observations about the inadequacy of classification and segregation in prisons. It noted that while women, young offenders, criminal lunatics, and prisoners suffering from infectious diseases and even prisoners with 'better socio-economic background' were duly segregated, the rest of the prisoners were huddled together. The report noted that the classification into smaller groups was not along systematic lines.[241] It underlined the objective of classification as follows:

> "11.4 … The objective of classification should be not only to prescribe and pursue individualised treatment programmes for reformation and rehabilitation of inmates, but also to ensure effective management from the angle of security and discipline.
>
> 11.5 A prisoner should not be classified merely by his physical appearance or by the nature of the crime committed by him or the information/data, if any, furnished by the police about his activities. It is necessary to know

241 Report of The Group of Officers on Prison Administration, 1987, p. 156 ("RK Kapoor Committee").

> and understand, as thoroughly as possible, each prisoner as an individual, soon after his admission. An in-depth study of his total personality is required. Personality means the whole background of the prisoner, i.e. his entire life history, and what he thinks, feels and acts by natural instinct and by habit of social conditioning. Hence, it is essential that each prisoner should be studied separately by a team consisting of experienced hail officials and of experts like psychiatrists, psychologists, trained social workers and medical officers. The officer-in-charge of industries, education and vocational training should also join this team which should be called the Classification Committee.
>
> 11.7 The recommendations of the classification committee should broadly fall under two heads: (a) classification in respect of security and control, and (b) classification from the point of view of correction, reformation and rehabilitation. After studying a prisoner, in detail, and making its assessment the classification committee should make recommendations on the following points in regard to his needs."[242]

The Report thus suggested that *first,* the purpose of classification in prisons must be two-fold: prison security/discipline as well as reformation of the prisoner; *second,* classification should be based on the individual needs of the prisoner based on a studied assessment of their personality.

160. It is clear from the above discussion that caste was used as a factor of classification in prisons. However, this does not have any effect on examining the validity of the impugned provisions. In fact, it suggests that the colonial administrators were open to even adopting discriminatory social practices to not upset the oppressor castes. The upholding of caste differences by the British inside the prisons reflected their overall support to legitimizing the law of caste. However, this Court cannot adopt the approach taken by the colonial administrators. The impugned provisions shall be examined on the basis of principles laid under the Constitution.

242 Ibid, pp. 157-160

(ii) Can Caste be a Basis in Classification?

161. The petitioner has averred that the Prison Manuals violate Article 14 of the Constitution of India in so far as they privilege a particular section of the society based entirely on its caste identity. They cast disparate burdens on prisoners based on their caste-identity.

162. A valid classification under Article 14 presupposes a definite yardstick to distinguish the classes created, and the difference must be real, pertinent and discernible.[243] The State is free to recognise degrees of harm as long as the basis of classification is not arbitrary, artificial, or evasive. The line between the two classes must be clear and not illusory, vague, and indeterminate.

163. The impugned rules are challenged on the ground that first, they directly identify caste as a means to allocate intramural labour, food-duties; second, by using vague terms such as "suitable caste" or "superior method of living" and similar terms, they tend to advantage the so-called higher castes; and third, they target the members of denotified tribes. We will now discuss whether caste is an intelligible and rational principle of classification and whether it has a rational nexus with the object of the classification.

164. Caste can be an intelligible principle of classification as it has been used to create protective policies for the marginalized castes. The Constitution recognises caste as a proscribed ground of discrimination under Article 15(1), and envisions a society free from caste-prejudices. Furthermore, the Constitution provides for the enumeration of certain castes and tribes as Scheduled Castes and Scheduled Tribes in order to facilitate protective discrimination and overall promote equitable distribution of resources. Article 15(4) allows the state to make special provisions for the advancement of socially and educationally backward classes of citizens, which includes Scheduled Castes and Scheduled Tribes. In that sense, caste can be ground for classification, as long as it is used to grant benefits to the victims of caste-discrimination.

165. However, as evident from the language of Article 15(1), caste cannot be a ground to discriminate against members of marginalized castes.

243 Murthy Match Works v. Asst Collector of Central Excise (1974) 4 SCC 428

Any use of caste as a basis for classification must withstand judicial scrutiny to ensure it does not perpetuate discrimination against the oppressed castes. While caste-based classifications are permissible under certain constitutional provisions, they are strictly regulated to ensure they serve the purpose of promoting equality and social justice.

166. In the context of prisons, valid classification must be a functional classification.[244] The classification of prisoners has been considered both from the point of view of security and discipline as well as reform and rehabilitation.[245] This has been the objective. However, there is no nexus between classifying prisoners based on caste and securing the objectives of security or reform. Limitations on inmates that are cruel, or irrelevant to rehabilitation are per se unreasonable, arbitrary and constitutionally suspect.[246] Inmates are entitled to fair treatment that promotes rehabilitation, and classification of any kind must be geared towards the same. Courts have been enjoined with the duty "to invigorate the intra-mural man-management so that the citizen inside has spacious opportunity to unfold his potential without overmuch inhibition or sadistic overseeing".[247] Segregating prisoners on the basis of caste would reinforce caste differences or animosity that ought to be prevented at the first place. Segregation would not lead to rehabilitation.

167. The petitioner's counsel have brought to the notice the observations made by the Madras High Court in **C. Arul v. The Secretary to Government**.[248] One of the prayers in the writ petition was "not to discriminate the prisoners on the basis of the caste and forbearing the jail authority from confining Palayamkottai prison inmates on caste basis". The writ petition was not entertained, as the High Court accepted the explanation of the State government that "the inmates belonging to different castes are housed in different blocks, in order to avoid any community clash, which is prevailing common in Tirunelveli and Tuticorin Districts". It was also noted that "there

244 Charles Sobraj v. Supdt., Central Jail, 1978 INSC 149

245 RK Kapoor Committee, pp. 157-160.

246 Sunil Batra (I) v. Delhi Administration (1978) 4 SCC 494

247 Hiralal Mallick v. State of Bihar (1977) 4 SCC 44

248 W.P.(MD) No. 6587 of 2012 (Madras High Court, Order dated 28 October 2014)

is rivalry between two groups on account of caste feeling, which is regular in the District and in order to avoid any untoward incident and put an end to such rivalry, the Prison Authority is compelled to house the inmates of different communities in different blocks". We cannot agree with the position taken by the High Court. It is the responsibility of the prison administration to maintain discipline inside the prison without resorting to extreme measures that promote caste-based segregation. Adopting the logic accepted by the High Court is similar to the argument which was given in the United States to legalize race-based segregation: separate but equal.[249] Such a philosophy has no place under the Indian Constitution. Even if there is rivalry between individuals of two groups, it does not require segregating the groups permanently. Discipline cannot be secured at the altar of violation of fundamental rights and correctional needs of inmates. The prison authorities ought to be able to tackle perceived threats to discipline by means that are not rights-effacing and inherently discriminatory.

168. Furthermore, the differentia between inmates that distinguishes on the basis of "habit", "custom", "superior mode of living", and "natural tendency to escape", etc. is unconstitutionally vague and indeterminate. These terms and phrases do not serve as an intelligible differentia, that can be used to demarcate one class of prisoners from the other. These terms have resultantly been used to target individuals from marginalized castes and denotified tribes.

169. The objective of classification for labour for treatment and for conferment of entitlements such as remissions has to be maximisation of the reformatory potential of prisons. Such classification should be based solely on the correctional needs of the individual prisoner. An objective assessment of these needs prior to the classification is a constitutional imperative. Only such classification that proceeds from an objective inquiry of factors such as work aptitude, accommodation needs, special medical and psychological needs of the prisoner would pass constitutional muster. Classification based on caste reduces the individual prisoner to a group identity and does not leave room for an objective assessment of their correctional needs. Their reformation

249 For a broader history, see Michael Klarman, *Unfinished Business: Racial Equality in American History,* Oxford University Press (2007).

is stultified by the burdens of their group-identity and thereby, their presumed ability to discharge stereotypical occupational tasks. This classification bears no nexus with individual qualifications, abilities and needs. Such a classification does not aid reformation. It rather effaces the prisoner's individuality and deprives them of individualised assessment of their correctional needs. Such classification bears no rational nexus with either prison discipline or prison reform. It is also opposed to substantive equality within prisoners as a class as it deprives some of them of equal opportunity to be assessed for their correctional needs, and consequently, opportunity to reform. The classification on obsolete understanding of caste, based on pre-constitutional legislations and practices, lacks a rational nexus with the correctional objectives of classification in prisons.

170. Thus, Rules that discriminate among individual prisoners on the basis of their caste specifically or indirectly by referring to proxies of caste identity are violative of Article 14 on account of invalid classification and subversion of substantive equality.

(iii) The discriminatory manuals

171. On a reading of the impugned provisions, it is clear that the provisions discriminate against marginalized castes and act to the advantage of certain castes. By assigning cleaning and sweeping work to the marginalized castes, while allowing the high castes to do cooking, the Manuals directly discriminate. This is an instance of direct discrimination under Article 15(1).

172. The manuals/rules suffer from indirect discrimination by using broad terms which act to the disadvantage of the marginalized castes. Phrases such as "menial" jobs to be performed by castes "accustomed to perform such duties" may appear to be facially neutral, but refer to marginalized communities, given the history of systemic discrimination against them. Such indirect usages of phrases, which target the so-called 'lower castes', cannot be permitted in our constitutional framework. The phrases, though neutral on their face, carry an embedded bias that disadvantages marginalized communities by reinforcing historical patterns of labour based on caste. Even if caste is not explicitly mentioned, phrases like "menial" and "accustomed" indirectly uphold traditional caste roles. These provisions disproportionately harm marginalized castes, perpetuate caste-based labour divisions and reinforce social hierarchies.

173. The manuals/rules are also based on and reinforce stereotypes against the marginalized castes. These stereotypes not only demean and stigmatize marginalized communities but also serve to maintain and legitimize a social hierarchy that goes against the constitutional values of equality. The persistence of such associations in official documents like the Manuals/Rules normalizes the idea that these tasks are somehow natural for marginalized communities, reinforcing harmful societal hierarchies. By assigning specific types of work to marginalized castes based on their supposed "customary" roles, the Manuals perpetuate the stereotype that people from these communities are either incapable of or unfit for more skilled, dignified, or intellectual work.

174. The manuals/rules also reinforce stereotypes against denotified tribes. Rule 404 of the West Bengal Manual provides that a convict overseer may be appointed to be a night guard provided that "he does not belong to any class that may have a strong natural tendency to escape, such as men of wandering tribes". The Madhya Pradesh Manual permits the classification of habitual and non-habitual criminals, where habitual criminals are described as someone who "is by habit member of a gang of dacoits, or of thieves or a dealer in slaves or in stolen property", even if no previous conviction has been proved. Furthermore, any member of a denotified tribe may be treated as a habitual criminal, subject to the discretion of the State Government.[250] Similarly, Rule 217 of the Andhra Pradesh Manual, Rule 219 of the Tamil Nadu Manual, and Rule 201 of the Kerala Manual classify as "habitual criminals" those who are by "habit" a "robber, housebreaker, dacoit, thief or receiver of stolen property" or that he "habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery", even if "no previous conviction has been proved, that he is by habit a member of a gang of dacoits, or of thieves or a dealer in stolen property". The Andhra Manual also paints "a member of a wandering or criminal tribe" with the same brush of being "a bad or dangerous character, or has, at any time, escaped of attempted to escape from lawful custody", and prohibits their employment on any labour outside the walls of the prison, or to be permitted to pass out of the prison for employment

250 Rule 411, Madhya Pradesh Manual 1987

of the purpose of being so employed.[251] The Manual also describes "non-habitual prisoners of good character" as someone who "by social status, education and habit of life have been accustomed to a superior mode of living". Conversely, habitual prisoners are accustomed to an inferior mode of living.[252] The Odisha Manual and Rajasthan Manual also prohibit employment on extramural work of "Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe". The Odisha Rules[253] and Tamil Nadu Rules[254] prescribe the separation of habitual offenders from other prisoners. The Maharashtra Rules state that "Habitual women prisoners; prostitutes and procuress and young women prisoners shall be segregated."[255]

175. The tendency to treat members of denotified tribes as habitual to crime or having bad character reinforces a stereotype, which excludes them from meaningful participation in social life. When such stereotypes become a part of the legal framework, they legitimize discrimination against these communities. Members of the denotified tribes have faced the brunt of colonial caste-based undertones of discriminating against them, and the prison Manuals are reaffirming the same discrimination. Discrimination against denotified tribes is prohibited under the ground of "caste" in Article 15(1), as the colonial regime considered them as belonging to separate hereditary castes.

(iv) Whether a "practice" of untouchability?

176. At the risk of repetition, we must reproduce some of the impugned provisions. Rule 289(g) of the Uttar Pradesh Manual provides: "A convict sentenced to simple imprisonment,… shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties; but may be required to carry water for his own use provided he belongs to the class of society the members of which are accustomed to perform such duties in their own homes." Rule 158 states: "Remission to convicts on scavenging duty - Subject to good

251 Rule 448, Andhra Pradesh Manual 1979

252 Rule 1036, Andhra Pradesh Manual 1979

253 Rule 4, Odisha Rules 2020

254 Rule 214, Tamil Nadu Prison Rules 1983

255 Chapter XLI, Section II: Rule 3, Maharashtra Rules

work and conduct in jail, convicts of the scavenger class working as scavengers in jails…"

177. Rule 694 of West Bengal Manual provides: "… Interference with genuine religious practices or caste prejudices of prisoners should be avoided". Rule 741 states: "Food shall be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer…" Rule 793 provides: "The barber should belong to the A class. Sweepers should be chosen from the Mether or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work." Rule 1117 states: "Any prisoner in a jail who is of so high a caste that he cannot eat food cooked by the existing cooks shall be appointed a cook and be made to cook for the full complement of men."

178. Rule 36 of the Madhya Pradesh manual states: "While the latrine parade is being carried out, the mehtars attached to each latrine shall be present, and shall call the attention of the convict overseer to any prisoner who does not cover up his dejecta with dry earth. The mehtars shall empty the contents of the small receptacle into large iron drums and replace the receptacles in the latrine after having cleaned them." Rule 26.69 of the Himachal Pradesh Manual states, "If there are no female of suitable caste for conservancy work, paid-sweepers shall be taken into the enclosure in charge of a warder and under conditions laid down in paragraph 214".

179. The notion that an occupation is considered as "degrading or menial" is an aspect of the caste system and untouchability. The caste system rigidly assigns certain tasks to specific communities based on birth, with the lowest castes, being relegated to tasks considered impure or unclean, such as manual scavenging, cleaning, and other forms of physical labour. That a person belonging to such a community is accustomed to performing menial tasks is a mandate of the caste system. Similarly, the reference to "scavenger class" is a practice of the caste system and untouchability. No social group is born as a "scavenger class". They are forced to undertake certain jobs that are considered 'menial' and polluting based on the notions of birth-based purity and pollution.

180. Refusal to check caste practices or prejudices amounts to cementing of such practices. If such practices are based on the oppression

of the marginalized castes, then such practices cannot be left untouched. The Constitution mandates an end to caste discrimination and untouchability. The provision that food shall be cooked by "suitable caste" reflects notions of untouchability, where certain castes are considered suitable for cooking or handling kitchen work, while others are not. Besides, the division of work on the basis of caste is a practice of untouchability prohibited under the Constitution.

181. As discussed, prison manuals allot tasks of a barber to individuals from a certain caste, while sweeping work is allowed to Mehtar/ Hari/Chandal or similar castes. It is also provided that work shall be allotted on the basis of "attitude and sofar as may be practicable with due regard to his previous habits." This is a caste-based delegation of work based on the perceptions of the caste system that certain castes are meant to do jobs of "sweeping". The rule that a prisoner of a high caste be allowed to refuse the food cooked by other castes is a legal sanction by the State authorities to untouchability and the caste system.

182. Let us refer again to the impugned provisions which deal with "habits" of certain communities. Rule 440 of the Andhra Pradesh Manual states: "The prison tasks including conservancy work shall be allotted at the discretion of the Superintendent with due regard to capacity of the prisoner, his education, intelligence and attitude and so far as may be practicable with due regard to his previous habits." Rule 784 of the Odisha Manual states, "Prisoners who have shown, or are likely to have, a strong inclination to escape or are members of a wandering or criminal tribe, even though eligible, shall not be employed on extramural work." Rule 201 of Kerala Manual defines "habitual criminals" as follows: "(1) any person convicted of an offence punishable under Chapters XII, XVII and XVIII of the Indian Penal Code, whose facts of the present case, show that he is by habit a robber, house breaker, dacoit, thief or receiver of stolen property or that he habitually commits extortion, cheating, counterfeiting coin, currency notes or stamps or forgery"; "(4) any person convicted of any of the offence specified in (i) above when it appears from the facts of the case, even though no previous conviction has been proved, that he is by habit a member of a gang of dacoit, on of thieves or a dealer in slaves or in stolen property"; "(5) any person of a Criminal tribe subject to the discretion of the Government."

183. The provisions that "men of wandering tribes" or "criminal tribes" have a "strong natural tendency to escape" or are by "habit" accustomed to theft reflects a stereotype that has its basis in the colonial understanding of India's caste system. These stereotypes not only criminalize entire communities but also reinforce caste-based prejudices. They resemble a form of untouchability, as they assign certain negative traits to specific groups based on identity, perpetuating their marginalization and exclusion. By marking them as "criminal by birth," the law institutionalized a prejudiced view of these tribes, treating them as inherently dishonest and prone to theft. This stereotype—echoing elements of untouchability—reduced their humanity to a set of negative traits and perpetuated their exclusion from mainstream society. Once labelled a criminal tribe, individuals from these communities faced systematic discrimination in employment, education, and social services. The stigma attached to these labels extended beyond legal frameworks and became a part of social consciousness

184. The provision that a "non-habitual" prisoner is "by social status" and "habit of life… accustomed to a superior mode of living" is another caste-based construct. This hierarchical view of social status plays into the caste-based division of labour and morality that has long been entrenched in Indian society. While those from higher castes or classes were perceived as refined and deserving of more lenient treatment (even within the colonial criminal justice system), those from lower castes or marginalized communities were viewed as having a natural tendency towards criminality or immorality. This was not only an injustice but also reinforced existing power structures, ensuring that marginalized groups were trapped in cycles of poverty and discrimination, unable to transcend the stigmatization they faced.

(v) The right to overcome caste prejudices under Article 21

185. The impugned rules foster the antiquated notions of fitness of a particular community for a certain designated job. These rules reinforce occupational immobility of prisoners who belong to certain castes. For instance, rules assigning sweeping work which stipulate that "sweepers shall be chosen from the Mehtar or Hari caste, also from the Chandal or other low castes, if by the custom of the

district they perform similar work when free, or from the caste if the prisoner volunteers to do the work" designate the enumerated castes for the work in issue. The three castes enumerated in the Rule are Scheduled Castes and have historically been compelled to do manual scavenging. The only link between the caste so designated and the work in question is their historical, caste-based link with the profession. It does not regard their work capacity, health, education, and ability, based on an individualised assessment of the individual. Effectively, such rules obviate any inquiry into the correctional needs of the inmate and how, if at all they may be furthered by the assignment of work.

186. Such rules are indifferent to the potential of the individual prisoner to reform. Such a state of affairs is entirely opposed to substantive equality, as it contributes to institutional discrimination, depriving inmates of an opportunity to reform, at par with the others over whom the pall of caste does not hang.

187. Article 21 envisages the growth of individual personality. Caste prejudices and discrimination hinder the growth of one's personality. Therefore, Article 21 provides for the right to overcome caste barriers as a part of the right to life of individuals from marginalized communities. The protection provided by Article 21 can be seen as a constitutional guarantee that individuals from marginalized communities should have the freedom to break free from these traditional social restrictions. It extends beyond mere survival to ensure that they can flourish in an environment of equality, respect, and dignity, without being subjected to caste-based discrimination which stifles their personal growth.

188. When caste prejudices manifest in institutional settings, such as prisons, they create further restrictions on the personal development and reformation of individuals from marginalized communities. When Prison Manuals restrict the reformation of prisoners from marginalized communities, they violate their right to life. At the same time, such provisions deprive prisoners from marginalized groups of a sense of dignity and the expectation that they should be treated equally. When prisoners from marginalized communities are subjected to discriminatory practices based on caste, their inherent dignity is violated.

(vi) Caste-based division of labour/work: Whether forced labour?

189. Several provisions of different Prison Manuals impose a restriction on labour of certain communities. That is, these communities are allowed to undertake only one kind of labour. "Menial" jobs are prescribed to be performed by those communities who have been "accustomed" to performing such duties. The language used in such Manuals/Rules is rooted in a caste-based societal structure, where traditionally, certain communities were relegated to tasks considered impure or inferior, such as cleaning, manual scavenging, or other forms of servitude.

190. Again, at the risk of repetition, let us now refer to these impugned provisions. Rule 289 of the Prison Manual of Uttar Pradesh provides that a convict "shall not be called upon to perform duties of a degrading or menial character unless he belongs to a class or community accustomed to perform such duties". Rule 741 of the West Bengal Prison Manual provides "Food shall be cooked and carried to the cells by prisoner-cooks of suitable caste, under the superintendence of a jail officer". Rule 793 provides, "The barber should belong to the A class. Sweepers should be chosen from the Mehther or Hari caste, also from the Chandal or other castes, if by the custom of the district they perform similar work when free, or from any caste if the prisoner volunteers to do the work". Rule 36 of the Madhya Pradesh Jail Manual 1987 provides, "While latrine parade is being carried out, the mehtars attached to each latrine shall be present. The Mehtars shall empty the small receptacles into large iron drums and replace the receptacles after having cleaned them". Rule 563 provides, "The cook shall be of non-habitual class". Rule 26.69 of the Himachal Pradesh Manual states, "If there are no female of suitable caste for conservancy work, paid-sweepers shall be taken into the enclosure in charge of a warder and under conditions laid down in paragraph 214".

191. Such provisions often lead to an unfair distribution of labour within the prison system, with persons from specific communities performing *honourable* tasks, while those from marginalized communities are forced into *undesirable* work. It perpetuates the idea that some individuals are inherently suited to low-status labour based solely on their birth, reinforcing deep-rooted caste inequalities.

192. The provision that "food" shall be cooked by prisoner-cooks of "suitable caste" empowers the jail officer to discriminate against the

marginalized castes. At the same time, it takes away the opportunity from them to cook food. The imposition of cleaning latrines and sweeping work to only "Mehtar, Hari caste or Chandal" or similar castes is forcing only a type of work, which is considered low-grade, upon them. Imposing labour or work, which is considered impure or low-grade, upon the members of marginalized communities amounts to "forced labour" under Article 23. The Court in **Sunil Batra (II)**[256] had also held that "degrading labour" cannot be forced upon prisoners.

193. Being forced to undertake the menial tasks simply because of their caste background robs prisoners of the element of choice that other prisoners enjoy. Forcing marginalized caste inmates to perform tasks like cleaning latrines or sweeping, without providing them any choice in the matter and based purely on their caste, constitutes a form of coercion. These prison rules assign them degrading labour that other inmates are not required to perform. Prisoners from lower castes are systematically exploited and their vulnerability as marginalized individuals is used as justification for assigning them low-grade tasks.

194. This type of labour assignment, based on their caste, cannot be classified as voluntary. Forcing the members of oppressed castes to selectively perform menial jobs amounts to forced labour under Article 23. Dr Ambedkar had articulated that the socio-economic situation of oppressed communities should not be used to exploit their labour. Article 23 strikes at this philosophy. The said article is not a caste-ignorant provision, but a caste-conscious provision.

195. Article 23 was incorporated into the Constitution to protect the members of oppressed castes from exploitative practices, where their labour is taken advantage of, and without any adequate return. This is evident from the Constituent Assembly Debates. However, the prison rules, by exploiting the labour of the oppressed castes, perpetuate the same injustice to guard against which Article 23 was inserted into the Constitution. Assigning labour based on caste background strips individuals of their liberty to engage in meaningful work, and denies them the opportunity to rise above the constraints imposed by their social identity.

256 [1980] 2 SCR 557 : 1979 INSC 271

196. We therefore find that the impugned provisions are violative of Articles 14, 15, 17, 21, and 23. We shall now refer to the Model Prison Manual 2016, which has been cited by the Union government as a modern manual addressing all concerns.

XV. Model Prison Manual 2016: Whether Adequate?

197. Ms. Aishwarya Bhati, learned ASG, has submitted a brief note referring to the Model Prison Manual for the Superintendence and Management of Prisons in India, 2003, and The Model Prison Manual, 2016. It is argued that the 2016 Manual explicitly prohibits caste and religion-based discrimination practices. The note refers to some of the relevant provisions:

2003 Manual

a. The 2003 Manual in Para 2.15.1 states that *"Management of kitchen or cooking of food on caste or religious places will be totally banned in prisons."*

b. In Para 15.22 the Manual states that "*any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited."*

c. In Chapter XXIV, Para 24.02 Note (ii) states that *"No classification of prisoners shall be allowed on grounds of socio-economic status, caste or class."*

d. Para 24.35 states that *"Management of kitchen or cooking of food on caste or religious places will be totally banned in prisons for women."*

2016 Manual

a. The 2016 Manual in Para 2.12.4 states that *"Management of kitchen or cooking of food on caste or religious places will be prohibited in prisons."*

b. In Para 17.22 the Manual states that "*any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited."*

c. In Para 17.25 Note (ii) states that *"No classification of prisoners shall be allowed on grounds of socio-economic status, caste or class."*

> d. Para 24.35 states that *"Management of kitchen or cooking of food on caste or religious places will be strictly banned in prisons for women."*

198. The note submitted by Ms. Bhati also refers to the Advisory dated 26 February 2024 issued by the Ministry of Home Affairs, through the Deputy Secretary (PR & ATC) to the Principal Secretary (Home/ Jails) of all states and UTs and the DG/IG Prisons of all States and UTs to ensure that the State Prison Manual/Prison Act should not contain any discriminatory provisions. The advisory further states that:

> "It may be noted that the Constitution of India prohibits any kind of discrimination on the grounds of religion, race, caste, place of birth etc. The Model Prison Manual, 2016 prepared by the Ministry of Home Affairs and circulated to all States and UTs in May 2016 explicitly prohibits caste and religion-based discrimination of prisoners in management of kitchen or cooking of food on caste or religious basis. The manual also provides that any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited. It further provides that no classification of prisoners shall be allowed on grounds of socio-economic status, caste or class."

199. To the contrary, Ms. Disha Wadekar counsel for the petitioner, has argued that the Model Prison Manual 2016 is not adequate and that it does not address issues of caste-based division of labour, segregation, and discrimination against denotified tribes. A reference was made to the definition of "habitual offenders" to argue that it is misused against persons from denotified tribes in prison. It has been submitted that the Ministry of Home Affairs may be directed to incorporate and reform the Model Prison Manual, 2016, to address the highlighted issues.

200. The Model Prison Manual 2016 was prepared "to reflect the understanding behind constitutional provisions, Supreme Court directions on prison administration and international instruments".[257] It covers a range of aspects relating to prisons, including institutional framework, custodial management, medical care, education and

257 Model Prison Manual 2016, p. 4, https://www.mha.gov.in/sites/default/files/PrisonManual2016.pdf

training of prisoners, maintenance of prisoners, emergency situations, remission, parole, premature releases and inspection of prisons, among other things. The Model Prison Manual 2016 also focuses on "prison computerization, special provisions for women prisoners, focus on after care services, rights of prisoners sentenced to death, repatriation of prisoners from abroad, enhanced focus on prison correctional staff".[258] New chapters on legal aid and inspection of prisons have been incorporated.

201. The Model Prison Manual 2016 suffers from several lacunae. The first issue to be noted with reference to the Manual is its classification of "habitual offenders". The Manual defines "habitual offender" as "a prisoner classified as such in accordance with the provisions of applicable law or rules".[259] "Casual prisoner" is defined as "a prisoner other than a habitual offender".[260] The Manual provides for "the setting up of separate institutional facilities for different categories of prisoners", including "maximum security prisons/ annexes/yards for high-risk prisoners and hardened or habitual offenders".[261] The Manual mandates the classification of undertrial prisoners in three categories, wherein habitual offenders are tagged along with "Gangsters, hired Assassins, dacoits, serial killers/rapists/ violent robbers, drug offenders, communal fanatics and those highly prone to escapes/ previous escapees/attack on police and other dangerous offenders/including those prone to self-harm/posing threat to public order".[262] The habitual offenders are tagged in the same category in relation to classification of high risk offenders and for determination of the level of security for effective surveillance.[263] Similarly, regarding the women prisoners, it has been provided that "Habitual offenders shall be separated from casual prisoners"[264] and that "Habitual offenders, prostitutes and brothel keepers must also be confined separately".[265]

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258 Ibid

259 Para 13 of Chapter I, Model Prison Manual 2016

260 Para 3 of Chapter I, Model Prison Manual 2016

261 Para 2.03 of Chapter II, Model Prison Manual 2016

262 Ibid, Para 24.01

263 Ibid, Para 25.02

264 Ibid, Para 26.04 (ii)

265 Ibid, 26.04 (iii)

202. In a previous section of this judgment, we highlighted that the phrase "habitual offender" in several prison manuals refers to people from denotified or wandering tribes. Therefore, this definition cannot be left to be interpreted and applied "in accordance with the provisions of applicable law or rules". Otherwise, what it will end up doing is to classify and separate people from denotified tribes in prisons without any basis.

203. Second, the Manual does not explicitly prohibit physical caste-based segregation of prisoners, except in prisons for women. Only the chapter on "Women Prisoners" provides that "[n]o classification of prisoners shall be allowed on grounds of socioeconomic status, caste or class".[266] This is concerning, as the Manual was prepared in 2016, when prison manuals in different States mandated caste-based division of prisoners, as indicated in our analysis in the previous section. The Manual of 2016 therefore should have adopted a specific provision prohibiting the classification of prisoners on the basis of caste for all prisoners, as it does in the case of women prisoners.

204. Third, the Manual does not prohibit division of work on the basis of caste, except in cooking. Para 2.12.4 provides that "Management of kitchen or cooking of food on caste or religious basis shall be prohibited in prisons". Similarly, for women prisons, para 26.45 provides "Management of kitchens or cooking food on caste or religious basis should be strictly banned in prisons for women". In effect, prohibition of caste discrimination in kitchens shall also apply to allotment of work to cooks.[267] However, the Manual does not prohibit discrimination on the allotment of work other than cooking. As analysed, various prison manuals in different States specify different work to people on the basis of caste. The Model Manual 2016 should have taken into account such practices and provided specifically for their prohibition.

205. Instead, the Manual empowers the jail superintendent "for the execution of all orders regarding the labour of prisoners" and that they "shall assign to each prisoner his work on the recommendation of the classifying Committee constituted in each Central Prison for

266 Ibid, Para 26.04 Note (ii)

267 See Paras 6.30 and 6.31.

the purpose".[268] Furthermore, the medical officer shall "examine all newly admitted prisoners and record in the admission register and medical sheets particulars regarding their health, and the kind of labour they can perform in view of their health conditions".[269] If the medical opinion states that "the health of any prisoner suffers from employment of any kind or class of labour, he shall record such opinion in the prisoner's sheet and the prisoner shall not be employed on that labour".[270] Besides, the Manual penalizes any resistance by the prisoners to perform labour allotted to them. "Wilfully disabling himself from labour" is listed as a prison offence.[271]

206. The above provisions *prima facie* may be essential to maintain prison discipline, but absent any provision prohibiting caste-based allotment of work, these provisions may be used to target prisoners from marginalized castes. It may create a scenario where a prisoner from a marginalized caste may not be able to deny the work allotted to them on the basis of their caste, which would also be violative of the Articles 21 and 23 of the Constitution of India, which protects individual dignity and prohibits forced labour. In this regard, we may again refer to **Sunil Batra (II)**[272] which held that "allotment of degrading labour" in prisons is "an infraction of liberty or life in its wider sense and cannot be sustained" unless the procedure under Article 21 is satisfied. No such procedure which divides labour on the basis of caste can be sustained. This prohibition shall also apply to labour done in prison industries and skill development programmes under paras 15.30 and 15.31, work done by undertrial prisoners under paras 24.43 and 24.44, work done by high-risk offenders under paras 25.19, work done by women prisoners under paras 26.106 to 26.109, and labour done by young offenders under paras 27.32 and 27.33.

207. Fourth, the counsel for the petitioner have argued that the Manual does not refer to the provisions of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013, which prohibit manual scavenging. Clauses 2.10 and 6.79 deal with toilets. We

268 Ibid, Para 4.08.

269 Ibid, Para 7.45 (xxiii).

270 Ibid, Para 7.67.

271 Ibid, Para 21.09 (xxxv).

272 [1980] 2 SCR 557 : 1979 INSC 271

clarify that the Act has a binding effect even on prisons. In relation to toilets, manual scavenging[273] or hazardous cleaning[274] of a sewer or a septic tank inside a prison shall not be permitted.

208. Fifth, it has also been argued that caste-based privileges provided to certain prisoners are not forbidden, except in para 17.22. The said para states, "The main festivals of all religions should be celebrated. In these, every prisoner should be encouraged to participate. Any special treatment to a group of prisoners belonging to a particular caste or religion is strictly prohibited". In addition, prison offences include "wilfully hurting other's religious feelings, beliefs and faiths"[275] and "agitating or acting on the basis of caste or religious prejudices".[276] We clarify that no special treatment shall be given to any group of persons or individuals on the basis of caste in any scenario.

XVI. Model Prisons and Correctional Services Act, 2023

209. We now refer to the provisions of the "Model Prisons and Correctional Services Act, 2023". The Ministry of Home Affairs, in consultation with various stakeholders, prepared this draft legislation and forwarded it to all States and Union Territories in May 2023 for adoption in their respective jurisdictions.[277] The vision behind the preparation of the Model Act was to replace the previous colonial legislations, which have been "found to be outdated and obsolete", with "a progressive and robust Act which is in tune with contemporary modern day needs and correctional ideology".[278] According to the Ministry, the Model Act is "a comprehensive document which covers all relevant aspects of prison management, viz. security, safety, scientific & technological interventions, segregation of prisoners, special provision for women inmates, taking appropriate action against criminal activities of prisoners in the prison, grant of parole and furlough to prisoners,

273 Sections 2(1)(g) and 5, The Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013

274 Ibid, Section 7

275 Para 21.09 (xxxvii), Model Prison Manual 2016

276 Ibid, Para 21.09 (xxxviii)

277 Unstarred Question No. 3007 (Lok Sabha, dated 8 August 2023), available at https://www.mha.gov.in/MHA1/Par2017/pdfs/par2023-pdfs/LS-08082023/3007.pdf

278 Letter dated 10 May 2023 from Home Secretary, Government of India to Chief Secretaries, all States and UTs, available at https://www.mha.gov.in/sites/default/files/advisory_10112023.pdf

their education, vocational training and skill development, etc."[279] The Ministry also indicated that as "Prison" is a "State" subject, "it is for the respective State Governments to make use of the guidance provided in the Model Prisons and Correctional Services Act, 2023 and enact a suitable legislation on Prisons in their jurisdictions for bringing improvement in prison management and administration of prisoners."[280]

210. The Model Act does not contain a reference to the prohibition of caste-based discrimination. This is concerning because the Act empowers the officer-in-charge of the prison to "utilize the services of prisoners" for "administration and management of the prisons".[281] Further, disabling from labour and continuously refusing to work is a prison offence.[282] The officer-in-charge should not be given the liberty to discriminate against any group of prisoners on the basis of caste. While the Model Prison Manual 2016 refers to the prohibition of caste discrimination in prisons in several provisions, the Model Act of 2023 has completely avoided any such mention. A provision to that effect should be inserted in the Model Act. It should ban segregation or division of work based on caste.

211. The definition of "Habitual Offender" under Section 2(12) is also problematic. It states that, "Habitual Offender means a prisoner who is committed to prison repeatedly for a crime". The phrase "committed to prison repeatedly" is vague and over-broad. It can be used to declare anyone as a habitual offender, even if they have not been convicted for a crime. The Model Act also provides that "habitual offenders" may be housed in a high security prison.[283] In addition to the category of habitual offender, the Act creates a category of "recidivist", which means "any prisoner who is convicted for a crime more than once".[284] "Habitual/recidivist prisoners" may be classified

279 Unstarred Question No. 3007 (Lok Sabha, dated 8 August 2023), available at https://www.mha.gov.in/MHA1/Par2017/pdfs/par2023-pdfs/LS-08082023/3007.pdf

280 Ibid

281 Section 60, Model Prisons and Correctional Services Act, 2023

282 Ibid, Section 39(v) and (vi)

283 Section 2(15), Model Prisons and Correctional Services Act, 2023

284 Ibid, Section 2(29)

separately and segregated in prisons.[285]

212. Chapter IX of the Model Act, dealing with "Protection of Society from Criminal Activities of High-Risk Prisoners, Habitual Offenders and Hardened Criminals", also seems to be over-broad. Section 27(1) states that the society needs to be protected from "habitual offenders, along with high-risk prisoners, and hardened criminals. The said category is prohibited for "parole, furlough, or any kind of prison leave in the normal course".[286] The Act provides that "the release of a high-risk/hardened/habitual offender convict on completion of sentence or an under-trial on bail or an inmate released temporarily on parole/furlough, etc. shall be informed to the Superintendent of Police of the concerned district, who shall keep a watch on the activities of such prisoners".[287] This provision gives wide powers to the police, which may be misused.

XVII. The Continued Targeting of Denotified Tribes

213. The impugned provisions are also an instance of existing discrimination and targeting of the members of the Denotified Tribes. In a previous section of this judgment, we held that the impugned provisions discriminate against the Denotified Tribes. Dr. Muralidhar argued that the classification of "habitual offender" needs to be completely done away with. At this stage, it is necessary to discuss how the classification of "habitual offender" was initially conceptualized.

214. The classification of "habitual offender" emerged prior to the repeal of the Criminal Tribes Act. Several Provinces had enacted their habitual offender laws. The Madras Restriction of Habitual Offenders Act, 1948 applied to individual habitual offenders.[288] The Act neither required a notified offender to attend roll call to any authority nor provided for taking finger impressions of such offender.[289] However, once a person was notified under the Act to be a habitual offender, "no opportunity" was given to him "to defend himself against orders

285 Ibid, Sections 5(3), 5(5), 6(3), 26(2), 26(3)

286 Ibid, Section 27(3)

287 Ibid, Section 28(5)

288 The Criminal Tribes Enquiry Committee Report (1949-50), https://ia802807.us.archive.org/11/items/dli.csl.944/944.pdf, p. 92

289 Ibid, p. 93

of restriction or internment in a settlement". Contrary to the Criminal Tribes Act or the Madras Restriction of Habitual Offenders Act, the Bombay Habitual Offenders Restriction Act, 1947 granted power to only competent courts to pass restrictive orders after necessary legal proceedings. Under the Madras law, such orders could be passed by government or officers authorised by them.[290]

215. The Rajasthan Habitual Criminals (Registration and Regulation) Act, 1950 defined "habitual criminal" as "a person who being a member of a notified tribe" who within the prescribed period, has not "been declared by an order in writing of the District Magistrate as no longer a habitual criminal". Further, it included "a person, who whether he was a member of a notified tribe or not, has within any period of ten years following the aforesaid date, been convicted not less than thrice of any of the offences specified".[291] The Rajasthan Act gave "too much discretion" to the District Magistrate.[292] A biased officer may never declare any members of a Criminal Tribe as "no longer habitual criminals" even if they may not have any convictions at all.[293] The Rajasthan Act was "hardly any improvement" from the Criminal Tribes Act.[294]

216. The Criminal Tribes Enquiry Committee, while recommending the repeal of the Criminal Tribes Act, suggested enactment of a central habitual offender legislation. However, it stated that "a person should not be branded as a habitual offender merely on grounds of suspicion".[295] In his oral evidence before the Committee, a deputy inspector general rank officer from Bihar stated, "In some of the democratic countries of the world, the surveillance kept over even hardened criminals is not done in the way in which we do it India, and a time should come when no criminal should know that he is really being followed or pursued".[296] The Committee recommended that "a person who has been convicted twice for any non-bailable

290 Ibid, p. 94

291 Ibid

292 Ibid

293 Ibid

294 Ibid, p. 95

295 Ibid, p. 96

296 Ibid, p. 97

offences under Chapters XII, XVI and XVII of the Indian Penal Code including an order under section 118 of the Criminal Procedure Code should be considered a habitual offender for the purposes of the new Act".[297] The Committee was of the view that provisions similar to sections 23, 24, 26, and 27 of the Criminal Tribes Act should not be included in the new Act.[298]

217. After the repeal of the Criminal Tribes Act, several States enacted new habitual offender laws in their jurisdictions. Significantly, most States adopted an identical definition of "habitual offenders", referring to a person who has been sentenced on conviction for at least three occasion to "a substantive term of imprisonment" for any of more of the specified offences.[299] Similarly, the respective State legislations conferred power on the government to direct the District Collector to make a register of habitual offenders within his district by entering the names and prescribed particulars of such offenders.[300] These Acts also oust the jurisdiction of courts to review the validity of any direction or order issued under the Acts.[301] Furthermore, the District Collector or any officer authorised by him in this behalf may at any time order the finger and palm impressions, foot-prints and photographs of any registered offender to be taken.[302] Several of

297 Ibid

298 Ibid, p. 100

299 Tamil Nadu Restriction of Habitual Offenders Act, 1948 (previously Restriction of Habitual Offenders Act1948); Madhya Bharat Vagrants, Habitual Offenders and Criminals (Restrictions and Settlement) Act, 1952; Orissa Restriction of Habitual Offenders Act, 1952; Uttar Pradesh Habitual Offenders Act, 1952; Rajasthan Habitual Offenders Act, 1953; Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Bombay Habitual Offenders Act, 1959; Gujarat Habitual Offenders Act, 1959; Kerala Habitual Offenders Act, 1960; Karnataka Habitual Offenders Act, 1961; Andhra Pradesh Habitual Offenders Act, 1962; Himachal Pradesh Habitual Offenders Act, 1969; Goa, Daman and Diu Habitual Offenders Act, 1976;

300 Ibid

301 Section 19, Andhra Pradesh Habitual Offenders Act, 1962; Section 15, Tamil Nadu Habitual Offenders Act, 1948; Section 22, Goa, Daman and Diu Habitual Offenders Act, 1976; Section 22, Gujarat Habitual Offenders Act, 1959; Section 22, Bombay Habitual Offenders Act, 1959; Section 21, Himachal Pradesh Habitual Offenders Act, 1969; Section 23, Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Section 18, Karnataka Habitual Offenders Act, 1961; Section 18, Kerala Habitual Offenders Act, 1960; Section 12, Orissa Restriction of Habitual Offenders Act, 1952; Section 14, Rajasthan Habitual Offenders Act, 1953

302 Section 6, Andhra Pradesh Habitual Offenders Act, 1962; Section 6, Goa, Daman and Diu Habitual Offenders Act, 1976; Section 6, Gujarat Habitual Offenders Act, 1959; Section 6, Bombay Habitual Offenders Act, 1959; Section 6, Himachal Pradesh Habitual Offenders Act, 1969; Section 9, Jammu and Kashmir Habitual Offenders (Control and Reform) Act, 1956; Section 6, Karnataka Habitual Offenders Act, 1961; Section 6, Kerala Habitual Offenders Act, 1960; Section 4, Rajasthan Habitual Offenders Act, 1953;

these Acts require the notified offenders to share their residential details, and may also restrict their movements.

218. The "habitual offender" legislations were enacted to replace the Criminal Tribes Act. However, in States such as Rajasthan, they were used to refer to members belonging to criminal tribes/denotified tribes. Applying that logic, several Prison Manuals/Rules have also referred to "habitual offender" to mean members of Denotified Tribes or wandering tribes. This cannot be accepted. A whole community ought not to have either been declared a criminal tribe in the past or a habitual offender in the present. It would not be wrong to say that the classification of "habitual offender" has been used to target members of Denotified Tribes.

219. Various habitual offender laws enacted by States are not under challenge before us in the present. Hence, we shall not deal with their validity. However, the classification is constitutionally suspect, given the vague and broad language various laws and rules have employed, which is used to target the members of Denotified Tribes. The Criminal Tribes Enquiry Committee had noted that no person can be declared as a habitual offender merely on ground of suspicion. But the same has happened, as the vague language employed leaves the discretion for the authorities to declare persons as habitual offenders merely on the ground of suspicion. We urge the State governments to reconsider the usage of various habitual offender laws, i.e. whether such laws are needed in a constitutional system. In the meantime, the definition of "habitual offender" in the prison manuals/rules shall be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislature, subject to any constitutional challenge against such legislation in the future. In case, there is no habitual offender legislation in the State, the references to habitual offenders directly or indirectly, as discussed in this judgment, are struck down as unconstitutional. The Union and the State governments are directed to make necessary changes in the prison manuals/rules in line with this judgment.

XVIII. The Role of Legal Service Authorities in Prisons

220. In order to ensure that the fundamental rights of prisoners are not violated, the role of legal services authorities is crucial. The

importance of free legal aid has been emphasized by this Court in several judgments.

(i) Right to Free Legal Aid

221. The Court, in **Hussainara Khatoon v. Home Secretary, State of Bihar**, recognized the "right to free legal services" as "an essential ingredient" of "reasonable, fair and just" procedure under Article 21 for a person accused of an offence.[303] It is "a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation".[304] Later, in **Sheela Barse v. State of Maharashtra**,[305] regarding the plight of women prisoners in the jails of Maharashtra, the Court, while emphasizing free legal assistance, expressed its concern on "the helpless condition of a prisoner who is lodged in a jail who does not know to whom he can turn for help in order to vindicate his innocence or defend, his constitutional or legal rights or to protect himself against torture and ill-treatment or oppression and harassment at the hands of his custodians".

222. The Court declared in **Mohd. Hussain v. The State (Govt. of NCT) Delhi**[306] that Article 39A "casts duty on the State to ensure that justice is not denied by reason of economic or other disabilities in the legal system and to provide free legal aid to every citizen with economic or other disabilities". In **Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid v. State Of Maharashtra**,[307] the Court held that the right to access to legal aid "flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced". The Court directed all the magistrates in the country to inform a person accused of committing a cognizable offence produced before their court, that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The Court clarified that "any failure to fully discharge the duty

303 Hussainara Khatoon v. Home Secretary, State of Bihar [1979] 3 SCR

304 Ibid

305 Sheela Barse v. State of Maharashtra, 1983 INSC 9

306 AIR 2012 SC 750

307 [2012] 8 SCR 295 : 2012 INSC 357

would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceeding".

(ii) Inspection by Legal Services Authorities

223. Section 12 of the Legal Services Authorities Act, 1987, provides that all "persons in custody" are entitled to free legal aid. In 2015, NALSA wrote a letter to all State Legal Services Authorities (SLSAs) to constitute a prison legal aid clinic (PLAC) in every prison under their jurisdiction.[308] To further strengthen the functioning of PLACs, NALSA formulated the Standard Operating Procedures (SOP) on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022.

224. Under this SOP, there are provisions for two types of inspection visits to the prisons. One shall be undertaken by the secretary of the DLSA, and the other is to be done by the chairperson of the DLSA, i.e., the district and sessions judge:

> "4. Monitoring of functioning of PLAC by DLSA
>
> 4.1 Periodicity of visits by DLSA Secretary: DLSA Secretary will visit and inspect the Prison Legal Aid Clinics at least once a month.
>
> 4.2 Role of the DLSA Secretary during prison visits: The following is the role:
>
> > a) To ensure that legal aid lawyers have been appointed to represent all undertrials. In circumstances where any prisoner is found without legal representation during the visit by the DLSA, immediate steps to be taken towards ensuring appointment.
> >
> > b) To verify whether panel lawyers are meeting and interacting with prisoners including legal aid beneficiaries. In circumstances where panel lawyers are not interacting and communicating

308 NALSA Standard Operating Procedures on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022, https://nalsa.gov.in/acts-rules/guidelines/nalsa-sop-functioning-of-prison-legal-aid-clinics-2022

with the prisoners, the lawyer must be called to understand the concern and best respond to it. If need be, where deemed appropriate by the Secretary, DLSA, the concern lawyer may be removed from the panel, and a fresh appointment initiated.

c) To check the prison conditions with respect to health, sanitation, food and hygiene in addition to access to legal representation. If any such concerns are raised, the same shall be shared with the Chairman of the DLSA, Member Secretary of SLSA as well as the Board of Visitors who have the authority to raise it to the appropriate authority.

d) To track whether there are any instances of non-production at court hearings, be it physical or virtual. If such instances are reported, take immediate steps to rectify such misgivings.

e) To ensure that concerns of vulnerable category of prisoners are heard and responded to.

f) To ensure and check the documentation and reporting practices of the Clinic.

g) To ensure that the PLVs and JVLs are able to perform their duties effectively, and have access to the prison at all times. They should ensure that no unnecessary hindrances are set forward from the prison officers, which may create hurdle in working of the PLAC.

4.3 Periodicity of visits by the Chairman, DLSA (District & Sessions Judge): The Chairman, DLSA (District & Sessions Judge) shall visit the Prison Legal Aid Clinics at least once in three months. He would also visit the premises of the prison to understand any concerns regarding prison conditions, and also enquire into the functioning of the

> PLAC. They may also interact with prisoners to received feedback for services provided.
>
> 4.4 Role of the Chairman, DLSA during prison visits: The Chairman DLSA would undertake to inspect the condition of the prisons, communicate with the inmates to understand their concerns with respect to their regimen, food, sanitation hygiene etc. in addition to access to legal representation. In circumstances where concerns are raised, the same may be raised in the meetings with the Secretary, DLSA to take measures to combat them. Specialized formats for documentation of prison visits by the Chairman may be prepared by the SLSA."[309]

The inspections have to be undertaken every month by the Secretary, DLSA, and quarterly by the Chairperson, DLSA. During these inspections, the authority inspecting is supposed to look at the overall condition of the prisons.

225. Apart from this, a Board of Visitors is constituted, as per the Model Prison Manual 2016, at a district level. The Board comprises of:

> "29.03 The Board of Visitors shall comprise the following official members:
>
> a) The District Judge at the District level, or the Sub-Divisional Judicial Magistrate exercising Jurisdiction, at Sub-Division level
>
> b) The District Magistrate, at the District level or Sub-Divisional officer at Sub- Divisional level
>
> c) District Superintendent of Police
>
> d) The Chief Medical Officer of the Health Department, at the District level or the Sub-Divisional Medical Officer at Sub-Division level
>
> e) The Executive Engineer, PWD at the District level, or Assistant Engineer PWD at Sub-Divisional level

309 Rule 4, NALSA Standard Operating Procedures on Access to Legal Aid Services to Prisoners and Functioning of the Prison Legal Aid Clinics, 2022, https://nalsa.gov.in/acts-rules/guidelines/nalsa-sop-functioning-of-prison-legal-aid-clinics-2022

f) The District Education Officer dealing with literacy programmes.

g) District Social Welfare Officer

h) District Employment Officer

i) District Agricultural Officer

j) District Industrial Officer

The Board shall make at least one visit per quarter and for this purpose, presence of three members and the chairman shall constitute quorum.

29.04 The Board of Visitors shall also comprise the following Non-Official Members:-

a) Three Members of the Legislative Assembly of the state of which one should be a woman.

b) A nominee of the State Human Rights Commission

c) Two social workers of the District/Sub-Division; one of them shall be a woman having an interest in the administration of prisons and welfare of prisoners.

29.05 The District Judge shall be the Chairman of the Board of visitors at District level and the Sub-Divisional Judicial Magistrate shall be the Chairman at Sub-Division level. The Non-official visitors after their appointment must be sensitised and trained about their duties, roles and responsibilities."

226. The duties of the Board have been provided as follows:

"29.22 All Visitors, official and non-official, at every visit shall:

(a) examine the cooked food;

(b) inspect the barracks, wards, work-sheds and other buildings of the prison generally;

(c) ascertain whether considerations of health, cleanliness and security are attended to, whether proper management

and discipline is maintained in every respect and whether any prisoner is illegally detained, or is detained for undue length of time while awaiting trial;

(d) examine prison registers and records, except secret records and records pertaining to accounts;

(e) hear and attend to all representation and petitions made by or on behalf of the prisoners;

(f) direct, if deemed advisable, that any such representation or petition be forwarded to the Government;

(g) suggest new avenues for improvement in correctional work."[310]

The comments of the Board of Visitors are recorded in the visitors' book of the prison and are forwarded to the Inspector General (IG) of Prisons. Any action on the comments is at the discretion of the IG Prisons.

227. The Model Prisons and Correctional Services Act, 2023 also envisages inspection of prisons, including by a Board of Visitors headed by the district judge/additional district judge/sub-divisional judicial magistrate.[311] It also includes the provision for "free legal aid to the prisoners in accordance with the provisions of the Legal Services Authorities Act, 1987" and the relevant standard operating procedure.[312]

XIX. The Future of Substantive Equality & Institutional Discrimination

228. What does the future hold for India? Dr Ambedkar had expressed this concern in his last address to the Constituent Assembly. The concern holds true even today. More than 75 years since independence, we have not been able to eradicate the evil of caste discrimination. We need to have a national vision for justice and equality, which involves all citizens. As Jamal Greene noted:

310 Rule 29.22, Model Prison Manual, 2016.

311 Section 54

312 Section 56

> "There is also such a thing as rights. Those individual people and families have hopes and fears that matter but that conflict with the fears and hopes of their fellow human beings. Their aspirations and worries don't depend on what Framers believed, or how Madison phrased the Bill of Rights, or whether some judicial opinion says "strict scrutiny" applies to a case. They depend on what people's expectations are, how they are treated by others, and why. We are bound to experience the rights we have differently than anyone else does—this is what makes them ours. The central challenge for any system of justice has always been that we dream alone but we live together."[313]

Therefore, we need real and quick steps to identify the instances of existing inequalities and injustices in our society. Words, without action, would mean nothing for the oppressed. As Paulo Freire noted in the "*Pedagogy of the Oppressed*":

> "The oppressor is solidary with the oppressed only when he stops regarding the oppressed as an abstract category and sees them as persons who have been unjustly dealt with, deprived of their voice, cheated in the sale of their labor—when he stops making pious, sentimental, and individualistic gestures and risks an act of love. True solidarity is found only in the plenitude of this act of love, in its existentiality, in the praxis. To affirm that men and women are persons and as persons should be free, and yet to do nothing tangible to make this affirmative a reality, is a farce."[314]

We need a compassionate approach, as Alan Paton had described:

> "It is my own belief that the only power which can resist the power of fear is the power of love. It's a weak thing and a tender thing; men despise and deride it. But I look for the day when […] we shall realize that the only lasting and

313 Jamal Greene, *How Rights Went Wrong: Why Our Obsession with Rights is Tearing America Apart,* Mariner Books, 2022, p. 248

314 Paulo Freire, *Pedagogy of the Oppressed* (translated by Myra Bergman Ramos), Penguin 2017, p. 24

> worth-while solution of our grave and profound problems lies not in the use of power, but in that understanding and compassion without which human life is an intolerable bondage, condemning us all to an existence of violence, misery and fear."[315]

229. We need an institutional approach where people from marginalized communities could share their pain and anguish about their future collectively.[316] We need to reflect and do away with institutional practices, which discriminate against citizens from marginalized communities or treat them without empathy. We need to identify systemic discrimination in all spaces by observing patterns of exclusion. After all, the "bounds of caste are made of steel"– "Sometimes invisible but almost always inextricable".[317] But not so strong that they cannot be broken with the power of the Constitution.

230. This petition highlighted an instance of institutional systemic discrimination. We appreciate the assistance provided by the lawyers in dealing with the issue.

XX. Conclusion and Directions

231. In light of the discussion, we issue the following directions:

(i) The impugned provisions are declared unconstitutional for being violative of Articles 14, 15, 17, 21, and 23 of the Constitution. All States and Union Territories are directed to revise their Prison Manuals/Rules in accordance with this judgment within a period of three months;

(ii) The Union government is directed to make necessary changes, as highlighted in this judgment, to address caste-based discrimination in the Model Prison Manual 2016 and the Model Prisons and Correctional Services Act 2023 within a period of three months;

(iii) References to "habitual offenders" in the prison manuals/Model

315 Alan Paton, *Cry, The Beloved Country*, Vintage Books, 2002

316 Bell Hooks, *Salvation: black people and love*, Harper Perennial, 2001; pp. 214-15

317 Nusrat F. Jafri, *This Land We Call Home: The Story of a Family, Caste, Conversions and Modern India,* Penguin (2024), p. xv

Prison Manual shall be in accordance with the definition provided in the habitual offender legislation enacted by the respective State legislatures, subject to any constitutional challenge against such legislation in the future. All other references or definitions of "habitual offenders" in the impugned prison manuals/rules are declared unconstitutional. In case, there is no habitual offender legislation in the State, the Union and the State governments are directed to make necessary changes in the manuals/rules in line with this judgment, within a period of three months;

(iv) The "caste" column and any references to caste in undertrial and/or convicts' prisoners' registers inside the prisons shall be deleted;

(v) The Police is directed to follow the guidelines issued in **Arnesh Kumar** v. **State of Bihar** (2014) and **Amanatullah Khan** v. **The Commissioner of Police, Delhi** (2024) to ensure that members of Denotified Tribes are not subjected to arbitrary arrest;

(vi) This Court takes *suo motu* cognizance of the discrimination inside prisons on any ground such as caste, gender, disability, and shall list the case from now onwards as **In Re: Discrimination Inside Prisons in India**. The Registry is directed to list the case after a period of three months before an appropriate Bench;

(vii) On the first date of hearing of the above *suo motu* petition, all States and the Union government shall file a compliance report on this judgment;

(viii) The DLSAs and the Board of Visitors formed under the Model Prison Manual 2016 shall jointly conduct regular inspections to identify whether caste-based discrimination or similar discriminatory practices, as highlighted in this judgment, are still taking place inside prisons. The DLSAs and the Board of Visitors shall submit a joint report of their inspection to the SLSAs, which shall compile a common report and forward it to NALSA, which shall in turn file a joint status report before this Court in the above-mentioned *suo motu* writ petition; and

(ix) The Union government is directed to circulate a copy of this judgment to the Chief Secretaries of all States and Union

territories within a period of three weeks from the date of delivery of this judgment.

232. The writ petition is disposed of.

233. Pending application(s), if any, stand disposed of.

Result of the Case: Writ Petition disposed of.

†*Headnotes prepared by:* Nidhi Jain