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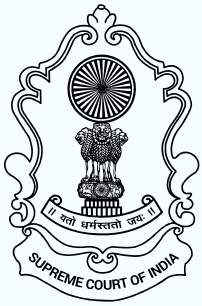

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[2024] 12 S.C.R. 1 : 2024 INSC 834

Subrata Choudhury @ Santosh Choudhury & Ors.
v.
The State of Assam & Anr.

(Criminal Appeal No. 4451 of 2024)

05 November 2024

[C.T. Ravikumar* and Rajesh Bindal, JJ.]

Issue for Consideration

Whether after the acceptance of a negative Final Report in the first complaint, upon considering the written objections/protest petition and hearing the complainant, a fresh/second complaint on the same set of facts is maintainable or not.

Headnotes†

Code of Criminal Procedure, 1973 – Second respondent-complainant filed second complaint dtd. 20.07.2011, after the dismissal of the protest petition and the acceptance of the negative Final Report in the first complaint dtd. 11.11.2010, on the same set of facts/allegations against the appellants and the other accused persons contained in the first complaint – Maintainability:

Held: Not maintainable – Maintainability or otherwise of the second complaint depends upon how the earlier complaint was rejected/dismissed at the first instance – If the earlier disposal of the complaint was on merits and in a manner known to law, the second complaint on 'almost identical facts' which were raised in the first complaint would not be maintainable if the core of both the complaints is same – In the present case, the core of the first complaint dated 11.11.2010 and the second complaint dated 20.07.2011 was the same – Further, the CJM dismissed the first complaint vide order dated 06.06.2011 after accepting the Final Report, hearing the second respondent and considering the protest petition holding that the investigation did not suffer from any infirmity – Despite the said order, the second respondent did not challenge the same but, chose to file a fresh complaint/ second complaint – Decision of the Sessions Judge and the High Court interfering with the order passed by the CJM which held that second complaint was not maintainable in law, set aside – Order of the CJM restored. [Paras 27, 31, 32, 34]

* Author

Code of Criminal Procedure, 1973 – ss.202, 203:

Held: Merely because some of the decisions of this Court had held that when a Magistrate conducted an inquiry under Section 202 Cr.P.C., and dismissed a complaint on merits, a second complaint on the same facts would not be maintainable unless there are very exceptional circumstances, it cannot be said that in all cases where a complaint to a Magistrate was not proceeded under Section 202, Cr.P.C., and dismissed not at the stage of Section 203, Cr.P.C., a second complaint or a second protest petition would be maintainable. [Para 31]

Code of Criminal Procedure, 1973 – ss.156(3), 2(d) – Protest petition when to be treated as a complaint u/s.2(d):

Held: A 'narazi' viz., disapproval against a final report submitted in a case investigated by the police on a first information report registered pursuant to a complaint under Section 156(3) for investigation should be treated as a complaint only if it satisfies the requirement in law to constitute a complaint as defined under Section 2(d) – In the present case, since the narazi petition dated 05.05.2011 did not satisfy the ingredients to attract Section 2(d), it could not be treated as a complaint. [Paras 17, 18]

Code of Criminal Procedure, 1973 – s.300(1) – When not applicable – Maxim –"nemo debet bis vexari pro una et eadem causa":

Held: No one shall be vexed twice for one and the same cause – However, in the present case, there was no conviction or acquittal of the appellants in regard to the Sections involved on the same set of facts, by a Court of competent jurisdiction – Section 300 is thus, not applicable. [Para 9]

Case Law Cited

Samta Naidu & Anr. v. State of Madhya Pradesh & Anr. [2020] 2 SCR 1127 **: (2020) 5 SCC 378 – relied on.**

Vijayalakshmi v. Vasudevan **(1994) 4 SCC 656;** *Bhagwat Singh v. Commissioner of Police and Anr* [1985] 3 SCR 942 **: (1985) 2 SCC 537;** *Abhinandan Jha v. Dinesh Misra* [1967] 3 SCR 668 **: AIR 1968 SC 117;** *Bhimappa Bassappa Bhu Sannavar v. Laxman Shivarayappa Samagouda & Ors.* [1971] 1 SCR 1 **: (1970) 1 SCC 665;** *Sunil Majhi v. The State* **AIR 1968 (Cal)**

238; *Shivshankar Singh v. State of Bihar & Anr.* [2011] 13 SCR 247 **: (2012) 1 SCC 130;** *H. S. Bains v. State (Union Territory of Chandigarh)* [1981] 1 SCR 935 **: AIR 1980 SC 1883;** *Bindeshwari Prasad Singh v. Kali Singh* [1977] 1 SCR 125 **: AIR 1977 SC 2432;** *Poonam Chand Jain & Anr. v. Farzu* [2010] 2 SCR 109 **: (2010) 2 SCC 631;** *Mahesh Chand v. B. Janaradhan Reddy & Anr.* [2002] Supp. 4 SCR 566 **: (2003) 1 SCC 734;** *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* [1962] Supp. 2 SCR 297 **: AIR 1962 SC 876;** *Jatinder Singh v. Ranjit Kaur* [2001] 1 SCR 707 **: (2001) 2 SCC 570;** *Ravinder Singh v. Sukhbir Singh* [2013] 1 SCR 243 **: (2013) 9 SCC 245 – referred to.**

List of Acts

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

List of Keywords

Protest petition; Second protest petition; Negative Final Report; First complaint/original complaint; Written objections; "narazi"; "Complaint"; Fresh/second complaint; Maintainability of the second complaint; Same set of facts/allegations; Identical facts; "nemo debet bis vexari pro una et eadem causa"; Sections 202, 203 of the Code of Criminal Procedure, 1973; Section 156(3) of the Code of Criminal Procedure, 1973.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 4451 of 2024

From the Judgment and Order dated 08.01.2021 of the Gauhati High Court in CRLRP No. 95 of 2013

Appearances for Parties

S. Nagamuthu, Sr. Adv., Amicus Curiae.

Pijush Kanti Roy, Sr. Adv., Pritthish Roy, Ms. Kakali Roy, Rajan K. Chourasia, M.P. Parthiban, Adv. for the Appellants.

Nalin Kohli, Sr. A.A.G., Ankit Roy, Ms. Nimisha Menon, Anshul Malik, Ayuushman Arora, Ms. Shruti Agarwal, Manish Goswami, Rongon Choudhury, Priyonkoo Gogoi, Rameshwar Prasad Goyal, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

Leave granted.

1. An affirmative answer to the question of law raised before the High Court as to whether after the acceptance of a negative Final Report filed under Section 173 of the Code of Criminal Procedure, 1973 (for short, the 'Cr.P.C.'), upon considering the written objection/ protest petition and hearing complainant, a fresh complaint on the same set of facts is maintainable, by the High Court of Gauhati and the consequential confirmation of the order of the learned Additional Sessions Judge, Cachar, Silchar in Criminal Revision Petition No.101/2012, as per judgment and order dated 08.01.2021 in Criminal Revision Petition No.95/2013 is under challenge in this appeal by special leave. As per the said judgment dated 08.01.2021, the High Court dismissed the revision petition and confirmed the order of the learned Additional Sessions Judge dated 28.02.2013 in Criminal Revision Petition No.101/2012 whereunder the order dated 12.07.2012 of the learned Chief Judicial Magistrate, Cachar, Silchar dismissing the complaint filed by the second respondent herein was set aside and case was remanded for consideration of the matter afresh for the purpose arriving at a finding as to whether any case for taking cognizance of the alleged offence(s) and for issuance of process has been made or not.

2. Facts and circumstances giving rise to the captioned appeal, in succinct, are as under: -

The second respondent herein filed a complaint on 11.11.2010 before the Chief Judicial Magistrate, Cachar, Silchar and it was forwarded for investigation under Section 156 (3) Cr.P.C. Consequently, on 05.12.2010, FIR No.244/2010 under Sections 406, 420 read with Section 34 of the Indian Penal Code, 1860 (for short the 'IPC') was registered at Dholai Police Station against the appellants. On completion of the investigation, Final Report under Section 173, Cr.P.C., was filed before the learned Magistrate on 28.02.2011. Virtually, it was a negative report as can be seen from Annexure-P3 – Final Report No.11 of 2011 dated 28.02.2011. Aggrieved by the said Final Report, the complainant filed a written objection/*narazi* petition on 05.05.2011, alleging that

the investigation was not conducted properly and praying for taking cognizance on it. As per order dated 06.06.2011, the learned Chief Judicial Magistrate (CJM) accepted the Final Report, after hearing the second respondent-complainant and considering the *narazi* petition, upon holding that the investigation did not suffer from any infirmity. On 20.07.2011, the second respondent filed the second complaint with the same set of allegations against the appellants and the others who were shown as accused in the first complaint, before the learned CJM alleging commission of offence under the very Sections viz., 406, 420 and 34 IPC, and the same was numbered as C.R. No.159 of 2011. On 19.09.2011, as per Annexure P-7 order, the learned CJM exercising the power under Section 202 Cr.P.C., directed an investigation after recording the initial deposition of the complainant and the statements of the witnesses. Feeling aggrieved by the said order of the learned CJM dated 19.09.2011, the appellant(s)/accused preferred a Criminal Revision Petition before the High Court. As per Annexure P-8 order dated 24.05.2012, the High Court set aside the order of the learned CJM and directed the appellants herein to file an appropriate application raising the question of maintainability of the second complaint viz., C.R. No.159 of 2011.

3. Pursuant to the order dated 24.05.2012, the learned CJM considered the application filed by the appellants raising the question of maintainability of the second complaint and dismissed the second complaint holding it not maintainable in law. Against the said order of the CJM dated 12.07.2012, the second respondent-complainant filed Criminal Revision Petition No.101 of 2012. The learned Sessions Judge allowed the said Criminal Revision Petition as per Annexure P-10 order dated 28.02.2013 and set aside the order of the CJM and remanded the case for reconsideration of the matter afresh for the purpose of finding whether any case for taking cognizance of the alleged offences and issuance of process have been made out or not. Aggrieved by the said order dated 28.02.2013 the appellants preferred Criminal Revision No.95 of 2013 which was dismissed by the High Court as per the impugned order dated 08.01.2021.

4. Heard the learned counsel for the appellants and the learned counsel appearing for the respondents.

5. In the wake of aforesaid factual background, the appellants, relying various decisions of this Court, contended that the second complaint

filed by the second respondent-complainant is not maintainable. It is contended that the High Court had failed to consider the provisions under Section 300 (1), Cr.P.C., which resulted in dismissal of the revision petition. Dilating the said contentions, further grounds founded on Section 300 (1) of the Cr.P.C., are raised.

6. Before dealing with the other contentions raised to assail the judgment dated 08.01.2021, we think it is only appropriate to consider the contentions raised by the appellants founded on Section 300 (1), Cr.P.C., reads thus: -

> ***"300. Person once convicted or acquitted not to be tried for same offence.***—*(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under sub-section (1) of section 221, or for which he might have been convicted under sub-section (2) thereof."*

7. In view of the indisputable and undisputed facts, referred hereinbefore, revealing the outcome of the first complaint dated 11.11.2010 and taking into account the stage of the second complaint the question is whether Section 300 (1), Cr.P.C., is applicable or not to the case at hand.

8. Section 300 (1), Cr.P.C., is found on the maxim *"Nemo debet bis vexari pro una et eadem causa",* which means that no one shall be vexed twice for one and the same cause. The Section provides that no man once convicted or acquitted shall be tried for the same offence again for one and the same cause. Thus, it can be seen that in order to bar the trial in terms of Section 300 (1), Cr.P.C., it must be shown: -

a. that the person concerned has been tried by a competent Court for the same offence or one for which he might have been charged or convicted at that trial, on the same facts.

b. that he has been convicted or acquitted at the trial and that such conviction or acquittal is in force.

9. This fundamental rule of our criminal law revealed from this Section enables raising of the special pleas of *autrefois acquit* and *autrefois convict,* subject to the satisfaction of the conditions enjoined thereunder. This position has been made clear by this Court in ***Vijayalakshmi v. Vasudevan.***[1] In the case at hand, the undisputed facts stated hereinbefore would reveal that the appellants were never ever tried before a Court of competent jurisdiction for the aforesaid offence(s) on the basis of the aforesaid set of facts. Therefore, indisputably there was no verdict of conviction or acquittal in regard to the aforesaid Sections in respect of the appellants on the aforesaid set of facts, by a Court of competent jurisdiction. When that be the position, we have no hesitation to hold that the grounds founded on Section 300 (1), Cr.P.C. raised by the appellants merit no consideration.

10. As noted at the outset, the question of law raised before and decided by the High Court was whether after the acceptance of the Final Report filed under Section 173, Cr.P.C., upon considering the written objection/protest petition and hearing the complainant, a fresh complaint on the same set of facts is maintainable or not. There can be no two views as relates the position that there can be no blanket bar for filing a second complaint on the same set of facts. We will deal with the moot question and the aforesaid position a little later.

11. Firstly, the question as to what are the courses available to a Magistrate on receipt of a negative report is to be looked into and in fact, that question was considered by this Court in ***Bhagwat Singh v. Commissioner of Police and Anr.***[2] This Court held that on receipt of a negative report, the following four courses are open to the Magistrate concerned: -

1. to accept the report and to drop the proceedings;
2. to direct further investigation to be made by the police.
3. to investigate himself or refer the investigation to be made by another Magistrate under Section 159, Cr.P.C., and

1 (1994) 4 SCC 656

2 [1985] 3 SCR 942 : (1985) 2 SCC 537

4. to take cognizance of the offence under Section 200, Cr.P.C., as private complaint when materials are sufficient in his opinion as if the complainant is prepared for that course.

The indisputable position is that in the case at hand the learned CJM on receipt of the negative report accepted it after rejecting the written objections/protest petition, which is one of the courses open to a Magistrate on receipt of a negative report, in terms of **Bhagwat Singh's** case (*supra*).

12. In view of the confirmance of the judgment of the learned Sessions Judge carrying the following observations/findings it is not inappropriate to delve into them for the limited purpose. They, in so far as relevant, read thus:-

> *"(i) Thus, the present complaint in question is truly qualify to the definition of the term complaint and the same has been filed on being aggrieved against the final report, submitted against his previous complaint. Hence, in my considered opinion the learned court below misconstrued the definition of the term complaint, by treating the simple objection petition as Narazi complaint, whereas terming the present complaint in question as second complaint.*
>
> *(ii) Situated thus, the Hon'ble Apex Court of India, in the said decision, (referring to the decision in Abhinandan Jha v. Dinesh Misra, reported in AIR 1968 Supreme Court 117) specifically observed that even after accepting the final report, it is open to the Magistrate to treat the respective protest petitions as complaints and to take further proceedings in accordance with law."*

13. According to us, the observations/findings referred above as (i) is actually an outcome of a misconstruction on the part of the learned Sessions Judge. In troth, the learned CJM termed the subject complaint dated 20.07.2011 as second complaint not with reference to the written objection/protest petition dated 05.05.2011 and it was so treated with reference to the original complaint dated 11.11.2010. This fact is evident from the recitals in Annexure-P9 order dated 12.07.2012 passed by the learned CJM in complaint numbered as Case No.159/2011, which was challenged before the learned Sessions Judge. In the said order the learned CJM observed and held thus:-

> *"After the original complaint has been duly investigated by the police and Final Report submitted therein has been accepted by the Court in a Judicial Proceeding; therefore, in my considered view it cannot be re-opened by means of filing of a second complaint in respect of the same facts and circumstances."*

In view of the afore-extracted recital from the order dated 12.07.2012 of the learned CJM, it is evident that it was with reference to the original complaint that he termed the complaint filed by the second respondent on 20.07.2011 as the second complaint.

14. The second observation/finding referred above as (ii) also requires a clarification. It is true that correctly this Court held in the decision in ***Abhinandan Jha v. Dinesh Misra***[3] that even after accepting the final report it would be open to the Magistrate concerned to treat respective protest petition as complaint and to take further proceedings in accordance with law. Section 2(d) of the Cr.P.C. defines the term 'complaint'. No doubt in Cr.P.C., no form for filing complaint is prescribed. However, the essentials to constitute a complaint can be briefly mentioned thus: -

(i) An oral or written allegation;

(ii) That some person(s) known or unknown has committed an offence;

(iii) It must be made to a Magistrate with a view to his taking action.

15. In ***Bhimappa Bassappa Bhu Sannavar v. Laxman Shivarayappa Samagouda & Ors.***,[4] this Court, as regards the meaning of a complaint, held thus: -

> *"11. The word "complaint" has a wide meaning since it includes even an oral allegation. It may, therefore, be assumed that no form is prescribed which the complaint must take. It may only be said that there must be an allegation which prima facie discloses the commission of an offence with the necessary facts for the magistrate to take action. Section 190(1)(a) makes it necessary that the alleged facts must disclose the commission of an offence."*

3 [1967] 3 SCR 668 : AIR 1968 SC 117

4 [1971] 1 SCR 1: (1970) 1 SCC 665

16. In the decision in ***Sunil Majhi v. The State***,[5] the Calcutta High Court in paragraph 6 held thus: -

> *"6.The term 'naraji' means 'disapproval' and in the context of things it signifies disapproval of the report in relation to which it is filed. It may simply challenge the report on grounds stated and pray for its rejection: it may while praying for rejection of the report also reiterate the allegations made in the petition of complaint and pray for further action by the court and in that view of the matter it would be a fresh complaint. In the case Jamini Kanta v. Bhabanath. AIR 1939 Cal 273, it was observed:*
>
> *"The word 'naraji' is often loosely used and it is necessary to examine the petition which is filed in a particular case "to determine its true import in that case on an examination of the petition it was found that it was not a complaint. The reports of the cases cited by Mr. Banerji do not contain any discussion about the nature of the statements made in the naraji petitions in those cases, but from the fact that the naraji petitions were treated as complaints it would appear that they did satisfy the requirements of a complaint as defined in section 4(h) of the Code in order to be a complaint the petition must contain allegations of an offence and also a prayer for judicial action thereon. If therefore, the protest petition filed against an enquiry report filed or to be filed, while lodging a protest recites also the allegations already made and prays for action of the court thereon, there is no difficulty in treating it as a complaint and taking action thereon under Sections 202, 203 or 204 of the Cr PC. In the cases of Lachmi Shaw. AIR 1932 Cal 383 (1) (Supra) and Satkari Ghose. AIR 1941 Cal 439 (Supra) there were complaints to the police which were found on investigation to be false and the police submitted final reports and at the same time prayed for prosecuting the complainant under section 211 I.P.C. Naraji petitions were filed against the police reports but prosecutions were launched without considering them and it was held that*

5 AIR 1968 (Cal) 238

the procedure followed was irregular and that the naraji petitions should be treated as complaints and treated and disposed of as such before the prayer for prosecuting the complainant could be entertained."

17. In the light of the aforesaid decisions, we are of the view that a '*narazi*' viz., disapproval against a final report submitted in a case investigated by the police on a first information report registered pursuant to the forwarding of a complaint under Section 156(3), Cr.P.C., for investigation should be treated as a complaint only if the same satisfies the requirement in law to constitute a complaint as defined under Section 2(d), Cr.P.C. As held in **Sunil Majhi's** case (*supra*), if while praying for rejection of a final report after reiterating the allegations made in the original complaint and prayer for further action by the court, the same could be treated as a fresh complaint, but then, we may hasten to add that its maintainability depends upon the question as to how the original/protest petition was disposed of.

18. It is relevant to note that in paragraph 9 of the judgment dated 28.02.2013 (Annexure-P10), the learned Sessions Judge after referring to the term 'complaint,' defined under Section 2(d) of the Cr.P.C. and taking note of the aforesaid essentials to constitute a complaint made a scrutiny of the written objection dated 05.05.2011 submitted by the second respondent-complainant against the negative report dated 28.02.2011 held that the said objection dated 05.05.2011 could not be termed as a '*narazi* complaint' and found that it did not qualify to the definition of the term 'complaint'. In that context, with reference to the definition in Section 2(d) of the Cr.P.C. and the essentials to constitute a complaint as referred above, it can only be said that the said finding of the learned Sessions Judge is perfectly in tune with the position of law. Once that is so found and when it is a fact that the negative report on the original complaint dated 11.11.2010 was accepted after rejecting the written objection/protest petition dated 05.05.2011 it cannot be said that the learned CJM has gone wrong in describing the complaint dated 20.07.2011 as the second complaint. The clarification required to the observation/finding referred to as (ii), with reference to the **Abhinandan Jha's** case (*supra*) is that though it would be open to the Magistrate to treat a protest petition as complaint and to take further proceedings in accordance with law even after accepting final report that is permissible only if the protest petition concerned satisfies the ingredients to constitute

a complaint as defined under Section 2(d), Cr.P.C. Since the *narazi* petition dated 05.05.2011 did not satisfy the ingredients to attract Section 2(d), Cr.P.C., it could not be treated as a complaint as held by the learned Sessions Judge. At the same time, in view of what is stated above and taking note of the fact that the allegations made in the original complaint are reiterated in the complaint dated 20.07.2011 and pray for further action by the court, it is rightly taken by the courts below as a complaint. Since the final report on the original complaint was already accepted after rejecting the *narazi* petition the complaint dated 20.07.2011 which satisfies all requirements of a complaint, if at all having the characteristics of a protest petition, could be treated as a complaint and hence, the learned CJM and the learned Sessions Judge have rightly treated it as a complaint.

19. Now, we will consider the question whether the construction of the law laid down by this Court in regard to the maintainability of a second complaint, in the circumstances mentioned hereinbefore that led to the moot question, by the High Court as reflected under paragraph 20 of the impugned judgment and the consequential direction can be sustained. Paragraphs 20 and 21 in the impugned judgment read thus: -

> *20. Evidently, the learned Magistrate did not act upon the said protest petition, inasmuch as, the learned Magistrate did not proceed under Section 200/202 of the CrPC treating the same as narazi complaint. When the learned Magistrate did not proceed under Section 200 to 204 CrPC for taking cognizance upon received of the first protest petition nor the protest petition was dismissed under Section 203 CrPC, the complaint in question though considered to be a second narazi complaint with reference to the first protest petition as indicated above, the same is not barred under law, reason being that the alleged first protest petition did not contain detailed particulars of the case required for decision nor the learned Magistrate proceed on the basis of the first petition under Section 200/202 CrPC and therefore the alleged first protest petition in my cosndiered (sic: considered) view cannot be held to have been dismissed after full consideration under Section 203 CrPC. Even if it is assumed for the sake of argument that the*

first protest petition was dismissed after full consideration, the narazi complaint in question is maintainable for special circumstances, namely the first protest petition did not contain the full facts and particulars necessary to decide the case and the same was considered on incomplete facts and particulars and the learned Magistrate also did not examined the complainant or any witnesses under Section 200 CrPC nor proceeded under Section 202 CrPC to decide whether there was sufficient ground for proceeding. Therefore, in any view of the matter, the present complaint in question cannot be considered as second complaint and the same also cannot be held to be barred for acceptance of the final report. Secondly, even if it is considered to be second narazi complaint with reference to the first protest petition, then also the complainant is not barred in the facts situation of the case because of the special on exceptional circumstances as indicated above.

21. For the reasons stated above, this court do not find any fault with the impugned order passed by the learned Sessions Judge and accordingly, the revision petition is dismissed. The matter be remanded back to the learned Magistrate to proceed with the complaint in accordance with law.

20. Paragraph 21 of the impugned judgment of the High Court, as extracted above, would reveal that the High Court also treated the petition dated 20.07.2011 filed by the second respondent as a complaint. Since it is filed by the second respondent after the acceptance of the original complaint dated 11.11.2010 that too, after the rejection of his protest petition dated 05.05.2011, there can be no dispute regarding the status of the complaint dated 20.07.2011 as the second complaint of the second respondent.

21. The appellants herein contended that the second complaint carries the same set of allegations and in view of the dismissal of the first complaint after considering the protest petition and hearing the complainant, the second complaint filed by the second respondent dated 20.07.2011 is not maintainable. To buttress the

said contention, the learned counsel relied on the decisions of this Court in **Shivshankar Singh v. State of Bihar & Anr.,**[6] ***H. S. Bains v. State (Union Territory of Chandigarh),***[7] ***Bindeshwari Prasad Singh v. Kali Singh***[8] and ***Poonam Chand Jain & Anr. v. Farzu***.[9]

22. *Per contra,* the learned counsel appearing for the second respondent/ the complainant contended that the acceptance of the Final Report, based on the first complaint could not be a bar for maintaining a fresh complaint on the same set of facts. It is submitted that virtually upon filing of the Final Report based on the first complaint only an objection was filed by the second respondent and therefore, it ought not to have been taken as the first *narazi* complaint. At the same time, it is further contended that even if it is taken as the first *narazi* complaint, a second *narazi* complaint is not barred by law. To fortify the said contention, the learned counsel relied on the decision of this Court in ***Mahesh Chand v. B. Janaradhan Reddy & Anr.***[10] and ***Shivshankar Singh's*** case (supra).

23. In view of the plethora of decisions, there can be no doubt that even when Final Report filed after investigation based on the FIR registered pursuant to the receipt of complaint forwarded by a Court for investigation under Section 156 (3) of the Cr.P.C., is accepted and protest petition thereto is rejected, the Magistrate can still take cognizance upon a second complaint or second protest petition, on the same or similar allegations or facts. But this position is subject to conditions.

24. In ***Samta Naidu & Anr. v. State of Madhya Pradesh & Anr.***,[11] this Court considered all the relevant decisions including ***Pramatha Nath Talukdar v. Saroj Ranjan Sarkar,***[12] ***Jatinder Singh v. Ranjit Kaur,***[13] ***Poonam Chand Jain v. Farzu***,[14] and ***Shivshankar Singh's*** case

6 [2011] 13 SCR 247 : (2012) 1 SCC 130
7 [1981] 1 SCR 935 : AIR 1980 SC 1883
8 [1977] 1 SCR 125 : AIR 1977 SC 2432
9 [2010] 2 SCR 109 : (2010) 2 SCC 631
10 [2002] Supp. 4 SCR 566 : (2003) 1 SCC 734
11 [2020] 2 SCR 1127 : (2020) 5 SCC 378
12 [1962] Supp. 2 SCR 297 : AIR 1962 SC 876
13 [2001] 1 SCR 707 : (2001) 2 SCC 570
14 [2010] 2 SCR 109 : (2010) 2 SCC 631

(supra) in regard to the moot question involved, in paragraphs 12 to 12.3, 12.5, 13 and 16 thereunder. The said paragraphs, insofar as they are relevant to this case, are as under:

> *12. The law declared in Talukdar has consistently been followed, for instance, in Bindeshwari Prasad Singh v. Kali Singh it was observed: (Bindeshwari Prasad Singh case, SCC p. 59, para 4)*
>
> > *"4. … it is now well settled that a second complaint can lie only on fresh facts or even on the previous facts only if a special case is made out."*
> >
> > *(emphasis supplied)*
>
> *The view taken in Bindeshwari was followed in A.S. Gauraya v. S.N. Thakur.*
>
> *12.1. In Jatinder Singh v. Ranjit Kaur the issue was whether the first complaint having been dismissed for default, could the second complaint be maintained. The matter was considered as under: (SCC pp. 572-74, paras 9 & 12)*
>
> *"9. There is no provision in the Code or in any other statute which debars a complainant from preferring a second complaint on the same allegations if the first complaint did not result in a conviction or acquittal or even discharge. Section 300 of the Code, which debars a second trial, has taken care to explain that "the dismissal of a complaint, or the discharge of the accused, is not an acquittal for the purposes of this section". However, when a Magistrate conducts an inquiry under Section 202 of the Code and dismisses the complaint on merits, a second complaint on the same facts cannot be made unless there are very exceptional circumstances. Even so, a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance.*
>
> * * *
>
> *12. If the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a*

second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different. There appeared a difference of opinion earlier as to whether a second complaint could have been filed when the dismissal was under Section 203. The controversy was settled by this Court in Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, (1962) 1 Cri LJ 770. A majority of Judges of the three-Judge Bench held thus: (AIR p. 899, para 48)

> *'48. … An order of dismissal under Section 203, Criminal Procedure Code, is, however, no bar to the entertainment of a second complaint on the same facts but it will be entertained only in exceptional circumstances, e.g., where the previous order was passed on an incomplete record or on a misunderstanding of the nature of the complaint or it was manifestly absurd, unjust or foolish or where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings, have been adduced. It cannot be said to be in the interest of justice that after a decision has been given against the complainant upon a full consideration of his case, he or any other person should be given another opportunity to have his complaint inquired into.'*
>
> (emphasis supplied)

S.K. Das, J. (as he then was) while dissenting from the said majority view had taken the stand that right of a complainant to file a second complaint would not be inhibited even by such considerations. But at any rate the majority view is that the second complaint would be maintainable if the dismissal of the first complaint was not on merits.

(emphasis supplied)

12.2. In Ranvir Singh v. State of Haryana Haryana, the issue was set out in para 23 of the decision and the

discussion that followed thereafter was as under: (SCC p. 647, paras 23-26)

"23. In the instant case, the question is narrowed down further as to whether such a second complaint would be maintainable when the earlier one had not been dismissed on merits, but for the failure of the complainant to put in the process fees for effecting service.

24. The answer has been provided firstly in Pramatha Nath Talukdar case, wherein this Court had held that even if a complaint was dismissed under Section 203 CrPC, a second complaint would still lie under exceptional circumstances, indicated hereinbefore. The said view has been consistently upheld in subsequent decisions of this Court. Of course, the question of making a prayer for recalling the order of dismissal would not be maintainable before the learned Magistrate in view of Section 362 CrPC, but such is not the case in these special leave petitions.

25. In the present cases, neither have the complaints been dismissed on merit nor have they been dismissed at the stage of Section 203 CrPC. On the other hand, only on being satisfied of a prima facie case, the learned Magistrate had issued process on the complaint.

26. The said situation is mainly covered by the decision of this Court in Jatinder Singh case, wherein the decision in Pramatha Nath Talukdar case was also taken into consideration and it was categorically observed that in the absence of any provision in the Code barring a second complaint being filed on the same allegation, there would be no bar to a second complaint being filed on the same facts if the first complaint did not result in the conviction or acquittal or even discharge of the accused, and if the dismissal was not on merit but on account of a default on the part of the complainant."

(Underline supplied)

12.3. In Poonam Chand Jain v. Fazru the issue whether after the dismissal of the earlier complaint had attained

finality, could a second complaint be maintained on identical facts was considered as under: (SCC pp. 634-36, paras 14-20)

"14. In the background of these facts, the question which crops up for determination by this Court is whether after an order of dismissal of complaint attained finality, the complainant can file another complaint on almost identical facts without disclosing in the second complaint the fact of either filing of the first complaint or its dismissal.

15. Almost similar questions came up for consideration before this Court in Pramatha Nath Talukdar v. Saroj Ranjan Sarkar. The majority judgment in Pramatha Nath was delivered by Kapur, J. His Lordship held that an order of dismissal under Section 203 of the Criminal Procedure Code (for short "the Code") is, however, no bar to the entertainment of a second complaint on the same facts but it can be entertained only in exceptional circumstances. This Court explained the exceptional circumstances as:

(a) where the previous order was passed on incomplete record, or

(b) on a misunderstanding of the nature of the complaint, or

(c) the order which was passed was manifestly absurd, unjust or foolish, or

(d) where new facts which could not, with reasonable diligence, have been brought on the record in the previous proceedings.

16. This Court in Pramatha Nath made it very clear that interest of justice cannot permit that after a decision has been given on a complaint upon full consideration of the case, the complainant should be given another opportunity to have the complaint enquired into again. In para 50 of the judgment the majority judgment of this Court opined that fresh evidence or fresh facts must be such which could not with reasonable diligence have been brought on record. This Court very clearly held that it cannot be settled law which permits the complainant to place some

evidence before the Magistrate which are in his possession and then if the complaint is dismissed adduce some more evidence. According to this Court, such a course is not permitted on a correct view of the law. (para 50, p. 899)

17. This question again came up for consideration before this Court in Jatinder Singh v. Ranjit Kaur. There also this Court by relying on the principle in Pramatha Nath held that here is no provision in the Code or in any other statute which debars a complainant from filing a second complaint on the same allegation as in the first complaint. But this Court added when a Magistrate conducts an enquiry under Section 202 of the Code and dismisses a complaint on merits a second complaint on the same facts could not be made unless there are "exceptional circumstances". This Court held in para 12, if the dismissal of the first complaint is not on merit but the dismissal is for the default of the complainant then there is no bar in filing a second complaint on the same facts. However, if the dismissal of the complaint under Section 203 of the Code was on merit the position will be different.

19. Again in Mahesh Chand v. B. Janardhan Reddy, a three-Judge Bench of this Court considered this question in para 19 at p. 740 of the Report. The learned Judges of this Court held that a second complaint is not completely barred nor is there any statutory bar in filing a second complaint on the same facts in a case where a previous complaint was dismissed without assigning any reason. The Magistrate under Section 204 of the Code can take cognizance of an offence and issue process if there is sufficient ground for proceeding. In Mahesh Chand this Court relied on the ratio in Pramatha and held if the first complaint had been dismissed the second complaint can be entertained only in exceptional circumstances and thereafter the exceptional circumstances pointed out in Pramatha were reiterated. Therefore, this Court holds that the ratio in Pramatha Nath is still holding the field. The same principle has been reiterated once again by this Court in Hira Lal v. State of U.P. In para 14 of the judgment this Court expressly quoted the ratio in Mahesh Chand discussed hereinabove.

20. Following the aforesaid principles which are more or less settled and are holding the field since 1962 and have been repeatedly followed by this Court, we are of the view that the second complaint in this case was on almost identical facts which was raised in the first complaint and which was dismissed on merits. So the second complaint is not maintainable. This Court finds that the core of both the complaints is the same. Nothing has been disclosed in the second complaint which is substantially new and not disclosed in first complaint. No case is made out that even after the exercise of due diligence the facts alleged in the second complaint were not within the knowledge of the first complainant. In fact, such a case could not be made out since the facts in both the complaints are almost identical. Therefore, the second complaint is not covered within exceptional circumstances explained in Pramatha Nath. In that view of the matter the second complaint in the facts of this case, cannot be entertained."

(emphasis supplied)

12.4…..

12.5. In Ravinder Singh v. Sukhbir the matter was considered from the standpoint whether a frustrated litigant be permitted to give vent to his frustration and whether a person be permitted to unleash vendetta to harass any person needlessly. The discussion was as under: (SCC pp. 258-60, paras 26-27 & 33)

"26. While considering the issue at hand in Shivshankar Singh v. State of Bihar this Court, after considering its earlier judgments in Pramatha Nath Talukdar v. Saroj Ranjan Sarkar, Jatinder Singh v. Ranjit Kaur, Mahesh Chand v. B. Janardhan Reddy and Poonam Chand Jain v. Fazru held : (Shivshankar Singh case, SCC p. 136, para 18)

'18. … it is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on

the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit.'

27. In Chandrapal Singh v. Maharaj Singh this Court has held that it is equally true that chagrined and frustrated litigants should not be permitted to give vent to their frustration by enabling them to invoke the jurisdiction of criminal courts in a cheap manner. In such a fact situation, the court must not hesitate to quash criminal proceedings.

* * *

33. The High Court has dealt with the issue involved herein and the matter stood closed at the instance of Respondent 1 himself. Therefore, there can be no justification whatsoever to launch criminal prosecution on that basis afresh. The inherent power of the court in dealing with an extraordinary situation is in the larger interest of administration of justice and for preventing manifest injustice being done. Thus, it is a judicial obligation on the court to undo a wrong in course of administration of justice and to prevent continuation of unnecessary judicial process. It may be so necessary to curb the menace of criminal prosecution as an instrument of operation of needless harassment. A person cannot be permitted to unleash vendetta to harass any person needlessly. Ex debito justitiae is inbuilt in the inherent power of the court and the whole idea is to do real, complete and substantial justice for which the courts exist. Thus, it becomes the paramount duty of the court to protect an apparently innocent person, not to be subjected to prosecution on the basis of wholly untenable complaint."

25. After referring to the aforesaid decisions in **Samta Naidu's** case (supra) this Court further, held in Paragraph 13 thus: -

"13. The application of the principles laid down in Talukdar in Jatinder Singh shows that "a second complaint is permissible depending upon how the complaint happened to be dismissed at the first instance". It was further laid down that: (Jatinder Singh case, SCC p. 573, para 12)

"12. If the dismissal of the complaint was not on merit but on default of the complainant to be present there is no bar in the complainant moving the Magistrate again with a second complaint on the same facts. But if the dismissal of the complaint under Section 203 of the Code was on merits the position could be different."

"To similar effect are the conclusions in Ranvir Singh and Poonam Chand Jain. Para 16 of Poonam Chand Jain also considered the effect of para 50 of the majority judgment in Talukdar. These cases, therefore, show that if the earlier disposal of the complaint was on merits and in a manner known to law, the second complaint on "almost identical facts" which were raised in the first complaint would not be maintainable. What has been laid down is that "if the core of both the complaints is same", the second complaint ought not to be entertained."

(underline supplied)

26. It was further held in paragraph 16 of the decision in **Samta Naidu's** case (supra) thus: -

"16. As against the facts in Shivshankar, the present case stands on a different footing. There was no legal infirmity in the first complaint filed in the present matter. The complaint was filed more than a year after the sale of the vehicle which meant the complainant had reasonable time at his disposal. The earlier complaint was dismissed after the Judicial Magistrate found that no prima facie case was made out; the earlier complaint was not disposed of on any technical ground; the material adverted to in the second complaint was only in the nature of supporting material; and the material relied upon in the second complaint was not such which could not have been procured earlier. Pertinently, the core allegations in both the complaints

were identical. In the circumstances, the instant matter is completely covered by the decision of this Court in Talukdar as explained in Jatinder Singh and Poonam Chand Jain. The High Court was thus not justified in holding the second complaint to be maintainable."

27. Now, we will have to proceed with the appeal bearing in mind the exposition of law in ***Samta Naidu's*** *case (supra)* that if earlier disposal of the complaint was on merits and in a manner known to law, the second complaint on 'almost identical facts' which were raised in the first complaint would not be maintainable. "If the core of both the complaints is same, the second complaint ought not to be entertained," it was further held therein. In the light of the factual narration with respect to the disposal of the original complaint dated 11.11.2010, made hereinbefore and in view of the courses open to a Magistrate on receipt of a negative report and applying the exposition of law in ***Samta Naidu's*** *case (supra)* with respect to the maintainability of a second complaint we have no hesitation to hold that the maintainability of the second complaint dated 20.07.2011 filed by the second respondent would depend upon the question whether the core of the original complaint dated 11.11.2010 and the second complaint dated 20.07.2011 is the same as the disposal of the complaint dated 11.11.2010 was on merits and in a manner known to law. In this context, it is also to be noted after considering the final report, the protest complaint and admittedly, upon hearing the counsel for the complainant the protest petition was rejected not only by finding that the investigation suffers from no infirmity but also by finding that since it was conducted properly, no order for further investigation is invited and further that the materials are not sufficient to take cognizance. As noted earlier, despite the said nature of the order dated 06.06.2011 the second respondent-complainant has not chosen to challenge the same but, chosen only to file a fresh complaint, viz., the second complaint dated 20.07.2011.

28. In the contextual situation, it is relevant to note that earlier the learned Magistrate invoking the power under Section 202 Cr.P.C., postponed the issuance of summons. After recording the initial deposition of the complainant and the witnesses vide order dated 19.09.2011, he directed for police investigation and report. The High Court as per order dated 24.05.2012 in Criminal Petition No. 12/2012 set aside the order dated 19.09.2011 and directed the appellants herein to

file appropriate application raising the issue of maintainability and in turn, directing the learned CJM to decide on the maintainability expeditiously. The order dated 12.07.2012 was passed by the learned CJM in compliance with the direction in the order dated 24.05.2012.

29. The order dated 12.07.2012 of the learned CJM where under he discussed the second complaint dated 20.07.2011 would undoubtedly reveal that after taking into consideration the entire factual background of the case and the nature of disposal of the original complaint dated 11.11.2010 under the order dated 06.06.2011 the application filed by the appellant herein raising maintainability of the second complaint was considered by the learned CJM.

30. We have already referred to the manner the original complaint was disposed of earlier. The submissions made on behalf of the parties, the documents annexed thereto and above all, the order dated 12.07.2012 of the learned CJM, would reveal that the second complaint was filed on the same set of facts contained in the first complaint and the second one was filed after the dismissal of the protest petition and the consequential acceptance of the Final Report in the first complaint. It is not in dispute that subsequent to the rejection of the protest petition and acceptance of the Final Report (Annexure P-5) as per order dated 06.06.2011, the matter was not taken forward further by the respondent/complainant. The second complaint was filed thereafter on 20.07.2011 reiterating, rather, reproducing the complaint dated 11.11.2010 and further adding allegations, virtually made by way of the protest petition dated 05.05.2011 that the investigation pursuant to the original complaint was done perfunctorily. It is to be noted that the said allegation against the investigation was also rejected earlier as per order dated 06.06.2011 holding that the investigation did not suffer from any infirmity and further that it did not deserve further investigation. Now, a comparison of the first complaint dated 11.11.2010 and the second complaint dated 20.07.2011 shows that they contain the same set of allegations against the same accused as has been observed by the learned CJM in the order dated 12.07.2012. The learned CJM, in the order dated 12.07.2012 after referring to various decisions observed and held thus:-

> *"After the original complaint has been duly investigated by the police and Final Report submitted therein has*

been accepted by the Court in a Judicial Proceeding; therefore, in my considered view it cannot be re-opened by the means of filing of a second complaint in respect of the same facts and circumstances. In this connection, reliance can be placed n (Sic: in) a Judgment of the Hon'ble Patna High Court reported in 1981 CRL. LAW JOURNAL 795 Bhuveneswar Prasad Singh and others Vs. State of Bihar and another.

The Hon'ble Patna High Court relying upon a decision of the Hon'ble Apex Court reported in AIR 1968 Supreme Court 117 Abhinandan Jha Vs. Dinesh Mishra had held –

Where the Final Report by police holding the case against the accused persons to be untrue; was accepted by the Magistrate earlier, than the complaint petition was filed against the accused, the Magistrate would not be justified in taking cognizance on the basis of the complaint petition in respect of the same facts constituting the offence which were mentioned in the final form where a Judicial order was passed by accepting final form."

31. The circumstances expatiated above and a scanning of the decision in **Samta Naidu's** case and the decisions referred to in the aforesaid paragraphs thereunder would constrain us to say, with respect, that the understanding of the settled position in regard to the maintainability of a second complaint or second protest petition of the High Court, as reflected mainly in paragraph 20 of the impugned judgment is not true to the position settled by this Court. Merely because this Court in some of such decisions held that when a Magistrate conducted an inquiry under Section 202 Cr.P.C., and dismissed a complaint on merits, a second complaint on the same facts would not be maintainable unless there are very exceptional circumstances, it could not be understood that in all cases where a complaint to a Magistrate was not proceeded under Section 202 of the Cr.P.C., and dismissed not at the stage of Section 203, Cr.P.C., a second complaint or a second protest petition would be maintainable. The various decisions referred above in **Samta Naidu's** case and recitals therefrom, extracted above would indubitably reveal the said position. The different situations where a second complaint or a second protest petition would be maintainable and would not be maintainable were specifically discussed and decided, in those decisions. In short, the

maintainability or otherwise of the second complaint would depend upon how the earlier complaint happened to be rejected/dismissed at the first instance.

32. In the context of the contentions, it is to be noted that the case at hand stands on a firmer footing than the case involved in **Samta Naidu's** case (*supra*). Paragraph 16 of **Samta Naidu's** case (*supra*), as extracted above,would reveal that the earlier complaint involved in that case was disposed of not on technical ground but on finding that no prima *facie* case was made out and in the second complaint the nature of the supporting materials were furnished and this Court observed that it could not be said that those materials furnished and relied upon in the second complaint could not have been procured earlier. Thereafter, finding that both the complaints were identical the finding of the High Court that the second complaint was maintainable was rejected and the subject complaint was dismissed as not being maintainable. In the case at hand, a perusal of protest petition dated 05.05.2011 and the second complaint dated 20.07.2011 would reveal that the second complaint filed after acceptance of final report filed pursuant to the investigation in the FIR registered based on the complaint dated 11.11.2010, that too after considering the *narazi* petition and hearing the complainant (the second respondent herein) the second complaint dated 20.07.2011 has been filed reproducing the first complaint dated 11.11.2010 and stating that the said complaint was not properly investigated and action should be taken on the second complaint dated 20.07.2011. In fact, the indubitable position is that the core of the original complaint dated 11.11.2010 and the second complaint dated 20.07.2011 is the same.

33. In the light of the decision in ***Ravinder Singh v. Sukhbir Singh***,[15] referred to in **Samta Naidu's** case (*supra*) repeated complaints by frustrated litigants cannot be maintained. A scanning of the second complaint dated 20.07.2011 would reveal that none of the situations permissible in terms of the decisions referred *supra* exist in the case at hand to maintain the said complaint. When that be the position, the learned Sessions Judge as also the High Court were not justified in interfering with the order passed by the learned CJM

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dated 12.07.2012 holding the second complaint as not maintainable in law and issuing further direction.

34. In the aforesaid circumstances we allow the appeal and set aside the decision of the High Court dated 08.01.2021 and the decision of the learned Sessions Judge that got confirmance by the judgment of the High Court and consequently restore the order of the learned CJM dated 12.07.2012. In short, the complaint dated 20.07.2011 stands rejected for not being maintainable.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 12 S.C.R. 28 : 2024 INSC 847

Tej Prakash Pathak & Ors.
v.
Rajasthan High Court & Ors.

(Civil Appeal No. 2634 of 2013)

07 November 2024

[Dr Dhananjaya Y Chandrachud, CJI, Hrishikesh Roy, Pamidighantam Sri Narasimha, Pankaj Mithal and Manoj Misra,* JJ.]

Issue for Consideration

(a) When the recruitment process commences and comes to an end; (b) Basis of the doctrine that 'rules of the game' must not be changed during the course of the game, or after the game is played; (c) Whether the decision in K. Manjusree is at variance with earlier precedents on the subject; (d) Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process; (e) Whether the procedure prescribed in the Extant Rule can be violated; (f) Whether appointment could be denied even after placement in select list.

Headnotes†

Service Law – Recruitment – Commencement and end of the recruitment process:

Held: The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies – It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or *viva voce* and preparation of list of successful candidates for appointment. [Para 13]

Service Law – Recruitment – Basis of the doctrine that 'rules of the game' must not be changed during the course of the game, or after the game is played:

Held: The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14 of the Constitution – Article 16 is only an instance of the application of the concept of

* Author

equality enshrined in Article 14 – In other words, Article 14 is the genus while Article 16 is a species – Article 16 gives effect to the concept of equality in all matters relating to public employment – These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment – Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit – Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness. [Paras 14, 42(2)]

Service Law – Recruitment – Whether the decision in K. Manjusree is at variance with earlier precedents on the subject:

Held: K. Manjusree case is not at variance with earlier precedents – The decision in K. Manjusree does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played – This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates malpractices in preparation of select list – The decision in K. Manjusree case lays down good law and is not in conflict with the decision in Subash Chander Marwaha case – Subash Chander Marwaha deals with the right to be appointed from the Select List whereas K. Manjusree deals with the right to be placed in the Select List – The two cases therefore deal with altogether different issues. [Paras 18, 30, 42(3)]

Service Law – Recruitment – Whether recruiting bodies can devise an appropriate procedure for concluding recruiting process:

Held: Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/non-arbitrary and has a rational nexus to the object sought to be achieved. [Para 42(4)]

Service Law – Recruitment – Whether the procedure prescribed in the Extant Rule can be violated:

Held: Procedure prescribed in the Extant Rule cannot be violated – Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility – Where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules – In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution – But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules. [Paras 39, 42(5)]

Service Law – Name in select list – Right to appointment – Whether appointment could be denied even after placement in select list:

Held: Appointment may be denied even after placement in select list – A candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available – But there is a caveat – The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate – Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List. [Para 40]

Service Law – Recruitment – Legitimate Expectation – Discretion of Public Authority – Public Interest:

Held: Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary – The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals – However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it – The public authority has the discretion to exercise the full range of choices available within its executive power – The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision – The courts are generally cautious in interfering with a *bona fide* decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest – Thus, public

interest serves as a limitation on the application of the doctrine of legitimate expectation – Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. [Para 16]

Case Law Cited

K. Manjusree v. State of A.P. [2008] 2 SCR 1025 **: (2008) 3 SCC 512 – held good law.**

Sivanandan CT & Ors. v. High Court of Kerala & Ors. [2023] 11 SCR 674 **: 2023 INSC 709 – followed.**

Ramesh Kumar v. High Court of Delhi [2010] 2 SCR 256 **: (2010) 3 SCC 104;** *K. H. Siraj v. High Court of Kerala & Ors.* [2006] Supp. 2 SCR 790 **: (2006) 6 SCC 395;** *M.P. Public Service Commission v. Navnit Kumar Potdar* [1994] Supp. 3 SCR 665 **: (1994) 6 SCC 293;** *Union of India v. T. Sundararaman* [1997] 3 SCR 792 **: (1997) 4 SCC 664;** *Tridip Kumar Dingal v. State of W.B.* [2008] 15 SCR 194 **: (2009) 1 SCC 768;** *Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr.* [2024] 8 SCR 885 **: 2024 INSC 647 – relied on.**

State of Haryana v. Subash Chander Marwaha [1974] 1 SCR 165 **: (1974) 3 SCC 220;** *Tej Prakash Pathak & Others v. Rajasthan High Court and Others* **(2013) 4 SCC 540;** *Shankar K. Mandal v. State of Bihar* [2003] 3 SCR 796 **: (2003) 9 SCC 519;** *Mohd. Sohrab Khan v. Aligarh Muslim University and Others* [2009] 2 SCR 907 **: (2009) 4 SCC 555;** *A.P. Public Service Commission v. B. Sarat Chandra* [1990] 2 SCR 463 **: (1990) 2 SCC 669;** *Rakhi Ray v. High Court of Delhi* [2010] 2 SCR 239 **: (2010) 2 SCC 637;** *E.P. Royappa v. State of T.N.* [1974] 2 SCR 348 **: (1974) 4 SCC 3;** *State of Jharkhand v. Brahmputra Metallics Ltd.* [2020] 14 SCR 45 **: (2023) 10 SCC 634;** *Shankarsan Dash v. Union of India* [1991] 2 SCR 567 **: (1991) 3 SCC 47;** *All India SC & ST Employees Association v. A. Arthur Jeen & Others* [2001] 2 SCR 1183 **: (2001) 6 SCC 380;** *M. Ramesh v. Union of India* [2018] 6 SCR 763 **: (2018) 16 SCC 195;** *P.K. Ramachandra Iyer v. Union of India* [1984] 2 SCR 200 **: (1984) 2 SCC 141;** *Hemani Malhotra v. High Court of Delhi* [2008] 5 SCR 1066 **: (2008) 7 SCC 11;** *Ashok Kumar Yadav v. State of Haryana* [1985] Supp. 1 SCR 657 **: (1985) 4 SCC 417;** *Lila Dhar v. State of Rajasthan and Others* [1982] 1 SCR 320 **: (1981) 4 SCC 159;** *Santosh Kumar Tripathi v. U.P. Power Corporation* **(2009) 14 SCC 210;** *Banking Service Recruitment Board, Madras v. V. Ramalingam* **(1998) 8 SCC 523 – referred to.**

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List of Acts

Constitution of India; Rajasthan High Court Staff Service Rules 2002; Kerala Judicial Service Rules, 1991.

List of Keywords

Service Law; Recruitment; Appointment; 'Rules of the game'; Recruiting bodies; Appropriate procedure; Recruiting process; Name in select list; Right to appointment; Procedure prescribed in the Extant Rule; Recruiting process; Article 14 of the Constitution; Article 16 of the Constitution; Article 309 of the Constitution; Transparent; Non-discriminatory; Non-arbitrary; Eligibility criteria; Select List; Extant Rule; Principle of fairness; Legitimate expectation; Rule against arbitrariness.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2634 of 2013

From the Judgment and Order dated 11.03.2011 of the High Court of Rajasthan at Jodhpur in DBCWP No. 2174 of 2010

With

Civil Appeal Nos. 2635 And 2636 of 2013

Appearances for Parties

Dr. Ritu Bhardwaj, Mohan Kumar, Anurag Katarki, Amit Kumar, Ms. Neetu Singh, Ms. Asia Beg, Mrs. Haripriya Padmanabhan, Kuriakose Varghese, V. Shyamohan, Shrutanjaya Bhardwaj, Ms. Aishwarya Hariharan, Vishal Sinha, Akshat Gogna, Ms. Isha Ghai (for M/s. Kmnp Law), Raghenth Basant, Ms. Liz Mathew, Ms. Aakashi Lodha, Ms. Mallika Agarwal, P. V. Dinesh, Ms. Oommen Anna A, Ms. Urvashi Chauhan, Chetan Garg, Ranjit Kumar, Ajay Vikram Singh, Advs. for the Appellants.

K.M. Nataraj, ASG, Vijay Hansaria, Sr. Adv., Pawanshree Agrawal, Sunil Kumar Jain, Ms. Rashika Swarup, Ms. Tanya Agarwal, Anil Kumar, Maibam Nabaghanashyam Singh, Mahesh Thakur, Shakti K Pattanaik, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

The ideal in recruitment is to do away with unfairness[1]

REFERENCE

1. A three-Judge Bench of this Court while accepting the salutary principle that once the recruitment process commences the State or its instrumentality cannot tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned, wondered whether that should apply also to the procedure for selection. In that context, doubting the correctness of a coordinate Bench decision in ***K. Manjusree***[2] for not having noticed an earlier decision in ***Subash Chander Marwaha***,[3] *vide* order[4] dated 20 March 2013, it was directed that the matter be placed before the Chief Justice for constituting a larger Bench for an authoritative pronouncement on the subject.

THE FACTUAL CONTEXT FOR THE REFERENCE

2. The relevant facts giving rise to the reference are as follows:

(a) The Rajasthan High Court[5] *vide* notification dated 17 September 2009 invited applications from amongst Judicial Assistants and Junior Judicial Assistants, having an experience of three years in the establishment of the High Court and possessing degree of M. A. in English Literature, for appointment on 13 posts of Translators. Preference was to be accorded to law graduates.

(b) At the relevant time, 'The Rajasthan High Court Staff Service Rules 2002'[6] framed by the Chief Justice of the High Court under Article 229 (2) of the Constitution of India[7] governed the appointments.

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1 UNITED NATIONS HANDBOOK OF CIVIL SERVICE LAWS AND PRACTICES.

2 K. Manjusree v. State of A.P. (2008) 3 SCC 512

3 State of Haryana v. Subash Chander Marwaha (1974) 3 SCC 220

4 Tej Prakash Pathak & Others v. Rajasthan High Court and Others (2013) 4 SCC 540

5 The High Court.

6 2002 Rules.

7 Constitution.

(c) Under the 2002 Rules, the Chief Justice of the High Court *vide* Office Order dated 5 December 2002, *inter alia*, specified the qualifications as well as the method of recruitment for the post of 'Translator' (Ordinary Scale) in the following terms:

> "TRANSLATORS (ORDINARY SCALE)
>
> Recruitment to the post of Translators (Ordinary Scale) shall be made on the recommendation of a Committee nominated by the Appointing Authority on the criteria of selection from amongst the graduate Upper Division Clerks or officials in equivalent or above grade but below the grade of Translators (Ordinary Scale), with Hindi or English Literature as one of the optional subject in Graduation or Lower Division Clerks with Hindi or English Literature as subject in post-graduation and having minimum experience of five years.
>
> COMPETITIVE EXAMINATION
>
> A qualifying examination shall be held to test the ability of the candidates of translation from English to Hindi and Hindi to English.
>
> Paper-I English to Hindi translation 100 marks
>
> Paper-II Hindi to English translation 100 marks
>
> Explanation: For the qualifying examination the officials appearing therein shall be given passages for translation from English to Hindi and Hindi to English from the judgment and records.
>
> Personal Interview:
>
> There shall be a personal interview of the candidate. 50 marks
>
> Note: A candidate who secures in aggregate 75% marks and minimum 60% marks in each paper shall only be called for interview."

(d) Later, *vide* Office Order dated 24 July 2004, amendments were made in the Office Order dated 5 December 2002 thereby substituting the provision relating to recruitment of Translators (Ordinary Scale) by the following:

> "TRANSLATORS
>
> Recruitment shall be made from amongst the judicial assistants or junior judicial assistants having experience of 3 years by holding a test in English and Hindi translation. Candidates shall be given passages in English from the judgments and records and shall be asked to translate them into Hindi. Similarly passages in Hindi from the records or from some other books etc. shall be given and the candidates shall be asked to translate them into English.
>
> Minimum qualification shall be Graduate
>
> Preference shall be given to a Law Graduate"

(e) Thereafter, on 8 September 2009, the Office Order dated 5 December 2002 was further amended to substitute the specified minimum qualification with the following:

> "Minimum qualification shall be Post Graduate in English Literature from any recognized University established by law in India"

(f) On 19 December 2009 examination was held. Twenty-one aspirants appeared in the examination. Result was declared on 20 February 2010, wherein only 3 candidates were declared successful. This was so, because the Chief Justice of the High Court ordered that only those candidates who secured a minimum of 75% marks will be selected to fill up the posts in question. As only three candidates could secure a minimum of 75% marks, the list of successful candidates comprised of only three candidates.

(g) Some of the unsuccessful candidates filed writ petition before the High Court questioning the decision of the Chief Justice of the High Court in fixing the cut off at 75% on the ground that it amounted to "changing the rules of the game after the game is played". The High Court on its administrative side defended the decision of the Chief Justice by claiming it to have been taken in good faith for appointing a suitable candidate.

(h) The writ petition came to be dismissed by the High Court *vide* judgment under appeal dated 11 March 2011. The High Court

took the view that on mere placement in the select list no indefeasible right accrues to a candidate for appointment. The employer may fix a higher benchmark to ensure that a person suitable to the post is appointed.

(i) On a special leave petition challenging the judgment of the High Court, while granting leave, *vide* order dated 20 March 2013, the matter was referred for an authoritative pronouncement by a larger Bench of this Court.

RELEVANT EXTRACTS FROM THE REFERENCE ORDER

3. To have a clear understanding of the scope of the reference, the relevant paragraphs of the reference order are extracted below:

> "**5**. Admittedly, the requirement of securing the minimum qualifying marks of 75% is not a stipulation of the Service Rules (referred to earlier) of the first respondent High Court as on the date of initiation of the recruitment process in question (i.e. 17-9-2009). It appears that such a prescription had existed earlier under the Rules, but by an amendment, the said prescription was dropped with effect from 14-7-2004.
>
> **6.** Therefore, the appellants challenged the selection process on the ground that the decision of the Chief Justice to select only those candidates who secured a minimum of 75% marks would amount to "changing the rules of the game after the game is played"—a cliché whose true purport is required to be examined notwithstanding the declaration of this Court in *Manjusree case* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] that it is "clearly impermissible".
>
> **7.** The question whether the "rules of the game" could be changed was considered by this Court on a number of occasions in different circumstances. Such question arose in the context of employment under the State which under the scheme of our Constitution is required to be regulated by "law" made under Article 309 or employment under the

instrumentalities of the State which could be regulated either by statute or subordinate legislation. In either case the "law" dealing with the recruitment is subject to the discipline of Article 14.

8. The legal relationship between employer and employee is essentially contractual. Though in the context of employment under the State the contract of employment is generally regulated by statutory provisions or subordinate legislation which restricts the freedom of the employer i.e. the "State" in certain respects.

9. In the context of the employment covered by the regime of Article 309, the "law"—the recruitment rules in theory could be either prospective or retrospective subject of course to the rule of non-arbitrariness. However, in the context of employment under the instrumentalities of the State which is normally regulated by subordinate legislation, such rules cannot be made retrospectively unless specifically authorised by some constitutionally valid statute.

10. Under the scheme of our Constitution an absolute and non-negotiable prohibition against retrospective law-making is made only with reference to the creation of crimes. Any other legal right or obligation could be created, altered, extinguished retrospectively by the sovereign law-making bodies. However, such drastic power is required to be exercised in a manner that it does not conflict with any other constitutionally guaranteed rights, such as, Articles 14 and 16, etc. Changing the "rules of game" either midstream or after the game is played is an aspect of retrospective law-making power.

11. Those various cases [(*a*) *C. Channabasavaih* v. *State of Mysore*, AIR 1965 SC 1293; *State of Haryana* v. *Subash Chander Marwaha* (1974) 3 SCC 220 : 1973 SCC (L&S) 488; *P.K. Ramachandra Iyer* v. *Union of India* (1984) 2 SCC 141 : 1984 SCC (L&S) 214; *Umesh Chandra Shukla* v. *Union of India* (1985) 3 SCC 721 : 1985

SCC (L&S) 919; *Durgacharan Misra* v. *State of Orissa* (1987) 4 SCC 646 : 1988 SCC (L&S) 36 : (1987) 5 ATC 148; *State of U.P.* v. *Rafiquddin*, 1987 Supp SCC 401 : 1988 SCC (L&S) 183 : (1987) 5 ATC 257; *Maharashtra SRTC* v. *Rajendra Bhimrao Mandve* (2001) 10 SCC 51 : 2002 SCC (L&S) 720; *Pitta Naveen Kumar* v. *Narasaiah Zangiti* (2006) 10 SCC 261 : (2007) 1 SCC (L&S) 92; *K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841; *Hemani Malhotra* v. *High Court of Delhi* (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203; *K.H. Siraj* v. *High Court of Kerala* (2006) 6 SCC 395 : 2006 SCC (L&S) 1345; *Ramesh Kumar* v. *High Court of Delhi* (2010) 3 SCC 104 : (2010) 1 SCC (L&S) 756; *Rakhi Ray* v. *High Court of Delhi* (2010) 2 SCC 637 : (2010) 1 SCC (L&S) 652; *Hardev Singh* v. *Union of India* (2011) 10 SCC 121 : (2012) 1 SCC (L&S) 390 — Where procedural rules were altered.(*b*) *P. Mahendran* v. *State of Karnataka* (1990) 1 SCC 411 : 1990 SCC (L&S) 163 : (1990) 12 ATC 727; *M.P. Public Service Commission* v. *Navnit Kumar Potdar* (1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286; *Gopal Krushna Rath* v. *M.A.A. Baig* (1999) 1 SCC 544 : 1999 SCC (L&S) 325; *Umrao Singh* v. *Punjabi University* (2005) 13 SCC 365 : 2006 SCC (L&S) 1071; *Mohd. Sohrab Khan* v. *Aligarh Muslim University* (2009) 4 SCC 555 : (2009) 1 SCC (L&S) 917 — Where the eligibility criteria were altered.] deal with situations where the State sought to alter (1) the eligibility criteria of the candidates seeking employment, or (2) the method and manner of making the selection of the suitable candidates. The latter could be termed as the procedure adopted for the selection, such as, prescribing minimum cut-off marks to be secured by the candidates either in the written examination or viva voce as was done in *Manjusree* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] or the present case or calling upon the candidates to undergo some test relevant to the nature of the employment (such as driving test as was in *Maharashtra SRTC* [*Maharashtra*

SRTC v. Rajendra Bhimrao Mandve (2001) 10 SCC 51 at pp. 55-56, para 5 : 2002 SCC (L&S) 720]).

12. If the principle of *Manjusree case* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] is applied strictly to the present case, the respondent High Court is bound to recruit 13 of the "best" candidates out of the 21 who applied irrespective of their performance in the examination held. In such cases, theoretically it is possible that candidates securing very low marks but higher than some other competing candidates may have to be appointed. In our opinion, application of the principle as laid down in *Manjusree case* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] without any further scrutiny would not be in the larger public interest or the goal of establishing an efficient administrative machinery.

13. This Court in *State of Haryana* v. *Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] while dealing with the recruitment of Subordinate Judges of the Punjab Civil Services (Judicial Branch) had to deal with the situation where the relevant rule prescribed minimum qualifying marks. The recruitment was for filling up of 15 vacancies. 40 candidates secured the minimum qualifying marks (45%). Only 7 candidates who secured 55% and above marks were appointed and the remaining vacancies were kept unfilled. The decision of the State Government not to fill up the remaining vacancies in spite of the availability of candidates who secured the minimum qualifying marks was challenged. The State Government defended its decision not to fill up posts on the ground that the decision was taken to maintain the high standards of competence in judicial service. The High Court upheld the challenge and issued a mandamus. In appeal, this Court reversed and opined that the candidates securing minimum qualifying marks at an examination held for the purpose of recruitment into the service of the State have no legal right to be appointed. In the context, it was held: (*Subash Chander Marwaha*

case [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] , SCC p. 227, para 12)

> "*12.* … In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for more (sic mere) eligibility."

14. Unfortunately, the decision in *Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] does not appear to have been brought to the notice of Their Lordships in *Manjusree* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841]. This Court in *Manjusree* [*K. Manjusree* v. *State of A.P.* (2008) 3 SCC 512 at p. 524, para 27 : (2008) 1 SCC (L&S) 841] relied upon *P.K. Ramachandra Iyer* v. *Union of India* [(1984) 2 SCC 141 : 1984 SCC (L&S) 214], *Umesh Chandra Shukla* v. *Union of India* [(1985) 3 SCC 721 : 1985 SCC (L&S) 919] and *Durgacharan Misra* v. *State of Orissa* [(1987) 4 SCC 646 : 1988 SCC (L&S) 36]. In none of the cases, was the decision in *Subash Chander Marwaha* [(1974) 3 SCC 220 : 1973 SCC (L&S) 488] considered.

15. No doubt it is a salutary principle not to permit the State or its instrumentalities to tinker with the "rules of the game" insofar as the prescription of eligibility criteria is concerned as was done in *C. Channabasavaih* v. *State of Mysore* [AIR 1965 SC 1293], etc. in order to avoid manipulation of the recruitment process and its results. Whether such a principle should be applied in the context of the "rules of the game" stipulating the procedure for selection more particularly when the change sought is to impose a more rigorous scrutiny for selection requires an authoritative pronouncement of a larger Bench of this Court. We, therefore, order that the matter be placed before the Hon'ble Chief Justice of India for appropriate orders in this regard."

(Emphasis supplied)

SCOPE OF THE REFERENCE

4. Public services broadly fall in two categories. One, where services are in connection with the affairs of the State/ Union. Second, where services are under the instrumentalities of the State. In either category, law governing recruitment must conform to the overarching principles enshrined in Articles 14 and 16 of the Constitution.

5. In various judicial pronouncements, the law governing recruitment to public services has been colloquially termed as 'the rules of the game'. The 'game' is the process of selection and appointment. Courts have consistently frowned upon tinkering with the rules of the game once the recruitment process commences. This has crystallised into an oft-quoted legal phrase that "the rules of the game must not be changed mid-way, or after the game has been played". Broadly-speaking these rules fall in two categories. One which prescribes the eligibility criteria (i.e., essential qualifications) of the candidates seeking employment; and the other which stipulates the method and manner of making the selection from amongst the eligible candidates.

6. Cut-off date with reference to which eligibility has to be determined is the date appointed by the relevant service rules; where no such cut-off date is provided in the rules, then it will be the date appointed in the advertisement inviting applications; and if there is no such date appointed, then eligibility criteria shall be applied by reference to the last date appointed by which the applications were to be received.[8]

7. The law is settled that after commencement of the recruitment process the eligibility criteria is not to be altered because candidates even if eligible under the altered criteria might not apply by the last date under the belief that they are not eligible as per the advertised criteria.[9] Such alteration/ change, therefore, deprives a person of the guarantee of equal opportunity in matters of public employment provided by Article 16 of the Constitution. The reference order therefore acknowledges this legal position and in clear terms accepts that 'the rules of the game' cannot be changed after commencement of the recruitment process insofar as the eligibility criteria is concerned.

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8 Shankar K. Mandal v. State of Bihar (2003) 9 SCC 519

9 Mohd. Sohrab Khan v. Aligarh Muslim University and others (2009) 4 SCC 555

8. However, in regard to changing the rules of the game *qua* method or procedure for selection, the three-Judge Bench in the reference order doubted the correctness of the decision in ***K. Manjusree*** (supra) *inter alia* on the ground that it failed to notice an earlier decision in ***Subash Chander Marwaha*** (supra). Accordingly, the reference order seeks an authoritative pronouncement in that regard from a larger Bench of this Court. The scope of the reference is therefore limited to (a) whether ***K. Manjusree*** (supra) lays down the correct law; and (b) whether the rules of the game *qua* method and manner of making selection can be changed or altered after commencement of the recruitment process.

SUBMISSIONS

9. We have heard a battery of counsels both in support as well as against the strict applicability of the doctrine. During their arguments, they have either questioned or supported the decision of the High Court. For an effective analysis of their submissions and to properly adjudicate upon the issues which would arise while addressing the reference, we deem it appropriate to segregate their submissions into two parts. One which propounds that after commencement of the recruitment process, the stipulated procedure (i.e., rules of the game) for selection cannot be changed mid-way, or after the game is played, and the other which propounds that it is permissible to change / alter the stipulated procedure or method for selection to ensure that the most meritorious person, who is suitable for the post, gets appointed.

SUBMISSIONS AGAINST CHANGE

10. Submissions propounding that 'rules of the game' *qua* the procedure for selection must not be changed in the midst of the game, or after the game is played, are summarised below:

(a) Equality of opportunity in matters of public employment and fairness in State action are guaranteed by Articles 16 and 14, respectively, of the Constitution which proscribe a change in the rules of the game *qua* selection criteria, once the game has begun. These rights would be infringed if candidates, otherwise eligible, are excluded from the zone of consideration based on a *post facto* change in the selection criteria.

(b) Candidates have a right to know, before the selection process commences, the standards/ criteria on which they will be assessed/ evaluated so that they could modulate their level of preparedness accordingly.

(c) A change in the advertised cut off marks for eligibility to be placed in the select list, after the game is played, may seriously prejudice a candidate on two counts. First, the candidate may not put in effort more than required for achieving the advertised cut off marks. Second, the interviewer or evaluator may unknowingly place the candidate in a non-eligible category while imagining that he has been placed in an eligible category. Thus a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.

(d) If eligibility cut-off marks is to be prescribed, it should be done before the test or the interview so that both the examinee and the examiner are aware as to how many marks would qualify a candidate for further consideration.

(e) Recruitment to public services must not only be fair but must appear to be so. A change in the selection criteria mid-way would create an impression that the State is not acting fairly and the change is to favour certain individuals. It thus violates transparency in decision making process, which is fundamental to rule out arbitrariness, and fosters nepotism.

(f) Discretion is antithesis to the Rule of law which is the hallmark of our Constitution. Rule of law suffers when rules of the game are left to be altered at the discretion of the employer.

(g) ***K. Manjusree*** (supra) is not in conflict with ***Subash Chander Marwaha*** (supra). ***Subash Chander Marwaha*** proceeds on the principle that existence of vacancies does not confer a right to a candidate placed in the select list to be appointed. ***K. Manjusree*** on the other hand deals with a situation where a candidate is denied placement in the select list only because after the interviews were over, minimum marks for the interviews, not prescribed earlier, were prescribed. The two decisions, therefore, operate in different fields.

SUBMISSIONS PROPOUNDING CHANGE IS PERMISSIBLE

11. Submissions propounding that change in the selection procedure or criteria is permissible even in the midst of the recruitment process are summarised below:

(a) In absence of service rules, or the advertisement, prescribing or proscribing a cut off, employer has discretion to fix cut-off as may be considered necessary to appoint a candidate suitable to the post.

(b) Even if no cut-off is stipulated for eligibility *qua* placement in the merit list, the employer may choose to appoint only such of those from the merit list who are higher than a particular cut-off and such cut-off may be fixed later. This is so, because no selected candidate has an indefeasible right to be appointed.

(c) Considering the nature of the post, cut-off even if not prescribed by the Rules or the advertisement can be prescribed to appoint a person suitable to the post. Fixation of such cut-off would not be deemed arbitrary, as efficiency in service is the paramount consideration for the employer.

(d) A change in the selection criteria which does not bear on the merit list but only affects appointment based thereupon, would not fall foul of either Article 16 or Article 14 of the Constitution if such a change is in the larger interest of efficiency in the service.

ANALYSIS

12. To effectively analyse and adjudicate upon the questions referred, we would divide our discussion into following parts:

(a) When the recruitment process commences and comes to an end;

(b) Basis of the doctrine that 'rules of the game' must not be changed during the course of the game, or after the game is played;

(c) Whether the decision in ***K. Manjusree*** (supra) is at variance with earlier precedents on the subject;

(d) Whether the above doctrine applies with equal strictness *qua* method or procedure for selection as it does *qua* eligibility criteria;

(e) Whether procedure for selection stipulated by Act or Rules framed either under the proviso to Article 309[10] of the Constitution or a Statute could be given a go-bye;

(f) Whether appointment could be denied by change in the eligibility criteria after the game is played.

(A) COMMENCEMENT/END OF THE RECRUITMENT PROCESS

13. The process of recruitment begins with the issuance of advertisement and ends with the filling up of notified vacancies. It consists of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment.[11]

(B) BASIS OF THE DOCTRINE

14. The doctrine proscribing change of rules midway through the game, or after the game is played, is predicated on the rule against arbitrariness enshrined in Article 14[12] of the Constitution. Article 16[13] is only an

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10 **Article 309. Recruitment and conditions of service of persons serving the Union or a State.—** Subject to the provisions of this Constitution, Acts of the appropriate legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State.
Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act.

11 A.P. Public Service Commission v. B. Sarat Chandra (1990) 2 SCC 669; and Rakhi Ray v. High Court of Delhi (2010) 2 SCC 637

12 **Article 14. Equality before law. -** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

13 **Article 16. Equality of opportunity in matters of public employment. -** (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, or State or Union territory, any requirement as to residents within that State or Union territory prior to such employment or appointment.
(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any backward class of citizens which, in the opinion of the state, is not adequately represented in the services under the State.
(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

instance of the application of the concept of equality enshrined in Article 14. In other words Article 14 is the genus while Article 16 is a species. Article 16 gives effect to the concept of equality in all matters relating to public employment. These two articles strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles alike to all similarly situate and not to be guided by any extraneous or irrelevant considerations.[14] In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary State action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest.[15]

15. The principle of fairness in action requires that public authorities be held accountable for their representations. Good administration requires public authorities to act in a predictable manner and honour the promises made or practices established unless there is good reason not to do so.[16]

16. Candidates participating in a recruitment process have legitimate expectation that the process of selection will be fair and non-arbitrary. The basis of doctrine of legitimate expectation in public law is founded on the principles of fairness and non-arbitrariness in government dealings with individuals. It recognises that a public authority's promise or past conduct will give rise to a legitimate expectation. This doctrine is premised on the notion that public authorities, while

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(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the sealing of 50% reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

(6) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favor of any economically weaker sections of citizens other than the classes mentioned in clause (4) in addition to the existing reservation and subject to a maximum of 10% of the posts in each category.

14 E. P. Royappa v. State of T.N. (1974) 4 SCC 3

15 State of Jharkhand v. Brahmputra Metallics Ltd. (2023) 10 SCC 634

16 Sivanandan CT & Ors. v. High Court of Kerala & Ors., 2023 INSC 709

performing their public duties, ought to honour their promises or past practices. The legitimacy of an expectation can be inferred if it is rooted in law, custom, or established procedure.[17] However, the doctrine of legitimate expectation does not impede or hinder the power of the public authorities to lay down a policy or withdraw it. The public authority has the discretion to exercise the full range of choices available within its executive power. The public authority often has to take into consideration diverse factors, concerns, and interests before arriving at a particular policy decision. The courts are generally cautious in interfering with a bona fide decision of public authorities which denies legitimate expectation provided such a decision is taken in the larger public interest. Thus, public interest serves as a limitation on the application of the doctrine of legitimate expectation. Courts have to determine whether the public interest is compelling and sufficient to outweigh the legitimate expectation of the claimant. While performing a balancing exercise, courts have to often grapple with the issues of burden and standard of proof required to dislodge the claim of legitimate expectation.[18]

17. In ***Sivanandan CT***,[19] the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held that for a public authority to frustrate a claim of legitimate expectation, it must objectively demonstrate by placing relevant material before the court that its decision was in the public interest. This standard is consistent with the principles of good administration which require that State actions must be held to scrupulous standards to prevent misuse of public power and ensure fairness to citizens. It was also highlighted that the doctrine of legitimate expectation lays emphasis on predictability and consistency in decision-making which is a facet of non-arbitrariness. In addition, the Court observed:

> "43. The underlying basis for the application of the doctrine of legitimate expectation has expanded and evolved to include the principles of good administration. ……. The principles of good administration require that the decisions of public authorities must withstand the test of consistency,

17 Sivanandan CT (supra), paragraph 18.

18 Sivanandan CT (supra), paragraph 37.

19 See Footnote 13, paragraph 38.

transparency, and predictability to avoid being regarded as arbitrary and therefore violative of Article 14."

(C) K. MANJUSREE IS NOT AT VARIANCE WITH EARLIER PRECEDENTS

18. In ***K. Manjusree*** (supra) the recruitment exercise was for selection and appointments to the posts of District & Sessions Judges (Grade II). The extant rules prescribed the eligibility qualifications but were silent on the procedure for selection. The manner and method of selection was therefore to be decided by the High Court for every selection as and when the vacancies were notified for selection. The vacancies were notified by the State Government. As per the advertisement for selection a written examination followed by an interview were to be held. By a resolution dated 30.11.2004, the Administrative Committee of the High Court resolved to conduct written examination for 75 marks and interview for 25 marks. It was also resolved that the minimum qualifying marks for the OC,[20] BC,[21] SC[22] and ST[23] candidates shall be as prescribed earlier. Following the High Court's direction, written examination was held on 30.1.2005, and its results were declared on 24.2.2005 wherein 83 candidates were successful. Interviews were held in March 2006. Thereafter, the marks obtained by those 83 candidates were aggregated and a consolidated merit list was prepared in the order of merit on the basis of the aggregate marks. The merit list *inter alia* contained marks secured in the written examinations out of 100; marks secured in the interview out of 25; and the total marks secured in the written examination and interview out of 125. Based on that list, the Administrative Committee approved the selection of ten candidates as per merit and reservation. However, the Full Court did not agree with the select list prepared. Consequently, the Chief Justice constituted a Committee of Judges for preparing a fresh list. The Committee recommended that in place of 100 marks for the written examination and 25 marks for the interview, the candidates should be evaluated with reference to 75 marks for the written examination and 25 marks

20 Open Category or Unreserved Category.

21 Backward Class Category.

22 Scheduled Caste Category.

23 Scheduled Tribe Category.

for the interview in line with earlier resolution dated 30.11.2004. The Committee also recommended that the minimum pass percentage applied for the written examination to determine the eligibility of the candidates for appearance in the interview should also be applied for interview marks, and those who failed to secure such minimum marks in the interview should be considered as having failed. Based on the recommendation of the Committee, the minimum percentage for passing the written examination (i.e., 50% for OC, 40% for BC, and 35% for SC and ST) was applied for interview and, therefore, only those candidates who secured the minimum of 12.5 marks in OC, 10 marks in BC and 8.7 marks in SC and ST were considered as having succeeded in the interview. As a result, only 31 candidates were found to have qualified both in the written examination and interview. In consequence, a revised merit list of only 31 successful candidates was prepared wherein few candidates, earlier selected, were ousted and few others who did not find place in the earlier select list gained entry. However, out of those 31 candidates only 9 were recommended for appointment.

19. In that factual context, two candidates whose names found mention in the first list, and who got excluded in the second list, filed writ petitions by claiming that High Court's decision to prepare selection list by prescribing minimum qualifying marks for the interview was arbitrary and illegal. They thus sought a direction to the High Court to redraw the select list without adopting minimum qualifying marks for the interview. The writ petitions were dismissed by the High Court. Being aggrieved, the writ petitioners preferred SLPs[24] before this Court. This Court while granting leave and allowing the appeal of the writ petitioners held that the High Court, though was correct in scaling down marks of written examination from 100 to 75, was not legally justified in directing that only those candidates would be placed in the merit list who obtained such minimum marks in the interview as was specified by the Committee. Key observations of this Court in ***K. Manjusree*** (supra) are being extracted below:

> "22. … the interview Committee conducted the interviews on 13.3.2006 … on the understanding that there were no minimum marks for interviews, that the marks awarded

24 Special Leave Petitions.

by them would not by itself have the effect of excluding or ousting any candidate from being selected, and that marks awarded by them in the interviews will merely be added to the written examination marks, for preparation of the merit list and selection list. We are referring to this aspect, as the matter of conducting interviews and awarding marks in interviews, by five members of the interviewing committee would have been markedly different if they had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and that the marks are awarded by them would have the effect of barring or ousting any candidate from being considered for selection. Thus, the entire process of selection – from the stage of holding the examination, holding interviews and finalising the list of candidates to be selected – was done by the Selection Committee on the basis that there was no minimum marks for the interview. To put it differently the game was played under the rule that there was no minimum marks for the interview.

27. ...Therefore, introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played which is clearly impermissible.

33. …We may clarify that prescription of minimum marks for any interview is not illegal. We have no doubt that the authority making rules regulating the selection, can prescribe by rules, the minimum marks both for written examination and interviews, or prescribe minimum marks for written examination but not for interview, or may not prescribe any minimum marks for either written examination or interview. Where the rules do not prescribe any procedure, the Selection Committee may also prescribe the minimum marks, as stated above. But if the Selection Committee wants to prescribe minimum marks for interview, it should do so before the commencement of selection process. If the Selection committee prescribe minimum marks only for the written examination, before the commencement

> of selection process, it cannot either during the selection process or after the selection process, add an additional requirement that the candidates should also secure minimum marks in the interview. What we have found to be illegal, is changing the criteria after completion of the selection process, when the entire selection proceeded on the basis that there will be no minimum marks for the interview."
>
> (Emphasis supplied)

20. The discernible ratio in ***K. Manjusree*** (supra) is that the criterion for selection is not to be changed after completion of the selection process, though in absence of rules to the contrary the Selection Committee may fix minimum marks either for written examination or for interview for the purposes of selection. But if such minimum marks are fixed, it must be done before commencement of selection process. This view has been followed by another three-Judge Bench of this Court in ***Ramesh Kumar v. High Court of Delhi***[25] wherein the law on the issue has been summarized thus:

> "15. … in case the statutory rules prescribe a particular mode of selection, it has to be given strict adherence accordingly. In case, no procedure is prescribed by the rules and there is no other impediment in law, the competent authority while laying down the norms for selection may prescribe for the tests and further specify the minimum benchmarks for written tests as well as for viva voce."

21. What is important in ***K. Manjusree*** (supra) is that the minimum marks for the interview was fixed after the interviews were over. In that context, it was observed (a) that the game was played under the rule that there was no minimum marks for the interview, therefore introduction of the requirement of minimum marks for interview, after the entire selection process consisting of written examination and interview was completed, would amount to changing the rules of the game after the game was played; and (b) if the interviewers had to proceed on the basis that there were minimum marks to be secured in the interview for being considered for selection and

25 [2010] 2 SCR 256 : (2010) 3 SCC 104

that the marks awarded by them would have the effect of barring or ousting any candidate from being considered for selection, the awarding of marks might have been markedly different. The above observation (b) lends credence to the submission made before us that a change in the eligibility cut off, after evaluation is done, denies the evaluator an opportunity to modulate the marks for placing the candidate in a category to which he/she, in the view of the evaluator, is entitled to be placed.

22. In the reference order the correctness of the decision in ***K. Manjusree*** has been doubted on two counts: (a) if the principle laid down in K. Manjushree is applied strictly, the High Court would be bound to recruit 13 of the "best" candidates out of the 21 who applied irrespective of their performance in the examination held, which would not be in the larger public interest or the goal of establishing an efficient administrative machinery; and (b) the decision of this Court in ***Subash Chander Marwaha*** (supra) was neither noticed in ***K. Manjusree*** nor in the decisions relied upon in ***K. Manjusree***.

23. Insofar as the first reason to doubt ***K. Manjusree*** is concerned, we are of the view that the apprehension expressed in the referring order that all selected candidates regardless of their suitability to the establishment would have to be appointed, if the principle laid down in ***K. Manjusree*** is strictly applied, is unfounded. Because ***K. Manjusree*** does not propound that mere placement in the list of selected candidates would confer an indefeasible right on the empanelled candidate to be appointed. The law in this regard is already settled by a Constitution Bench of this Court in ***Shankarsan Dash***[26] in the following terms:

> "7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire

26 Shankarsan Dash v. Union of India (1991) 3 SCC 47, which has been consistently followed. See also All India SC & ST Employees Association v. A. Arthur Jeen & Others (2001) 6 SCC 380; M. Ramesh v. Union of India (2018) 16 SCC 195; and Rakhi Ray and Others v. High Court of Delhi and Others (2010) 2 SCC 637

> any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted".

24. As regards the second reason (i.e., ***K. Manjusree*** not considering earlier decision in ***Subash Chander Marwaha***), it would be appropriate for us to first examine the facts of ***Marwaha's*** case. In ***Subash Chander Marwaha*** (supra) against 15 vacancies in Haryana Civil Service (Judicial Branch) a select list of 40 candidates, who obtained minimum 45% or more marks in the competitive examination, was prepared. The State Government, however, which was the appointing authority, made only 7 appointments from amongst top seven in the select list. Candidates who were ranked 8, 9 and 13 filed writ petitions in the High Court for a direction to the State Government to fill up the remaining vacancies as per the order of merit in the select list. State Government contested the petitions by claiming that in its view, to maintain high standards of competence in judicial service, candidates getting less than 55% marks in the examination were not suitable to be appointed as subordinate judges. The High Court allowed the writ petition by taking a view that the State Government was not entitled to impose a new standard of 55% of marks for selection as that was against the rule which provided for a minimum of 45% only.

25. After taking note of the relevant extant rules (i.e., Rules 8 and 10)[27] this Court allowed State's appeal with the following observations:

> "**10.** … The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be

27 Rule 8. -No candidate shall be considered to have qualified unless he obtains 45% marks in the aggregate of all the papers and at least 33% marks in the language paper, that is, Hindi (in Devnagri script).
Rule 10.- (*i*) The result of the examination will be published in the Punjab Government Gazette;
(*ii*) Candidates will be selected for appointment strictly in the order in which they have been placed by the Punjab Public Service Commission in the list of those who have qualified under Rule 8;…."

appointed. Indeed, if the State Government while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect. The true effect of Rule 10 …… is that if and when the State Government propose to make appointments of Subordinate Judges the State Government (*i*) shall not make such appointments by travelling outside the list, and (*ii*) shall make the selection for appointments strictly in the order the candidates have been placed in the list published in the Government Gazette. In the present case neither of these two requirements is infringed by the Government. They have appointed the first seven persons in the list as Subordinate Judges. Apart from these constraints on the power to make the appointments, Rule 10 does not impose any other constraint. There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence.

11. It must be remembered that the petition is for a mandamus. This Court has pointed out in *Dr Rai Shivendra Bahadur* v. *Governing Body of the Nalanda College* [AIR 1962 SC 1210 : 1962 Supp (2) SCR 144 : (1962) 2 SCJ 208 : (1962) 1 Lab LJ 247 : (1962) 4 FIR 507.] that in order that mandamus may issue to compel an authority to do something, it must be shown that the statute imposes a legal duty on that authority and the aggrieved party has a legal right under the statute to enforce its performance. Since there is no legal duty on the State Government to appoint all the 15 persons who are in the list and the petitioners have no legal right under the rules to enforce its performance the petition is clearly misconceived.

12. It was, however, contended by Dr Singhvi on behalf of the respondents that since Rule 8 ….. makes candidates who obtained 45% or more in the competitive examination eligible for appointment, the State Government had no right to introduce a new rule by which they can restrict the appointments to only those who have scored not less than

55%. It is contended that the State Government have acted arbitrarily in fixing 55% as the minimum for selection and this is contrary to the rule referred to above. The argument has no force. Rule 8 is a step in the preparation of a list of eligible candidates with minimum qualifications who may be considered for appointment. The list is prepared in order of merit. The one higher in rank is deemed to be more meritorious than the one who is lower in rank. It could never be said that one who tops the list is equal in merit to the one who is at the bottom of the list. Except that they are all mentioned in one list, each one of them stands on a separate level of competence as compared with another. That is why Rule 10(*ii*) …. speaks of "selection for appointment". Even as there is no constraint on the State Government in respect of the number of appointments to be made, there is no constraint on the Government fixing a higher score of marks for the purpose of selection. In a case where appointments are made by selection from a number of eligible candidates it is open to the Government with a view to maintain high standards of competence to fix a score which is much higher than the one required for mere eligibility. As shown in the letter of the Chief Secretary already referred to, they fixed a minimum of 55% for selection as they had done on a previous occasion. There is nothing arbitrary in fixing the score of 55% for the purpose of selection, because that was the view of the High Court also previously intimated to the Punjab Government on which the Haryana Government thought fit to act. That the Punjab Government later on fixed a lower score is no reason for the Haryana Government to change their mind. This is essentially a matter of administrative policy and if the Haryana State Government think that in the interest of judicial competence persons securing less than 55% of marks in the competitive examination should not be selected for appointment, those who got less than 55% have no right to claim that the selections be made of also those candidates who obtained less than the minimum fixed by the State Government. In our view the High Court was in error in thinking that the State Government had somehow contravened Rule 8 of ….."

26. A close reading of the judgment in ***Subash Chander Marwaha*** (supra) would disclose that there was no change in the rules of the game *qua* eligibility for placement in the select list. There the select list was prepared in accordance with the extant rules. But, since the extant rules did not create any obligation on the part of the State Government to make appointments against all notified vacancies, this Court opined that the State could take a policy decision not to appoint candidates securing less than 55% marks. With that reasoning and by taking into account that appointments made were of top seven candidates in the select list, who had secured 55% or higher marks, this Court found no merit in the petition of the writ petitioners. On the other hand, in ***K. Manjusree*** (supra), the eligibility criteria for placement in the select list was changed after interviews were held which had a material bearing on the select list. Thus, ***Subash Chander Marwaha*** (supra) dealt with the right to be appointed from the select list whereas ***K. Manjusree*** (supra) dealt with the right to be placed in the select list. The two cases therefore dealt with altogether different issues. For the foregoing reasons, in our view, ***K. Manjusree*** (supra) could not have been doubted for having failed to consider ***Subash Chander Marwaha*** (supra).

27. In ***K. H. Siraj v. High Court of Kerala & Ors.***[28] the High Court of Kerala invited applications for appointment to the post of Munsif Magistrate in the Kerala Judicial Service. Out of more than 1800 candidates who had applied, 1292 applications were found valid. 118 candidates passed the written examination. Out of the said candidates, 88 passed the interview and select list was prepared from amongst these 88 candidates. Candidates who were not selected as they had not secured the prescribed minimum marks in the interview filed writ petitions contending that in the absence of specific legislative mandate prescribing cut-off marks in interviews, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test touching the required subjects in detail, was violative of the statute. The writ petitions were allowed by a single judge of the High Court against which intra-court appeal was filed before division bench of the High Court. The division bench set aside the order of the learned single judge against which appeals came before this Court. While

28 [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395

dismissing the appeals upon interpretation of Rule 7 of the Kerala Judicial Service Rules, 1991,[29] this Court held:

> "50. What the High Court has done by the notification dated 26.3.2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26.3.2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter…..
>
> xxx xxx xxx
>
> 62. Thus it is seen that apart from the amplitude of the power under rule 7 it is clearly open for the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the rules barring such a procedure from being adopted. It may also be mentioned

29 **Rule 7.**- *Preparation of lists of approved candidates and reservation of appointments*. – (1) The High Court of Kerala shall, from time to time, hold examinations, written and oral, after notifying the probable number of vacancies likely to be filled up and prepare a list of candidates considered suitable for appointment to category 2. The list shall be prepared after following such procedure as the High Court deems fit and by following the rules relating to reservation of appointments contained in Rules 14 to 17 of part 2 of the Kerala State and Subordinate Services Rules, 1958.
(2) The list consisting of not more than double the number of probable vacancies notified shall be forwarded for the approval of the Governor. The list approved by the Governor shall come into force from the date of the approval and shall remain in force for a period of two years or until a fresh approved list is prepared, whichever is earlier.

> that executive instructions can always supplement the rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the rule with a view to implement them by prescribing relevant standards in the advertisement for selection."

After observing as above, in ***K.H. Siraj*** (supra), this Court distinguished its earlier decision in ***P.K. Ramachandra Iyer v. Union of India***[30] with the following reasoning:

> "65. … In Ramachandra Iyer case Rule 14 (…..) mandated that the marks at the written test and the oral examination have to be aggregated and the merit list prepared on the basis of such aggregation of marks. Therefore, the marks obtained at the written test and the oral test were both relevant whatever be the percentage, in the preparation of the merit list. Nevertheless, the examining board prescribed minimum for viva voce test and eliminated those who failed to get the minimum. Resultantly, candidates who would have found a place in the rank list based on the aggregate of the marks for the two tests stood eliminated because they did not get the minimum in the test. This was contrary to Rule 14 and that was the reason why the prescription of minimum marks for viva voce test was held invalid in Ramachandra Iyer case."

28. The decision in ***K.H. Siraj*** (supra) makes it clear that if the rules governing recruitment provides latitude to the competent authority to devise its procedure for selection it may do so subject to the rule against arbitrariness enshrined in Article 14 of the Constitution. Even ***K. Manjusree*** (supra) does not proscribe fixing minimum marks for either the written test, or the interview, as an eligibility criterion for selection. What ***K. Manjusree*** (supra) does is to regulate the stage at which it could be done. This is clear from the decision of this Court in ***Hemani Malhotra v. High Court of Delhi***.[31] In ***Hemani*** (supra) a contention was raised that the decision in ***K. Manjusree*** (supra)

30 [1984] 2 SCR 200 : (1984) 2 SCC 141

31 [2008] 5 SCR 1066 : (2008) 7 SCC 11

should be regarded as per incuriam for not having noticed earlier decisions in ***Ashok Kumar Yadav v. State of Haryana***[32] as well as ***K.H. Siraj*** (supra). Rejecting the contention, this Court observed:

> "16. … what is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the learned counsel for the respondent. While deciding the case of K Manjusree the Court noticed the decisions in P K Ramachandra Iyer v. Union of India, Umesh Chandra Shukla v. Union of India and Durgacharan Misra v. State of Orissa, and has thereafter laid down the proposition of law….. . On the facts and in the circumstances of the case this Court is of the opinion that the decisions rendered by this court in K. Manjusree can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

29. The ultimate object of any process of selection for entry into a public service is to secure the best and the most suitable person for the job, avoiding patronage and favoritism. Selection based on merit, tested impartially and objectively, is the essential foundation of any useful and efficient public service. So, open competitive examination has come to be accepted almost universally as the gateway to public services.[33] It is now well settled that while a written examination assesses a candidate's knowledge and intellectual ability, an interview test is valuable to assess a candidate's overall intellectual and personal qualities. While written examination has certain distinct advantages over the interview test there are yet no written tests which can evaluate a candidate's initiative, alertness, resourcefulness, dependableness, cooperativeness, capacity for clear

32 [1985] Supp. 1 SCR 657 : (1985) 4 SCC 417

33 Lila Dhar v. State of Rajasthan and Others (1981) 4 SCC 159 paragraph 4.

and logical presentation, effectiveness in discussion, effectiveness in meeting and dealing with others, adaptability, judgment, ability to make decision, ability to lead, intellectual and moral integrity.[34] Thus, the written examination assesses the man's intellect and the interview test the man himself and "the twain shall meet" for a proper selection.[35]

30. What is clear from above is that the object of any process of selection for entry into a public service is to ensure that a person most suitable for the post is selected. What is suitable for one post may not be for the other. Thus, a degree of discretion is necessary to be left to the employer to devise its method/ procedure to select a candidate most suitable for the post *albeit* subject to the overarching principles enshrined in Articles 14 and 16 of the Constitution as also the Rules/ Statute governing service and reservation. Thus, in our view, the appointing authority/ recruiting authority/ competent authority, in absence of Rules to the contrary, can devise a procedure for selection of a candidate suitable to the post and while doing so it may also set benchmarks for different stages of the recruitment process including written examination and interview. However, if any such benchmark is set, the same should be stipulated before the commencement of the recruitment process. But if the extant Rules or the advertisement inviting applications empower the competent authority to set benchmarks at different stages of the recruitment process, then such benchmarks may be set any time before that stage is reached so that neither the candidate nor the evaluator/ examiner/ interviewer is taken by surprise. The decision in ***K. Manjusree*** (supra) does not proscribe setting of benchmarks for various stages of the recruitment process but mandates that it should not be set after the stage is over, in other words after the game has already been played. This view is in consonance with the rule against arbitrariness enshrined in Article 14 of the Constitution and meets the legitimate expectation of the candidates as also the requirement of transparency in recruitment to public services and thereby obviates mal practices in preparation of select list.

34 See paragraph 5 of Lila Dhar (supra)

35 See paragraph 6 of Lila Dhar (supra)

(D) RULE DOES NOT APPLY WITH EQUAL STRICTNESS TO STEPS FOR SELECTION

31. As already noticed in Section (A), a recruitment process *inter alia* comprises of various steps like inviting applications, scrutiny of applications, rejection of defective applications or elimination of ineligible candidates, conducting examinations, calling for interview or viva voce and preparation of list of successful candidates for appointment. Subject to the rule against arbitrariness, how tests or viva voce are to be conducted, what questions are to be put, in what manner evaluation is to be done, whether a short listing exercise is needed are all matters of procedure which, in absence of rules to the contrary, may be devised by the competent authority. Often advertisement(s) inviting applications are open-ended in terms of these steps and leave it to the discretion of the competent authority to adopt such steps as may be considered necessary in the circumstances *albeit* subject to the overarching principle of rule against arbitrariness enshrined in Article 14 of the Constitution.

32. To elucidate the above proposition we shall notice few instances where the procedure devised by the recruiting body has been approved by this Court. In ***Santosh Kumar Tripathi v. U.P. Power Corporation***,[36] this Court was required to consider whether the Rule enabling Service Commission to examine, interview, select and recommend suitable candidates would include power to hold written examination. This Court accepted the High Court's view that power to 'examine' would include holding of written examination.

33. In ***M.P. Public Service Commission v. Navnit Kumar Potdar***[37] the question which arose before this Court was as to whether in the process of short-listing, the Commission has altered or substituted the criteria or the eligibility of a candidate to be considered for being appointed against the post of Presiding Officer, Labour Court. In that context it was observed:

> "6. … It may be mentioned at the outset that whenever applications are invited for recruitment to the different posts, certain basic qualifications and criteria are fixed and the

36 (2009) 14 SCC 210

37 [1994] Supp. 3 SCR 665 : (1994) 6 SCC 293

> applicants must possess those basic qualifications and criteria before their applications can be entertained for consideration. The Selection Board or the Commission has to decide as to what procedure is to be followed for selecting the best candidates from amongst the applicants. In most of the services, screening tests or written tests have been introduced to limit the number of candidates who have to be called for interview. Such screening tests or written tests have been provided in the concerned statutes or prospectus which govern the selection of the candidates. But where the selection is to be made only on basis of interview, the Commission or the Selection Board can adopt any rational procedure to fix the number of candidates who should be called for interview. It has been impressed by the courts from time to time that where selections are to be made only on the basis of interview, then such interviews / viva voce tests must be carried out in a thorough and scientific manner in order to arrive at a fair and satisfactory evaluation of the personality of the candidate."

34. Likewise in ***Union of India v. T. Sundararaman***[38] where the eligibility conditions referred to a minimum of 5 years' experience, the selection committee was held justified in shortlisting those candidates with more than 7 years' experience having regard to the large number of applicants compared to the vacancies to be filled. The relevant observations are being extracted below:

> "4. ….Note 21 to the advertisement expressly provides that if a large number of applications are received the Commission may shortlist candidates for interview on the basis of higher qualifications although all applicants may possess the requisite minimum qualifications. In the case of *M.P. Public Service Commission* v. *Navnit Kumar Potdar* [(1994) 6 SCC 293 : 1994 SCC (L&S) 1377 : (1994) 28 ATC 286 : JT (1994) 6 SC 302] this Court has upheld shortlisting of candidates on some rational and reasonable basis. In that case, for the purpose of shortlisting, a longer

38 [1997] 3 SCR 792 : (1997) 4 SCC 664

> period of experience than the minimum prescribed was used as a criterion by the Public Service Commission for calling candidates for an interview. This was upheld by this Court. In the case of *Govt. of A.P. v. P. Dilip Kumar* [(1993) 2 SCC 310 : 1993 SCC (L&S) 464 : (1993) 24 ATC 123 : JT (1993) 2 SC 138] also this Court said that it is always open to the recruiting agency to screen candidates due for consideration at the threshold of the process of selection by prescribing higher eligibility qualification so that the field of selection can be narrowed down with the ultimate objective of promoting candidates with higher qualifications to enter the zone of consideration. The procedure, therefore, adopted in the present case by the Commission was legitimate…."

35. Similarly, in ***Tridip Kumar Dingal v. State of W.B.***[39] it was held that shortlisting is permissible on the basis of administrative instructions provided the action is *bona fide* and reasonable. The relevant observations in the judgment are extracted below:

> **"**38. … The contention on behalf of the State Government that written examination was for shortlisting the candidates and was in the nature of "elimination test" has no doubt substance in it in view of the fact that the records disclose that there were about 80 posts of Medical Technologists and a huge number of candidates, approximately 4000 applied for appointment. The State authorities had, therefore, no other option but to "screen" candidates by holding written examination. It was observed that no recruitment rules were framed in exercise of the power under the proviso to Article 309 of the Constitution and hence no such action could be taken. In our opinion, however, even in absence of statutory provision, such an action can always be taken on the basis of administrative instructions—for the purpose of "elimination" and "shortlisting" of huge number of candidates provided the action is otherwise bona fide and reasonable."

39 [2008] 15 SCR 194 : (2009) 1 SCC 768

36. Another example is in respect of fixing different cutoffs for different subjects having regard to the relative importance of the subjects and their degree of relevance.[40] These instances make it clear that this Court has been lenient in letting recruiting bodies devise an appropriate procedure for successfully concluding the recruitment process provided the procedure adopted has been transparent, non-discriminatory/ non-arbitrary and having a rational nexus to the object sought to be achieved.

(E) PROCEDURE PRESCRIBED IN THE EXTANT RULE NOT TO BE VIOLATED

37. In ***Sivanandan C.T.*** (supra) the issue before the Constitution Bench was whether for selection minimum marks could be prescribed contrary to the extant rules and the advertisement. Answering in the negative, the Constitution Bench, speaking through one of us (Dr. D.Y. Chandrachud, CJ), held:

> "15. The Administrative Committee of the High Court decided to impose a cut off for the viva-voce examination actuated by the bona fide reason of ensuring that candidates with requisite personality assume judicial office. However laudable that approach of the Administrative Committee may have been, such a change would be required to be brought in by a substantive amendment to the rules which came in much later as noticed above. This is not a case where the rules of the scheme of the High Court were silent. Where the statutory rules are silent, they can be supplemented in a manner consistent with the object and spirit of the Rules by an administrative order.
>
> 16. In the present case, the statutory rules expressly provided that the select list would be drawn up on the basis of the aggregate marks obtained in the written examination and the viva-voce. This was further elaborated in the scheme of examination which prescribed that there would be no cut off marks for the viva-voce. This position is also reflected in the notification of the High Court dated 30 September 2015. In this backdrop we have come to

40 Banking Service Recruitment Board, Madras v. V. Ramalingam (1998) 8 SCC 523

> the conclusion that the decision of the High Court suffered from its being ultra vires the 1961 Rules besides being manifestly arbitrary."

38. Following ***Sivanandan CT*** (supra), a three-Judge Bench of this Court in ***Salam Samarjeet Singh v. The High Court of Manipur at Imphal & Anr***[41] held:

> "31. … Prescribing minimum marks for viva-voce segment may be justified for the holistic assessment of a candidate, but in the present case such a requirement was introduced only after commencement of the recruitment process and in violation of the statutory rules. The decision of the Full Court to depart from the expected exercise of preparing the merit list as per the unamended rules is clearly violative of the substantive legitimate expectation of the petitioner. It also fails the tests of fairness, consistency and predictability and hence is violative of Article 14 of the Constitution of India."

39. There can therefore be no doubt that where there are no Rules or the Rules are silent on the subject, administrative instructions may be issued to supplement and fill in the gaps in the Rules. In that event administrative instructions would govern the field provided they are not *ultra vires* the provisions of the Rules or the Statute or the Constitution. But where the Rules expressly or impliedly cover the field, the recruiting body would have to abide by the Rules.

(F) APPOINTMENT MAY BE DENIED EVEN AFTER PLACEMENT IN SELECT LIST.

40. In Section (C) above, we have already noticed the Constitution Bench decision of this Court in ***Shankarsan Das*** (supra) where it was held:

> "Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken *bona fide* for appropriate reasons. And if the vacancies or any of them are filled up,

41 [2024] 8 SCR 885 : 2024 INSC 647

the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

41. Thus, in light of the decision in ***Shankarsan Das*** (supra), a candidate placed in the select list gets no indefeasible right to be appointed even if vacancies are available. Similar was the view taken by this Court in ***Subash Chander Marwaha*** (supra) where against 15 vacancies only top 7 from the select list were appointed. But there is a caveat. The State or its instrumentality cannot arbitrarily deny appointment to a selected candidate. Therefore, when a challenge is laid to State's action in respect of denying appointment to a selected candidate, the burden is on the State to justify its decision for not making appointment from the Select List.

CONCLUSIONS

42. We, therefore, answer the reference in the following terms:

(1) Recruitment process commences from the issuance of the advertisement calling for applications and ends with filling up of vacancies;

(2) Eligibility criteria for being placed in the Select List, notified at the commencement of the recruitment process, cannot be changed midway through the recruitment process unless the extant Rules so permit, or the advertisement, which is not contrary to the extant Rules, so permit. Even if such change is permissible under the extant Rules or the advertisement, the change would have to meet the requirement of Article 14 of the Constitution and satisfy the test of non-arbitrariness;

(3) The decision in ***K. Manjusree*** (supra) lays down good law and is not in conflict with the decision in ***Subash Chander Marwaha*** (supra). ***Subash Chander Marwaha*** (supra) deals with the right to be appointed from the Select List whereas ***K. Manjusree*** (supra) deals with the right to be placed in the Select List. The two cases therefore deal with altogether different issues;

(4) Recruiting bodies, subject to the extant Rules, may devise appropriate procedure for bringing the recruitment process to its logical end provided the procedure so adopted is transparent, non-discriminatory/ non-arbitrary and has a rational nexus to the object sought to be achieved.

(5) Extant Rules having statutory force are binding on the recruiting body both in terms of procedure and eligibility. However, where the Rules are non-existent, or silent, administrative instructions may fill in the gaps;

(6) Placement in the select list gives no indefeasible right to appointment. The State or its instrumentality for bona fide reasons may choose not to fill up the vacancies. However, if vacancies exist, the State or its instrumentality cannot arbitrarily deny appointment to a person within the zone of consideration in the select list.

43. Let the appeals be placed before appropriate Bench for decision in terms of the answers rendered above, after obtaining administrative directions from Hon'ble the Chief Justice.

Result of the case: Reference answered.

†*Headnotes prepared by:* Ankit Gyan

[2024] 12 S.C.R. 68 : 2024 INSC 848

Kirloskar Ferrous Industries Limited & Anr.
v.
Union of India & Ors.

(Writ Petition No. 715 of 2024)

07 November 2024

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

Issue for Consideration

Whether, the Explanation(s) appended to Rule 38 of the Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 and Rule 45 of the Mineral Conservation and Development Rules, 2017 respectively are unreasonable and manifestly arbitrary and in consequence of violation of Article 14 of the Constitution.

Headnotes†

Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 – Explanation to r.38 – Mineral Conservation and Development Rules, 2017 – Explanation to r.45 – Validity challenged – Computation of royalty levied for the extraction or consumption of mined ores – Change in the methodology/formula of computation of royalty – Compounding effect on the rate of royalty for every subsequent month – Petitioner argued that the inclusion of the royalty and contributions towards District Mineral Foundation (DMF) and National Mineral Exploration Trust (NMET) paid previously for computation of the requisite royalty for subsequent months has a cascading effect on the rate of royalty for every subsequent month – New methodology of computation of royalty, if unreasonable or arbitrary:

Held: No – Merely because the methodology or formula for computation of royalty has been altered from what it was under the erstwhile MCR, 1960 will not make the new mechanism or methodology unreasonable or arbitrary and liable to be struck down – It is possible that at the relevant time in respect of some of the minerals, royalty was being computed without inclusion of the royalty, DMF and NMET contributions previously paid, however, that

*Author

does not mean that the Central Government's power is restricted and it cannot alter the mode of computation of royalty – Matters such as computation of royalty or the levy of such royalty on different minerals is entirely a matter of policy making beyond the expertise and domain of the Courts – Whether a particular policy is wise or a better public policy can be evolved is purely the domain of the executive – Judicial review of policy decisions is limited to assessing the legality of the decision making process rather than the substantive merits of the policy itself – Court should confine itself to the question of legality as to whether the policy making authority exceeded its powers, or committed an error of law or breached the rules of natural justice or reached a decision which no reasonable authority would have reached or whether it abused its powers – Though the mechanism for computation of royalty in terms of r.38, MCR, 2016 and r.45, MCDR, 2017 might have onerous implications in monetary terms on the mining leaseholders as there is a compounding effect on the rate of royalty for every subsequent month however, in absence of anything to show that the policy was in excess of the powers or domain of the respondents or in breach of any statutory provision, it cannot be struck down – Mineral (Development and Regulation) Amendment Act, 2015. [Paras 50, 51, 61]

Economic policies/laws relating to economic activities – Mineral (Development and Regulation) Amendment Act, 2015 – Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 – Explanation to r.38 – Mineral Conservation and Development Rules, 2017 – Explanation to r.45 – Different mechanism for computation of royalty for coal and other minerals – Whether the exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals is unreasonable and manifestly arbitrary:

Held: No – The exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals cannot be termed as arbitrary or unreasonable, merely because the computation for one differs from the other in certain aspects – Deference needs to be shown to the legislature in deciding how royalty must be computed in respect of different mineral grades/ concentrates – Although, the computation of royalty for different minerals is purely a matter of policy yet, it cannot be ignored that prima facie there is anomaly both in the very computation

mechanism of average sale price for minerals and the perplexing stance of exclusion of only coal from such mechanism despite the general nature and application of the aforesaid rules – Also, the legislature itself has acknowledged the anomaly in compounding of royalty etc. for the purpose of computation of average sale price – Respondents granted 2 months to conclude the public consultation process undertaken by themselves for amending the MMDR Act and take a final decisive call as regards the cascading impact of royalty on royalty in the calculation of the 'average sale price' by virtue of the Explanations to r.38 of the MCR, 2016 and r.45 of the MCDR, 2017. [Paras 71, 76, 84]

Principle of separation of powers – Doctrine of judicial restraint:

Held: Each branch of government has a unique, defined role and operates within its designated boundaries – Separation of powers ensures that one branch does not encroach upon the functions of the others, with checks and balances crucial to democratic governance – Courts should respect the decisions made by the legislative and executive branches, provided the decisions are legally sound and constitutionally valid – Doctrine of judicial restraint emphasizes that courts should exercise caution and avoid involvement in policy decisions, as these are complex judgments requiring a balancing of diverse and often competing interests – Courts should not replace policymakers' judgments with their own unless absolutely necessary. [Paras 52-54]

Policy decisions – Power of judicial review:

Held: Not absolute – Policy decisions often require the expertise of professionals and specialists in fields such as economics, public health, national security, and environmental science etc. – These domains involve specialized knowledge that judges, as generalists in legal matters, may lack – Judicial review does not mean a comprehensive re-evaluation of the policy's wisdom – It is limited to assessing the legality of the decision-making process rather than the substantive merits of the policy itself. [Para 56]

Interpretation of Statutes – Explanation(s) to r.38 of Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 and r.45 of Mineral Conservation and Development Rules, 2017 – Interpretation of Explanation – Aforesaid Explanations, if exceeded the ambit of the main provisions:

Held: No – Explanation added to a statutory provision is not a substantive provision – It is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision and thus, must be read so as to harmonise with and clear up the ambiguity in the main section – An explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain – The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used – An 'explanation' must be interpreted according to its own tenor; that it is meant to explain and not vice versa – Merely because the Explanations to r.38 of the MCR, 2016 and r.45 of the MCDR, 2017 provides that there shall be no deduction of royalty, payments to the DMF and NMET from the gross amount for the purpose of computing sale value does not make the aforesaid Explanation in derogation of the main provision – The Explanations are merely clarificatory in nature inasmuch as they explain the ambiguities in the main provisions of r.38 of the MCR, 2016 and r.45 of the MCDR, 2017, and thus, do not exceed the ambit of the main provisions or in contravention of the statutory scheme. [Paras 65, 66]

Case Law Cited

Mineral Area Development Authority & Anr. v. Steel Authority of India Limited & Anr. [2024] 8 SCR 540 **: 2024 SCC OnLine SC 1974;** *Manish Kumar v. Union of India* [2021] 14 SCR 895 **: (2021) 5 SCC 1***; Dy. Commissioner of Income Tax & Anr. v. Pepsi Foods Limited* [2021] 4 SCR 1 **: (2021) 7 SCC 413;** *K.P. Varghese v. ITO* [1982] 1 SCR 629 **: (1981) 4 SCC 173;** *Natural Resources Allocation, In Re: Special Reference No. 1 of 2012* [2012] 9 SCR 311 **: (2012) 10 SCC 1 – referred to.**

M.P. Oil Extraction & Anr. v. State of Madhya Pradesh & Ors [1997] Supp. 1 SCR 671 **: (1997) 7 SCC 592;** *Premium Granites & Anr. v. State of Tamil Nadu & Ors.* [1994] 1 SCR 579 **: (1994) 2 SCC 691;** *Delhi Science Forum and Others v. Union of India and Another* [1996] 2 SCR 767 **: (1996) 2 SCC 405;** *Balco Employees' Union v. Union of India* [2001] Supp. 5 SCR 511 **: (2002) 2 SCC 333;** *State of Punjab v. Principal Secretary to the Governor of Punjab & Anr.,* [2023] 15 SCR 777 **: 2023 INSC 1017;** *State of U.P. v. Achal Singh* [2018] 9 SCR 912 **: (2018) 17 SCC 578;** *R.K. Garg v. Union of India* [1982] 1 SCR 947 **: (1981) 4 SCC 675;** *State of Tamil Nadu*

and Anr. v. National South Indian River Interlinking Agriculturist Association [2021] 7 SCR 479 **: (2021) 15 SCC 534;** *Tata Steel Ltd. v. Union of India* [2015] 6 SCR 29 **: (2015) 6 SCC 193;** *State of Jharkhand v. Brahmputra Metallics Ltd* [2020] 14 S.C.R. 45 **: (2023) 10 SCC 634;** *Ramana Dayaram Shetty v. International Airport Authority of India & Ors.* [1979] 3 SCR 1014 **: AIR 1979 SC 1628;** *Narottam Kishore Deb Varma v. Union of India* [1964] 7 SCR 55**;** *H.H. Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt.* [1980] 1 SCR 368 : **(1979) 4 SCC 642 – relied on**.

List of Acts

Mines and Minerals (Development and Regulation) Act, 1957; Mineral (Development and Regulation) Amendment Act, 2015; Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016; Mineral Conservation and Development Rules, 2017; Mineral Concession Rules, 1960; Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015; Mineral (Auction) Rules, 2015; Constitution of India.

List of Keywords

Royalty; Extraction or consumption of mined ores; Mode of computation of royalty; Methodology/formula of computation of royalty changed; Not unreasonable or arbitrary; New mechanism/ methodology; Compounding effect on rate of royalty for every subsequent month; Cascading effect; Mining leasehold company; Iron ores; 'Sale Value'; Mineral concession; Non-profit autonomous body; District Mineral Foundation (DMF); National Mineral Exploration Trust (NMET); Exclusion of royalty; Deduction of royalty, Payments to the DMF, NMET from gross amount for computing sale value; Computation of royalty for different minerals; Policy matter; Policy decisions; Public policy; Compounding of royalty; Average Sale Price; Wise policy; Better public policy; Domain of the executive; Natural resources; Economic policies/laws relating to economic activities; Mining leaseholders; Principle of separation of powers; Doctrine of judicial restraint; Substantive merits of the policy; Judicial review; Decision making process; Legality; Policy making authority; Rules of natural justice; Explanation; Ambiguities in the statutory provision; Ambiguity in the main section; Explanations clarificatory in nature; Different mechanism for computation of royalty for coal and other minerals; Indian Bureau of Mines.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (C) No. 715 of 2024

(Under Article 32 of The Constitution of India)

Appearances for Parties

Rakesh Dwivedi, Ms. Kiran Suri, Dr. A.M. Singhvi, Dhruv Mehta, Yashraj Deora Singh, Sr. Advs., S.J. Amith, Mrs. Maria Carmita Dcosta Mashelkar, Ms. Vidushi Garg, Eklavya Dwivedi, Ms. Preetika Dwivedi, Dr. Mrs. Vipin Gupta, M/s. Legal Options, Ninad Laud, M.S. Ananth, Ms. Aanchal Mullick, Ms. Kamakshi Sehgal, Siddharth Seem, Abhinav Agrawal, Ms. Ranjeeta Rohatgi, Saket Sikri, Linette Rodrigues, Ajay Pal Singh Kullar, Naveen Kumar, Tanmaya Agarwal, Abhishek Gupta, Advs. for the Petitioners.

Shiv Mangal Sharma, AAG, Shailesh Madiyal, Sr. Adv., M/s. K J John & Co., Gurmeet Singh Makker, Ms. Chinmayee Chandra, Sridhar Potaraju, Veer Vikrant Singh, Shailesh Madiyal, Sandeep Singh, Milind Kumar, Rohit K. Singh, Harsh V. Surana, Irshad Ahmad, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

1. The petitioners have invoked the jurisdiction of this Court under Article 32 of the Constitution *inter-alia* seeking to challenge the validity of the Explanation to Rule 38 of the Mineral (Other than Atomic and Hydrocarbons Energy Minerals) Concession Rules, 2016 (for short, the "**MCR, 2016**") and the Explanation to Rule 45(8)(a) of the Mineral Conservation and Development Rules, 2017 (for short, the "**MCDR, 2017**") that stipulates the computation of royalty to be levied for the extraction or consumption of mined ores.

A. BRIEF FACTUAL MATRIX

2. The petitioner no.1 herein is a mining leasehold company *inter-alia* engaged in the extraction of pig iron and the manufacturing and sale of its byproducts by way of a mining lease for iron ores in the State of Karnatak in terms of the provisions and procedure envisaged under

the Mineral (Development and Regulation) Amendment Act, 2015 (for short the "**2015 Amendment Act**"). The petitioner no.2 herein is one of the shareholders in the petitioner no.1 company. The respondent no. 1 herein is the Union of India through the Secretary, Ministry of Mines, whereas the respondent no. 2 herein is the Indian Bureau of Mines.

3. As per Section 9 of the Mines and Minerals (Development and Regulation) Act, 1957 (for short, the ("**MMDR, Act**"), the revenue required to be paid for any mineral removed or consumed from the leasehold area would be in the form of royalty and mandates the mining leaseholder to pay such royalty as may be specified in the Second Schedule in respect of any minerals removed or consumed in the leased area allotted to him. Section 9 sub-section (3) of the MMDR Act further empowers the Central Government to enhance or reduce the rate of royalty payable by the leaseholders by way of a notification once every 3-years. The aforesaid provision reads as under: -

> ***"9. Royalties in respect of mining leases. –***
>
> *(1) The holder of a mining lease granted before the commencement of this Act shall, notwithstanding anything contained in the instrument of lease or in any law in force at such commencement, pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area after such commencement, at the rate for the time being specified in the Second Schedule in respect of that mineral.*
>
> *(2) The holder of a mining lease granted on or after the commencement of this Act shall pay royalty in respect of any mineral removed or consumed by him or by his agent, manager, employee, contractor or sub-lessee from the leased area at the rate for the time being specified in the Second Schedule in respect of that mineral.*
>
> *(2A) The holder of a mining lease, whether granted before or after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972*

(56 of 1972) shall not be liable to pay any royalty in respect of any coal consumed by a workman engaged in a colliery provided that such consumption by the workman does not exceed one-third of a tonne per month.

(3) The Central Government may, by notification in the Official Gazette, amend the Second Schedule so as to enhance or reduce the rate at which royalty shall be payable in respect of any mineral with effect from such date as may be specified in the notification:

Provided that the Central Government shall not enhance the rate of royalty in respect of any mineral more than once during any period of three years."

4. Section(s) 13 and 18 of the MMDR Act respectively further empowers the Central Government to frame Rules for regulating the grant of mineral concession and for the conservation and systematic development of minerals respectively. Pursuant to the above provisions, the Central Government enacted the Mineral Concession Rules, 1960 (for short, the "**MCR, 1960**") which later came to be replaced by the MCR, 2016 for the computation and payment of royalty in terms of Section 9 read with Schedule II of the MMDR, Act.

5. The erstwhile MCR, 1960, more particularly Rule 64D that was inserted *vide* Notification bearing no. GSR 883(E) dated 10.12.2009, stipulated that the royalty to be paid for all non-atomic and non-fuel minerals would be computed on the basis of the State-wise sale price of different minerals as published by the Indian Bureau of Mines / the respondent no. 2. The said provision reads as under: -

"64 D. Manner of payment of royalty on minerals on ad valorem basis:

(1) Every mine owner, his agent, manager, employee, contractor or sub-lessee shall compute the amount of royalty on minerals where such royalty is charged on ad valorem basis as follows:

(i) for all non-atomic and non fuel minerals sold in the domestic market or consumed in captive plants or exported by the mine owners (other than

bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold, silver and minerals specified under Atomic Energy Act), the State-wise sale prices for different minerals as published by Indian Bureau of Mines shall be the sale price for computation of royalty in respect of any mineral produced any time during a month in any mine in that State, and the royalty shall be computed as per the formula given below:

Royalty = Sale price of mineral (grade wise and State-wise) published by IBM X Rate of royalty (in percentage) X Total quantity of mineral grade produced/ dispatched:

Provided that if for a particular mineral, the information for a State for a particular month is not published by the Indian Bureau of Mines, the latest information available for that mineral in the State shall be referred, failing which the latest information for All India for the mineral shall be referred.

(ii) for the grades of minerals produced for captive consumption (other than bauxite and laterite despatched for use in alumina and metallurgical industries, copper, lead, zinc, tin, nickel, gold and silver) and those not despatched for sale in domestic market or export, the sale price published by the Indian Bureau of Mines shall be used as the benchmark price for computation of royalty.

(iii) for primary gold, silver, copper, nickel, tin, lead and zinc, the total contained metal in the ore or concentrate produced during the period for which the royalty is computed and reported in the statutory monthly returns under Mineral Conservation and Development Rules, 1988 or recorded in the books of the mine owners shall be considered for the purposes of computing the royalty in the first place and then the royalty shall be computed as the percentage of the

average metal prices published by the Indian Bureau of Mines for primary gold, silver, copper, nickel, tin, lead and zinc during the period of computation of royalty as follows:

Royalty = sale price X rate of royalty in percentage

where sale price = Average price of metal as published by Indian Bureau of Mines during the month X Total contained metal in ore or concentrate produced X Rupee or Dollar exchange rate selling as on the last date of the month of computation of royalty:

Provided that in case of by-product gold and silver the royalty shall be based on the total quantity of metal produced and such royalty shall be calculated as follows:

Royalty = Sale price X rate of royalty in percentage

Explanation - For the purpose of this sub-clause sale price means, average price of metal as published by Indian Bureau of Mines during the month X Total byproduct metal actually produced X Rupee or Dollar Exchange rate selling as on the last date of the month of computation of royalty.

(iv) For bauxite or laterite ore despatched for use in alumina and aluminium metal extraction or despatched to alumina or aluminium metal extraction industry within India, the total contained alumina in the bauxite or laterite ore on dry basis produced during the period for which the royalty is computed and reported in the statutory monthly returns under Mineral Conservation and Development Rules, 1988 or recorded in the books of the mine owners shall be considered for the purpose of computing the royalty in the first place and then the royalty shall be computed as the percentage of the average monthly price for the contained aluminium metal in the said alumina content of the ore published by the Indian Bureau of Mines, on the following basis namely:-

Royalty =

52.9/100	*X*	*Percentage of Al2O3 in the bauxite on dry basis (as reported in the Statutory Monthly return under MCDR)*	*X*	*Average monthly price of aluminium as published by the IBM*	*X*	*Rupee/ dollar exchange rate (selling) as on the last date of the period of the computation of royalty*	*X*	*Rate of royalty (in percentage)*

Provided that for computing the royalty for bauxite or laterite despatched for end use other than alumina and aluminium metal extraction and for exports provisions of this clause shall not apply.

(2) In case of metallic ores based on metal contained in ore and metal prices based on benchmark prices, the royalty shall be charged on dry basis, and the mine owner shall establish suitable facilities for collection of sample and its analysis on dry basis at the mine site."

6. A bare perusal of the aforesaid provision makes it clear that for computing the royalty that may be payable both the i) grade-wise and State wise sale price of mineral as published by IBM and the ii) rate of royalty were being factored along with the quantity of mineral that is produced or dispatched in order to determine the ultimate royalty that may be payable.

7. Thereafter, the Central Government by way of the aforesaid 2015 Amendment Act *inter-alia* inserted Section(s) 9B and 9C into the MMDR Act whereby contributions were required to be paid to the District Mineral Foundation ("**DMF**"), a non-profit body established to work for the interest and benefit of persons and areas affected by mining related operation and to the National Mineral Exploration Trust ("**NMET**") a non-profit autonomous body for the purposes of regional and detailed exploration.

8. As per Section 9B sub-section (5) of the MMDR Act, the contributions towards the DMF were computed as a percentage of the royalty paid by the mining leaseholder that could extend upto a sum equivalent

to a maximum of one-third of such royalty. Thereafter, the Mines and Minerals (Contribution to District Mineral Foundation) Rules, 2015 ("**DMF Rules**") came to be enacted, Rule 2(a) of which stipulated that the contributions towards DMF shall be computed as ten percent of the royalty paid in accordance with the Second Schedule. On the other hand, the contributions towards the NMET under Section 9C of the MMDR Act, were calculated as a sum equivalent to two percent of the royalty paid.

9. On 04.03.2016, the Central Government vide Notification no. GSR 278(E) enacted and notified the MCR, 2016 rules replacing the erstwhile rules of MCR, 1960, in order to revamp the entire mechanism *inter-alia* for the calculation of royalty on minerals and the grant of concessions.

10. Rule 38 of the MCR, 2016 defines the term 'Sale Value' as the gross amount payable as per the sale invoice where the sale transaction is on an arms' length basis and such price is the sole consideration for the sale excluding taxes. The Explanation appended to the said rule further provides that for computation of 'Sale Value' there shall no deduction in respect of royalty, payments or contributions towards DMF and NMET. The relevant provision reads as under: -

> *"**38. Sale Value. –***
>
> *Sale value is the gross amount payable by the purchaser as indicated in the sale invoice where the sale transaction is on an arms' length basis and the price is the sole consideration for the sale, excluding taxes, if any.*
>
> *Explanation - For the purpose of computing sale value no deduction from the gross amount will be made in respect of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust*."
>
> (Emphasis supplied)

11. Rule 39 sub-rule (3) of the MCR, 2016 further provides how royalty is to be paid and the manner in which it is to be computed. It stipulates that royalty in respect of any mineral is to be paid on an Ad valorem basis. It further provides that royalty shall be calculated at the specified percentage of the 'average sale price' of such mineral for the month of removal / consumption as published by the Indian Bureau of Mines.

12. Rule 42 of the MCR, 2016 provides the manner in which the 'average sale price' shall be computed. Rule 42 sub-rule (1) stipulates that the average sale price of mineral grade / concentrate shall be computed on the basis of its 'ex-mine price'. Rule 42 sub-rule (3) further provides that the 'average sale price' shall be the weighted average of the 'ex-mine price' as computed in terms of sub-rule (2) of Rule 42. Rule 42 sub-rule (2)(b) provides that the 'ex-mine price' shall be computed as the sale value of the mineral less the actual expenditure incurred where the sale takes place domestically but beyond the mining lease area. The said provision reads as under: -

> ***"42. Computation of average sale price.***
>
> *(1) The ex-mine price shall be used to compute average sale price of mineral grade/concentrate.*
>
> *(2) The ex-mine price of mineral grade or concentrate shall be:*
>
> *(a) where export has occurred, the free-on-board (F.O.B) price of the mineral less the actual expenditure incurred beyond the mining lease area towards transportation charges by road, loading and unloading charges, railway freight (if applicable), port handling charges/export duty, charges for sampling and analysis, rent for the plot at the stocking yard, handling charges in port, charges for stevedoring and trimming, any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported.*
>
> *(b) where domestic sale has occurred, sale value of the mineral less the actual expenditure incurred towards transportation loading, unloading, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold.*
>
> *(c) where sale has occurred, between related parties and/or where the sale is not on arms' length basis, then such sale shall not be recognized as a sale*

for the purpose of this rule and in such case, sub-clause (d) shall be applicable.

(d) where sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade / concentrate for a particular State:

Provided that if for a particular mineral grade / concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade / concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be used, failing which the latest information for All India for the mineral grade / concentrate, shall be used.

(3) The average sale price of any mineral grade/ concentrate in respect of a month shall be the weighted average of the ex-mine prices of the non-captive mines, accordance with computed the in above provisions, the weight being the quantity dispatched from the mining lease area of mineral grade I concentrate relevant to each ex-mine price."

13. In other words, Rule 39(3) of the MCR, 2016 provides that royalty would be calculated as the percentage of the average of the 'Sale Value'. The Sale Value of any graded mineral / concentrate for the purposes of these rules in terms of Rule 38 is the gross amount payable as per the sale invoice including the royalty, DMF and NMET paid. This Sale Value minus the actual expenditure incurred (without deducting the royalty, DMF and NMET in terms of the Explanation to Rule 38) would be the ex-mine price of such mineral grade / concentrate. The weighted average of this 'ex-mine price' shall be the 'Average Sale Price' for the purposes of calculating royalty.

14. Similarly, under the Mineral Conservation and Development Rules, 2017 (for short, the "MCDR, 2017") that was enacted by the Central Government for the conservation and systematic development of minerals in exercise of its powers under Rule 18 of the MMDR Act, Rule 45(8)(b) provides that the 'Sale Value' for the purposes of the said rules is the gross amount payable without any deduction in respect of royalty, DMF and NMET paid. The said rule reads as under: -

*"**45. Monthly and annual returns –***

(8) In case of mining of minerals by the holder of a mining lease, the –

(b) ex-mine price of mineral grade or concentrate shall be,–

(I) where export has occurred, the total of, sale value on free-on-board (F.O.B) basis, less the actual expenditure incurred beyond the mining lease area towards –

- *(i) transportation charges by road;*
- *(ii) loading and unloading charges;*
- *(iii) railway freight (if applicable);*
- *(iv) port handling charges or export duty;*
- *(v) charges for sampling and analysis;*
- *(vi) rent for the plot at the stocking yard;*
- *(vii) handling charges in port;*
- *(viii) charges for stevedoring and trimming;*
- *(ix) any other incidental charges incurred outside the mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity exported;*

(II) where domestic sale of mineral has occurred, the total of sale value of the mineral, less the actual expenditure incurred towards loading, unloading, transportation, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area as notified by the Indian Bureau of Mines from time-to-time, divided by the total quantity sold;

(III) where sale has occurred, between related parties and is not on arms' length basis, then such sale shall not be recognised as a sale for the purposes of this rule and in such case, sub-clause shall be applicable;

(IV) where the sale has not occurred, the average sale price published monthly by the Indian Bureau of Mines for that mineral grade or concentrate for a particular State:

Provided that if for a particular mineral grade or concentrate, the information for a State for a particular month is not published by the Indian Bureau of Mines, the last available information published for that mineral grade or concentrate for that particular State by the Indian Bureau of Mines in the last six months previous to the reporting month shall be referred, failing which the latest information for all India for the mineral grade or concentrate, shall be referred;

(V) the per unit cost of production in case of captive mines."

15. It is the case of the petitioners that, in view of the Explanation(s) appended to the definition of 'Sale Value' in Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017, royalty which has already been paid in the previous month is again being factored for the purposes of computation of royalty to be paid for the subsequent months. Thus, it is the contention of the petitioners that this "compounding" of royalty by virtue of the aforesaid Explanations is manifestly arbitrary inasmuch as it has led to a cascading effect within the fold of determination of the rate of royalty under Section 9 sub-section (3) of the MMDR Act.

16. However, when it comes to computation of royalty in respect of coal, it was submitted by the petitioners that the Central Government has remedied the aforesaid anomaly by excluding the previously paid royalty and contributions towards DMF and NMET in its calculation, by way of an amendment *vide* Notification No. GSR 445(E) by inserting an Explanation in Entry A, Item 10 in the Second Schedule of the MMDR Act. The relevant provision reads as under: -

"Explanation:- For the purposes of this sub entry –

(iii)

(iv) Actual price means the sale invoice value of coal, net of statutory dues including taxes, · contribution to levies,· royalty, National Mineral Exploration Trust and District Mineral Foundation ... "

17. The petitioners have contended that for the purposes of computation of royalty there exists no intelligible differentia between coal and iron ore and thus, the exclusion of royalty, DMF and NMET contributions for computation of sale value for coal but not for other minerals such as iron is manifestly arbitrary and the aforesaid Explanation(s) to

Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is in consequence of violation of Article 14 of the Constitution and liable to be struck down.

18. During the course of hearing, our attention was also drawn to the fact that on 25.05.2021, a notice was issued by a committee of the Ministry of Mines inviting comments and suggestions from all stakeholders on this issue of double calculation of royalty for computation of the 'average sale price', and that after receiving the responses, a report dated 31.01.2022 was submitted by the said committee to the Ministry of Mines giving its recommendations on the incidence of compounding royalty.

19. Although the aforesaid report has not been made publicly available, yet the Ministry of Mines pursuant to the aforesaid report has issued a Notice dated 25.05.2022 for public consultation on amending the MMDR Act to bring reforms in the mining sector by *inter-alia* proposing amendment to the relevant rules for removing the cascading impact of royalty on royalty in the calculation of the 'average sale price'. The relevant portion of the aforesaid notice reads as under: -

> *"1. Calculation of ASP: Removing the cascading impact of royalty on royalty*
>
> *(iv) A committee was constituted by the Ministry of Mines under chairmanship by Shri Praveen Kumar, /AS (Retd.) with members from Ministry of Mines, NIT/ Aayog, Ministry of Steel, Indian Bureau of Mines (IBM) and Indian Statistical Institute to examine the incidence of double calculation of royalty. The committee concluded that since the sale value already includes royalty, DMF and NMET, the Jessee pays royalty on royalty, DMF and NMET. Due to this, there is an additional charge on the miners under the current methodology.*
>
> *(vi) Accordingly, it is proposed to (i) introduce new section in the MMDR Act regarding ASP; (ii) the provision shall specifically provide that ex-mine price for determination of ASP shall exclude GST, export duty, royalty. DMF & NMET & such other levies as may be prescribed; (iii) the change will be applicable for all the MLs, whether auctioned/ granted before or after the commencement of the proposed MMDR*

Amendment Act, for the minerals removed or consumed from the leased area after the commencement of the said Act; and (iv) adoption of new formula only for the future dues for existing MLs arising after the amendment"

20. The petitioners on the strength of the aforesaid notices issued by the Ministry of Mines have contended that although the respondents themselves have acknowledged the compounding of royalty in the computation of 'average sale price' yet no action or amendment has been made to the MMDR Act and the relevant rules thereunder in this regard.

21. In such circumstances referred to above, the petitioners have come up before this Court with the present writ petition.

B. SUBMISSIONS OF THE PETITIONER

22. Dr. A.M. Singhvi, the learned senior counsel for the petitioners presented the statutory background to us in his submissions. He submitted that Section 9(2) of the MMDR Act contemplates payment of royalty at the rates specified in the Second Schedule to the MMDR Act and that Section 9(3) of the MMDR Act affords revision of the rates, but with a proviso restricting it to once every 3 years.

23. Dr. Singhvi apprised us of the fact that Section 13 of the MMDR Act empowers the Government of India to make rules, *inter alia,* with respect to the manner in which royalty shall be payable and consequent to such powers, the MCR, 2016 have been enacted. He submitted that Rule 39(3) of the MCR, 2016 provides that where royalty is to be paid on *ad valorem* basis, it shall be calculated as a specified percentage of the ASP as published by the Indian Bureau of Mines for the month of removal/consumption. Moreover, he underlined that Rule 42 provides for the manner of computation of the ASP, and sub-rule (2)(b) thereof excludes the actual expenditure incurred from the sale value, in its prescriptions of the manner of computation.

24. We were further apprised of the fact that the method to compute ASP is in turn governed by Rule 38 of the MCR, 2016 which defines the term "sale value" and the Explanation thereto which stipulates that the royalty as well as the contributions made to DMF and NMET will not be deducted while computing the "sale value". He pointed out a similar method of computation in Rule 45(8)(a) of the MCDR, 2017 which prescribes the manner of filing of monthly and annual returns.

25. He submitted that the present petition seeks to challenge the Explanation to Rule 38 of the MCR, 2016 and Explanation to Rule 45(8)(a) of the MCDR, 2017 as they mandate the non-exclusion of royalty and the contributions made to DMF and NMET, in the computation of the "sale value".

26. The learned senior counsel contended that the Impugned Explanations lead to a situation where the royalty as well as payments to DMF and NMET made previously, are included in the ASP, which, in turn, is used as the basis to compute royalty for the next month. Such method of computation of ASP effectively results in the payment of royalty as well as DMF and NMET contributions not only on the value of the ore/mineral, but also on the royalty, DMF and NMET contributions paid in the previous month. Thus, there is an imposition of royalty on a royalty. It was contended that the Impugned Explanations create a twin charge on royalty: *first*, a charge on the value of the mineral before payment of royalty at the prescribed rate; and, *secondly*, a re-charge of royalty on royalty at a prescribed rate. It was submitted that such re-charge of royalty on royalty is *ultra vires* to the scope of Section 9(3) of the MMDR Act.

27. The learned senior counsel contended that the Impugned Explanations are manifestly arbitrary for the following reasons:

(i) The present methodology for computing royalty leads to a compounding or cascading effect as it creates a charge of royalty on previous month's royalty.

(ii) It has been held by a 9-Judge Bench of this Court in ***Mineral Area Development Authority & Anr. v. Steel Authority of India Limited & Anr.*** reported in **2024 SCC OnLine SC 1974** that royalty is a consideration for extracting minerals. Therefore, such consideration cannot be compounded every month.

(iii) Rule 42(2)(b) of the MCR, 2016 excludes actual expenditure incurred towards transportation, loading, unloading, rent for the plot at the stocking yard, charges for sampling and analysis and any other charges beyond mining lease area. However, the impugned Explanations do not exclude royalty, DMF and NMET contributions from such actual expenditure. It was contended that royalty is also an expense as it has been excluded from the category of taxes, therefore, it is illogical to not exclude the same from the ex-mine price.

28. The learned senior counsel referred to the following judgments pronounced by this Court to submit that manifest arbitrariness is a well-recognized ground to challenge the validity of a legislation and the same has been acknowledged as a facet of Article 14:

- ***Manish Kumar v. Union of India*** reported in **(2021) 5 SCC 1**;
- ***Dy. Commissioner of Income Tax & Anr. v. Pepsi Foods Limited*** reported in **(2021) 7 SCC 413**.

29. Dr. Singhvi also submitted that there is no statutory prescription for the inclusion of royalty, DMF and NMET contributions while computing ASP. It is only the Impugned Explanations which save these payments from being excluded thereby resulting in a compounding or cascading effect.

30. We were informed by the learned senior counsel that this anomaly has been noticed by the Government of India in a report of a committee set up by the Ministry of Mines and a public notice dated 25.05.2022 has been published to call for suggestions in this regard. He submitted that the Ministry of Mines is charged with administering the MMDR Act. Therefore, the Consultation Paper of 2022, published by it is *contemporeo exposito* and is a valid aid of construction of the relevant Rules and the Impugned Explanations as per the dictum of this Court in **K.P. Varghese v. ITO** reported in **(1981) 4 SCC 173**.

31. Furthermore, such anomaly was remedied by the Ministry of Coal with respect to only coal by effecting an amendment to Schedule II of the MMDR Act, which defined "actual price" for the purpose of imposing royalty at *ad valorem* rates, to mean the sale invoice value of coal, net of statutory dues including taxes, levies, royalty, contribution to National Mineral Exploration Trust and District Mineral Foundation. The learned senior counsel submitted that remedying such anomaly for coal but not for iron ore creates a classification which has no intelligible differentia and is in violation of Article 14.

32. It was also submitted that lessees such as the petitioner herein, who have secured a mine in an auction, also pay a premium in terms of Rules 8 and 13(2) of the Mineral (Auction) Rules, 2015 respectively which is calculated on the basis of the flawed definition of ASP.

33. Dr. Singhvi while countering the submissions of the learned senior counsel for the Union of India, submitted that the compounding or cascading effect occurring every single month cannot come within the fold of determination of the rate of royalty under Section 9(3) of the MMDR Act, as it would be in contravention to the proviso thereto which prohibits a change of rate of royalty for three years.

C. SUBMISSIONS OF THE RESPONDENT

34. Mr. Shailesh Madiyal, the learned ASG appearing on behalf of the Union of India presented the scheme of the MMDR Act and the MCR, 2016 in relation to the computation of royalty and submitted that Section 9(1) of the MMDR Act requires the holder of a mining lease to pay royalty in respect of the mineral being mined from the lease area at the rate specified in Schedule II of the MMDR Act. He apprised us of the fact that Section 9(3) permits the Government of India to issue notifications to amend Schedule II to increase or reduce the rate at which royalty is payable. He informed that the rate of royalty for iron ore at present is 15% of average sale price on *ad valorem* basis.

35. The learned ASG submitted that the computation of the ASP is to be done on a monthly basis and as per Rule 42(3), the ASP of any mineral grade/concentrate for a particular month shall be the weighted average of the ex-mine prices of the non-captive mine. He submitted that the ASP with respect to a particular month is unrelated to the ASP of the previous month and there can be no cumulative effect on the royalty charged.

36. It was submitted that Rule 42(2)(b) of the MCR, 2016 provided that where domestic sale has occurred, the ex-mine price of a mineral grade or concentrate is the "sale value" of the mineral less the actual expenditure incurred towards transportation, loading and unloading, etc. divided by the total quantity sold.

37. The learned senior counsel then proceeded to submit that the term "sale value" is defined in Rule 38 of the MCR, 2016 and the Explanation thereto provides that no deduction from the gross amount will be made in respect of royalty, payments to the DMF and NMET.

38. Mr. Madiyal submitted that the writ petition, challenging the Impugned Explanations, has been filed under Article 32 of the Constitution of

India and therefore, is not maintainable as the petitioner ought to have approached the High Court under Article 226.

39. The learned senior counsel referred to the decision of a 5-Judge Bench of this Court in the case of ***Natural Resources Allocation, In Re: Special Reference No. 1 of 2012*** reported in **(2012) 10 SCC 1** to submit that the methodology pertaining to disposal of natural resources is an economic policy entailing intricate economic choices. Therefore, the manner of computation of royalty is a matter of policy and must be left to the discretion of the executive and legislative authorities, as the case may be.

40. The learned ASG that the petitioner's challenge to the Impugned Explanations does not meet the threshold of 'manifest arbitrariness' that is, whether an action was done or legislation was enacted capriciously, irrationally and/or without adequate determining principle, and cannot be excessive and disproportionate. He vehemently argued that no evidence or data was provided by the petitioner to show that the Impugned Explanations result in an endless monthly cumulative exaction of royalty. He submitted that the ASP for a succeeding month could in fact be lower than that of the previous month and no consistent monthly cumulative effect was possible.

41. Mr. Madiyal also contended that at the time of the auction of mining leases, the bids submitted are taking into consideration the existing legal regime, which includes Rule 38 of the MCR, 2016 as well as the Explanation thereto, and the bidders are aware that royalty and auction premium is calculated on the basis of the sale value which is inclusive of the royalty and contributions to DMF and NMET of the previous month. He submitted that the revenue of a State comprises of the royalty collected from such mining leases. Changing the methodology of calculation of "sale value" by excluding the royalty payable for mining leases which have already been auctioned would therefore, result in loss of revenue to the States as estimated at the beginning of the auctioning process. It was submitted that it is important that the revenue of the state Governments should be protected.

42. He further submitted that there is no legal bar on the imposition of royalty on royalty and cannot be adjudged on the same footing as a case of "tax on tax", in light of this Court's decision in ***Mineral Area Development Authority*** (supra) wherein it was held that royalty is not a tax.

43. On the status of public consultations, Mr. Madiyal submitted that the Committee constituted by the Ministry of Mines has received the views & suggestions from various stakeholders as well as from the State Governments. However, the issue is under consideration and no decision yet has been taken on the matter. The learned ASG apprised us of the fact that the Committee is deliberating on the question of the amendment of the Rules and the impact of such amendment on the determination of royalty and auction premium payable in respect of mining leases auctioned prior to the amendment, if any carried out in the future.

D. ISSUE FOR DETERMINATION

44. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the pivotal question of law that falls for our consideration: -

I. Whether, the Explanation(s) appended to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 respectively are unreasonable and manifestly arbitrary and in consequence of violation of Article 14 of the Constitution?

E. ANALYSIS

45. Before, we proceed with the analysis, it is necessary to understand the case of the petitioners in the present litigation as discernible from their pleadings. The argument of the petitioners in sum is twofold: -

(i) ***First,*** that the very inclusion of the royalty, and contributions towards DMF and NMET paid previously for the purpose of computation of the requisite royalty for subsequent months is manifestly arbitrary. The said mechanism of computation of royalty has a cascading effect on the rate of royalty for every subsequent month.

(ii) ***Secondly,*** the exclusion of the royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals such as iron ore for computation of royalty is unreasonable and manifestly arbitrary. There exists no intelligible differentia between coal and iron ore or any other similar mineral and thus the act of the legislature in excluding the royalty, and contributions towards DMF and NMET for one but not for the other i.e., for coal but not for iron is in violation of Article 14

of the Constitution and thus, the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is liable to be struck down.

i. Whether the manner or mechanism of computation of royalty under the MCR, 2016 and MCDR, 2017 is manifestly arbitrary?

46. In ***M.P. Oil Extraction & Anr. v. State of Madhya Pradesh & Ors***, reported in **(1997) 7 SCC 592**, this Court held that policy decisions are the domain of the executive authority of the State and that the courts should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the stature or the Constitution of India. It further observed that unless the policy framed is absolutely capricious or not informed by reasons, the court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. The relevant observations read as under: -

> *"41. After giving our careful consideration to the facts and circumstances of the case and to the submissions made by the learned counsel for the parties, it appears to us that the Industrial Policy of 1979 which was subsequently revised from time to time cannot be held to be arbitrary and based on no reason whatsoever but founded on mere ipse dixit of the State Government of M.P. The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy*

and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the stature or the Constitution of India. The supremacy of each of the three organs of the State i.e. legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

(Emphasis supplied)

47. Similarly, in ***Premium Granites & Anr. v. State of Tamil Nadu & Ors.*** reported in **(1994) 2 SCC 691**, this Court observed that it is not the domain of the courts to consider as to whether a particular policy is wise or that a better public policy can be evolved, and that such matters must be left to the discretion of the executive and legislature. The relevant observations read as under: -

"54. It is not the domain of the Court to embark upon unchartered ocean of public policy in an exercise to consider as to whether the particular public policy is wise or a better, public policy can be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. …"

(Emphasis supplied)

48. In yet one another decision of this Court in ***Delhi Science Forum and Others v. Union of India and Another*** reported in **(1996) 2 SCC 405** it was observed that the courts should not express opinion as to whether a particular policy should be adopted or not, and no such direction can be given unless they pertain to the implementation of any policy as a result of which there is a violation or infringement of any constitutional or statutory provision. The relevant observations read as under: -

> *"7. What has been said in respect of legislations is applicable even in respect of policies which have been adopted by Parliament. They cannot be tested in Court of Law. The courts cannot express their opinion as to whether at a particular juncture or under a particular situation prevailing in the country any such national policy should have been adopted or not. There may be views and views, opinions and opinions which may be shared and believed by citizens of the country including the representatives of the people in Parliament. But that has to be sorted out in Parliament which has to approve such policies. Privatisation is a fundamental concept underlying the questions about the power to make economic decisions. What should be the role of the State in the economic development of the nation? How the resources of the country shall be used? How the goals fixed shall be attained? What are to be the safeguards to prevent the abuse of the economic power? What is the mechanism of accountability to ensure that the decision regarding privatisation is in public interest? All these questions have to be answered by a vigilant Parliament. Courts have their limitations because these issues rest with the policy-makers for the nation. No direction can be given or is expected from the courts unless while implementing such policies, there is violation or infringement of any of the constitutional or statutory provision. The new Telecom policy was placed before Parliament and it shall be deemed that Parliament has approved the same. This Court cannot review and examine as to whether the said policy should have been adopted. Of course, whether there is any legal or constitutional bar in adopting such policy can certainly be examined by the Court".*
>
> (Emphasis supplied)

49. In ***Balco Employees' Union v. Union of India*** reported in **(2002) 2 SCC 333** this Court held that it is not for the courts to consider the relative merits of different economic policies and consider whether a better policy may be evolved. It further held that when it comes to policy decisions on economic matters, the courts ought to be very circumspect in disturbing such conclusions unless there is

an illegality in the decision itself. The relevant observations read as under: -

> *"93. Wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the Courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. For testing the correctness of a policy, the appropriate forum is the Parliament and not the Courts.*
>
> *xxx xxx xxx*
>
> *98. In the case of a policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgement of the experts who may have arrived at a conclusion unless the Court is satisfied that there is illegality in the decision itself."*
>
> (Emphasis supplied)

50. It is possible that at the relevant time in respect of some of the minerals, royalty was being computed without inclusion of the royalty, DMF and NMET contributions previously paid, however, that does not mean that the Central Government's power is restricted and that the Central Government cannot alter the mode of computation of royalty. Merely, because the methodology or formula for computation of royalty has been altered from what it was under the erstwhile MCR, 1960 will not make the new mechanism or methodology unreasonable or arbitrary and liable to be struck down.

51. From the above conspectus of decisions referred to by us, it is clear that the whether a particular policy is wise or that a better public policy can be evolved is purely the domain of the executive of the state. Matters such as computation of royalty or the levy of such royalty on different minerals is entirely a matter of policy making which is beyond the expertise and domain of the courts. It is no longer res-integra, that a question as regards the validity of a particular policy is concerned with reviewing not the merits of such decision or policy, but the very policy making process itself. The duty of the courts is to confine itself to the question of legality and

its concern should be whether a policymaking authority exceeded its powers, whether it committed an error of law or committed a breach of the rules of natural justice or reached a decision which no reasonable authority would have reached or whether it has abused its powers.

52. In a constitutional democracy, each branch of government—executive, legislative, and judiciary — has a defined role and operates within its designated boundaries. This separation of powers ensures that one branch does not encroach upon the functions of the others, preserving a system of checks and balances crucial to democratic governance. Within this framework, courts are primarily responsible for interpreting and upholding the law, while the executive and legislature hold the mandate to formulate and implement policy. This division is essential, as it aligns with the principle that policy-making, particularly in areas requiring specialized knowledge, foresight, and discretion, should remain within the domain of the elected representatives and those with the requisite expertise.

53. Judicial restraint is rooted in the understanding that courts should respect the decisions made by the legislative and executive branches, provided these decisions are legally sound and constitutionally valid. By adhering to judicial restraint, courts avoid overstepping their constitutional role and thereby prevent potential conflicts with the executive and legislative branches. The principle of separation of powers supports the idea that each branch has a unique role, and mutual respect between these branches is essential for the proper functioning of government. The courts are to ensure that laws and policies do not infringe upon citizens' rights or exceed the authority granted by law. However, this role does not extend to evaluating whether a policy is "wise" or whether a better one could be devised, and rather this process is entrusted to the legislature and executive, which have the expertise to make these determinations.

54. The doctrine of judicial restraint, which is central to this discussion, emphasizes that courts should exercise caution and avoid involvement in policy decisions, as these are complex judgments that require a balancing of diverse and often competing interests. Policies are crafted based on thorough analysis of social, economic, and political factors, considerations beyond the court's purview. The court is tasked with ensuring that policies do not breach constitutional provisions

or statutory limits; however, they should not replace policymakers' judgments with their own unless absolutely necessary.

55. Policy decisions often require the expertise of professionals and specialists in fields such as economics, public health, national security, and environmental science. These domains involve specialized knowledge that judges, as generalists in legal matters, may lack. For instance, in economic policy, the executive may decide on trade tariffs or subsidies based on extensive data and projections that aim to balance domestic industry support with global trade commitments. The courts, lacking the same level of economic expertise and without the authority to make trade-offs among competing policy objectives, is typically not equipped to second-guess these kinds of decisions.

56. While courts have the power of judicial review to ensure that executive actions and legislative enactments comply with the Constitution, this power is not absolute. Judicial review is meant to act as a safeguard against actions that overstep legal boundaries or infringe on fundamental rights, but it does not entail a comprehensive re-evaluation of the policy's wisdom. The judicial review of policy decisions is limited to assessing the legality of the decision-making process rather than the substantive merits of the policy itself. For example, if a government policy infringes on fundamental rights or discriminates against a particular group, the courts have a duty to strike down such policies. However, in the absence of constitutional or legal violations, the courts should respect the policy choices made by the executive or legislature.

57. The duty of the court in policy-related cases is primarily to determine whether the policy falls within the scope of the authority granted to the relevant body. If the policy decision is within the executive's legal authority and has been made following proper procedures, the courts should defer to the expertise and discretion of the policy-makers, even if the policy appears unwise or imprudent. This restraint ensures that the courts do not impose its own perspective on policy matters that are rightly the responsibility of other branches.

58. Economic and social policies often involve significant redistribution of resources, prioritization of interests, and balancing of public needs, which requires careful consideration by those with specialized knowledge and broad perspectives. In the realm of economic policy, for instance, questions regarding the allocation of subsidies, fiscal

deficits, or budget allocations are best managed by the executive, which has access to economic data and is accountable to the public for its financial management. Judicial interference in such areas risks creating disruptions in the economic balance that policy-makers are trying to achieve.

59. Courts should assume that policy-makers act in good faith unless there is clear evidence to the contrary. As long as the policy does not contravene the Constitution or violate statutory provisions, it is not the role of the courts to question the wisdom or fairness of such policy.

60. While judicial restraint is essential in respecting the boundaries of each branch of government, it does not mean that courts abdicate their responsibility to protect constitutional rights. The courts must still intervene if a policy infringes on fundamental rights, discriminates unfairly, or breaches statutory provisions. The role of the court in such instances is to protect individuals and groups from unlawful actions while maintaining the overall integrity of the policy-making process. This balance ensures that while courts do not interfere in matters of policy wisdom, they remain vigilant guardians of constitutional rights.

61. In the present case, there is no doubt that the mechanism for computation of royalty in terms of Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 devised by the respondents might have onerous implications in monetary terms on the mining leaseholders inasmuch as there is a compounding effect on the rate of royalty for every subsequent month. However, this Court in the absence of anything to show that such policy is in excess of the powers or domain of the respondents herein or in breach of any statutory provision, cannot strike down the same.

62. It was argued by the petitioners, that here is no statutory prescription for the inclusion of royalty, DMF and NMET contributions while computing ASP. In other words, but for these Explanations, there would be no compounding or cascading effect in the computation of royalty.

63. This Court in ***State of Punjab v. Principal Secretary to the Governor of Punjab & Anr.*** reported in **2023 INSC 1017** it was held that a proviso may be in the form of an exception or in the form of an explanation or in addition to the substantive provision of a statute. The relevant observations read as under: -

> *"22. A proviso, as is well settled, may fulfil the purpose of being an exception. Sometimes, however, a proviso*

may be in the form of an explanation or in addition to the substantive provision of a statute. [...]"

64. Similarly in ***State of U.P. v. Achal Singh***, reported in **(2018) 17 SCC 578** this Court reiterated that an Explanation becomes part of the main section and can be read as proviso and be understood as explaining the scope of the main provision. The relevant observations read as under: -

> *"19. Reliance was also placed on the decision rendered by this Court in State of Bombay v. United Motors (India) Ltd. [State of Bombay v. United Motors (India) Ltd. (1953) 1 SCC 514 : AIR 1953 SC 252] and Bengal Immunity Co. Ltd. v. State of Bihar [Bengal Immunity Co. Ltd. v. State of Bihar, AIR 1955 SC 661] , in which it has been observed that Explanation can be read as proviso and it explains the scope of the main provision and the Explanation becomes part of the main section. There is no dispute with the aforesaid proposition. The Explanation in the Rules in question has to be applied to both the situations as contemplated in Rule 56(c) and is applicable to both the exigencies not only when the Government decides to retire an employee, but also applicable where voluntary retirement is sought by an employee. It cannot be said that no further restriction by Explanation has been added in a case where an employee has decided to obtain voluntary retirement. The public interest is the prime consideration on which authority has to decide such a prayer as per the rules applicable in the State of Uttar Pradesh."*
>
> (Emphasis supplied)

65. What can be discerned from the above is that an Explanation must be read so as to harmonise with and clear up any ambiguity in the main section. It should not be so construed as to widen the ambit of the section. An explanation does not enlarge the scope of the original section that it is supposed to explain. It is axiomatic that an explanation only explains and does not expand or add to the scope of the original section. The purpose of an explanation is, however, not to limit the scope of the main provision. The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. An 'explanation' must

be interpreted according to its own tenor. Sometimes an explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus, an explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa. Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision.

66. Merely because the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 provides that there shall be no deduction of royalty, payments to the District Mineral Foundation and payments to the National Mineral Exploration Trust from the gross amount for the purpose of computing sale value does not in any manner makes the aforesaid Explanation in derogation of the main provision. The aforesaid Explanation(s) are merely clarificatory in nature inasmuch as it explains the ambiguities in the main provisions of Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017, and thus, they cannot be said to exceed the ambit of the main provisions or in contravention of the statutory scheme.

ii. Whether the exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals is unreasonable and manifestly arbitrary?

67. In ***R.K. Garg v. Union of India*** reported in (1981) 4 SCC 675, this Court observed that laws relating to economic activities should be viewed with greater latitude and the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula. The relevant observations read as under: -

> "*8. Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It has been said by no less a person than*

Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved."

(Emphasis supplied)

68. Similarly in ***State of Tamil Nadu and Anr. v. National South Indian River Interlinking Agriculturist Association*** reported in **(2021) 15 SCC 534** it was held that courts should show a higher degree of deference to matters concerning economic policy. The relevant observations read as under: -

> *"11. … It is also settled that the Courts would show a higher degree of deference to matters concerning economic policy, compared to other matters of civil and political rights. …"*

69. While examining the challenge to the validity of laws relating to economic activities, the courts must be slow and circumspect. A higher degree of deference needs to be shown in such matters, and sufficient flexibility should be given to the legislature and the executive in dealing with economic matters. Complex issues of economic and fiscal nature cannot be construed by any strait-jacket formula or unidirectional approach. This Court has time and again recognised that a judicial hands-off approach must be followed *qua* economic legislation and that the legislature is to be allowed wide latitude in experimenting with economic legislation, by virtue of it being an extension of the Government's economic policy.

70. Since the MMDR Act and the rules thereunder pertain to the extraction, disposal and sale of natural resources which is an economic policy that entails intricate economic choices and have a direct effect on the macroeconomics, we are of the considered opinion that when it comes to computation of royalty the legislature must have greater play in the joints.

71. The exclusion of royalty, and contributions towards DMF and NMET paid previously for coal but not for other minerals cannot be termed as arbitrary or unreasonable, merely because the computation for one differs from the other in certain aspects. Deference needs to be shown to the legislature in deciding how royalty must be computed in respect of different mineral grades / concentrates.

72. However, the present petition particularly the challenge to the validity of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is unique in its own way. While there is nothing to show that such policy is in excess of the powers or domain of the respondents herein or in breach of any statutory provision, at the same time, we should not ignore or overlook the fact that the legislature itself has acknowledged the anomaly in compounding of royalty etc. for the purpose of computation of average sale price.

73. Similarly, though the discretion to exclude previously paid royalty and contributions for coal but not for other minerals cannot be approached in a rigid manner and it would be incorrect to import policies framed and tailored by the executive for one particular subject-area and blanketly apply it to other related subject-areas, as it is the executive which is best suited to determine the fine distinctions existing between interlacing or seemingly similar domains and formulate distinct policies to best factor in the dissimilarities.

74. However, this Court in ***Tata Steel Ltd. v. Union of India***, reported in **(2015) 6 SCC 193** while examining Rule 64B of the erstwhile MCR, 1960 has observed that the aforesaid rules were general in nature and applicable to types of minerals including coal. This Court rejected the categorization of coal on a different pedestal from other minerals under the MMDR Act for the purpose of levy of royalty. The relevant observations read as under: -

> "***70.*** *There is nothing to indicate in Rule 64-B and Rule 64-C of the MCR that coal has been put on a different pedestal from other minerals mentioned in the MMDR Act read with the Second Schedule thereto. It is, therefore, difficult to accept the view canvassed by the Union of India that these Rules "may not be particularly applicable on coal minerals". That apart, the stand of the Union of India is not definite or categorical ("may not be"). In any event,*

we are not bound to accept the interpretation given by the Union of India to Rule 64-B and Rule 64-C of the MCR as excluding only coal. On the contrary, in NMDC [National Mineral Development Corpn. Ltd. v. State of M.P. (2004) 6 SCC 281] this Court has observed that these Rules are general in nature, applicable to all types of minerals, which includes coal. The expression of opinion by the Union of India is contrary to the observations of this Court.

71. *Therefore, on a plain reading of Rule 64-B and Rule 64-C of the MCR, we are of the opinion that with effect from 25-9-2000 when these Rules were inserted in the MCR, royalty is payable on all minerals including coal at the stage mentioned in these Rules, that is, on removal of the mineral from the boundaries of the leased area. For the period prior to that, the law laid down in Central Coalfields Ltd. [Central Coalfields Ltd. v. State of Jharkhand, Civil Appeal No. 8395 of 2001 decided by three learned Judges on 24-9-2003. Ed. : Now reported at (2015) 6 SCC 220.] will operate, as far as coal is concerned, from 10-8-1998 when SAIL [State of Orissa v. SAIL (1998) 6 SCC 476] was decided, though for different reasons.*"

(Emphasis supplied)

75. Even the respondents herein appear to have acknowledged that the differing mechanism for computation of royalty for coal and other minerals is not based on any fine distinction between the two, but rather an anomaly in the MCR, 2016 and MCDR, 2017, which is why it constituted a committee to look into the same and has proposed amendments for rectifying the same.

76. In view of the fact that the appropriate authorities are actively considering the issue of compounding royalties in the computation of average sale price for all other minerals, and the fact that a notice for public consultation on amending the MMDR Act to *inter-alia* address the aforementioned issue, we may not say anything further as regards whether the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 are manifestly arbitrary or not. Although, the computation of royalty for different minerals is purely a matter of policy yet we should not just shut our eyes to the *prima-facie* anomaly that exists both in the very computation mechanism of average sale price

for minerals in terms of the aforesaid provisions and the perplexing stance of exclusion of only coal from such mechanism despite the general nature and application of the aforesaid rules.

77. However, we intend to grant one last opportunity to the respondents herein to seriously consider the mechanism of computation of average sale for the purposes of determining the rate of royalty for all other minerals in terms of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017. We direct the respondents to conclude the process of public consultation in respect of the compounding of royalties and take a well-meaning decision keeping in mind the representations made by the petitioners herein.

78. We may remind the respondents that, it cannot continue to keep the aforesaid issue in limbo on the pretext of ongoing process of public consultation process. In this regard, we may refer to the decision in ***State of Jharkhand v. Brahmputra Metallics Ltd.,*** reported in **(2023) 10 SCC 634**, wherein the following observations of this Court are significant: -

> *"50. It is one thing for the State to assert that the writ petitioner had no vested right but quite another for the State to assert that it is not duty-bound to disclose its reasons for not giving effect to the exemption notification within the period that was envisaged in the Industrial Policy, 2012. Both the accountability of the State and the solemn obligation which it undertook in terms of the policy document militate against accepting such a notion of State power. The State must discard the colonial notion that it is a sovereign handing out doles at its will. Its policies give rise to legitimate expectations that the State will act according to what it puts forth in the public realm. In all its actions, the State is bound to act fairly, in a transparent manner. This is an elementary requirement of the guarantee against arbitrary State action which Article 14 of the Constitution adopts. A deprivation of the entitlement of private citizens and private business must be proportional to a requirement grounded in public interest. This conception of State power has been recognised by this Court in a consistent line of decisions. As an illustration, we would like to extract this Court's observations in National Buildings Construction*

Corpn. [National Buildings Construction Corpn. v. S. Raghunathan (1998) 7 SCC 66 : 1998 SCC (L&S) 1770] : (SCC p. 75, para 18)

> *"18. … The Government and its departments, in administering the affairs of the country, are expected to honour their statements of policy or intention and treat the citizens with full personal consideration without any iota of abuse of discretion. The policy statements cannot be disregarded unfairly or applied selectively. Unfairness in the form of unreasonableness is akin to violation of natural justice.""*

(Emphasis supplied)

79. We may also remind the respondents of one another decision of this Court in ***Ramana Dayaram Shetty v. International Airport Authority of India & Ors.*** reported in **AIR 1979 SC 1628** wherein it was held that an executive authority must be rigorously held to the standard by which it professes its actions to be judged. The relevant observations read as under: -

> *"10. [...] It is a well-settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. [...]"*

(Emphasis supplied)

80. Once the respondents have themselves initiated a public consultation process for amending the MMDR Act to *inter-alia* address the aforementioned anomaly in computation of royalty, they must take a prompt decision in this regard. Merely because it has the discretion to take such policy decision does not mean that it can endlessly keep on prolonging the decision-making process whereby the very discretion is rendered ad-lib and the issue in itself a forgone conclusion.

81. Before, we close this matter, we must make a reference to the decision in ***Narottam Kishore Deb Varman v. Union of India,*** reported in **(1964) 7 SCR 55** wherein this Court was called upon to decide a batch of petitions challenging the validity of Section 87B of the Code

of Civil Procedure, 1908. In the said decision, although this Court stopped short from holding the provision as unconstitutional yet it called upon the government to examine if the provision was to be allowed to continue for all times to come. It further observed that the considerations on which the validity of the provision is founded will wear out with the passage of time and may later become open to a serious challenge. The relevant observations read as under: -

> *"11. Before we part with this matter, however, we would like to invite the Central Government to consider seriously whether it is necessary to allow Section 87-B to operate prospectively for all time. The agreements made with the Rulers of Indian States may, no doubt, have to be accepted and the assurances given to them may have to be observed. But considered broadly in the light of the basic principle of the equality before law, it seems somewhat odd that Section 87-B should continue to operate for all time. For past dealings and transactions, protection may justifiably be given to Rulers of former Indian States; but the Central Government may examine the question as to whether for transactions subsequent to 26th of January, 1950, this protection need or should be continued. If under the Constitution all citizens are equal, it may be desirable to confine the operation of Section 87-B to past transactions and not to perpetuate the anomaly of the distinction between the rest of the citizens and Rulers of former Indian States. With the passage of time, the validity of historical considerations on which Section 87-B is founded will wear out and the continuance of the said section in the Code of Civil Procedure may later be open to serious challenge."*
>
> (Emphasis supplied)

82. Similarly in ***H.H. Shri Swamiji of Shri Amar Mutt v. Commr., Hindu Religious and Charitable Endowments Deptt.***, reported in **(1979) 4 SCC 642**, this Court was called upon to determine the constitutionality of application of the Madras Hindu Religious Charitable Endowments Act to South Kanara District. This Court observed that even after the passage of 23 years, no serious attempts were made to remove the inequality that was being caused in the South Kanara District by the

said Act. However, this Court while refraining itself from declaring the law as inapplicable, called upon the legislature look into the issue in the hope that it would act promptly, lest the said Act suffer a serious and successful challenge in the not-so-distant future. The relevant observations read as under: -

> *"31. But that is how the matter stands today. Twenty-three years have gone by since the States Reorganisation Act was passed but unhappily, no serious effort has been made by the State Legislature to introduce any legislation — apart from two abortive attempts in 1963 and 1977 — to remove the inequality between the temples and Mutts situated in the South Kanara Disrict and those situated in other areas of Karnataka. Inequality is so clearly writ large on the face of the impugned statute in its application to the district of South Kanara only, that it is perilously near the periphery of unconstitutionality. We have restrained ourselves from declaring the law as inapplicable to the district of South Kanara from today but we would like to make it clear that if the Karnataka Legislature does not act promptly and remove the inequality arising out of the application of the Madras Act of 1951 to the district of South Kanara only, the Act will have to suffer a serious and successful challenge in the not distant future. We do hope that the Government of Karnataka will act promptly and move an appropriate legislation, say, within a year or so. A comprehensive legislation which will apply to all temples and Mutts in Karnataka, which are equally situated in the context of the levy of fee, may perhaps afford a satisfactory solution to the problem. This, however, is a tentative view-point because we have not investigated whether the Madras Act of 1951, particularly Section 76(1) thereof, is a piece of hostile legislation of the kind that would involve the violation of Article 14. Facts in regard thereto may have to be explored, if and when occasion arises."*
>
> (Emphasis supplied)

83. In view of the decisions referred to above, we may only say that since the respondents herein are already in *seisin* of the anomaly in computation of royalty and the policy is being reconsidered on

the grounds raised by the petitioners herein, we do not say anything further as regards the provisions in question other than what we have observed. We clarify that this decision shall not preclude the petitioners from challenging the final policy decision that the respondents may take on completion of the ongoing consultation process.

F. CONCLUSION

84. In view of the aforesaid, we grant the respondents a period of 2-months from the date of pronouncement of this judgment to conclude the public consultation process undertaken for amending the MMDR Act initiated pursuant to the Notice dated 25.05.2022 and take a final decisive call in regard to the cascading impact of royalty on royalty in the calculation of the 'average sale price' by virtue of the Explanation(s) to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017.

85. The challenge to the validity of Explanation(s) appended to Rule 38 of the MCR, 2016 and Rule 45 of the MCDR, 2017 is answered accordingly.

86. The Registry shall notify this matter before an appropriate Bench after a period of two months from the date of pronouncement of this judgment to report compliance of our directions.

Result of the case: Matter to be notified to report compliance of directions.

†*Headnotes prepared by:* Divya Pandey

[2024] 12 S.C.R. 108 : 2024 INSC 849

Aslam Ismail Khan Deshmukh
v.
Asap Fluids Pvt. Ltd. & Anr.

(Arbitration Petition No. 20 of 2019)

07 November 2024

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

Issue for Consideration

Petitioner sought appointment of an arbitrator for the adjudication of disputes and claims in terms of the Shareholders Agreement between the parties. Whether the reference under Section 11(6) of the Arbitration & Conciliation Act, 1996, should be declined by examining whether the substantive claims of the petitioner are *ex facie* and hopelessly time barred.

Headnotes†

Arbitration & Conciliation Act, 1996 – s.11(6) – Appointment of Arbitrators – Jurisdiction of referral court – Scope of interference – Petitions filed u/s.11(6), if within limitation:

Held: Courts at the referral stage can interfere only in rare cases where it is manifest that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute – While determining the issue of limitation in the exercise of powers u/s.11(6), the referral court must only conduct a limited enquiry for the purpose of examining whether the s.11(6) application has been filed within the limitation period of three years or not – At this stage, the referral court would not indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred – Such a determination must be left to the decision of the arbitrator – Petitioner had issued notice invoking arbitration on 23.01.2017 which was delivered to both the respondents on 24.01.2017 – However, the respondents failed to reply to the said notice within 30 days i.e. within 23.02.2017 – Therefore, the period of limitation of three years, for the purposes of a s.11(6) petition, would begin to run from 23.02.2017 i.e., the date of failure or refusal by the other party to comply with the requirements mentioned

*Author

in the notice invoking arbitration – Thus, the present petitions u/s.11(6) filed on 09.04.2019 were within limitation – Furthermore, at the stage of s.11 application, the referral Courts need only to examine whether the arbitration agreement exists or not – The existence of the arbitration agreement in the Shareholders Agreement is not disputed – Petitions allowed – Sole arbitrator already appointed for the adjudicating disputes between the parties in relation to the Service Agreement, appointed for adjudication of the present disputes pertaining to the Shareholders Agreement – Issue as regards the claim of the petitioner being *ex facie* time barred may be adjudicated as a preliminary issue – Limitation Act, 1963. [Paras 32, 39, 41, 44-46]

Arbitration & Conciliation Act, 1996 – s.11(6) – Limited scope of interference by referral courts – Interests of the party forced to participate in the arbitration proceedings to be balanced, arbitral tribunal may impose costs on the party abusing process of law:

Held: At the stage of s.11 application, the referral Courts need only to examine whether the arbitration agreement exists or not, nothing more, nothing less – However, some parties might take undue advantage of such a limited scope of judicial interference of the referral courts and force other parties to the agreement into participating in a time consuming and costly arbitration process in cases, including but not limited to, where the claims are either *ex facie* time-barred or are discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought etc. – In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the arbitral tribunal may impose costs of the arbitration on the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration. [Para 44]

Case Law Cited

Interplay between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In Re [2023] 15 SCR 1081 **– followed.**

Vidya Drolia & Ors v. Durga Trading Corporation [2020] 11 SCR 1001 **: (2021) 2 SCC 1;** *Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited* [2021] 2 SCR 644 **: (2021) 5 SCC 738;** *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024] 7 SCR 840 **: 2024 SCC OnLine SC 1754 – relied on.**

Arif Azim Company Limited v. Aptech Limited [2024] 3 SCR 73 **: (2024) 5 SCC 313 – referred to.**

List of Acts

Arbitration & Conciliation Act, 1996; Limitation Act, 1963.

List of Keywords

Section 11(6) of the Arbitration & Conciliation Act, 1996; Referral court; Jurisdiction of referral court; Limitation; Petitions filed under Section 11(6) of the Arbitration & Conciliation Act, 1996 within limitation; Appointment of an arbitrator; Shareholders Agreement; Service Agreement; Non-Resident Indian; Claims *ex facie* and hopelessly time barred; Limited enquiry; No intricate evidentiary enquiry; Period of limitation of three years for Section 11(6) petition; Notice invoking arbitration; Failure or refusal by the other party to comply with the requirements; Arbitration agreement; Existence of a prima facie arbitration agreement; Sole arbitrator; Time consuming, Costly arbitration process; Claims *ex facie* time-barred; Preliminary issue; Claims discharged through "accord and satisfaction"; Impleadment of a non-signatory to the arbitration agreement sought; Costs; Abuse of process of law; Harassment caused to the other party to the arbitration.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Arbitration Petition No. 20 of 2019

(Under Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996)

With

Arbitration Petition No. 22 of 2019

Appearances for Parties

Kunal Cheema, Raghav Deshpande, Shubham Chandankhede, Advs. for the Petitioner.

Ms. Jasmine Damkewala, Rajesh Kumar, Ms. Vaishali Sharma, Ms. Rachita Sood, Ms. Nishtha Tyagi, Divyam Khera, Tushar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

1. Since the captioned petitions raise analogous issues between the same parties, those were taken up together and are being disposed of by this common judgment and order.

2. The petitioner has filed the present two petitions in terms of Section 11(6) read with Section 11(12)(a) of the Arbitration & Conciliation Act, 1996 (for short **"the Act, 1996"**), seeking appointment of an arbitrator for the adjudication of disputes and claims in terms of Clause 13.10 of the Shareholders Agreement dated 25.07.2011 entered into between the petitioner and the respondents.

I. FACTUAL MATRIX

3. Aslam Ismail Khan Deshmukh (hereinafter referred to as the **"petitioner"**) is a Non-Resident Indian, who is currently residing and working in Dubai, UAE, having experience and expertise in the drilling fluid industry.

4. ASAP Fluids Pvt. Ltd. (hereinafter referred to as the **"respondent no.1"**) is an Indian private limited company engaged in providing drilling fluids services to the oil and gas industry, whereas Gumpro Drilling Fluids Pvt. Ltd. (hereinafter referred to as the **"respondent no. 2"**) is a private limited company that specializes in oil field services and offers mud services.

5. A Shareholders Agreement dated 25.07.2011 (hereinafter referred to as **"Shareholders Agreement"**) was executed by and among the petitioner, respondent no.1, respondent no.2, Mr. Robert Wayne Pantermuehl, and Mr. Sunil B. Shitole. In terms of the said Shareholders Agreement, the petitioner was to hold 4,00,000 equity shares of respondent no. 1 and also participate in the management of respondent no.1 company. The relevant clauses from the same are reproduced hereinbelow:

"4. ***RIGHT OF PRE-EMPTION FOR ISSUE OF NEW DILUTION INSTRUMENTS OR DILUTION OF SHAREHOLDING***

Present issued, subscribed and paid up share capital of the Company is Rs.2,64,00.000/- divided into 26,40,000 equity shares of INR 10 each which is held by the members as mentioned below:

a. *Gumpro holding 18,00,000 equity shares of Rs. 10/- each in the Company.*

b. *Bob currently holding only 40,000 equity shares of Rs. 10/- each and shall be allotted additional 360,000 equity shares subject to getting the approval of Foreign Investment Promotion Board (FIPB). Ministry of' Finance and Reserve Bank of India or such other approval as may be required as per Indian Law.*

c. *Aslam Khan holding 400,000 equity shares of Rs. 10/- each in the Company and*

d. *Sunil Shitole holding 400,000 equity shares of Rs. 10/- each in the Company.*

On allotment of further 360,000 equity shares to Bob, the issued, subscribed and paid up share capital of the Company will be Rs. 3 Crores divided into 30,00,000 equity shares of Rs. 10/- each which will be held as follow:

a. *Gumpro 18,00,000 equity shares of Rs. 10/- each in the Company*

b. *Bob 400,000 equity shares of Rs. 10/- each in the Company*

c. *Aslam Khan 400,000 equity shares of Rs. 10/- each in the Company and*

d. *Sunil Shitole 400,000 equity shares of Rs. 10/- each in the Company·*

Gumpro has provided Rs.4,58,39,200 Crores as unsecured Loan (as on 31st March 2011) and Gumpro will additionally raise Rs.6.6 Crores for the Company from private equity

fund or venture capital fund and advance it to the Company as secured loan against the security of equipments of the Company.

General. Subject to the terms and conditions specified in Section 4.3, the affirmative approval provisions contained in Section 9 and applicable Indian law, in the event that the Company proposes to issue any Dilution Instruments, the Company shall first offer such Dilution Instruments to all the Shareholders on rights basis, in proportion to their shareholding ratio in the Company on the date immediately prior to such further issue, in accordance with the procedure set forth in Section 4.2. It is clarified that the shareholding pattern of the Company as stated in Clause 4.1 shall be maintained at all times, save and except in the circumstances specified in Clause 4.2 below. It is agreed and understood by all the Parties to this Agreement that any Shares offered/ issued or subscribed by the Other Shareholder will be under lock -in period of 3 (Three) years from the date of its allotment. The Board shall prior to undertaking any such issue appoint any reputed investment banker/ Chartered accountant to carry out a valuation of the Company. The Board shall ensure that the capital shall be raised at valuation no lower than the valuation set forth in the report of such investment banker/ Chartered Accountant.

xxx xxx xxx

5 RESTRICTIONS ON TRANSFER OF SHARES AND PROVISIONS RELATING TO TRANSMISSION OF SHARES

5.1 Other Shareholder Share Sale Restriction. Notwithstanding anything contained elsewhere in this Shareholder's Agreement, the Other Shareholder agree that they shall not, whether collectively or individually, directly or indirectly, Transfer any part of their shareholding in the Company in whatever form, or any legal or beneficial interest therein, until the earlier of: (a) Gumpro ceasing to hold a minimum of two percent (2%) of its shareholding in the Company and (b) the completion of a Qualified Public

Offering, except in compliance with this Shareholders' Agreement, particularly Section 6. Without prejudice to the generality of the foregoing. The Other Shareholder shall not Transfer any part of their individual shareholding until the expiry of three (03) years from the date of issue of such shares. It has been clearly understood and agreed that the shares of the Other Shareholder are locked-in for a period of three years from the date of its issuance or conversion of it into equity shares.

xxx xxx xxx

6. RIGHT OF FIRST REFUSAL AND RIGHT OF CO-SALE

*6.1 General. Subject to the provisions of Section 5, the Other Shareholder (for this Section "**Selling Shareholder**") hereby unconditionally and irrevocably grants to Gumpro a right (the "**Right of First Refusal**") to purchase all or a portion of the Shares that such Selling Shareholder may propose to Transfer ("**Sale Shares**")."*

6. Mr. Anand Gupta, the Managing Director of respondent no.2 informed the petitioner, *vide* letter dated 22.09.2011, that 2,00,010 equity shares of respondent no.1 which belong to the petitioner were being held by respondent no.2 in its name. It was stated therein that this arrangement was made to provide comfort to the potential investors in respondent nos.1 and 2 respectively. It was further clarified that the abovementioned shares held by respondent no.2 would be governed by the Shareholders Agreement dated 25.07.2011 and that those shall not be pledged or sold at any time without the written consent of the petitioner. At the time of sale of respondent no.1, it was confirmed that the value of these shares net of taxes would be paid to the petitioner or his nominee.

7. Subsequently, the respondent no.1 along with its Dubai subsidiary company, ASAP Fluids DMCC (hereinafter referred to as the "**Dubai subsidiary**") entered into a **Service Agreement** dated 18.10.2011 (hereinafter referred to as, the "**Service Agreement**") with the petitioner. By the Service Agreement, the petitioner was appointed as a Director of respondent no.1 and its Dubai subsidiary. Among his responsibilities in relation to respondent no.1, the petitioner was also required to carry on the responsibilities of the full operations of

the Dubai subsidiary. He was obligated to hold office for an initial period of 3 years w.e.f. 01.01.2011. The Service Agreement provided for the remuneration and benefits that the petitioner was entitled to. The relevant clauses from the same are reproduced hereinbelow:

> *"**3. TERM***
>
> *3.1 The Director shall hold the office for a period of three years commencing from _____ subject to the determination thereof as hereinafter provided.*
>
> *xxx xxx xxx*
>
> ***10. TERM AND TERMINATION***
>
> *[…]*
>
> *10.2 Aslam Khan shall not for a period of three (3) years from the Effective Date (**Initial Term**), terminate this Agreement. In case if he terminates his employment prior to Initial Term, he shall transfer all the equity shares held by him in favour of the Promoter of the Company at zero consideration implying his outstation from the register of members of the Company."*

8. On the same day, i.e., on 18.10.2011, the petitioner signed an Agreement for Transfer of Commercial Expertise (hereinafter referred to as **"Commercial Expertise Agreement"**) with respondent nos. 1 and 2 respectively, agreeing to the transfer of all his commercial expertise, knowledge and experience in the field of getting approvals from the government, and handling administrative and legal aspects of the business to respondent no. 1. In return, respondent no. 1 agreed to issue 4,00,000 equity shares of Rs. 10/- each to the petitioner for consideration other than cash. The relevant recitals and clauses from the same are reproduced hereinbelow:

> *" **WHEREAS***
>
> *[…]*
>
> *3. The Parties have agreed before starting this venture that the Transferor shall transfer all his commercial expertise knowledge and experience in the field of getting the approvals of government. handling administrative and legal aspects of the Business ("Commercial Expertise·') to the*

Transferee and the Transferee shall issue him 400,000 equity shares of Rs.10/- each in the Transferee Company for the consideration other than cash for transferring such Commercial Expertise to the Transferee and continuing with the transferee Company for minimum period of three (3) years and the such shares allotted to him shall be under lock in for three years.

xxx xxx xxx

3. TRANSFER OF COMMERCIAL EXPERTISE AND ISSUE OF SHARES

3.1 It is hereby agreed by and between the parties hereto that all the Commercial Expertise of the Transferor pertaining to or referable to all expertise in the management of the Business and its related activities including Administration, ensuring smooth performance, high efficiency and productivity along with knowledge on tender participations etc. shall be transferred to and unto the transferee and the Transferor shall work for a minimum period of 3 years for the Transferee or its affiliate or group company either in India or Overseas effective from 1st January 2011 and the Transferee shall issue and allot 400,000 Equity Shares of Rs. 10/- each at par in the Transferee Company in lieu thereof by way of consideration for transfer of such Commercial Expertise as mentioned above and holding such shares under lock in for minimum period of 3 years. The Transferor shall then assign and transfer all the Transferor's right, title and interest in all the Commercial Expertise for the entire world and for entire period during which this Commercial Expertise subsists to and unto the Transferee absolutely.

xxx xxx xxx

4. COVENANTS OF THE TRANSFEROR

4.1 The Transferor ensures that he shall continue in the employment of the Transferee for minimum period of three years effective from 1st January 2011.

[…]

4.3 If at any time after a minimum period of 3 years as locking of shares the transferee wish to sell his share to the transferee he must first offer for sale to management, all (and not only some unless management agrees otherwise) of the shares owned by him ("the Sale Shares") at a price as mutually agreed with him and the management at the relevant time."

xxx *xxx* *xxx*

10. TERM OF THE AGREEMENT

[…]

10.2 The term for this Agreement will start on Allotment of Shares by the Transferee to the Transferor and the such allotted Shares will be under Lock in for a period of three years from the date of its Allotment and the Transferor shall not leave the services with the Transferee for a period of three years from the date of Allotment of Shares in the Company as per terms of this Agreement"

(Emphasis supplied)

9. Upon certain other issues arising between the parties, the petitioner tendered his resignation as the Director in respondent no. 1 and its Dubai subsidiary. The resignation was accepted by the Dubai subsidiary *vide* Director's Resolution dated 18.07.2013.

10. The petitioner was concerned with the failure of respondent no.2 in transferring 2,00,010 shares in respondent no.1 which belonged to the petitioner despite confirmation of the same *vide* letter dated 22.09.2011 and also the non-issuance of the share certificates evidencing allotment of additional 2,00,010 shares in the name of the petitioner by respondent no. 1. The petitioner further contended that despite holding 4,00,000 equity shares in respondent no.1 as per the Shareholders Agreement, respondent no.1 failed to issue duly stamped, signed and sealed share certificates evidencing such an allotment to the petitioner.

11. It is the case of the petitioner that he had requested respondent no.1 on several occasions to either issue the share certificates evidencing allotment of 4,00,000 equity shares or in the alternate, return the amount equivalent to such shares. The petitioner alleged that, since the share certificates were not issued to him, he was unable to send

an 'offer notice' to sell his portion of equity shares to respondent no.2 who has the "Right of First Refusal" under Clause 6 of the Shareholders Agreement.

12. The petitioner stated that since the respondents were not paying heed to his repeated requests for issuance of share certificates, the petitioner sent a Common Notice dated 23.01.2017 (hereinafter referred to as **"Arbitration Notice"**) to both the respondents, directing them to either issue the share certificates evidencing allotment of 2,00,010 and 4,00,000 shares respectively or in the alternate, to return the amount equivalent to those shares. The same was received by both the respondents on 24.01.2017. In the event of a dispute, the Arbitration Notice called upon the respondents to appoint arbitrators in terms of Clause 13.10 of the Shareholders Agreement. The said clause is reproduced hereinbelow:

> "*13.10. Dispute Resolution. Any dispute, claim or controversy arising under or relating to this Agreement, including without limitation any dispute concerning the existence or enforceability hereof, shall be resolved by arbitration in Mumbai in accordance with the Arbitration and Conciliation Act, 1996. The dispute will be referred to the arbitrator, and Gumpro has right to appoint 2 (two) arbitrators and Other Shareholder have the right to appoint 1(one) arbitrator. All these three (03) arbitrators, will appoint one of them to act as umpire of the arbitral tribunal. The language of the arbitration shall be English. Any arbitration award by the arbitral tribunal shall be final and binding upon the Parties, shall not be subject to appeal, and shall be enforced by judgment of a court of competent jurisdiction*."

13. As there was no response from the respondents, the petitioner filed two separate applications dated 03.03.2017 under Section 11(6) of the Act, 1996, bearing Arbitration Application No. 50 of 2017 for adjudication of disputes pertaining to the 4,00,000 equity shares and Arbitration Application No. 51 of 2017 for adjudication of disputes pertaining to 2,00,010 equity shares, before the High Court of Bombay, praying for the appointment of an arbitral tribunal.

14. After nearly 10 months from the date of the arbitration notice, on 07.11.2017, the respondents sent a reply denying and disputing all

the claims and allegations made by the petitioner. Without prejudice to the contentions in the reply, the respondents appointed two arbitrators in terms of clause 13.10 of the Shareholders Agreement and called upon the petitioner to nominate the third arbitrator. It was asserted that the alleged claim of 2,00,010 shares or the value thereof cannot be referred to arbitration as it does not fall within the remit of the dispute resolution clause of the Shareholders Agreement.

15. The High Court of Bombay *vide* Judgment and final order dated 22.02.2019 held that the petitioner is a Non-Resident Indian who habitually resides and works in Dubai. The proceedings would constitute an "international commercial arbitration" and therefore, the Section 11 applications filed before it were not maintainable.

16. In light of the above and upon the dismissal of the Section 11 applications by the High Court, the petitioner has filed the present petitions before this Court i.e., Arbitration Petition No.20 and Arbitration Petition No. 22 under Section 11(6), for appointment of an arbitral tribunal, to adjudicate the disputes under the Shareholders Agreement pertaining to 2,00,010 shares and 4,00,000 shares respectively.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER

17. Mr. Kunal Cheema, the learned counsel appearing for the petitioner, submitted that both the arbitration petitions arise out of disputes under the Shareholders Agreement. Clause 13.10 of the agreement provides for the arbitration clause and the same has not been disputed by the parties.

18. It was submitted that the petitioner was entitled to be allotted 4,00,000 equity shares of Rs. 10 each in respondent no.1 company under the Shareholders Agreement. In addition, as per the letter dated 22.09.2011, respondent no.2 further confirmed that 2,00,010 equity shares in respondent no.1 which belonged to the petitioner, were being held by respondent no.2. Despite repeated reminders to both the respondents, the share certificates of the aforementioned shares were not issued to the petitioner.

19. The counsel submitted that the respondents have raised two broad contentions - *one*, with respect to the merits of the dispute; and *two*, that the claims made in the petitions are not maintainable as they are barred by limitation. As regards the first aspect, it was submitted

that the merits of the dispute can be looked into by the arbitral tribunal and arguments on merit can be made after the parties file their pleadings and lead evidence therein.

20. On the issue of limitation, it was submitted that under the Shareholders Agreement, there was no time frame within which the share certificates were to be issued to the petitioner. On a reading of the letter dated 22.09.2011, the value of the share was to be paid to the petitioner at the time of sale of respondent no.1 company. As far as the petitioner is aware, such a sale has not been made, at least till the issuance of notice dated 23.02.2017. Hence, there is no specific date/day on which it can be ascertained that the cause of action had arisen.

21. The counsel submitted that it is the case of the respondents that certain correspondence was exchanged between the parties in the period between 06.08.2015 and 15.10.2015. Therefore, the Arbitration Notice dated 23.01.2017 was sent within 3 years from 15.10.2015 which is the date of the last legal notice sent by the respondents to the petitioner. Thereafter, the petitioner filed two arbitration applications on 03.03.2017 before the High Court of Bombay which were ultimately dismissed on 22.02.2019. Immediately thereafter, on 09.04.2019, the present petitions were filed before this Court. Therefore, the arbitration petitions cannot be said to be ex-facie time barred and the implication or interpretation of the said correspondences could be looked into by the arbitral tribunal while deciding the claim and its maintainability on the question of limitation and merits.

22. It was submitted that, without prejudice to the aforesaid contention, even if it is assumed that the "cause of action" had arisen at any specific point of time, there is a continuing breach of contract since the respondents failed to provide the share certificates and abide by the Shareholders Agreement and the letter dated 22.09.2011. Therefore, in view of Section 22 of the Limitation Act, 1963, a fresh period of limitation would begin to run at every moment of time during which the breach continues.

23. Another submission of the counsel was that the respondents, on 07.11.2017 had sent a reply to the Arbitration Notice dated 23.01.2017 wherein they appointed two arbitrators as per Clause 13.10 of the Shareholders Agreement. The same was sent after the applications under Section 11(6) were filed before the High Court of Bombay. In

the said letter, the respondents have not contended that the claim is time barred.

24. It was further submitted that, in reply to the Arbitration Notice, the only case of the respondents is that the issue regarding the 2,00,010 shares cannot be referred to arbitration under clause 13.10 of the Shareholders Agreement and that the scope of arbitration should be confined only to the issue of the 4,00,000 shares. However, the letter dated 22.09.2011 clearly states that the 2,00,010 shares will be governed by the Shareholders Agreement. Therefore, this being a contentious issue should be considered by the arbitral tribunal.

25. The counsel finally submitted that, in the event the Court is inclined to allow the petition, then, considering the nature and low value of the claim, instead of a three-member tribunal, a sole arbitrator may be appointed.

III. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

26. On the other hand, Ms. Jasmine Damkewala, the learned counsel appearing for the respondents submitted that the petitioner is seeking implementation of the Shareholders Agreement dated 25.07.2011. However, the petitioner has violated the Lock-in Period of 3 years, in as much as the petitioner's date of employment is 01.01.2011 and the date of acceptance of resignation *vide* the board resolution is 18.07.2013.

27. It was submitted that in terms of Clause 4 of the Shareholders Agreement, the petitioner was holding 4,00,000 equity shares in respondent no.1. Clause 5.1 of the said Shareholders Agreement specifically indicates that the petitioner shall not transfer any part of his individual shareholding until the expiry of 3 years from the date of issue of such shares. It was argued that there was a clear understanding which was agreed upon by the parties that the shares of the petitioner shall remain locked for a period of 3 years from the date of their issuance or conversion of it into equity shares. However, any right over the said shares would accrue only if the petitioner remained in employment.

28. Clause 3 of the Service Agreement indicates that the Director shall hold office for a period of 3 years commencing from the date of employment (w.e.f. 01.01.2011) which is a Lock-in Period. Further Clause 10.2 of the Service Agreement states that the petitioner shall transfer all the equity shares held by him in favour of the Promoter of

respondent no.1 at zero consideration if he terminates his employment prior to the Initial Term of 3 years. Accordingly, the petitioner would in any case, have no valid right or claim over the subject shares having terminated his employment before a period of 3 years.

29. It was submitted that as per Recital 3, and Clauses 3.1 and 4.1 respectively of the Commercial Expertise Agreement, for the petitioner to hold the shares, he ought to have worked for a period of 3 years. Since the petitioner resigned on 18.07.2013, he is not entitled to these shares. In any case, any claim regarding the 4,00,000 equity shares, howsoever misconceived, can arise only upon the date of resignation i.e., 18.07.2013 and the Arbitration Notice being issued on 23.01.2017 was clearly outside of limitation. Therefore, the present petition is stale, belated and misconceived.

30. The counsel, in the last, submitted that Section 43 of the Act, 1996 lays down that the Limitation Act, 1963 is applicable to arbitrations. An arbitration commences upon issuing the notice of invocation of arbitration in accordance with the arbitral clause i.e., Clause 13.10 of the Shareholders Agreement. Accordingly, where the petitioner seeks enforcement of the letter dated 22.09.2011, the Notice for Invocation of Arbitration was served 6 years later i.e., on 23.01.2017 and is hopelessly outside of limitation. For the sake of argument and without admitting, even if limitation for the claim of the petitioner with respect to the 2,00,010 shares is calculated from the date when he ceased to be in employment, i.e., from 18.07.2013, the claim is still clearly time-barred.

IV. ANALYSIS

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the short question that falls for our consideration is whether we should decline to make a reference under Section 11(6) of the Act, 1996 by examining whether the substantive claims of the petitioner are *ex facie* and hopelessly time barred?

32. A three-judge bench of this Court in ***Vidya Drolia & Ors v. Durga Trading Corporation*** reported in **(2021) 2 SCC 1** while dealing with the scope of powers of the referral court under Sections 8 and 11 respectively, endorsed the *prima facie* test and opined that Courts at the referral stage can interfere only in rare cases where it is manifest

that the claims are *ex facie* time-barred and dead, or there is no subsisting dispute. Such a restricted and limited review was considered necessary to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The relevant observations are reproduced hereinbelow:

> *"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)] , it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.*
>
> *xxx xxx xxx*
>
> ***154.4.** Rarely as a demurrer the court may interfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably*

"non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(Emphasis supplied)

33. In ***Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*** reported in **(2021) 5 SCC 738**, the notice invoking arbitration was issued 5 ½ years after the cause of action arose, i.e., rejection of the claims of Nortel by BSNL and the claim was therefore held to be *ex facie* time-barred. This Court clarified that the period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to substantive claims made in the underlying commercial contract. By placing reliance on ***Vidya Drolia*** *(supra)* it was held that, a referral court exercising its jurisdiction under section 11 may decline to make the reference in a very limited category of cases, where there is not even a vestige of doubt that the claim is *ex facie* time-barred. The relevant observations are reproduced hereinbelow:

"44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties.

xxx xxx xxx

47. It is only in the very limited category of cases, where there is not even a vestige of doubt that the claim is ex facie time-barred, or that the dispute is non-arbitrable, that the court may decline to make the reference. However, if there is even the slightest doubt, the rule is to refer the disputes to arbitration, otherwise it would encroach

upon what is essentially a matter to be determined by the tribunal.

48. Applying the law to the facts of the present case, it is clear that this is a case where the claims are ex facie time-barred by over 5½ years, since Nortel did not take any action whatsoever after the rejection of its claim by BSNL on 4-8-2014. The notice of arbitration was invoked on 29-4-2020. There is not even an averment either in the notice of arbitration, or the petition filed under Section 11, or before this Court, of any intervening facts which may have occurred, which would extend the period of limitation falling within Sections 5 to 20 of the Limitation Act. Unless, there is a pleaded case specifically adverting to the applicable section, and how it extends the limitation from the date on which the cause of action originally arose, there can be no basis to save the time of limitation.

49. The present case is a case of deadwood/no subsisting dispute since the cause of action arose on 4-8-2014, when the claims made by Nortel were rejected by BSNL. The respondent has not stated any event which would extend the period of limitation, which commenced as per Article 55 of the Schedule of the Limitation Act (which provides the limitation for cases pertaining to breach of contract) immediately after the rejection of the final bill by making deductions."

(Emphasis supplied)

34. This very Bench in ***Arif Azim Company Limited v. Aptech Limited*** reported in **(2024) 5 SCC 313** was concerned with the following two issues while deciding an application for the appointment of an arbitrator under Section 11(6) of the Act, 1996 – *first,* whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996?; and *second*, whether the Court may decline to make a reference under Section 11 of the Act, 1996 where the claims are *ex-facie* and hopelessly time barred.

35. On the first issue in ***Arif Azim*** *(supra),* it was observed that Section 11(6) of the Act, 1996 would be covered by Article 137 of

the Limitation Act, 1963 which prescribes a limitation period of 3 years from the date when the right to apply accrues. The limitation period for filing an application seeking appointment of an arbitrator was held to commence only after a valid notice invoking arbitration had been issued by one of the parties to the other party and there had been either a failure or refusal on the part of the other party to comply with the requirements of the said notice.

36. On the second issue in ***Arif Azim*** *(supra)*, which is identical to the issue raised in the present petitions, it was observed that, although, limitation is an admissibility issue, yet it is the duty of the Courts to prima facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process. The findings on both the issues were summarized as thus:

> *"92. Thus, from an exhaustive analysis of the position of law on the issues, we are of the view that while considering the issue of limitation in relation to a petition under Section 11(6) of the 1996 Act, the Courts should satisfy themselves on two aspects by employing a two-pronged test — first, whether the petition under Section 11(6) of the 1996 Act is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings. If either of these issues are answered against the party seeking referral of disputes to arbitration, the Court may refuse to appoint an Arbitral Tribunal."*
>
> (Emphasis supplied)

37. However, subsequently, very pertinent observations were made by a seven-judge Bench of this Court in ***Interplay between Arbitration Agreements Under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899, In Re,*** reported in **2023 INSC 1066** regarding the scope of judicial interference at the Section 11 stage with a view to give complete meaning to the legislative intention behind the insertion of Section 11(6-A) of the Act, 1996. This Court referred to the Statement of Objects and Reasons of the 2015 Amendment Act and opined that the same indicated that the referral courts shall "examine the existence of a *prima facie* arbitration agreement and

not other issues" at the stage of appointment of an arbitrator. These "other issues" would include the examination of any other issue which has the consequence of unnecessary judicial interference in the arbitral proceedings. The relevant observations are reproduced hereinbelow:

> *"208. The Statement of Objects and Reasons of the 2015 Amendment Act are as follows:*
>
> > *"(iii) an application for appointment of an arbitrator shall be disposed of by the High Court or Supreme Court, as the case may be, as expeditiously as possible and an endeavour should be made to dispose of the matter within a period of sixty days.*
> >
> > *(iv) to provide that while considering any application for appointment of arbitrator, the High Court or the Supreme Court shall examine the existence of a prima facie arbitration agreement and not other issues."*
>
> *209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall "examine the existence of a prima facie arbitration agreement and not other issues". These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the "other issues" also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage […]"*
>
> (Emphasis supplied)

38. In light of the aforesaid observations, the ratio of ***Arif Azim*** *(supra)* was reconsidered by this very Bench in ***SBI General Insurance Co. Ltd. v. Krish Spinning*** reported in **2024 SCC OnLine SC 1754.** The position of law was clarified as thus:

> *"128. On the first issue, it was observed by us that the Limitation Act, 1963 is applicable to the applications filed under Section 11(6) of the Act, 1996. Further, we also held that it is the duty of the referral court to examine*

that the application under Section 11(6) of the Act, 1996 is not barred by period of limitation as prescribed under Article 137 of the Limitation Act, 1963, i.e., 3 years from the date when the right to apply accrues in favour of the applicant. To determine as to when the right to apply would accrue, we had observed in paragraph 56 of the said decision that "the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice."

129. Insofar as the first issue is concerned, we are of the opinion that the observations made by us in Arif Azim (supra) do not require any clarification and should be construed as explained therein.

xxx xxx xxx

132. Insofar as our observations on the second issue are concerned, we clarify that the same were made in light of the observations made by this Court in many of its previous decisions, more particularly in Vidya Drolia (supra) and NTPC v. SPML (supra). However, in the case at hand, as is evident from the discussion in the preceding parts of this judgment, we have had the benefit of reconsidering certain aspects of the two decisions referred to above in the light of the pertinent observations made by a seven-Judge Bench of this Court in In Re : Interplay (supra).

133. Thus, we clarify that while determining the issue of limitation in exercise of the powers under Section 11(6) of the Act, 1996, the referral court should limit its enquiry to examining whether Section 11(6) application has been filed within the period of limitation of three years or not. The date of commencement of limitation period for this purpose shall have to be construed as per the decision in Arif Azim (supra). As a natural corollary, it is further clarified that the referral courts, at the stage of deciding an application for appointment of arbitrator, must not conduct an intricate evidentiary enquiry into the question whether the claims

> *raised by the applicant are time barred and should leave that question for determination by the arbitrator. Such an approach gives true meaning to the legislative intention underlying Section 11(6-A) of the Act, and also to the view taken in In Re : Interplay (supra).*
>
> *134. The observations made by us in Arif Azim (supra) are accordingly clarified. We need not mention that the effect of the aforesaid clarification is only to streamline the position of law, so as to bring it in conformity with the evolving principles of modern-day arbitration, and further to avoid the possibility of any conflict between the two decisions that may arise in future. These clarifications shall not be construed as affecting the verdict given by us in the facts of Arif Azim (supra), which shall be given full effect to notwithstanding the observations made herein."*
>
> (Emphasis supplied)

39. Therefore, while determining the issue of limitation in the exercise of powers under Section 11(6) of the Act, 1996, the referral court must only conduct a limited enquiry for the purpose of examining whether the Section 11(6) application has been filed within the limitation period of three years or not. At this stage, it would not be proper for the referral court to indulge in an intricate evidentiary enquiry into the question of whether the claims raised by the petitioner are time barred. Such a determination must be left to the decision of the arbitrator. After all, in a scenario where the referral court is able to discern the frivolity in the litigation on the basis of bare minimum pleadings, it would be incorrect to assume or doubt that the arbitral tribunal would not be able to arrive at the same inference, especially when they are equipped with the power to undertake an extensive examination of the pleadings and evidence adduced before them.

40. As observed by us in ***Krish Spinning*** *(supra)*, the power of the referral court under Section 11 must essentially be seen in light of the fact that the parties do not have the right of appeal against any order passed by the referral court under Section 11, be it for either appointing or refusing to appoint an arbitrator. Therefore, if the referral court delves into the domain of the arbitral tribunal at the Section 11 stage and rejects the application of the claimant, we run a serious risk of leaving the claimant remediless for the adjudication of their claims. Moreover,

the Courts are vested with the power of subsequent review in which the award passed by the arbitrator may be subjected to challenge by any party to the arbitration. Therefore, the Courts may take a second look at the adjudication done by the arbitral tribunal at a later stage, if considered necessary and appropriate in the circumstances.

41. In view of the above discussion, we must restrict ourselves to examining whether the Section 11 petitions made before us are within limitation. The petitioner herein issued a notice invoking arbitration on 23.01.2017 and the same was delivered to both the respondents on 24.01.2017. However, the respondents failed to reply to the said notice within a period of 30 days i.e. within 23.02.2017. Therefore, the period of limitation of three years, for the purposes of a Section 11(6) petition, would begin to run from 23.02.2017 i.e., the date of failure or refusal by the other party to comply with the requirements mentioned in the notice invoking arbitration. The present petitions under Section 11(6) were filed on 09.04.2019. Even including the period during which the parties proceeded before the Bombay High Court which ultimately held that the applications before it were not maintainable i.e., 03.03.2017 to 22.02.2019, these petitions are well within the bounds of limitation.

42. The primary issue that has been canvassed by the respondents is that the substantive claims of the petitioner are *ex-facie* time barred and therefore, incapable of being referred to arbitration. The respondents contend that, with respect to the issue relating to the 2,00,010 equity shares, the petitioner has sought enforcement of the letter dated 22.09.2011 but has however, served a notice invoking arbitration 6 years later on 23.01.2017. Further, with respect to the 4,00,000 equity shares, it was contended that the claim can only arise upon the date of resignation i.e., 18.07.2013 and the claim would, therefore, again be time-barred. Conversely, the case of the petitioners is that the date of 15.10.2015 i.e., the date of the last legal notice sent by the respondents to the petitioner, can be considered as the date of cause of action for the purposes of limitation. In the alternative, they assert that there is no specific date or day on which it can be ascertained that the cause of action had arisen since there is a continuous breach of contract on part of the respondents. As evident from the aforesaid discussion and especially in light of the observations made in ***Krish Spinning*** *(supra)*, this Court cannot conduct an intricate evidentiary enquiry into the question of when

the cause of action can be said to have arisen between the parties and whether the claim raised by the petitioner is time barred. This has to be strictly left for the determination by the arbitral tribunal.

43. All other submissions made by the parties regarding the entitlement of the petitioner to 4,00,000 and 2,00,010 equity shares in the respondent no.1 company are concerned with the merits of the dispute which squarely falls within the domain of the arbitral tribunal.

44. It is now well settled law that, at the stage of Section 11 application, the referral Courts need only to examine whether the arbitration agreement exists – nothing more, nothing less. This approach upholds the intention of the parties, at the time of entering into the agreement, to refer all disputes arising between themselves to arbitration. However, some parties might take undue advantage of such a limited scope of judicial interference of the referral courts and force other parties to the agreement into participating in a time-consuming and costly arbitration process. This is especially possible in instances, including but not limited to, where the claimant canvasses either *ex facie* time-barred claims or claims which have been discharged through "accord and satisfaction", or cases where the impleadment of a non-signatory to the arbitration agreement is sought etc. In order to balance such a limited scope of judicial interference with the interests of the parties who might be constrained to participate in the arbitration proceedings, the arbitral tribunal may direct that the costs of the arbitration shall be borne by the party which the Tribunal ultimately finds to have abused the process of law and caused unnecessary harassment to the other party to the arbitration.

V. CONCLUSION

45. The existence of the arbitration agreement as contained in Clause 13.10 of the Shareholders Agreement is not disputed by either of the parties. The submissions as regard the claim of the petitioner being *ex-facie* time barred may be adjudicated upon by the arbitral tribunal as a preliminary issue.

46. In view of the aforesaid, the present petitions are allowed. Taking into consideration the fact that an arbitral tribunal comprising of a sole arbitrator, Mr. Mayur Khandeparkar (Advocate, High Court of Judicature at Bombay) has already been constituted for the adjudication of disputes between the same parties in relation to

the Service Agreement dated 18.10.2011, it would be desirable to constitute an arbitral tribunal comprising of the same sole arbitrator for adjudication of the present disputes pertaining to the Shareholders Agreement dated 25.07.2011. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

47. In the facts of the present case, it would be apposite to observe that, in the event the arbitral tribunal ultimately finds the present claims of the petitioner to be time-barred, it may direct that the costs of the arbitration pertaining to these claims be borne solely by the petitioner herein.

48. It is made clear that all the other rights and contentions of the parties are left open for adjudication by the learned arbitrator.

49. Pending applications(s), if any, shall stand disposed of.

Result of the case: Petitions allowed.

†*Headnotes prepared by:* Divya Pandey

[2024] 12 S.C.R. 133 : 2024 INSC 851

M/s HPCL Bio-Fuels Ltd.
v.
M/s Shahaji Bhanudas Bhad

(Civil Appeal No. 12233 of 2024)

07 November 2024

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

Issue for Consideration

(i) Whether a fresh application u/s.11(6) of the Arbitration and Conciliation Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application u/s.11(6) of the Act, 1996; (ii) whether the fresh application u/s.11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred. If yes, whether the respondent is entitled to the benefit of Section 14 of the Limitation Act. In other words, whether the period spent by the respondent in pursuing proceedings under the IBC is liable to be excluded while computing the limitation period for filing the application u/s.11(6); (iii) whether the delay caused by the respondent in filing the fresh arbitration application u/s.11(6) of the Act, 1996 can be condoned u/s.5 of the Limitation Act.

Headnotes†

Arbitration and Conciliation Act, 1996 – s.11(6) – Code of Civil Procedure, 1908 – Or.23 , R.1 – Insolvency & Bankruptcy Code, 2016 – Whether a fresh application u/s.11(6) of the Arbitration and Conciliation Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application u/s.11(6) of the Act, 1996 – The appellant contended that in lieu of the principles contained in Or.23 R.1 of the CPC, the respondent could not have filed a subsequent application u/s.11(6) for adjudication of the same disputes, having previously withdrawn unconditionally an application filed for the same purpose:

*Author

Held: In the instant case, both the applications u/s.11(6) of the Act, 1996 were filed seeking adjudication of the dispute which arose on 02.02.2014 upon refusal of the appellant to pay the dues of the respondent – The first application u/s.11(6) was filed on 16.02.2018 and was subsequently withdrawn unconditionally on 01.10.2018 – After a gap of more than four years, the respondent filed a subsequent application u/s.11(6) before the High Court on 09.12.2022 which came to be allowed by the impugned order – The chronology of events clearly indicates that the respondent did not withdraw the first arbitration application because of some defect which would have led to its dismissal – It is also clear from the order dated 01.10.2018 of the High Court permitting the respondent to withdraw the application that neither any liberty was sought by the respondent nor the court had granted any liberty to file a fresh arbitration application – It appears that the only reason the respondent withdrew the arbitration application was to get his application u/s.9 of the IBC any how admitted by the NCLT – It can be said without any doubt that the respondent took a calculated risk of abandoning the arbitration proceedings to maximise the chances of succeeding in the IBC proceedings – The respondent was within its right to abandon the arbitration proceedings in favour of IBC proceedings – However, having done so, it would no longer be open to it to file a fresh application for appointment of arbitrator without having obtained the liberty of the court to file a fresh application at the time of the withdrawal – The principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show *bona fides* on its part – From the conduct of the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration – The failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case – Therefore, in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable. [Paras 51, 52, 55, 58, 59, 61]

Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – s.14 – Whether the fresh application u/s.11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred – If yes, whether the respondent is entitled to the benefit of s.14 of the Limitation Act:

Held: The first application u/s.11(6) filed on 16.02.2018 was well within the prescribed limitation period of three years for filing such applications – The second application u/s.11(6) was required to be filed within a period of three years from the expiry of one month from the date of receipt of the notice invoking arbitration by the appellant – This period of three years came to an end in August, 2019 – The second application u/s.11(6) came to be filed by the respondent much later on 12.12.2022 and is clearly time-barred – As far as benefit of s.14 of the Limitation Act is concerned, there is a body of decisions of this Court taking the view that by virtue of s.43 of the Act, 1996, the Limitation Act is applicable to applications for appointment of arbitrator filed u/s.11(6) of the said Act – It thus follows that the benefit u/s.14 of the Limitation Act can be availed by an applicant subject to the fulfilment of the conditions specified therein – First, the benefit of s.14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of s.14(2) can be availed of where the subsequent proceeding is an application – Secondly, s.14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas s.14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief – As a petition u/s.11(6) of the Act, 1996 is not a suit, hence it would not be governed by sub-section (1) of s.14 of the Limitation Act – Instead, it would be governed by sub-section (2) of s.14 of the Limitation Act – As far as same relief is concerned, the High Court fell in error in holding that an application u/s.9 of the IBC and an application u/s.11(6) of the Act, 1996 are filed for seeking the same relief – While the relief sought in the former is the initiation of the CIRP of the corporate debtor, the relief sought in the latter is the appointment of an arbitrator for the adjudication of disputes arising out of a contract – As the relief sought in an application u/s.11(6) of the Act, 1996 is not the same as the relief sought in an application u/s.9 of the IBC, the benefit of s.14(2) cannot be given to the respondent in the present case. [Paras 74, 77, 83, 107]

Arbitration and Conciliation Act, 1996 – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – Whether the respondent was prosecuting the IBC proceedings in good faith and in a bonafide manner.

Held: The respondent couldn't be said to have had been prosecuting the IBC proceedings in good faith and in a bonafide manner – An element of mistake is inherent in the relief envisaged under Section 14 of the Limitation Act – In the present case, the respondent had initially approached the High Court with an application u/s.11(6) – However, for reasons best known to it, the respondent abandoned the said proceedings for appointment of arbitrator and approached the NCLT, Kolkata with an application u/s.9 of the IBC – The respondent was fully aware of the objection of a pre-existing dispute raised by the appellant in response to its second statutory demand notice issued u/s.8 of the IBC – Despite having preferred an application u/s.11(6) of the Act, 1996 before the jurisdictional court, and also being fully aware of the infirmities in the s.9 application filed under the IBC, the respondent took a conscious decision to abandon the right course of proceedings – The conduct of the respondent cannot be termed to be a mistake in any manner – Having taken a conscious decision to opt for specific remedy under the IBC which is not for the same relief as an application u/s.11(6) of the Act, 1996, the respondent cannot be now allowed to take the plea of ignorance or mistake and must bear the consequences of its decisions. [Para 110]

Arbitration and Conciliation Act, 1996 – s.11(6) – Code of Civil Procedure, 1908 – Insolvency & Bankruptcy Code, 2016 – Limitation Act, 1963 – s.5 – Whether the delay caused by the respondent in filing the fresh arbitration application u/s.11(6) of the Act, 1996 can be condoned u/s.5 of the Limitation Act:

Held: The position of law is that the benefit u/s.5 of the Limitation Act is available in respect of the applications filed for appointment of arbitrator u/s.11(6) of the Act, 1996 – Further, the requirement of filing an application u/s.5 of the Limitation Act is not a mandatory pre-requisite for a court to exercise its discretion under the said provision and condone the delay in institution of an application or appeal – The respondent took a conscious decision to abandon its first s.11(6) application with a view to pursue proceedings u/s.9 of the IBC – The respondent

made such choice despite a specific objection raised by the appellant in its reply to the statutory demand notice that there were pre-existing disputes between the parties – In view of this, maximisation of the chances of getting the application u/s.9 of the IBC admitted by the NCLT seems to have been the only reason for the abandonment of the first s.11(6) application by the respondent – In light of such conduct on the part of the respondent, this Court is of the view that the present case does not warrant the exercise of discretion u/s.5 of the Limitation Act. [Paras 121, 122]

Limitation – Object of having a limitation period:

Held: The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim "*Vigilantibus non dormientibus jura subveniunt*" which means that the law assists those who are vigilant and not those who sleep over their rights – The object behind having a prescribed limitation period is to ensure that there is certainty and finality to the litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability – Another object achieved by a fixed limitation period is that only those claims which are initiated before the deterioration of evidence takes place are allowed to be litigated – The law of limitation does not act to extinguish the right but only bars the remedy. [Para 68]

Arbitration and Conciliation Act, 1996 – s.11(6) – Limitation Act, 1963 – When the limitation period for filing an application seeking appointment of arbitrator would commence:

Held: On the aspect of when the limitation period for filing an application seeking appointment of arbitrator would commence, it is only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties, that the clock would start ticking for the purpose of the limitation of three years. [Para 70]

Limitation Act, 1963 – s.14 (1) – Ingredients need to be fulfilled for the applicability of Section 14(1):

Held: (i) The subsequent proceeding must be a suit; (ii) Both the earlier and the subsequent proceeding must be civil proceedings;

(iii) Both the earlier and subsequent proceedings must be between the same parties; (iv) The earlier and subsequent proceeding must have the same matter in issue; (v) The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature; (vi) The earlier proceedings must have been prosecuted in good faith and with due-diligence; and (vii) Both the earlier and the subsequent proceedings must be before a court. [Para 78]

Limitation Act, 1963 – s.14 (2) – Conditions required to be fulfilled for seeking the benefit of exclusion u/s.14(2) are as follows:

Held: (i) Both the earlier and the subsequent proceeding must be civil proceedings; (ii) Both the earlier and subsequent proceedings must be between the same parties; (iii) The earlier and subsequent proceeding must be for the same relief; (iv) The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature; (v) The earlier proceedings must have been prosecuted in good faith and with due-diligence; and (vi) Both the earlier and the subsequent proceedings are before a court. [Para 83]

Limitation Act, 1963 – s.14(1) and s.14(2) – The key difference between sub-sections (1) and (2) of Section 14 respectively is two-fold:

Held: (i) First, the benefit of Section 14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of Section 14(2) can be availed of where the subsequent proceeding is an application; (ii) Secondly, Section 14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas Section 14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief. [Para 84]

Arbitration and Conciliation Act, 1996 – s.11(6) – Insolvency & Bankruptcy Code, 2016 – Object of initiation of insolvency proceedings and the objective behind the appointment of an arbitrator:

Held: The object of initiation of insolvency proceedings under the IBC is to seek rehabilitation of the corporate debtor by

appointment of a new management, whereas the objective behind the appointment of an arbitrator is to resolve the disputes arising between the parties out of a private contract – As soon as the CIRP of a corporate debtor is initiated, it becomes a proceeding in rem – On the contrary, arbitration being concerned with private disputes is not an in-rem proceeding. [Para 98]

Insolvency & Bankruptcy Code, 2016 – Distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings:

Held: Insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration, etc. – The first distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings is that under the former the primary relief is the recovery of dues whereas under the latter the primary concern is the revival and rehabilitation of the corporate debtor – No doubt both proceedings contemplate an aspect of recovery of debt, however in insolvency proceedings, the recovery is only a consequence of the rehabilitation/ resolution of the corporate debtor and not the main relief – The second distinguishing feature is that although both proceedings entail recovery of debt to a certain extent, however they are different inasmuch as when it comes to recovery proceedings it is the individual creditor's debt which is sought to be recovered, whereas in insolvency proceedings it is the entire debt of the company which is sought to be resolved – The former is only for the benefit of the individual creditor who initiates the recovery proceedings whereas the latter is for the benefit of all creditors irrespective of who initiates insolvency – The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is simpliciter for the full recovery of amount which is unpaid to it – Whereas, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future. [Paras 103, 104, 105]

Case Law Cited

Vallabh Das v. Madan Lal (Dr) [1971] 1 SCR 211 : **(1970) 1 SCC 761;** *V. Rajendran v. Annasamy Pandian* [2017] 2 SCR 508 : **(2017) 5 SCC 63;** *Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others* [1987] 1 SCR 200 : **(1987) 1 SCC 5;** *Upadhyay & Co. v. State of U.P. and Others* [1998] Supp. 3 SCR 234 : **(1999) 1 SCC 81;** *Commissioner, Madhya Pradesh Housing Board & Ors. v. Mohanlal and Company* [2016] 3 SCR 357 : **(2016) 14 SCC 199;** *Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.* [2019] 3 SCR 535 : **(2019) 4 SCC 17;** *Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors.* [2019] 10 SCR 381 : **(2019) 8 SCC 416;** *Hindustan Construction Company Ltd. & Anr. v. Union of India* [2019] 17 SCR 331 : **(2020) 17 SCC 324;** *Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.* [2021] 12 SCR 603 : **(2022) 1 SCC 401;** *Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari* [1950] 1 SCR 852; *Pathapati Subba Reddy (Died) by Lrs. and Others v. The Special Deputy Collector (LA)* [2024] 4 SCR 241 : **(2024) 4 SCR 241;** *Ramlal v. Rewa Coalfields Ltd.* [1962] 2 SCR 762 : **1961 SCC OnLine SC 39 – relied on.**

Arif Azim Co. Ltd. v. Aptech Ltd. [2024] 3 SCR 73 : **2024 SCC OnLine SC 215;** *BSNL v. Nortel Networks (India) (P) Ltd.* [2021] 2 SCR 644 : **(2021) 5 SCC 738;** *Natesan Agencies (Plantations) v. State* [2019] 11 SCR 508 : **(2019) 15 SCC 70;** *Consolidated Engg. Enterprises & Ors. v. Principal Secy. Irrigation Department & Ors.* [2008] 5 SCR 1108 : **(2008) 7 SCC 169;** *J. Kumaradasan Nair v. Iric Sohan* [2009] 3 SCR 238 : **2009 (12) SCC 175;** *Union of India v. West Coast Paper Mills Ltd.* [2004] 2 SCR 642 : **(2004) 3 SCC 458;** *Maharashtra State Farming Corporation Ltd. v. Belapur Sugar & Allied Industries Ltd.,* **2004 (3) MHLF 414;** *Sarva Shramik Sanghatana v. State of Maharashtra* [2007] 12 SCR 645 : **2008 1 SCC 494;** *Vanna Claire Kaura v. Gauri Anil Indulkar & Ors.* [2009] 11 SCR 280 : **(2009) 7 SCC 541;** *Mobilox Innovations Private Limited v. Kirusa Software Private Limited* [2017] 10 SCR 1006 : **(2018) 1 SCC 353;** *M.P. Housing Board v. Mohanlal & Co.* [2016] 3 SCR 357 : **(2016) 14 SCC 199;** *Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.* [2021] 3 SCR 806 : **(2021) 7 SCC 313;** *BSNL v.*

Telephone Cables Limited [2010] 3 SCR 291 **: 2010 5 SCC 213 – referred to.**

Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar, **2018 SCC OnLine Bom 4885;** *Yogesh Kumar Gupta v. Anuradha Rangarajan,* **2007 SCC OnLine Del 287 – referred to.**

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List of Acts

Insolvency & Bankruptcy Code, 2016; Code of Civil Procedure, 1908; Arbitration and Conciliation Act, 1996; Companies Act, 2013; Limitation Act, 1963; Code of Civil Procedure (Amendment) Act, 1976; Industrial Disputes Act, 1947.

List of Keywords

Section 11(6) of the Arbitration and Conciliation Act, 1996; Section 14 of Limitation Act, 1963; Order 23 Rule 1 of the Code of Civil Procedure, 1908; Object of having a limitation period; Recovery Proceedings; Insolvency Proceedings; Appointment of an arbitrator; Ordinary recovery proceedings; *Vigilantibus non dormientibus jura subveniunt*.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 12233 of 2024

From the Judgment and Order dated 31.01.2024 of the High Court of Judicature at Bombay in COMAP No. 1 of 2023

Appearances for Parties

Tushar Mehta, Solicitor General, Sanjay Kapur, Surya Prakash, Ms. Mahima Kapur, Ms. Divya Singh Pundir, Advs. for the Appellant.

Jay Savla, Sr. Adv., Prakash Shah, Durgaprasad Poojari, Jasdeep Singh Dhillon, Prabhat Kumar Chaurasia, Anirudh Jamwal, M/s. Mps Legal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

For the convenience of exposition, this judgment is divided into the following parts:

1. Leave granted.

2. This appeal arises from the final judgment and order dated 31.01.2024 ("**impugned order**") passed by the High Court of Judicature at Bombay in Commercial Arbitration Petition No. 1 of 2023, wherein the High Court allowed the petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "**the Act, 1996**") at the instance of the M/s Shahaji Bhanudas Bhad ("**the respondent**") and appointed Justice (Retd.) Dilip Bhosale as the sole arbitrator

* Ed. Note: Pagination as per the original Judgment.

to adjudicate the disputes and differences between HPCL Biofuels Ltd. ("**the appellant**") and the respondent.

A. FACTUAL MATRIX

3. The appellant is a Government company within the meaning of Section 4(35) of the Companies Act, 2013 and is engaged *inter alia* in the business of manufacturing bio-fuels. The appellant is a wholly-owned subsidiary of Hindustan Petroleum Corporation Ltd.

4. The respondent is engaged in the business of manufacture, supply and erection of the equipment and machinery required for the setting up of sugar factories and allied products in the name of M/s S.S. Engineer, as a sole proprietor.

5. Between 27.06.2012 and 30.08.2012, the appellant floated tenders for enhancing the capacity of various process stations and Boiling House at Lauriya (West Champaran) and Sugauli (East Champaran). The respondent participated in the bidding process and was declared as the successful bidder. Subsequently, in accordance with the terms and conditions of the tender, the appellant in October and November of 2012 issued purchase orders in favour of the respondent for enhancing the capacity of the concerned Boiling House on a turn-key basis. Between 21.11.2012 and 25.03.2014, the respondent supplied various equipment under the purchase orders and raised invoices for the same.

6. While the work was in progress, the appellant expressed its concerns about the slow progress of work, quality of materials supplied and non-adherence to timelines by the respondent and attempts were made to resolve the same through mutual discussions between the parties.

7. On 13.06.2013, the appellant floated two more tenders for the purpose of completion of certain work and supplies at the Sugauli and Lauriya plants respectively. In August 2013, the appellant issued purchase orders in favour of the respondent, for completing various works including supplies on a lump-sum turnkey basis. The respondent raised invoices between 29.03.2013 & 25.03.2014 for the service portion of the turn-key contract. Accordingly, as per the respondent, the total sum payable to it under the various purchase orders aggregated to Rs. 38,18,71,026/-.

8. Between 18.12.2012 and 07.11.2013, the appellant made an aggregate payment of Rs. 19.02 crore to the respondent, with the last payment being made on 07.11.2013**.** As per the case of the respondent, the balance amount of Rs. 18,12,21,452/- remained outstanding. The discussions between the parties undertaken between October 2013 and January 2014 did not yield any fruits as the issues relating to payment and deficiency in services rendered could not be resolved. In this regard, the respondent *vide* an e-mail dated 02.02.2014 made a request to release the balance amount at the earliest, so as to enable it to complete the balance work. The appellant *vide* an e-mail dated 04.02.2014 responded to the said email and reiterated that the performance of the respondent was unsatisfactory and it had failed in fulfilling its obligations in accordance with the terms of the purchase orders. In such circumstances, the appellant refused to clear the outstanding dues of the respondent.

9. On 09.07.2016, the respondent issued a legal notice to the appellant, seeking release of the alleged outstanding payment amounting to Rs. 18,12,21,452/- along with interest. The respondent also specified in the said notice that in the event of failure of the appellant to settle the outstanding amount, the notice shall be construed as the notice for invocation of arbitration in terms of Clause 14 of the tender. The appellant, however, did not respond to the aforesaid notice.

10. On 16.02.2018, the respondent filed Arbitration Petition (ST) No. 5095 of 2018 before the High Court of Judicature at Bombay seeking appointment of an arbitrator in terms of Section 11 of the Act, 1996. However, prior to filing the Section 11 application, the respondent also sent a demand notice dated 30.08.2017 under Section 8 of the Insolvency & Bankruptcy Code, 2016 (for short "**the IBC**") to the appellant, claiming the alleged outstanding amount along with interest.

11. On 01.10.2018, upon the request made by the respondent, the Arbitration Petition (ST) No. 5095 of 2018 was disposed of as withdrawn. The relevant portions of the order dated 01.10.2018 are reproduced below: -

> *"1. Not on board. Upon mentioning, taken on board.*
>
> *2. The Learned Advocate appearing for the Petitioner*

on instructions seeks to withdraw the above Arbitration Petition. In view thereof, the above Arbitration Petition is disposed of as withdrawn."

i. Proceedings under the IBC

12. After withdrawing the Section 11(6) application from the High Court, the respondent, on 15.10.2018, filed CP(IB) No. 1422/KB/2018 under Section 9 of the IBC before the National Company Law Tribunal, Kolkata ("**NCLT**, **Kolkata**") seeking initiation of the corporate insolvency resolution process of the appellant. The appellant opposed the application, *inter alia*, on the ground that there were disputes between the parties even prior to the issuance of demand notice under Section 8 of IBC. The appellant also relied on the notice invoking the arbitration clause in support of its contention.

13. The NCLT, Kolkata vide order dated 12.02.2020, admitted the application of the respondent and appointed an Interim Resolution Professional (**IRP**). On the aspect of existence of disputes between the parties, the following observations were made:

"17. As regards the pre-existing dispute, we have gone through all the facts stated by the Corporate Debtor but having regard to the quantum of claim in respect of supplies order, in our considered view, the amount of disputed claim due and payable will be more than Rs. One lakh in any case. Hence, such claims do not help the case of Corporate Debtor in substantial manner. Having said so, we would further refer to the provisional statement attached with the letter of the Corporate Debtor dated June 25, 2014 copy of which has been placed at Page 1779 of Vol. 10 of the paper book to find as to what is the factual position as per the stand of Corporate Debtor on various issues. As per this provisional statement, the total purchase order value has been shown as Rs. 3818.72 lakhs. There have been several deductions including for services provided by Corporate Debtor to the Operational Creditor in the execution of the contract, entry tax, TDS, WCD, payment to parties/ payment to Operational Creditor by the Corporate Debtor / sub-vendors and sub-contractors/vendors of the Operational Creditor. These are normal deductions as per business practice and terms of contract. However, it

is noteworthy that Liquidated Damage @ 5% amounting to Rs. 190.94 lakhs, Performance Bank Guarantee to the tune of 673.6 lakhs, work claim of Rs. 352.00 lakhs for boiler house extension P.O. finalisation and additional work 71 lakh have also been considered. The net effect has been worked out by Corporate Debtor as Rs. 500 lakhs receivable from the Operational Creditor. If the boiler house extension and additional work are ignored, the amount recoverable from the Operational Creditor gets reduced to 63.13 lakhs. Further, if the amount retained for Performance Bank Guarantee is taken into consideration, then the amount payable to Operational Creditor works out at Rs. 610.23 lakhs (i.e., 673-63.13). As noted earlier, L.D. is applicable @ 5% amounting to Rs. 190.94 lakhs has already been deducted. Further, amount of Rs. 400.55 lakhs in respect of Purchase Orders issued at the risk and cost of the vendor have also been deducted. Thus, all recoveries for non-performance / default has been considered and therefore, amount of Performance Bank Guarantee minus recovery i.e., 610.23 lakhs at least becomes payable by Corporate Debtor to the Operational Creditor. As an adjudicating authority in the proceedings, we are not supposed to do this kind of working, but to find out the genuineness of the claim of pre-existing dispute, and amount of outstanding debt, it was necessary in the facts and circumstances of the case, hence, it has been so analysed on the basis of the provisional statement prepared and filed by the Corporate Debtor itself. At the cost of repetition, we again state that this statement takes into consideration all these disputes raised by the Corporate Debtor, hence, the amount payable by the Corporate Debtor remains in positive which is more than one lakh ultimately that too when we have considered the project as a whole against the claim of Operational Creditor of undisputed dues of supply portion only. We have also gone through the emails which have been taken into consideration while preparing this provisional statement. Hence, on the basis of material on record, it cannot be said that any other dispute remains to be considered. Apart from this, the fact which is crucial to note is that the Corporate Debtor

has awarded new work orders to the Operational Creditor subsequently which means that all the disputes relating to this contract had been considered / resolved and this fact has remained undisputed. Further, Form "C"s have been issued as late as up to March 2018. We further make it clear that we have analysed the provisional statement with limited objective of admissibility of this application and this analysis cannot be considered as expression of opinion on the amount of claim in any manner which may be actually due and payable."

(Emphasis supplied)

14. The order of the NCLT, Kolkata was subsequently set aside by the NCLAT, New Delhi *vide* order dated 10.01.2022. The NCLAT, on the aspect of pre-existing disputes between the parties, observed thus:

"18. It is clear from Section 8(2)(a) that 'Existence of a Dispute', (if any, or) record of the pendency of the Suit or Arbitration Proceeding filed before the receipt of such Notice or invoice in relation to such dispute should be brought to the notice of the 'Operational Creditor' within 10 days of receipt of the Demand Notice. In this case, the Demand Notice under Section 8 of the Code claiming a sum of Rs.13.69 Crores was issued on 25.07.2018. On 07.08.2018, the 'Corporate Debtor' responded to the Demand Notice referring to various communications, Minutes of the Meeting and submitted that there was a 'Pre-Existing Dispute'. Though we are conscious of the fact that the 'Corporate Debtor' responded to the Demand Notice belatedly, the fact remains that the Appellant raised the issue of Existence of a Dispute' in their Reply filed before the Adjudicating Authority with all the supporting documents.

19. It is pertinent to note that on 09.07.2016, 'prior to the issuance of the Demand Notice under Section 8 of the Code', the 'Operational Creditor' invoked Arbitration pursuant to the 8 project orders issued by the 'Corporate Debtor', which itself substantiates the 'Existence of a Dispute'. In the 'Notice' invoking Arbitration, the 'Operational Creditor' has stated that there is an outstanding of

Rs. 18,12,21,452/- and has further stated that they are ready to settle the disputes through Arbitration. A brief perusal of the documents on record evidence that the 'Operational Creditor' admitted that the contract was on lumpsum turnkey basis and stated in the Arbitration 'Notice' that the 'Corporate Debtor' had raised issues relating to non-adherence of the terms of the contract.

xxx xxx xxx

21. The facts of the present case are being examined in the light of the law laid down by the Hon'ble Supreme Court, though the Learned Counsel for the 'Operational Creditor' has strenuously contended that the issuance of further work orders and the Notice issued by the Operational Creditor invoking Arbitration does not amount to Existence of a Dispute', the nature of communication on record with rival contentions clarify the 'Existence of a Dispute' between the parties prior to issuance of the Demand Notice. It has been time and again held that it is enough that a 'dispute exists' between the parties.

*22. The communication between the parties as noted in para 10 read together with the Arbitration invoked by the 'Operational Creditor', we are of the considered view that there is an Existence of a Dispute between the parties which is a genuine dispute and not a spurious, patently feeble legal argument or an assertion of fact unsupported by evidence. Therefore, we are of the opinion that the ratio laid down by the Hon'ble Apex Court in the aforenoted '**Mobilox Innovations (P) Ltd.**' **(Supra)** and **'K. Kishan' (Supra)** is squarely applicable to the facts of this case."*

(Emphasis supplied)

15. The respondent challenged the aforesaid order of the NCLAT before this Court by filing the Civil Appeal No. 4583 of 2022. The appeal ultimately came to be dismissed by a two-Judge Bench *vide* judgment dated 15.07.2022 wherein the order of the NCLAT was upheld. The relevant observations made by this Court are reproduced below:

"30. This Court finds that there was a pre-existing dispute with regard to the alleged claim of the appellant against

HPCL or its subsidiary HBL. The NCLAT rightly allowed the appeal filed on behalf of HBL. It is not for this Court to adjudicate the disputes between the parties and determine whether, in fact, any amount was due from the appellant to the HPCL/HBL or vice-versa. The question is, whether the application of the Operational Creditor under Section 9 of the IBC, should have been admitted by the Adjudicating Authority. The answer to the aforesaid question has to be in the negative. The Adjudicating Authority (NCLT) clearly fell in error in admitting the application.

31. The NCLT, exercising powers under Section 7 or Section 9 of IBC, is not a debt collection forum. The IBC tackles and/or deals with insolvency and bankruptcy. It is not the object of the IBC that CIRP should be initiated to penalize solvent companies for non-payment of disputed dues claimed by an operational creditor.

32. There are noticeable differences in the IBC between the procedure of initiation of CIRP by a financial creditor and initiation of CIRP by an operational creditor. On a reading of Sections 8 and 9 of the IBC, it is patently clear that an Operational Creditor can only trigger the CIRP process, when there is an undisputed debt and a default in payment thereof. If the claim of an operational creditor is undisputed and the operational debt remains unpaid, CIRP must commence, for IBC does not countenance dishonesty or deliberate failure to repay the dues of an Operational Creditor. However, if the debt is disputed, the application of the Operational Creditor for initiation of CIRP must be dismissed.

33. We find no grounds to interfere with the judgment and order of the NCLAT impugned in this appeal.

34. The appeal is dismissed.

35. Needles to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any."

ii. Proceedings before the High Court

16. Consequent to the dismissal of the insolvency proceedings, the respondent, on 09.12.2022, filed a fresh petition under the

Section 11(6) of the Act, 1996 before the High Court of Bombay seeking appointment of an arbitrator in terms of clause 14 of the tender. The appellant opposed the petition, *inter-alia* on the ground that the same was barred by limitation and that the claim sought to be referred to arbitration was also a deadwood.

17. The High Court *vide* the impugned order allowed the application of the respondent and proceeded to appoint an arbitrator. The High Court took the view that the fresh Section 11 petition filed by the respondent, after withdrawal of the first, was not time-barred and neither the claim was a deadwood. The relevant observations of the High Court are reproduced below:

> *"8. As regards the first submission of Mr. Paranjape, that once the Section 11 Petition is withdrawn no second Petition shall lie, I do not find any provision in the Act imposing such a restrain.*
>
> *It is not the case, where the appointment of Arbitrator was prayed before the Court and the Application was turned down on merits, holding that no arbitrator deserves to be appointed in absence on an Arbitration Agreement. The Petitioner chose to withdraw the Petition and as it is categorically stated in the Petition that he was under advise to do so and pursuant thereto he approached NCLT under the IBC but did not succeed in the endeavour as the NCLT did not find such proceedings to be maintainable and even the Apex Court upheld the said order by recording that an Operational Creditor can only trigger the CIRP process when there is an undisputed debt and default in payment thereof, but if the debt is disputed, then the Application of the Operational Creditor for initiation of CIRP must be declined.*
>
> *Be that as it may be, while dismissing the Appeal, being conscious of the position that the dues of the Petitioner/ Appellant are yet to be realized, liberty was conferred to avail such remedies in accordance with law which shall include the remedy of arbitration.*
>
> *With this clear indication, by the Highest Court of the country, I am not persuaded to accept the submission of Mr. Paranjape that an Application under Section 11 of the Act seeking appointment of an Arbitrator is not maintainable.*

9. The Petitioner by his invocation notice had triggered the arbitration and accordingly approached the Court seeking appointment of an Arbitrator as the Respondent failed to agree to the appointment of Arbitrator within the period stipulated under Section 11, but instead of prosecuting the said remedy, he chose to adopt the path of initiating the proceedings under the IBC, but unfortunately, remained unsuccessful.

It is, thus, imperatively clear that the Petitioner was prosecuting the IBC proceedings before the NCLT or NCLAT, which was a completely wrong forum for him for redressal of his grievance, he was ultimately turned away by the Apex Court on 15.07.2022 by declaring that since the debt which he claims is disputed, he cannot initiate the CIRP.

10. Since he was availing a wrong remedy, he was turned down on 15.07.2022, by availing the liberty conferred, he has filed the Arbitration Petition.

Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963.

In fact, the NCLT by its order dated 28.02.2020, admitted the Application under Section 8 and 9 of the IBC and even declared the said moratorium public announcement and in accordance with Section 13 and 14 of the IBC and Moratorium under Section 14 of the IBC was also imposed.

11. Another point raised by Mr. Paranjape in respect of time barred claim being prosecuted by the Petitioner must also meet the same fate.

The learned counsel would place reliance upon the decision in case of Bharat Sanchar Nigam Limited and Another vs. Nortel Networks India Private Limited (2021) 5 SCC 738, where it is held that since there is no provision in the 1996 Act specifying the period of limitation for filing an application under Section 11, recourse must be held to the Limitation Act as per Section 43 of the 1996 Act and since none of the Articles in the schedule to Limitation Act provide time for filing such Application, it would be governed by residual provision in Article 137.

A reading of the said decision would also disclose that, it has been held that limitation is normally mixed question of fact and law and would lie within the domain of Arbitral Tribunal, but claim is hopelessly barred or a deadwood, in that case, the Court exercising the power under Section 11 may not deem it expedient to refer an exfacie time barred and dead claim to the Arbitrator. […]

xxx xxx xxx

13. I do not agree with the learned counsel that the claim of Petitioner is ex facie time-barred as a deadwood, as all the while the claim was kept alive, though it was being agitated before a wrong forum, but ultimately when the Petition was turned down by the Apex Court, he was granted liberty to stake his claim by availing such remedies as may be available to him, in accordance with law, including the remedy of Arbitration. Since the remedy of Arbitration cannot be denied to him, merely on the ground that he had at earlier point of time, before knocking the doors of NCLT withdrew the Petition filed for appointment of Arbitrator, on validly invoking arbitration. Since I do not find that the claim is ex facie time-barred for it was being prosecuted though before a wrong forum, the objection cannot be sustained.

14. In the wake of existence of an arbitration agreement between the parties, the dispute must be referred to an Arbitrator, though I leave it open to the Respondent to agitate the point of limitation before the Arbitrator.

15. In the wake of the above, Mr. Justice Dilip Bhosale (retired Chief Justice of Allahabad High Court) is appointed

as Sole Arbitrator to adjudicate the disputes and differences that have arisen between the applicant and the respondent in the two applications.

The Arbitrator shall, within a period of 15 days before entering the arbitration reference forward a statement of disclosure as contemplated u/s.11(8) r/w Section 12 of the Arbitration and Conciliation Act, 1996, to the Prothonotary and Senior Master of this Court to be placed on record. […]"

18. Aggrieved by the aforesaid order appointing an arbitrator for adjudicating the disputes between the parties, the appellant has come up before this Court with the present appeal.

B. SUBMISSIONS ON BEHALF OF THE APPELLANT

19. Mr. Tushar Mehta, the learned Solicitor General of India, appearing for the appellant submitted that the Section 11(6) petition filed by the respondent before the High Court as well as the claims sought to be referred to arbitration were time-barred.

20. He submitted that the cause of action in the present case arose on 04.02.2014, i.e., on the date when the claim of the respondent was denied by the appellant. The respondent invoked arbitration *vide* the notice dated 09.07.2016 and filed a Section 11 petition on 16.02.2018 before unconditionally withdrawing the same. The period of limitation as per Article 137 of the First Schedule to the Limitation Act, 1963 ("**the Limitation Act**") for filing a Section 11 petition is three years. In the present case, the limitation period for filing an application under Section 11(6) of the Act, 1996 came to an end on 07.08.2019. Therefore, the subsequent Section 11 application filed before the High Court on 09.12.2022 was clearly time-barred.

21. He further submitted that in addition to the limitation period for filing the Section 11 application having expired, the underlying claim sought to be referred to arbitration also became time barred on 04.02.2017, that is, after the expiry of three years from the date when the cause of action first arose. To buttress his submissions on the aspect of limitation, he placed reliance on the decisions of this Court in ***Arif Azim Co. Ltd. v. Aptech Ltd.*** reported in **2024 SCC OnLine SC 215** and ***BSNL v. Nortel Networks (India) (P) Ltd.*** reported in **(2021) 5 SCC 738.**

22. By placing reliance on the decision of this Court in ***Sarguja Transport Service v. S.T.A.T*** reported in **(1987) 1 SCC 5**, he argued that although the Code of Civil Procedure, 1908 (for short "**CPC**") may not apply *stricto sensu* to the arbitration proceedings, yet the principle underlying Order 23 Rule 1(3) which imposes a bar on the institution of subsequent proceedings against the same defendant for the same cause of action where liberty to institute fresh proceedings is not granted by the court, can be extended to it in view of the expeditious and time-bound nature of arbitration proceedings.

23. He submitted that the respondent is not entitled to avail the benefit available under Section 14 of the Limitation Act, 1963 (for short **"the Limitation Act"**) as the said provision would not be applicable to the present case. He argued that Section 14 of the Limitation Act provides for exclusion of time spent in prosecuting proceedings in a non-jurisdictional court, where the earlier and later proceedings relate to the same matter in issue or are for seeking the same relief. However, he submitted, that the insolvency and arbitral proceedings are distinct proceedings and are not for seeking the same relief. The remedy in arbitral proceedings is *in personam* whereas the remedy in insolvency proceedings is *in rem.* He submitted that the High Court failed to appreciate this distinction and erroneously allowed the arbitration petition filed by the respondent by extending to it the benefit under Section 14 of the Limitation Act.

24. He further submitted that the IBC was enacted to consolidate and amend the laws relating to the reorganisation and insolvency resolution of corporate persons in a time-bound manner for maximising the value of assets and balance the interests of all the stakeholders. On the other hand, arbitration proceedings are for the purpose of adjudication of disputes. Therefore, the objective, relief that may be granted and the procedure governing IBC and arbitration proceedings are widely divergent.

25. He argued that the period spent by the respondent pursuing insolvency proceedings instead of arbitration does not entitle them to the benefit of Section 14 of the Limitation Act, more particularly having unconditionally withdrawn the first Section 11 petition. In this regard reliance was placed by him on the decisions of this Court in ***Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **1950 SCR 852** and ***Natesan Agencies (Plantations) v. State*** reported in **(2019) 15 SCC 70**.

26. In the last, he submitted that this Court while dismissing the appeal filed by the respondent against the order of the NCLAT, had only granted conditional liberty to the respondent to pursue arbitration, which would be permitted only if it is available in law. However, in the present case, since the Section 11 application as well as the claims are time-barred, the remedy of pursuing arbitration cannot be available to the respondent in law.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT

27. Mr. Jay Savla, the learned Senior Counsel appearing on behalf of the respondent submitted that the High Court rightly excluded the time taken by the respondent in pursuing the IBC proceedings, that is, the period between the date of filing of the Section 9 application before the NCLT and the date of the order of this Court concluding the IBC proceedings by disposing of the appeal filed by the respondent against the order of the NCLAT, while calculating the limitation period for the purpose of filing a fresh application under Section 11(6) of the Act, 1996.

28. He submitted that the aforesaid period is liable to be excluded under Section 14 of the Limitation Act as the respondent was pursuing the IBC proceedings diligently and in a *bonafide* manner. He relied on the following decisions of this Court to submit that the phrase "other cause of like nature" used in Section 14 of the Limitation Act should be given a wide and liberal interpretation:

    i. ***Consolidated Engg. Enterprises & Ors. v. Principal Secy. Irrigation Department & Ors.*** reported in **(2008) 7 SCC 169**

    ii. ***J. Kumaradasan Nair v. Iric Sohan*** reported in **2009 (12) SCC 175**

    iii. ***Union of India v. West Coast Paper Mills Ltd.*** reported in **2004 (3) SCC 458**

    iv. ***Maharashtra State Farming Corporation Ltd. v. Belapur Sugar & Allied Industries Ltd.*** reported in **2004 (3) MHLF 414**

29. He submitted that the second application under Section 11(6) of the Act, 1996 was maintainable as the first application was withdrawn without any adjudication on merits and even before any formal notice could be issued by the High Court. By placing reliance on the decision of this Court in ***Sarva Shramik Sanghatana v. State of Maharashtra*** reported in ***2008 1 SCC 494***, he argued that the

withdrawal of an application under Section 11(6) of the Act, 1996 is not the same as withdrawal of a suit or a claim, and thus the principles enshrined under Order 23 Rule 1 of the CPC will have no application to the present case.

30. It was submitted that Section 32 of the Act, 1996 provides for termination of arbitration proceedings and is the only provision that relates to termination of arbitration proceedings upon their commencement under Section 21. In the present case, arbitration was invoked by the respondent *vide* notice dated 09.07.2016, and there has been no termination of such arbitration proceedings as per Section 32 of the Act, 1996. Hence, in the absence of any express bar on filing of more than one 11(6) application under the provisions of the Act, 1996, the second 11(6) application filed by the respondent cannot be said to be not maintainable.

D. ISSUES FOR DETERMINATION

31. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

i. Whether a fresh application under Section 11(6) of the Act, 1996 filed by the respondent could be said to be maintainable more particularly when no liberty to file a fresh application was granted by the High Court at the time of withdrawal of the first application under Section 11(6) of the act, 1996?

ii. Whether the fresh application under Section 11(6) of the Act, 1996 filed by the respondent on 09.12.2022 could be said to be time-barred? If yes, whether the respondent is entitled to the benefit of Section 14 of the Limitation Act? in other words, whether the period spent by the respondent in pursuing proceedings under the ibc is liable to be excluded while computing the limitation period for filing the application under section 11(6)?

iii. Whether the delay caused by the respondent in filing the fresh arbitration application under Section 11(6) of the Act, 1996 can be condoned under section 5 of the limitation act?

E. ANALYSIS

32. Clause 14 of the General Terms and Conditions of the tender document contained the arbitration clause and is reproduced hereinbelow:

> *"**14. ARBITRATION***
>
> ***14.1** All disputes and differences of whatsoever nature, whether existing or which shall at any time arise between the parties hereto touching or concerning the agreement, meaning, operation or effect thereof or to the rights and liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before after determination, foreclosure, termination or breach of the agreement (other than those in respect of which the decision of any person is, by the contract, expressed to be final and binding) shall, after written notice by either party to the agreement to the other of them and to the Appointing Authority hereinafter mentioned, be referred for adjudication to the Sole Arbitrator to be appointed as hereinafter provided.*
>
> ***14.2** The appointing authority shall either himself act as the Sole Arbitrator or nominate some officer/retired officer of HBL/Hindustan Petroleum Corporation Limited (referred to as owner or HBL) or any other Government Company, or any retired officer of the Central Government not below the rank of a Director, to act as the Sole Arbitrator to adjudicate the disputes and differences between the parties. The contractor/vendor shall not be entitled to raise any objection to the appointment of such person as the Sole Arbitrator on the ground that the said person is/was an officer and/or shareholder of the owner, another Govt. Company or the Central Government or that he/she has to deal or had dealt with the matter to which the contract relates or that in the course of his/her duties, he/she has/had expressed views on all or any of the matters in dispute or difference.*
>
> ***14.3** In the event of the Arbitrator to whom the matter is referred to, does not accept the appointment, or is unable or unwilling to act or resigns or vacates his office for any*

reasons whatsoever, the Appointing Authority aforesaid, shall nominate another person as aforesaid, to act as the Sole Arbitrator.

14.4 *Such another person nominated as the Sole Arbitrator shall be entitled to proceed with the arbitration from the stage at which it was left by his predecessor. It is expressly agreed between the parties that no person other than the Appointing Authority or a person nominated by the Appointing Authority as aforesaid, shall act as an Arbitrator. The failure on the part of the Appointing Authority to make an appointment on time shall only give rise to a right to a Contractor to get such an appointment made and not to have any other person appointed as the Sole Arbitrator.*

14.5 *The Award of the Sole Arbitrator shall be final and binding on the parties to the Agreement.*

14.6 *The work under the Contract shall, however, continue during the Arbitration proceedings and no payment due or payable to the concerned party shall be withheld (except to the extent disputed) on account of initiation, commencement or pendency of such proceedings.*

14.7 *The Arbitrator may give a composite or separate Award(s) in respect of each dispute or difference referred to him and may also make interim award(s) if necessary.*

14.8 *The fees of the Arbitrator and expenses of arbitration, if any, shall be borne equally by the parties unless the Sole Arbitrator otherwise directs in his award with reasons. The lumpsum fees of the Arbitrator shall be Rs 60,000/- per case and if the sole Arbitrator completes the arbitration including his award within 5 months of accepting his appointment, he shall be paid Rs.10,000/- additionally as bonus. Reasonable actual expenses for stenographer, etc. will be reimbursed. Fees shall be paid stage wise i.e. 25% on acceptance, 25% on completion of pleadings/ documentation, 25% on completion of arguments and balance on receipt of award by the parties.*

14.9 *Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 1996 or any statutory*

modification or re-enactment thereof and the rules made thereunder, shall apply to the Arbitration proceedings under this Clause.

14.10 *The Contract shall be governed by and constructed according to the laws in force in India. The parties hereby submit to the exclusive jurisdiction of the Courts situated at Mumbai for all purposes. The Arbitration shall be held at Mumbai and conducted in English language.*

14.11 *The Appointing Authority is the Functional Director of Hindustan Petroleum Corporation Limited."*

33. Neither the existence nor the validity of the arbitration agreement has been disputed by the appellant. However, the appellant has challenged the allowing of the application for appointment of arbitrator by the High Court on two grounds – (i) the application before the High Court was not maintainable as it was filed for the second time having been withdrawn previously without seeking any liberty to file afresh; and (ii) the application is time-barred for being beyond the time period of three years prescribed under Article 137 of the Limitation Act. We shall address both these contentions in seriatim as they are pivotal to the fate of the present appeal.

i. Issue No. 1

34. Section 11 of the Act, 1996 lays down the procedure for appointment of arbitrators through the intervention of the High Court or the Supreme Court, as the case may be. A reading of the said provision indicates that there is nothing therein which prevents a party from filing more than one application seeking the appointment of arbitrator for adjudicating disputes arising from the same contract.

35. However, the appellant has contended that in lieu of the principles contained in Order 23 Rule 1 of the CPC, the respondent could not have filed a subsequent application under Section 11(6) for adjudication of the same disputes, having previously withdrawn unconditionally an application filed for the same purpose. To address the contention of the appellant, we need to determine whether the principles contained in Order 23 Rule 1 of the CPC will apply to an application under Section 11(6) of the Act, 1996.

a. Scope and applicability of Order 23 Rule 1 of the CPC to proceedings other than suits

36. Prior to its amendment by the Code of Civil Procedure (Amendment) Act, 1976, Order 23 Rule 1 of the CPC provided for two kinds of withdrawal of a suit, namely absolute withdrawal and withdrawal with the permission of the court to institute a fresh suit on the same cause of action. The first category of withdrawal was governed by sub-rule (1) thereof, as it stood then, which provided that at any time after the institution of a suit, the plaintiff may, as against all or any of the defendants withdraw his suit or abandon a part of his claim. The second category was governed by sub-rule (2) thereof which provided that where the court was satisfied (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there were sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thought fit, grant the plaintiff permission to withdraw from such suit or abandon a part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. Sub-rule (3) of the former Order 23 Rule 1 of the CPC provided that where the plaintiff withdrew from a suit or abandoned a part of a claim without the permission referred to in sub-rule (2), he would be liable to such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The legislature felt that the use of the word "withdrawal" in relation to both the aforesaid categories had led to confusion and thus amended the rule to avoid such confusion.

37. Order 23 Rule 1 of the CPC as it stands now post the amendment is reproduced hereinbelow:

> *"**Withdrawal of suit or abandonment of part of claim.—***
>
> *(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*
>
> *Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim,

It may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiff"

38. The key difference between Order 23 Rule 1 as it stood prior to the amendment and as it stands now is that while in sub-rule (1) of the former Order 23 Rule 1, the expression "withdraw his suit" had been used, whereas in sub-rule (1) of the amended Order 23 Rule 1, the expression "abandon his suit" has been used. The new sub-rule (1) is applicable to a case where the court declines to accord permission to withdraw from a suit or such part of the claim with liberty to institute

a fresh suit in respect of the subject-matter of such suit or such part of the claim. In the new sub-rule (3) which corresponds to the former sub-rule (2), practically no change is made. Under sub-rule (3), the court is empowered to grant, subject to the conditions mentioned therein, permission to withdraw from a suit with liberty to institute a fresh suit in respect of the subject-matter of such suit. Sub-rule (4) of the amended Order 23 Rule 1 provides that where the plaintiff abandons any suit or part of claim under sub-rule (1) or withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he would be liable for such costs as the court may award and would also be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

39. Order 23 Rule 1, as it now stands post the amendment, makes a distinction between "abandonment" of a suit and "withdrawal" from a suit with permission to file a fresh suit and provides for – *first,* abandonment of suit or a part of claim; and *secondly,* withdrawal from suit or part of claim with the leave of the court. Abandonment of suit or a part of claim against all or any of the defendants is an absolute and unqualified right of a plaintiff and the court has no power to preclude the plaintiff from abandoning the suit or direct him to proceed with it. Sub-rule (1) of Order 23 Rule 1 embodies this principle. However, if the plaintiff abandons the suit or part of claim, then he is precluded from instituting a fresh suit in respect of such subject-matter or such part of claim. Upon abandoning the suit or part of claim, the plaintiff also becomes liable to pay such costs as may be imposed by the Court. This is specified under sub-rule (4) of Order 23 Rule 1.

40. However, if the plaintiff desires to withdraw from a suit or part of a claim with liberty to file a fresh suit on the same subject matter or part of the claim, then he must obtain the permission of the court under sub-rule (3) of Order 23 Rule 1. The failure to obtain such permission would preclude the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim, and also to any costs that may be imposed by the court.

41. The court granting liberty under sub-rule (3) of Order 23 Rule 1 may do so only upon being satisfied of one of the following two conditions– *first*, that the suit suffers from some formal defect and would fail by reason of such defect; and *second*, that there are sufficient grounds for allowing the plaintiff to institute a fresh suit

for the same subject-matter or part of the claim. The court may grant liberty on such terms as it deems fit. It is also apparent from the text of the provision that the liberty under sub-rule (3) can only be granted by the court trying the earlier suit and not by the court before which the subsequent suit is instituted.

42. On meaning of the phrase 'subject-matter' appearing in Order 23 Rule 1, this Court in ***Vallabh Das v. Madan Lal (Dr)*** reported in **(1970) 1 SCC 761** held thus:

> *"5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression "subject-matter" is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause*

of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression "subject-matter" in Order 23 of the Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words "subject-matter" means the bundle of facts which have to be proved in order to entile the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit."

(Emphasis supplied)

43. Discussing on the meaning of the phrases 'formal defect' and 'sufficient grounds', a two-Judge Bench of this Court in ***V. Rajendran v. Annasamy Pandian*** reported in **(2017) 5 SCC 63** observed thus:

"9. […] As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh

suit only if the condition in either of the clauses (a) or (b), that is, existence of a "formal defect" or "sufficient grounds". The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In K.S. Bhoopathy v. Kokila [(2000) 5 SCC 458], it has been held that it is the duty of the Court to be satisfied about the existence of "formal defect" or "sufficient grounds" before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the "formal defect" or "sufficient grounds", such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the "formal defect" or "sufficient grounds". "Formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. "Formal defect" must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order 23 Rule 1(3)(b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words "sufficient grounds", there are two views : one view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should

> *be read independent of the words a "formal defect" and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is, "sufficient grounds".*"
>
> (Emphasis supplied)

44. The main purpose of permitting the withdrawal of a suit and its re-filing is to ensure that justice is not thwarted due to technicalities. Where permission under Order 23 Rule 1 is granted, the principle of estoppel does not operate and the principle of *res judicate* would also not apply. However, Order 23 Rule 1 is not intended to enable the plaintiff to get a chance to commence litigation afresh in order to avoid the results of his previous suit, or to engage in multiple proceedings with the motive of bench-hunting.

45. Order 23 Rule 2 stipulates that any fresh suit instituted on permission granted under Order 23 Rule 1 shall be governed by the law of limitation in the same manner as if the first suit had not been instituted. The object underlying this Rule is to prevent a party from misusing the liberty of filing a fresh suit for evading the limitation period governing the said suit. The said rule is reproduced hereinbelow:

> *"2. Limitation law not affected by first suit.—In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted."*

46. Undoubtedly, an application under Section 11(6) of the Act, 1996 is not a suit and hence will not be governed *stricto-sensu* by Order 23 Rule 1 of the CPC. However, in a number of decisions, this Court has extended the principle underlying Order 23 Rule 1 to proceedings other than suits on the ground of public policy underlying the said rule. The appellant has submitted that in view of the aforesaid decisions, there is no reason why the principles of Order 23 Rule 1 should not be extended to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.

47. A two-Judge Bench of this Court in ***Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others***

reported in **(1987) 1 SCC 5** while elaborating upon the principle underlying Order 23 Rule 1 of CPC, extended them to writ petitions under Articles 226 and 227. Relevant observations from the said decision are as follows:

> *"7. […] The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur — the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will loose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court.*

> *8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court."*
>
> (Emphasis supplied)

48. The principles enunciated in ***Sarguja Transport*** *(supra)* were extended to Special Leave Petitions filed before this Court by a two-Judge Bench of this Court in ***Upadhyay & Co. v. State of U.P. and Others*** reported in **(1999) 1 SCC 81**. It was observed by the bench thus:

> *11. […] It is not a permissible practice to challenge the same order over again after withdrawing the special leave petition without obtaining permission of the court for withdrawing it with liberty to move for special leave again subsequently.*
>
> ***xxx xxx xxx***
>
> *13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service v. STAT [(1987) 1 SCC 5). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order*

admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. […]

xxx xxx xxx

15. We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Article 136 of the Constitution also. […]"

(Emphasis supplied)

49. The respondent has relied upon the decision of this Court in ***Sarva Shramik Sanghatana*** *(supra)* to contend that the principles underlying Order 23 Rule 1 of the CPC cannot be applied as a matter of fact in every legal proceeding. In the said case, an application seeking permission for closure under Section 25-O(1) of the Industrial Disputes Act, 1947 had been filed by the respondent Company therein. However, before the application could be decided, the Company received a letter from the Deputy Commissioner of Labour, Mumbai inviting it to a meeting for exploring the possibility of an amicable settlement. The Company withdrew its application in lieu of the invite and Section 25-O(3) which provides that an application made under Section 25-O(1) will be deemed to have been allowed if it is not decided within a period of 60 days from the date of filing. However, after the attempts for an amicable settlement failed, the Company moved a fresh application under Section 25-O(1). The application was opposed by the appellant therein, *inter-alia*, on the ground that since the first application was withdrawn by the Company without obtaining liberty to file a fresh application, the same would not be maintainable as per the principles underlying Order 23 Rule 1 of the CPC. In this regard, reliance was placed by the appellant therein upon the decision of this Court in ***Sarguja Transport*** *(supra)*.

However, this Court distinguished the decision in ***Sarguja Transport*** *(supra)* on the ground that the objective in the said decision was to prevent such situations where the petitioner withdraws a case to file it before a more convenient Bench or for some other *mala fide* purpose. The relevant observations from the said decision are reproduced hereinbelow:

> *"19. In the present case, we are satisfied that the application for withdrawal of the first petition under Section 25-O(1) was made bona fide because the respondent Company had received a letter from the Deputy Labour Commissioner on 5-4-2007 calling for a meeting of the parties so that an effort could be made for an amicable settlement. In fact, the respondent Company could have waited for the expiry of 60 days from the date of filing of its application under Section 25-O(1), on the expiry of which the application would have deemed to have been allowed under Section 25-O(3). The fact that it did not do so, and instead applied for withdrawal of its application under Section 25-O(1), shows its bona fide. The respondent Company was trying for an amicable settlement, and this was clearly bona fide, and it was not a case of Bench-hunting when it found that an adverse order was likely to be passed against it. Hence, Sarguja Transport case [(1987) 1 SCC 5 : 1987 SCC (Cri) 19 : AIR 1987 SC 88] is clearly distinguishable, and will only apply where the first petition was withdrawn in order to do Bench-hunting or for some other mala fide purpose.*
>
> *20. We agree with the learned counsel for the appellant that although the Code of Civil Procedure does not strictly apply to proceedings under Section 25-O(1) of the Industrial Disputes Act, or other judicial or quasi-judicial proceedings under any other Act, some of the general principles in CPC may be applicable. For instance, even if Section 11 CPC does not in terms strictly apply because both the proceedings may not be suits, the general principle of res judicata may apply vide Pondicherry Khadi & Village Industries Board v. P. Kulothangan [(2004) 1 SCC 68 : 2004 SCC (L&S) 32] . However, this does not mean that all provisions in CPC will strictly apply to proceedings which are not suits.*

> *22. No doubt, Order 23 Rule 1(4) CPC states that where the plaintiff withdraws a suit without permission of the court, he is precluded from instituting any fresh suit in respect of the same subject-matter. However, in our opinion, this provision will apply only to suits. An application under Section 25-O(1) is not a suit, and hence, the said provision will not apply to such an application."*
>
> (Emphasis supplied)

50. While we agree with the decision in the aforesaid case to the extent that it declined to apply the principles of Order 23 Rule 1 and refused to dismiss a *bonafide* subsequent application filed after the earlier one was withdrawn in good faith to attempt conciliation, we are of the view that it cannot be declared as a general rule that merely because a legal proceeding is not a 'suit', it would be completely exempted from the application of principles underlying Order 23 Rule 1. These principles, being in the nature of public policy, bring efficiency and certainty to the administration of justice by any court and should be invoked and enforced unless they are expressly prohibited by statute or appear to counter serve the interest of justice, rather than advancing it.

51. One important policy consideration which permeates the scheme of Order 23 Rule 1 is the legislative intent that legal proceedings in respect of a subject-matter are not stretched for unduly long periods by allowing a party to reagitate the same issue over and over again, which also leads to uncertainty for the responding parties. Arbitration as a dispute resolution method, too, seeks to curtail the time spent by disputing parties in pursuing legal proceedings. This is evident from the various provisions of the Act, 1996 which provide a timeline for compliance with various procedural requirements under the said Act. An application for appointment of arbitrator under Section 11(6) of the Act, 1996 is required to be filed when there is failure on the part of the parties or their nominated arbitrators to commence the arbitration proceedings as per the agreed upon procedure. This Court, being conscious of the temporally sensitive nature of proceedings under Section 11(6), has issued various directions from time to time to ensure that applications for appointment of arbitrators are decided in an expeditious manner. Keeping in view the approach of this Court and the nature of

applications under Section 11(6) of the Act, 1996, we find no reason to not extend the principles of Order 23 Rule 1 to such proceedings, when the very same principles have been extended to writ proceedings before High Courts under Articles 226 & 227 and SLPs before this Court under Article 136.

52. One important aspect that needs to be kept in mind while applying the principles of Order 23 Rule 1 to applications under Section 11(6) of the Act, 1996 is that it will act as a bar to only those applications which are filed subsequent to the withdrawal of a previous Section 11(6) application filed on the basis of the same cause of action. The extension of the aforesaid principle cannot be construed to mean that it bars invocation of the same arbitration clause on more than one occasion. It is possible that certain claims or disputes may arise between the parties after a tribunal has already been appointed in furtherance of an application under Section 11(6). In such a scenario, a party cannot be precluded from invoking the arbitration clause only on the ground that it had previously invoked the same arbitration clause. If the cause of action for invoking subsequent arbitration has arisen after the invocation of the first arbitration, then the application for appointment of arbitrator cannot be rejected on the ground of multiplicity alone.

53. The principles of Order 23 Rule 1 are extended to proceedings other than suits with a view to bring in certainty, expediency and efficiency in legal proceedings. However, at the same time, it must also be kept in mind while extending the principles to legal proceedings other than suits that the principles are not applied in a rigid or hyper-technical manner. While the nature of the proceedings, that is, whether such proceeding is a suit or otherwise, should not be a consideration in deciding whether the principles of Order 23 Rule 1 should be extended to such proceedings or not, the *bonafide* conduct of a party in the unique facts of a case must be considered before precluding such a party from moving ahead with the proceedings.

54. In the case of ***Vanna Claire Kaura v. Gauri Anil Indulkar & Ors.*** reported in **(2009) 7 SCC 541** the applicant filed a Section 11(6) application before the High Court of Bombay. A dispute was raised that the application was not maintainable as the agreements were in the nature of international commercial arbitration agreement under the Act, 1996 and the application for appointment would only lie before

the Chief Justice of India. Accordingly, the applicant withdrew the Section 11 application and filed a Section 11(6) application before this Court. The subsequent application was opposed *inter alia* on the ground that arbitration was invoked by notice dated 14.03.2006 and was thereafter abandoned with the withdrawal of the petition from the High Court. Hence, the second application without the leave of the High Court would not be maintainable. However, this Court, negatived the objections against the application and proceeded to appoint the arbitrator.

55. Coming to the facts of the case at hand, both the applications under Section 11(6) of the Act, 1996 were filed seeking adjudication of the dispute which arose on 02.02.2014 upon refusal of the appellant to pay the dues of the respondent. The first application under Section 11(6) was filed on 16.02.2018 and was subsequently withdrawn unconditionally on 01.10.2018. After a gap of more than four years, the respondent filed a subsequent application under Section 11(6) before the High Court on 09.12.2022 which came to be allowed by the impugned order.

56. The High Court was of the view that the respondent chose to withdraw the petition under legal advice and thereafter approached NCLT under the IBC but did not succeed in its endeavor. Further, the High Court observed that while dismissing the appeal, this Court vide Order dated 15.07.2022 granted liberty to the respondent to avail such remedies in accordance with law, which shall include the remedy of arbitration. Accepting the explanation given by the respondent as *bonafide* and relying on the order dated 15.07.2022 of this Court, the High Court held the fresh petition under Section 11(6) to be maintainable.

57. A perusal of paragraph 18 of the order dated 10.01.2022 passed by the NCLAT setting aside the order of the NCLT reveals that after invoking the arbitration clause by the notice dated 09.07.2016, the respondent issued a statutory demand notice to the appellant under Section 8 of the IBC on 30.08.2017. When no reply was sent by the appellant to the said demand notice, the respondent, rather than filing an application under Section 9 of the IBC, filed an application for the appointment of arbitrator on 16.02.2018. During the pendency of the application under Section 11(6) of the Act, 1996 before the High Court, the respondent issued a second statutory demand notice under Section 8 of the IBC to the appellant on 25.07.2018. The appellant filed a reply to the said demand notice on 07.08.2018, wherein, *inter*

alia, it took the defence that there was a pre-existing dispute between the parties, which was evidenced by the existence of the pending arbitration proceedings. Subsequently, the respondent withdrew the arbitration application on 01.10.2018 and thereafter proceeded to file an application before the NCLT, Kolkata on 05.10.2018.

58. The chronology of events as discussed above clearly indicates that the respondent did not withdraw the first arbitration application because of some defect which would have led to its dismissal. It is also clear from the order dated 01.10.2018 of the High Court permitting the respondent to withdraw the application that neither any liberty was sought by the respondent nor the court had granted any liberty to file a fresh arbitration application. It appears to us that the only reason the respondent withdrew the arbitration application was to get his application under Section 9 of the IBC any how admitted by the NCLT. It is also evident that the existence of a pre-existing dispute was brought to the notice of the respondent by the appellant much prior to the withdrawal of the arbitration application in reply to the demand notice issued by the respondent under Section 8 of the IBC. Thus, it can be said without any doubt that the respondent took a calculated risk of abandoning the arbitration proceedings to maximise the chances of succeeding in the IBC proceedings.

59. The respondent was within its right to abandon the arbitration proceedings in favour of IBC proceedings. However, having done so, it would no longer be open to it to file a fresh application for appointment of arbitrator without having obtained the liberty of the court to file a fresh application at the time of the withdrawal. We say so particularly because the withdrawal of the first arbitration application was not with a view to cure some formal defect or any other sufficient ground. The application was withdrawn with the hope that the application filed by the respondent under Section 9 of the IBC may succeed, as the pendency of the arbitration application would have proven to be an indicator of existence of a pre-existing dispute between the parties, and thus fatal to the IBC proceedings.

60. As we are of the view that the principles underlying Order 23 Rule 1 can be extended to applications for appointment of arbitrator, the only recourse to the respondent to defend the second application as maintainable despite it having been withdrawn earlier without liberty was to show *bona fides* on its part. From the conduct of

the respondent, it is evident that it thought fit to initiate insolvency proceedings perhaps thinking that the issues existing between the parties may not get resolved through arbitration. Further, no document has been placed on record to substantiate the so called incorrect legal advice the respondent claims to have received. Therefore, the failure on the part of the respondent to withdraw the first Section 11 application without seeking any liberty cannot be condoned in the facts of the present case.

61. In light of the aforesaid discussion, we are of the view that in the absence of any liberty sought by the respondents from the High Court at the time of withdrawal of the first arbitration application, the fresh Section 11 petition arising out of the same cause of action cannot be said to be maintainable.

62. Another way of looking at the abandonment of Section 11(6) application is by understanding the importance of such an application in view of Sections 21 and 43(2) of the Act, 1996 respectively. By virtue of Section 21, the arbitral proceedings commence on the date on which the respondent receives the petitioner's notice invoking arbitration. The said provision is reproduced below:

> *"**21. Commencement of arbitral proceedings.—**Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."*

63. Section 43(2) of the Act, 1996 provides that for the purposes of limitation, an arbitration shall be 'deemed' to have commenced on the date referred to in Section 21. Section 43(2) is reproduced below:

> *"(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21."*

64. As is clear from the word "deemed" used in Section 43(2), the commencement of arbitration proceedings, as contemplated in Section 21, is in the nature of a legal or deeming fiction. It is a notional commencement and not a factual or actual commencement of arbitration. However, the factual or actual arbitration proceeding commences only once an arbitrator is appointed either by the High Court under Section 11 or by consent of parties.

65. Hence, a petition under Section 11(6) of the Act, 1996 is not a proceeding merely seeking the appointment of an arbitrator. It is in reality a proceeding for appointing an arbitrator and for commencing the actual or real arbitration proceedings.

66. If that is so, the unconditional withdrawal of a Section 11(6) petition amounts to abandoning not only the formal prayer for appointing an arbitrator but also the substantive prayer for commencing the actual arbitration proceedings. It amounts to abandoning the arbitration itself. It results in abandonment of the notional 'arbitration proceeding' that had commenced by virtue of Section 21 and thus amounts to an abandonment of a significant nature. Therefore, it is all the more important to import and apply the principles underlying Order 23 Rule 1 of the CPC to abandonment of applications under Section 11(6).

ii. Issue No. 2

67. It was submitted by the appellant that the fresh application filed by the respondent under Section 11(6) of the Act, 1996 before the High Court was beyond the period of limitation prescribed for filing of such an application and was not maintainable. The appellant also contended that the substantive claims raised by the respondent are also *ex-facie* time-barred and thus the High Court ought to have dismissed the fresh arbitration application filed by the respondent on this ground as well.

68. The basic premise behind the statutes providing for a limitation period is encapsulated by the maxim *"Vigilantibus non dormientibus jura subveniunt"* which means that the law assists those who are vigilant and not those who sleep over their rights. The object behind having a prescribed limitation period is to ensure that there is certainty and finality to the litigation and assurance to the opposite party that it will not be subject to an indefinite period of liability. Another object achieved by a fixed limitation period is that only those claims which are initiated before the deterioration of evidence takes place are allowed to be litigated. The law of limitation does not act to extinguish the right but only bars the remedy.

69. The limitation period governing applications under Section 11(6) of the Act, 1996 has recently been explained by a three-Judge Bench of this Court, to which My Lord, the Chief Justice of India and myself

were a part, in ***M/s Arif Azim Co. Ltd. v. M/s Aptech Ltd.*** reported in **2024 INSC 155**. The said decision has referred to Article 137 of the Limitation Act, 1963 to hold that the limitation period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues.

70. On the aspect of when the limitation period for filing an application seeking appointment of arbitrator would commence, the aforesaid decision has held that it is only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties, that the clock would start ticking for the purpose of the limitation of three years.

71. In the case at hand, the respondent invoked the arbitration clause vide a notice dated 09.07.2016. Since there was no response to the said notice by the appellant, the respondent filed an application for appointment of arbitrator before the High Court under Section 11(6) of the Act, 1996 on 16.02.2018. Subsequently, it abandoned the application to pursue proceedings under the IBC.

72. On 15.10.2018, the respondent filed an application under Section 9 of the IBC for initiation of Corporate Insolvency Resolution Process against the appellant. The IBC proceedings initiated by the respondent under Section 9 were ultimately dismissed by this Court vide order dated 15.07.2022 by way of which the order of the NCLAT was upheld and the order of the NCLT was set-aside. This Court took the view that the NCLT had committed a grave error of law by admitting the application of the respondent even though there was a pre-existing dispute between the parties. Placing reliance on the decision of this Court in ***Mobilox Innovations Private Limited v. Kirusa Software Private Limited*** reported in **(2018) 1 SCC 353**, this Court held that upon the occurrence of a pre-existing dispute regarding the alleged claims of the respondent against the appellant, the Section 9 application of the respondent as an 'Operational Creditor' could not have been entertained.

73. Upon rejection of the Section 9 application by this Court, the respondent filed a fresh application under Section 11(6) on 09.12.2022 before the High Court. The High Court allowed the application and proceeded to appoint the arbitrator vide the impugned order.

74. An overview of the facts as discussed above indicates that the first application under Section 11(6) filed on 16.02.2018 was well within the prescribed limitation period of three years for filing such applications. However, even assuming that the second application under Section 11(6) is not barred by the principles underlying Order 23 Rule 1, the same was required to be filed within a period of three years from the expiry of one month from the date of receipt of the notice invoking arbitration by the appellant. This period of three years came to an end in August, 2019. The second application under Section 11(6) came to be filed by the respondent much later on 12.12.2022 and is clearly time-barred.

75. However, to save the second Section 11(6) application from being dismissed on account of being time-barred, the respondent has contended that it is entitled to invoke the benefit under Section 14 of the Limitation Act, 1963 to seek exclusion of the period spent by it in pursuing the proceedings under Section 9 of the IBC. The respondent has further submitted that even otherwise, this Court in exercise of its discretion available under Section 5 of the Limitation Act may condone the delay in filing the second 11(6) application before the High Court, as it was pursuing the insolvency proceedings in a *bona fide* manner and would be left remediless if the appointment of arbitrator by the High Court is set aside by this Court.

76. Section 14 of the Limitation Act provides for exclusion of time of proceeding bona fide in court without jurisdiction and is reproduced below: -

> ***"14. Exclusion of time of proceeding bona fide in court without jurisdiction.—***
>
> *(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.*
>
> *(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a*

court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.—For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

77. There is a body of decisions of this Court taking the view that by virtue of Section 43 of the Act, 1996, the Limitation Act is applicable to applications for appointment of arbitrator filed under Section 11(6) of the said Act. It thus follows that the benefit under Section 14 of the Limitation Act can be availed by an applicant subject to the fulfilment of the conditions specified therein. However, a bare perusal of the aforesaid provision indicates that sub-sections (1) and (2) respectively of Section 14 are materially different from each other. Thus, it is important to ascertain as to which provision would be applicable to an application for appointment of arbitrator under Section 11(6) of the Act, 1996.

78. Under Section 14(1), in computing the period of limitation for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first

instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it. Thus, the following ingredients need to be fulfilled for the applicability of Section 14(1):

i. The subsequent proceeding must be a suit;

ii. Both the earlier and the subsequent proceeding must be civil proceedings;

iii. Both the earlier and subsequent proceedings must be between the same parties;

iv. The earlier and subsequent proceeding must have the same matter in issue;

v. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;

vi. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and

vii. Both the earlier and the subsequent proceedings must be before a court.

79. A three-Judge Bench of this Court in ***Consolidated Engg. Enterprises v. Irrigation Deptt.*** reported in **(2008) 7 SCC 169**, dealt with the question as to whether Section 14 of the Limitation Act would be applicable to an application submitted under Section 34 of the Act, 1996 for setting aside the award made by the arbitrator. The Court enumerated the conditions for the applicability of Section 14(1) as follows:

> "*21. Section 14 of the Limitation Act deals with exclusion of time of proceeding bona fide in a court without jurisdiction. On analysis of the said section, it becomes evident that the following conditions must be satisfied before Section 14 can be pressed into service:*
>
> *(1) Both the prior and subsequent proceedings are civil proceedings prosecuted by the same party;*
>
> *(2) The prior proceeding had been prosecuted with due diligence and in good faith;*

(3) The failure of the prior proceeding was due to defect of jurisdiction or other cause of like nature;

(4) The earlier proceeding and the latter proceeding must relate to the same matter in issue and;

(5) Both the proceedings are in a court."

80. Section 2 of the Limitation Act provides certain definitions. Some of them which are pertinent to the present discussion are reproduced hereinbelow:

"In this Act, unless the context otherwise requires,—

(a) "applicant" includes—

(i) a petitioner;

(ii) any person from or through whom an applicant derives his right to apply;

(iii) any person whose estate is represented by the applicant as executor, administrator or other representative;

xxx xxx xxx

(b) "application" includes a petition;

xxx xxx xxx

(h) "good faith" - nothing shall be deemed to be done in good faith which is not done with due care and attention;

xxx xxx xxx

(j) "period of limitation" means the period of limitation prescribed for any suit, appeal or application by the Schedule, and "prescribed period" means the period of limitation computed in accordance with the provisions of this Act;

xxx xxx xxx

(l) "suit" does not include an appeal or an application;

81. Section 2(1) as reproduced above clearly provides for a distinction between a 'suit' and an 'application' under the Limitation Act. Thus, the clear intention of the legislature was that they are not to be considered as the same for the purpose of Limitation Act.

82. In Section 11(6) of the Act, 1996, the words 'the appointment shall be made, on an application of the party' are used, thereby signifying that a Section 11 petition is in the nature of an 'application' and cannot be considered to be a 'suit' for the purposes of the Limitation Act. Even otherwise, 'application' under the Limitation Act includes a 'petition', thereby leaving no room for any doubt that a Section 11(6) petition is to be treated as an application.

83. As a petition under Section 11(6) of the Act, 1996 is not a suit, hence it would not be governed by sub-section (1) of Section 14 of the Limitation Act. Instead, it would be governed by sub-section (2) of Section 14 of the Limitation Act. Some of the conditions required to be fulfilled for seeking the benefit of exclusion under Section 14(2) are materially different from those required under Section 14(1) and are as follows:

    i. Both the earlier and the subsequent proceeding must be civil proceedings;

    ii. Both the earlier and subsequent proceedings must be between the same parties;

    iii. The earlier and subsequent proceeding must be for the same relief;

    iv. The earlier proceeding must have failed owing to a defect of jurisdiction of the earlier court or any other cause of a like nature;

    v. The earlier proceedings must have been prosecuted in good faith and with due-diligence; and

    vi. Both the earlier and the subsequent proceedings are before a court.

84. With every other ingredient remaining the same, the key difference between sub-sections (1) and (2) of Section 14 respectively is two-fold:

    i. First, the benefit of Section 14(1) can be availed of where the subsequent proceeding is a suit, whereas the benefit of Section 14(2) can be availed of where the subsequent proceeding is an application.

    ii. Secondly, Section 14(1) applies if both the earlier and the subsequent proceedings have the same matter in issue, whereas Section 14(2) applies when both the earlier and the subsequent proceedings are filed for seeking the same relief.

85. Clearly, the scope of the expression "same matter in issue" appearing in Section 14(1) is much wider than that of the expression "for the same relief" appearing in Section 14(2) of the Limitation Act. This is evident on account of the difference between the nature of a suit vis-à-vis an application. In a suit, a party generally seeks relief in the nature of the cause of action which is established on the basis of oral and documentary evidence and arguments. Whereas, an application is made under a particular provision of a statute and if it appears to the court that such provision of the statute is not applicable, then the application as a whole cannot be sustained. Thus, an application is made for a specific purpose as provided by the statutory provision under which it is made unlike a suit which is instituted based on a cause of action and is for seeking remedies falling in a wider conspectus.

86. Sub-section (3) of Section 14 stipulates that where liberty to withdraw any suit is granted under sub-rule (3) of Order 23 Rule 1 on the ground of defect of jurisdiction or other cause of a like nature, then, the exclusion of limitation period as provided by Section 14(1) will be available to the plaintiff to institute any fresh suit on the same subject-matter.

87. The respondent has contended that the expression "other cause of a like nature" used in Section 14 of the Limitation Act should be given a wide interpretation as Section 14 is meant to advance the cause of the justice and not thwart it by procedural impediments. In view of liberal interpretation of Section 14, the respondent submitted that the case at hand is one fit for the grant of relief under Section 14 of the Limitation Act.

88. This Court in ***M.P. Housing Board v. Mohanlal & Co.*** reported in **(2016) 14 SCC 199** observed thus on the liberal interpretation of Section 14 of the Limitation Act:

> *"16. From the aforesaid passage, it is clear as noonday that there has to be a liberal interpretation to advance the cause of justice. However, it has also been laid down that it would be applicable in cases of mistaken remedy or selection of a wrong forum. As per the conditions enumerated, the earlier proceeding and the latter proceeding must relate to the same matter in issue. It is worthy to mention here that the words "matter in*

issue" are used under Section 11 of the Code of Civil Procedure, 1908. As has been held in Ramadhar Shrivas v. Bhagwandas [(2005) 13 SCC 1], the said expression connotes the matter which is directly and substantially in issue. We have only referred to the said authority to highlight that despite liberal interpretation placed under Section 14 of the Act, the matter in issue in the earlier proceeding and the latter proceeding has to be conferred requisite importance. That apart, the prosecution of the prior proceeding should also show due diligence and good faith.

(Emphasis supplied)

89. Undoubtedly, this Court over a period of time has taken a consistent view that the expression "other cause of a like nature" appearing in Section 14 should be given a wide interpretation. However, while considering the applicability of Section 14 of the Limitation Act, one must not lose sight of the fact that the applicability of the provision is contingent upon not just the reason for the failure of the earlier proceedings, but is also dependent on several other factors as explained in the preceding paragraphs. It is only when all the ingredients required for the applicability of Section 14 are fulfilled that the benefit would become available. In this context the appellant has submitted that as the proceedings undertaken by the respondent before the IBC and the proceedings for the appointment of arbitrator before the High Court are not for the "same relief", hence the benefit of Section 14 of the Limitation Act will not be available to the respondent. To address this contention of the appellant, it is important to understand the purpose of IBC proceedings vis-à-vis proceedings under Section 11(6) of the Act, 1996.

a. Application under Section 11(6) of the Act, 1996 is not for the same relief as an application under Section 9 of the IBC

90. In the introduction to the *Treatise on the Insolvency and Bankruptcy Code, 2016* by *Dr. Dilip K. Sheth,* the author has opined that IBC was enacted on the basis of recommendations of various committees and suggestions received from various stakeholders to address the infirmities of the erstwhile insolvency regime and fulfil the following objectives:

i. To balance the interest of stakeholders and creditors by reviewing and restructuring insolvent businesses having potential for a turn-around.

ii. To provide robust mechanism for earlier resolution of insolvency in time-bound manner.

91. A reading of the Preamble to the IBC reveals the following avowed objects behind its enactment:

i. To consolidate and amend the laws relating to reorganisation and insolvency resolution of corporate persons, partnership firms and individuals in a timebound manner for maximization of value of assets of such persons;

ii. To promote entrepreneurship and availability of credit;

iii. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues; and

iv. To establish the Insolvency and Bankruptcy Board of India.

92. One of the cardinal objectives of the IBC is to protect and preserve the life of the corporate debtor "as a going concern" by providing for the resolution of its insolvency through restructuring and keeping liquidation only as a measure of last resort.

93. One of the essential ingredients of an application filed under Section 9 of the IBC is that there is an existence of a default. The term 'default' is defined under Section 3(12) of the IBC to mean non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not paid by the debtor.

94. 'Debt' is defined under Section 3(11) of the IBC to mean a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt.

95. On the other hand, arbitration is a consent-based private dispute resolution method for the expeditious adjudication of disputes. Arbitration is initiated when one or both parties are not able to resolve their disputes amicably and seek to have the matter resolved by an independent arbitrator.

96. The High Court in the impugned order thought fit to exclude the time-period spent by the respondent before the NCLT, Kolkata under the

IBC since it was of the view that the respondent was availing remedy for recovery of dues before a wrong forum and was thus squarely covered by Section 14(2) of the Limitation Act. The High Court took the view that since the proceedings for initiating corporate insolvency resolution process ("**CIRP**") under IBC as well as the proceeding sought to be initiated by way of arbitration were ultimately for the recovery of debts, both proceedings could be said to be for the same relief, and thus entitled the respondent for the benefit under Section 14(2) of the Limitation Act. The relevant observations read as under: -

> *"10. [...] Worth it to note that initially when he approached the NCLT, Kolkata, under Section 8 and 9 of the IBC for institution of CIRP process against the Respondent, his claim was entertained and it is only the Respondents, who approached the Appellate Tribunal, the order passed by the NCLT in favour of the Applicant came to be reversed. Therefore, it cannot be said that the Petitioner was sitting idle and not taking any steps for recovery of his dues, but it is a case where he was availing remedy for recovery of his dues before a wrong forum and he is entitled to take benefit of Section 14 of the Limitation Act, 1963."*

97. We are of the view that the High Court fell in error in holding that an application under Section 9 of the IBC and an application under Section 11(6) of the Act, 1996 are filed for seeking the same relief. While the relief sought in the former is the initiation of the CIRP of the corporate debtor, the relief sought in the latter is the appointment of an arbitrator for the adjudication of disputes arising out of a contract.

98. The object of initiation of insolvency proceedings under the IBC is to seek rehabilitation of the corporate debtor by appointment of a new management, whereas the objective behind the appointment of an arbitrator is to resolve the disputes arising between the parties out of a private contract. As soon as the CIRP of a corporate debtor is initiated, it becomes a proceeding in rem. On the contrary, arbitration being concerned with private disputes is not an in-rem proceeding.

99. In ***Swiss Ribbons Pvt. Ltd. & Anr. v. Union of India & Ors.*** reported in **(2019) 4 SCC 17** this Court, speaking through R.F Nariman J., held that IBC was not a mere recovery legislation for the creditors

but rather a beneficial legislation intended to revive and rehabilitate the corporate debtor. The relevant observations read as under:

> *"28. It can thus be seen that the primary focus of the legislation is to ensure revival and continuation of the corporate debtor by protecting the corporate debtor from its own management and from a corporate death by liquidation. The Code is thus a beneficial legislation which puts the corporate debtor back on its feet, not being a mere recovery legislation for creditors. The interests of the corporate debtor have, therefore, been bifurcated and separated from that of its promoters/those who are in management. Thus, the resolution process is not adversarial to the corporate debtor but, in fact, protective of its interests. The moratorium imposed by Section 14 is in the interest of the corporate debtor itself, thereby preserving the assets of the corporate debtor during the resolution process. The timelines within which the resolution process is to take place again protects the corporate debtor's assets from further dilution, and also protects all its creditors and workers by seeing that the resolution process goes through as fast as possible so that another management can, through its entrepreneurial skills, resuscitate the corporate debtor to achieve all these ends."*
>
> (Emphasis supplied)

100. Similarly, in ***Pioneer Urban Land & Infrastructure Ltd. & Anr. v. Union of India & Ors.*** reported in **(2019) 8 SCC 416**, this Court reiterated that IBC is not a debt recovery mechanism. It observed that when CIRP is initiated the aspect of recovery of debt is completely outside the control of the creditor and there is no guarantee of recovery or refund of the entire amount in default. A creditor initiates insolvency under the Code not for the relief of recovery of debt but rather for rehabilitating the corporate debtor and for a new management to take over. The relevant observations read as under:

> *"It is also important to remember that the Code is not meant to be a debt recovery mechanism (see para 28 of **Swiss Ribbons**). It is a proceeding in rem which, after being triggered, goes completely outside the control of the allottee who triggers it. Thus, any allottee/home buyer*

> *who prefers an application under Section 7 of the Code takes the risk of his flat/apartment not being completed in the near future, in the event of there being a breach on the part of the developer. Under the Code, he may never get a refund of the entire principal, let alone interest. […]"*
>
> (Emphasis supplied)

101. In yet another decision of this Court in ***Hindustan Construction Company Ltd. & Anr. v. Union of India*** reported in **(2020) 17 SCC 324** it was held that IBC is not meant to be a recovery mechanism as it is an economic legislation meant for the resolution of stressed assets. The relevant observations read as under: -

> *"79. Dr Singhvi then argued that under Section 5(9) of the Insolvency Code, "financial position" is defined, which is only taken into account after a resolution professional is appointed, and is not taken into account when adjudicating "default" under Section 3(12) of the Insolvency Code. This does not in any manner lead to the position that such provision is manifestly arbitrary. As has been held by our judgment in Pioneer Urban Land & Infrastructure Ltd. v. Union of India, IBC is not meant to be a recovery mechanism (see para 41 thereof)—the idea of the Insolvency Code being a mechanism which is triggered in order that resolution of stressed assets then takes place. For this purpose, the definitions of "dispute" under Section 5(6), "claim" under Section 3(6), "debt" under Section 3(11), and "default" under Section 3(12), have all to be read together. Also, IBC, belonging to the realm of economic legislation, raises a higher threshold of challenge, leaving Parliament a free play in the joints, as has been held in Swiss Ribbons (P) Ltd. v. Union of India [...]"*
>
> (Emphasis supplied)

102. Similarly, in ***Jaypee Kensington Boulevard Apartments Welfare Assn. v. NBCC (India) Ltd.,*** reported in **(2022) 1 SCC 401** this Court held that the focus of IBC was more on ensuring the revival and continuation of the corporate debtor rather than mere recovery of the debt owed by the corporate debtor to its creditors. The relevant observations read as under: -

> "*88.2. In the judgment delivered on 25-1-2019 in Swiss Ribbons (P) Ltd. v. Union of India 82 (hereinafter also referred to as the case of "Swiss Ribbons"), this Court traversed through the historical background and scheme of the Code in the wake of challenge to the constitutional validity of various provisions therein. One part of such challenge had been founded on the ground that the classification between "financial creditor" and "operational creditor" was discriminatory and violative of Article 14 of the Constitution of India. This ground as also several other grounds pertaining to various provisions of the Code were rejected by this Court after elaborate dilation on the vast variety of rival contentions. In the course, this Court took note, inter alia, of the pre-existing state of law as also the objects and reasons for enactment of the Code. While observing that focus of the Code was to ensure revival and continuation of the corporate debtor, where liquidation would be the last resort, this Court pointed out that on its scheme and framework, the Code was a beneficial legislation to put the corporate debtor on its feet, and not a mere recovery legislation for the creditors.*"
>
> (Emphasis supplied)

103. What can be discerned from aforesaid decisions is that insolvency proceedings are fundamentally different from proceedings for recovery of debt such as a suit for recovery of money, execution of decree or claims for amount due under arbitration, etc. The first distinguishing feature that sets apart ordinary recovery proceedings from insolvency proceedings is that under the former the primary relief is the recovery of dues whereas under the latter the primary concern is the revival and rehabilitation of the corporate debtor. No doubt both proceedings contemplate an aspect of recovery of debt, however in insolvency proceedings, the recovery is only a consequence of the rehabilitation/ resolution of the corporate debtor and not the main relief.

104. The second distinguishing feature is that although both proceedings entail recovery of debt to a certain extent, however they are different inasmuch as when it comes to recovery proceedings it is the individual creditor's debt which is sought to be recovered, whereas in insolvency proceedings it is the entire debt of the company which is sought

to be resolved. The former is only for the benefit of the individual creditor who initiates the recovery proceedings whereas the latter is for the benefit of all creditors irrespective of who initiates insolvency.

105. The last distinguishing feature is that, a recovery proceeding be it a suit or arbitration is initiated by a creditor where an amount is due and is unpaid by a debtor, in other words the intention behind initiating a recovery proceeding is *simpliciter* for the full recovery of amount which is unpaid to it. However, in an insolvency proceeding there is no guarantee of recovery of the entire debt. A creditor opts for insolvency where an amount of such threshold is unpaid, that the creditor has an apprehension that the debtor in its current state and under the existing management in all likelihood will be unable to repay that debt in the future i.e., there is no likely prospect of any recovery, and thus it would be beneficial to take the risk of initiating insolvency which even though does not guarantee full recovery, in order for a new management to take over the corporate debtor and to recover at least some amount of debt before it is too late. Thus, the underlying intention behind initiating insolvency is not with the intention of recovering the amount owed to it, but rather with the intention that the corporate debtor is resolved / rehabilitated through a new management as soon as possible before it becomes unviable with no prospect of any meaningful recovery of its dues in the near future.

106. Thus, by no stretch of imagination can insolvency proceedings be construed as being for the same relief as any ordinary recovery proceedings, and therefore no case is made out for exclusion of time under Section 14(2) of the Limitation Act, 1963.

107. As the relief sought in an application under Section 11(6) of the Act, 1996 is not the same as the relief sought in an application under Section 9 of the IBC, the benefit of Section 14(2) cannot be given to the respondent in the present case.

108. In ***Yeshwant Deorao Deshmukh v. Walchand Ramchand Kothari*** reported in **(1950) 1 SCR 852** this Court held that the relief sought under insolvency is completely different from the relief sought under an execution application for a decree for recovery of money. In the former, the estate of the insolvent is apportioned or realised for the benefit of all creditors whereas in the latter the money due is

sought to be realised only for the benefit of the decree-holder alone. Although both proceedings envisage an aspect of recovery of debt, yet in insolvency, the recovery is a mere consequence and not the ultimate relief. Thus, insolvency proceedings are not one for recovery of debt and cannot be equated with execution proceedings as both proceedings are different in nature and for different reliefs and as such no benefit can be given under Section 14(2) of the Limitation Act which stipulates the requirement of "*same relief*". The relevant observations read as under: -

> *"5. [...] There could be no exclusion for the time occupied by the insolvency proceedings which clearly was not for the purpose of obtaining the same relief. The relief sought in insolvency is obviously different from the relief sought in the execution of application. In the former, an adjudication of the debtors as insolvency is sought as preliminary to the vesting of all his estate and the administration of it by the Official Receive or the Official Assignee, as the case may be, for the benefit of all the creditors; but in the latter the money due is sought to be realised for the benefit of the decree-holder alone, by processes like attachment of property and arrest of person. It may that ultimately in the insolvency proceedings the decree-holder may be able to realise his debt wholly or in part, but this is a mere consequence or result. Not only is the relief of a different nature in the two proceedings but the procedure is also widely divergent."*
>
> (Emphasis supplied)

109. This Court in ***Commissioner, Madhya Pradesh Housing Board & Ors. v. Mohanlal and Company*** reported in **(2016) 14 SCC 199** considered whether benefit of Section 14 of the Limitation Act would be available when a party instead of challenging an arbitral award under Section 34, filed a Section 11 application for appointment of arbitrator. This Court while setting aside the appointment, observed that the proceedings for appointment of an arbitrator are entirely different from the proceedings for challenging an award. Therefore, even after adopting a liberal interpretation, it would not be appropriate to grant benefit of exclusion of time-period under Section 14.

110. Even otherwise, the respondent couldn't be said to have had been prosecuting the IBC proceedings in good faith and in a bonafide manner. It was observed by this Court in ***Consolidated Engg. Enterprises*** *(supra)* and ***M.P. Housing Board*** *(supra)* that an element of mistake is inherent in the relief envisaged under Section 14 of the Limitation Act. However, in the present case, the respondent had initially approached the High Court with an application under Section 11(6). However, for reasons best known to it, the respondent abandoned the said proceedings for appointment of arbitrator and approached the NCLT, Kolkata with an application under Section 9 of the IBC. The respondent was fully aware of the objection of a pre-existing dispute raised by the appellant in response to its second statutory demand notice issued under Section 8 of the IBC. Despite having preferred an application under 11(6) of the Act, 1996 before the jurisdictional court, and also being fully aware of the infirmities in the Section 9 application filed under the IBC, the respondent took a conscious decision to abandon the right course of proceedings. The conduct of the respondent cannot be termed to be a mistake in any manner. Having taken a conscious decision to opt for specific remedy under the IBC which is not for the same relief as an application under Section 11(6) of the Act, 1996, the respondent cannot be now allowed to take the plea of ignorance or mistake and must bear the consequences of its decisions.

iii. Issue No. 3

111. It was submitted on behalf of the respondent that in the event the benefit under Section 14(2) of the Limitation Act is not extended to it, then in such circumstance, this Court may consider to condone the delay in filing the second arbitration petition by exercising its discretion under Section 5 of the Limitation Act. In response to the said submission, the appellant contended that the benefit of condonation of delay under Section 5 of the Limitation Act cannot be extended to a petition for the appointment of an arbitrator under Section 11(6) of the Act, 1996. The appellant also submitted that assuming without conceding that delay can be condoned in exercise of powers under Section 5 of the Limitation Act, the facts do not warrant exercise of discretionary powers as no application for the condonation of delay has been filed by the respondent. It was further contended that the nature of relief sought for under Section 5 of the Limitation Act being discretionary in nature, the conduct of the respondent disentitles him to grant of such relief.

112. The following three questions fall for our consideration on the basis of the aforesaid submissions –

i. Whether the benefit of condonation of delay under Section 5 of the Limitation Act is available in respect of an application for appointment of arbitrator under Section 11(6) of the Act, 1996?

ii. Whether it is permissible for the courts to condone delay under Section 5 of the Limitation Act in the absence of any application seeking such condonation?

iii. Whether the facts of the present case warrant the exercise of discretion in favour of the respondent to condone the delay in filing the second arbitration application?

113. Section 5 of the Limitation Act provides that any appeal or application other than an application under the provisions of Order 21 of the CPC may be admitted after the prescribed period of limitation if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period. The provision is extracted hereinbelow:

> *"**5. Extension of prescribed period in certain cases.—** Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation.—The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."*

114. The use of the expression "may be admitted" in the aforesaid provision indicates that the nature of relief that can be granted under Section 5 is discretionary and not mandatory in nature. The applicant or the appellant, even upon showing sufficient cause, cannot assert as a matter of right that the delay be condoned. Thus, unlike Section 14 of the Limitation Act, where the applicant can seek the exclusion of time period as a matter of right upon fulfilment of the mandatory conditions, Section 5 of the Limitation Act leaves the ultimate decision

of extending the benefit of condonation of delay to the court before which the application for such condonation is made.

115. In a recent pronouncement in ***Pathapati Subba Reddy (Died) by LRs and Others v. The Special Deputy Collector (LA)*** reported in **(2024) 4 SCR 241** this Court observed thus:

> *"12. In view of the above provision, the appeal which is preferred after the expiry of the limitation is liable to be dismissed. The use of the word 'shall' in the aforesaid provision connotes that the dismissal is mandatory subject to the exceptions. Section 3 of the Act is peremptory and had to be given effect to even though no objection regarding limitation is taken by the other side or referred to in the pleadings. In other words, it casts an obligation upon the court to dismiss an appeal which is presented beyond limitation. This is the general law of limitation. The exceptions are carved out under Sections 4 to 24 (inclusive) of the Limitation Act but we are concerned only with the exception contained in Section 5 which empowers the courts to admit an appeal even if it is preferred after the prescribed period provided the proposed appellant gives 'sufficient cause' for not preferring the appeal within the period prescribed. In other words, the courts are conferred with discretionary powers to admit an appeal even after the expiry of the prescribed period provided the proposed appellant is able to establish 'sufficient cause' for not filing it within time. The said power to condone the delay or to admit the appeal preferred after the expiry of time is discretionary in nature and may not be exercised even if sufficient cause is shown based upon host of other factors such as negligence, failure to exercise due diligence etc."*
>
> (Emphasis supplied)

116. This Court in ***Ramlal v. Rewa Coalfields Ltd.*****, 1961 SCC OnLine SC 39** observed as follows:

> *"12. It is, however, necessary to emphasise that even after sufficient cause has been shown a party is not entitled to the condonation of delay in question as a matter of right. The proof of a sufficient cause is a condition precedent for*

the exercise of the discretionary jurisdiction vested in the court by Section 5. If sufficient cause is not proved nothing further has to be done; the application for condoning delay has to be dismissed on that ground alone. If sufficient cause is shown then the court has to enquire whether in its discretion it should condone the delay. This aspect of the matter naturally introduces the consideration of all relevant facts and it is at this stage that diligence of the party or its bona fides may fall for consideration; but the scope of the enquiry while exercising the discretionary power after sufficient cause is shown would naturally be limited only to such facts as the court may regard as relevant. It cannot justify an enquiry as to why the party was sitting idle during all the time available to it. In this connection we may point out that considerations of bona fides or due diligence are always material and relevant when the court is dealing with applications made under Section 14 of the Limitation Act. In dealing with such applications the court is called upon to consider the effect of the combined provisions of Sections 5 and 14. Therefore, in our opinion, considerations which have been expressly made material and relevant by the provisions of Section 14 cannot to the same extent and in the same manner be invoked in dealing with applications which fall to be decided only under Section 5 without reference to Section 14."

(Emphasis supplied)

117. As discussed in the foregoing parts of this judgment, the period of limitation to file an application under Section 11(6) of the Act, 1996 is governed as provided in Article 137 of the Schedule to the Limitation Act, that is, three years. We have observed that the benefit available under Section 14 of the Limitation Act will also be available in respect of applications made under Section 11(6) of the Act, 1996. Thus, in the absence of any specific statutory exclusion, there is no good reason to hold that the benefit under Section 5 of the Limitation Act cannot be availed for the purpose of condonation of delay caused in filing a Section 11(6) application.

118. In ***Deepdharshan Builders Pvt. Ltd. v. Saroj, Widow of Satish Sunderrao Trasikar*** reported in **2018 SCC OnLine Bom 4885**, the

Bombay High Court held that Section 5 of the Limitation Act would apply to an application filed under Section 11(6) of the Act, 1996. The relevant observations from the said decision are extracted hereinbelow:

> *"42. In my view, since the proceedings under Section 11(6) of the Arbitration Act are required to be filed before the High Court, Article 137 of the Schedule to the Limitation Act, 1963 would apply to such application filed under Section 11(6) of the Arbitration Act. In my view, since Article 137 of the Schedule to the Limitation Act, 1963 would apply to the arbitration application under Section 11(6) of the Arbitration Act, Section 5 of the Limitation Act, 1963 would also apply to the arbitration application filed under Section 11(6) of Arbitration Act."*

119. Similarly, the Delhi High Court in ***Yogesh Kumar Gupta v. Anuradha Rangarajan*** reported in **2007 SCC OnLine Del 287** had observed that in view of Section 43 of the Act, 1996, Section 5 of the Limitation Act would be applicable to applications filed under Section 11(6) of the Act, 1996. Relevant observations from the said decision are extracted hereinbelow:

> *"30. There is yet another alternative route which leads to some conclusion. Section 21 of the Act states that unless otherwise agreed by the parties (there is no agreement of the parties on this aspect), the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Consequently, when the petitioner issued the notice dated 10.4.2002 raising the dispute regarding rendition of accounts of the partnership business, the arbitral proceedings commenced as soon as the communication dated 10.4.2002 was received by the respondent. It is not the respondent's case that he did not receive the communication dated 10.4.2002 sent by the petitioner and since it was sent by registered post (as appears from the postal receipt filed on record along with the said communication), it can be safely presumed that the communication was received by the respondent within a matter of few days. Consequently, the arbitral*

proceedings stood commenced sometime in middle of April, 2002. The application under Section 11(5) of the Act is an application or a petition in relation to arbitral proceedings which have commenced with the issuance of a request for the reference of disputes to arbitration (Section 2(b) of the Limitation Act). Since Limitation Act, 1963 specifically applies to arbitrations, Section 5 of the Limitation Act would also apply to an application/petition under Section 11 (5) of the Limitation Act. Any application (other than under the provisions of Order 21 of CPC) may be admitted after the prescribed period, if the applicant satisfies the Court that he had sufficient cause for not preferring or making the application within such period. In my view, therefore, Section 5 of the Limitation Act would apply to, and be available to the petitioner filing an application/petition under Section 11 (5) of the Act."

(Emphasis supplied)

120. The necessary pre-condition for availing the remedy under Section 5 of the Limitation Act is that the applicant must satisfy the court that there was a sufficient cause which prevented him from instituting the application within the prescribed time period. Although it is a general practice that a formal application under Section 5 of the Limitation Act has to be filed by the applicant, yet no such requirement can be gathered from a bare reading of the statute. Thus, even in the absence of a formal application, a court or tribunal may consider exercising its discretion under Section 5 of the Limitation Act subject to the applicant assigning sufficient cause for condoning the delay. A similar view was taken by this Court in ***Sesh Nath Singh v. Baidyabati Sheoraphuli Coop. Bank Ltd.*** reported in **(2021) 7 SCC 313** wherein it was observed thus:

"63. Section 5 of the Limitation Act, 1963 does not speak of any application. The Section enables the Court to admit an application or appeal if the applicant or the appellant, as the case may be, satisfies the Court that he had sufficient cause for not making the application and/or preferring the appeal, within the time prescribed. Although, it is the general practice to make a formal application under Section 5 of the Limitation Act, 1963, in order to enable

the Court or Tribunal to weigh the sufficiency of the cause for the inability of the appellant/applicant to approach the Court/Tribunal within the time prescribed by limitation, there is no bar to exercise by the Court/Tribunal of its discretion to condone delay, in the absence of a formal application.

64. A plain reading of Section 5 of the Limitation Act makes it amply clear that, it is not mandatory to file an application in writing before relief can be granted under the said section. Had such an application been mandatory, Section 5 of the Limitation Act would have expressly provided so. Section 5 would then have read that the Court might condone delay beyond the time prescribed by limitation for filing an application or appeal, if on consideration of the application of the appellant or the applicant, as the case may be, for condonation of delay, the Court is satisfied that the appellant/applicant had sufficient cause for not preferring the appeal or making the application within such period."

(Emphasis supplied)

121. The position of law that emerges from the aforesaid discussion is that the benefit under Section 5 of the Limitation Act is available in respect of the applications filed for appointment of arbitrator under Section 11(6) of the Act, 1996. Further, the requirement of filing an application under Section 5 of the Limitation Act is not a mandatory prerequisite for a court to exercise its discretion under the said provision and condone the delay in institution of an application or appeal. Thus, the only question that remains to be considered is whether in the facts of the present case, the respondent could be said to have made out a case for condonation of delay in instituting the fresh Section 11(6) application.

122. As discussed, the respondent took a conscious decision to abandon its first Section 11(6) application with a view to pursue proceedings under Section 9 of the IBC. The respondent made such choice despite a specific objection raised by the appellant in its reply to the statutory demand notice that there were pre-existing disputes between the parties. In view of this, maximisation of the chances of

getting the application under Section 9 of the IBC admitted by the NCLT seems to have been the only reason for the abandonment of the first Section 11(6) application by the respondent. In light of such conduct on the part of the respondent, we are of the view that the present case does not warrant the exercise of our discretion under Section 5 of the Limitation Act.

123. The primary intent behind Section 5 of the Limitation Act is not to permit litigants to exploit procedural loopholes and continue with the legal proceedings in multiple forums. Rather, it aims to provide a safeguard for genuinely deserving applicants who might have missed a deadline due to unavoidable circumstances. This provision reflects the intent of the legislature to balance the principles of justice and fairness, ensuring that procedural delays do not hinder the pursuit of substantive justice. Section 5 of the Limitation Act embodies the principle that genuine delay should not be a bar access to justice, thus allowing flexibility in the interest of equity, while simultaneously deterring abuse of this leniency to prolong litigation unnecessarily.

124. The legislative intent of expeditious dispute resolution under the Act, 1996 must also be kept in mind by the courts while considering an application for condonation of delay in the filing of an application for appointment of arbitrator under Section 11(6). Thus, the court should exercise its discretion under Section 5 of the Limitation Act only in exceptional cases where a very strong case is made by the applicant for the condonation of delay in filing a Section 11(6) application.

125. Before we part with the matter, we would like to address the submission of the respondent that this Court, while dismissing its appeal against the order of the NCLAT, had granted it liberty to avail such remedies, including arbitration, as may be available to it in law, to realise its dues from the appellant. The relevant paragraph is reproduced hereinbelow:

> *"35. Needless to mention that the appellant may avail such other remedies as may be available in accordance with law including arbitration to realise its dues, if any."*

126. The liberty granted by this Court to the respondent has been prefixed by the words "*Needless to mention…*". Hence, it is amply clear that the observations were merely clarificatory and not intended to confer

upon the respondent a special right or privilege to file a proceeding which is not otherwise permissible under law. The intention cannot be said to have been to help the respondent come out of its action of unconditionally withdrawing the first Arbitration Petition or to deprive the appellant of defences available to it under law. Such intention cannot be attributed to this Court, particularly in the absence of any discussion on this point.

127. Further, the said paragraph only gives liberty to the respondent to avail such other remedies "*as may be available*" "*in accordance with law*". Hence, it cannot be construed as giving the respondent the liberty to file a proceeding that is not available or that is not in accordance with law.

128. The reliance placed by the petitioner upon the paragraph 35 referred to above is nothing but a completely incorrect reading of the said paragraph. In ***BSNL v. Telephone Cables Limited*** reported in **2010 5 SCC 213**, this Court observed thus:

> *"41. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. It is needless to say that courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law."*
>
> (Emphasis supplied)

129. The liberty to avail remedies available in law does not confer a right to avail such remedies. Seen from the perspective of Hohfeld's analysis of jural relations, liberties (or privileges) do not entail corresponding duties on others. Thus, having the freedom to seek a remedy does not imply an enforceable claim to it. This distinction underscores the fine difference between what one is free to do and what one is entitled to demand.

130. Hence, we are of the view that paragraph 35 as extracted above does not help the respondent as the fresh Section 11 petition could

be said to be hit by the principles analogous to Order 23 Rule 1 and is also barred by limitation for being beyond the prescribed period of 3 years.

F. CONCLUSION

131. In view of the aforesaid discussion, we have reached to the following conclusion:

(i) In the absence of any liberty being granted at the time of withdrawal of the first application under Section 11(6) of the Act, 1996, the fresh application filed by the respondent under the same provision was not maintainable;

(ii) The fresh application filed by the respondent under Section 11(6) of the Act, 1996 was time-barred;

(iii) The respondent is not entitled to the benefit of Section 14(2) of the Limitation Act; and

(iv) The respondent is also not entitled to the benefit of condonation of delay under Section 5 of the Limitation Act.

132. As a result, the appeal filed by the appellant is allowed and the impugned order passed by the High Court of Bombay is hereby set aside.

133. Pending application(s), if any, shall stand disposed of.

134. The parties shall bear their own costs.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 12 S.C.R. 202 : 2024 INSC 854

Commissioner of Customs
v.
M/s Canon India Pvt. Ltd.

(Review Petition No. 400 of 2021)
In
(Civil Appeal No. 1827 of 2018)

07 November 2024

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

Issue for Consideration

Issue arose whether there was an "error apparent on the face of the record" for the purpose of entertaining the review petition; whether law laid down in Canon India's case as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law; whether officers of DRI are the proper officers for the purposes of s.28 of the Customs Act, 1962; whether the introduction of s.28(11) vide the Validation Act of 2011 which retrospectively validates the show cause notices issued u/s.28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in Sayed Ali's case and, thus, is violative of Art.14 of the Constitution; whether the judgment delivered by the High Court in the case of Mangali Impex's case expounds the correct interpretation of s.28(11) and whether s.97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and thus, violative of Art.14 of the Constitution of India.

Headnotes†

Customs Act, 1962 – ss.2(34), 28, 17 – Proper officer – Directorate of Revenue Intelligence – DRI officers, if proper officers u/s.28 – Review of judgement in Canon India's case which held DRI officers were not proper officers u/s.28 and thus lacked the jurisdiction to issue show cause notice in terms of s.28, since only officers directly involved in assessment u/s.17 could initiate show cause notice proceedings u/s.28 – Maintainability:

*Author

Held: DRI officers are 'proper officers' to issue show cause notice u/s.28 – Review petition seeking review of the decision in Canon India's case allowed – DRI officers came to be appointed as the officers of customs vide Notification No. 19/90-Cus (N.T.) dated 26.04.1990 – This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002, to account for administrative changes – Circular No. 4/99-Cus dated 15.02.1999 which empowered the officers of DRI to issue show cause notices u/s.28 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for the purposes of ss.17 and 28 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in Canon India's case, thus the judgment was rendered without looking into the circular and the notification thereby seriously affecting the correctness of the same – Decision in Canon India's case failed to consider the statutory scheme of ss.2(34) and 5 respectively, thus the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of s.28 in accordance with s.6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty u/s.28 – Reliance placed in Canon India's on the decision in Sayed Ali's case is misplaced – Decision in Canon India's case is reviewed only to the extent that the jurisdiction of the DRI officers to issue show cause notices u/s.28 – Officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of s.28 and are competent to issue show cause notice thereunder – Any challenge made to the maintainability of the show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, to be dealt with in the manner stipulated. [Para 168]

Customs Act, 1962 – ss.17 and 28 – Issue as regards the proper officer to issue show cause notice in terms of s.28 – Sayed Ali's case held that the Commissioner of Customs (Preventive) is not a "proper officer" as defined in s.2(34) and thus, did not have the jurisdiction to issue a show cause notice in terms of s.28; and that only such officers who are vested with the power of assessment u/s.17 can be empowered to issue show

cause notices u/s.28 or else this would result in a state of chaos and confusion – Reconsideration of Sayed Ali's case:

Held: Decision in *Sayed Ali* proceeds on the assumption that for the "proper officer" to exercise the functions u/s.28, such officer must necessarily possess the power of assessment and reassessment u/s.17 – However, a plain reading of ss.17 and 28 does not bring out any such inter-dependence between the two provisions – Observations pertaining to interlinkage between ss.17 and 28 respectively made in Sayed Ali's case do not lay down the correct position of law – Even otherwise, decision in Sayed Ali's case could have been arrived at without deciding on the interdependence of ss.17 and 28 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the "proper officer" for the purposes of s.28 through a notification issued by the appropriate authority – Assignment of functions is a mandatory requirement for the exercise of jurisdiction by the "proper officer" – Observations made in Sayed Ali's case on the connection between ss.17 and 28 are obiter dicta and do not constitute the binding ratio decidendi of that judgment – Sayed Ali's case could not have been relied upon in Canon India's case as it could not have been applied for the period subsequent to 08.04.2011 since s.17 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011. [Paras 81-83]

Customs Act, 1962 – s.17 – Assessment of duty – Changes to s.17 w.e.f. 11.04.2011 – Amendment altered the method of assessment of bills of entry and shipping bills – Functions of the proper officer u/s.17 also underwent changes, the assessment of bill of entry and shipping bill no longer the task of the "proper officer", they were to be self-assessed, which is to be accepted or rejected by the proper officer subject to verification in certain cases – Said changes not brought to the notice of this Court while Canon India's case was heard – Effect:

Held: On basis of the amendment to s.17, the competence of the proper officer to conduct "assessment" was completely taken away by the legislature – New s.17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary – However, such re-assessment

is not a mandatory function on the same footing as "assessment" under the old s.17 – Thus, the scope of the functions of the proper officer under the new s.17 is limited – However, the attention of this Court in Canon India's case not drawn to the important changes brought to s.17 vide s.38 of the Finance Act, 2011 with effect from 08.04.2011 – Conclusion that an officer who did the assessment, could only undertake reassessment u/s.28(4) was arrived at without taking note of the amendment to s.17 – Judgment in Canon India's case also recorded an erroneous finding that the function of re-assessment is with reference to s.28(4) when in fact it is an exercise of function u/s.17 – In Canon India's case the show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012 – This Court erroneously applied the provisions of s.17, as they stood prior to 08.04.2011 as opposed to the amended s.17 which ought to have been applied. [Paras 90-94]

Customs Act, 1962 – ss.17 and 28 – Assessment of duty – Notice for payment of duties, interest – Scheme of ss.17 and 28:

Held: s.17 read with ss.46 and 47 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bills of entry – Amendment to s.17 introduces the process of self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance – Proceedings u/s.28 are subsequent to the completion of the process set out in s.17 – Procedure envisaged u/s.28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers – In the case of DRI, the proceedings u/s.28 start only after an investigation has been undertaken by DRI – This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011 – Thus, the nature of review u/s.28 significantly different from the nature of assessment and reassessment u/s.17 – Ambit of s.28 has also been restricted to the review of assessments and re-assessments done u/s.17 for ascertaining if there has been a short-levy, non-levy, part payment, non-payment or erroneous refund – Scheme of ss.17 and 28 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the Sayed Ali's case and Canon India's case that vesting of the functions of assessment and re-assessment u/s.17 is a threshold, mandatory

condition for proper officer to perform functions u/s.28, patently erroneous. [Paras 95-99]

Customs Act, 1962 – s.28 – Notice for payment of duties, interest – Use of article 'the' in the expression "the proper officer" – Interpretation:

Held: In Canon India's case it was held that the Parliament had employed the article "the" instead of "a/an" in s.28 so as to give effect to its intention of specifying that the proper officer referred to in s.28 is the same officer as the one referred to in s.17 and the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in s.28 is not "any" proper officer but "the" proper officer assigned with the function of assessment and reassessment u/s.17 – There was an error apparent in the said view – Definite article "the" has been used before "proper officer" with a view to limit the exercise of powers u/s.28 by a specific proper officer and not any proper officer – However, in the absence of any statutory linkage between ss.17 and 28 respectively, there was no legal footing for this Court in Canon India's case to hold that "the proper officer" in s.28 must necessarily be the same proper officer referred to u/s.17 – Statutory scheme of the 1962 Act necessitates that an officer of Customs can only perform the functions u/s.28 if such officer has been designated as "the proper officer" for the purposes of s.28 by an appropriate notification – Use of the article "the" in the expression "the proper officer" should be read in the context of that proper officer who has been conferred with the powers of discharging the functions u/s.28 by conferment u/s.5 – Proper officer is qua the function or power to be discharged or exercised – Use of article "the" in s.28 has no apparent relation with the proper officer referred to u/s.17. [Paras 100-103]

Customs Act, 1962 – s.2(34) – Proper officer – DRI officers as proper officers u/s 2(34):

Held: In Canon India's case, this Court erroneously concluded that officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and thus, cannot function as a "Proper Officer" – Finding that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent – By way of Notification No. 40/2012-Customs

(N.T.), the Board appointed several persons including the Officers of Directorate of Revenue Intelligence (DRI) as "Proper Officers" u/s.2(34) – Notification No. 40/2012-Customs (N.T.) issued u/s.2(34) cannot be read in isolation – It has to be read in conjunction with s.4(1) and the Notification issued thereunder – View that the "Proper Officer" for the purpose of s.28 and other provisions of the 1962 Act could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer from any other department requires reconsideration in view of the changes to the 1962 Act vide the Finance Act, 2011 and s.4 and the notification issued thereunder – Court in Canon India's case proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint "Proper Officers" – As per s.4(1), the Board is vested with the power to appoint such persons as it thinks fit to be "officers of customs", u/s.4(2) the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an "officer of customs" – This aspect was not brought to the notice in Canon India's case. [Paras 106-113]

Customs Act, 1962 – s.4 – Appointment of "Officers of Customs:

Held: It is only an officer of customs, appointed u/s.4(1) who can be designated as the "proper officer" as defined in s.2(34) by a notification – Notifications issued u/ss.2(34) and 4(1) are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs. [Para 115]

Customs Act, 1962 – s.6 – Entrustment of functions of Board and customs officers on certain other officers – Application of s.6:

Held: s.6 contemplates the entrustment of the functions of the Board or any officer of customs under the Act to any of the officers of the Central or the State Government or a local authority – Such entrustment could be either conditional or unconditional – Object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states as also officers working in the coast guard or the navy as they may be involved in anti smuggling operations – Plain reading of

s.6 makes it abundantly clear that it applies only to officers from departments other than the officers of the customs u/s.4 – Officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers – Post 07.03.2002, a notification of the Central Government u/s.6 is not required to recognise the officers from DRI as officers of customs – Assignment of functions of proper officers as mentioned in s.2(34) and entrustment of functions of customs officers as mentioned in s.6 operate on different planes – Assignment of functions of proper officer is to be done only to officers of customs (whether appointed u/s.4 or entrusted with certain functions u/s.6) – There may be some overlap between assignment of functions of proper officers u/s.2(34) rw s.5 and entrustment of functions of officers of customs u/s.6 in some instances but there can be no scenario where it can be held that "functions" u/s.6 and s.2(34) are congruent – One of the basis for the decision in Canon India's case was that no entrustment of functions u/s.6 was done in favour of DRI officers, which is a misapplication of s.6 and is in ignorance of the applicable law, ss.2(34) rw s.5 of the Act. [Paras 120-122, 125, 129, 130]

Customs Act, 1962 – s.28 (11) – Recovery of duties not levied or short-levied or erroneously refunded – Constitutional validity of s.28(11) – Introduction of s.28(11) vide the Validation Act of 2011 which retrospectively validates the show cause notices issued u/s.28 with effect from 06.07.2011, if discriminatory and arbitrary for not curing the defect highlighted in Sayed Ali's case and, thus, violative of Art.14 of the Constitution of India:

Held: s.28(11) is constitutionally valid and its application is not limited to the period between 08.04.2011 and 16.09.2011 **–** None of the changes made by the amendments to s.28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions u/s.28 – Only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices – Thus, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices u/s.28, cannot be said to be limited only to new s.28 but also to the provision as it stood prior to 08.04.2011 – Legislative intent is that sub-section (11) was meant to apply to s.28 without

any restriction as to time – Enactment of sub-section (11) of s.28 cures the defect pointed out in Sayed Ali's case. [Paras 147, 148, 151, 154, 155]

Customs Act, 1962 – ss.17 and 28 – Proper officer to issue show cause notice in terms of s.28 – Judgment by the High Court in the case of Mangali Impex', if expounds the correct interpretation of s.28(11):

Held: High Court in Mangali Impex's case observed that s.28(11) could not be said to have cured the defect pointed out in Sayed Ali's case as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect – High Court declined to give retrospective operation to s.28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to s.28 of the 1962 Act – Decision in Mangali Impex's case failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued – It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee u/s.28 – Further, the High Court could not have applied the doctrine of harmonious construction to harmonise s.28(11) with Explanation 2 because s.28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two – Thus, the decision in Mangali Impex's case set aside. [Para 168]

Finance Act, 2022 – s.97, Amendments made by Finance Act – Constitutional validity of ss.86, 87, 88, 94 and 97 – s.97 which retrospectively validates the show cause notices with effect from 01.04.2023, if manifestly arbitrary and thus, violative of Art.14 of the Constitution of India:

Held: s.97 which, inter-alia, retrospectively validated all show cause notices issued u/s.28 of the Act, 1962 cannot be said to be unconstitutional – It cannot be said that s.97 fails to cure the defect pointed out in Canon India's case nor is it manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it. [Para 168]

Constitution of India – Art.137 – Review of judgments or orders by the Supreme Court – Grounds of review as stipulated by the statute:

Held: Grounds of review are discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the petitioner or could not be produced by him at the time when the decree was passed or order made; mistake or error apparent on the face of the record; or any other sufficient reason – Thus, when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Ord. XLVII r.1 CPC – If a court is oblivious to the relevant statutory provisions, the judgment would in fact be per incuriam – In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed – Code of Civil Procedure, 1908 – Ord. XLVII r.1 – Supreme Court Rules, 2013 – Ord. XLVII Part IV. [Paras 60, 67]

Legislation – Validation of legislation to validate earlier acts declared illegal – Power of:

Held: Legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law – With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted – Possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. [Paras 152, 160]

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List of Keywords

Error apparent on face of record; Review petition; Canon India's case; Power of DRI to issue show cause notice; Officers of Directorate of Revenue Intelligence-DRI, if proper officers for s.28 of Customs Act, 1962; Retrospectively validating show cause notices; Sayed Ali's case; Mangali Impex's case; s.97 of the Finance Act, 2022; Proper officer; Review of judgement in Canon India's case; Notification No. 19/90-Cus (N.T.) dated 26.04.1990; Notification No. 17/2002 dated 07.03.2002; Administrative changes; Circular No. 4/99- Cus dated 15.02.1999; Proper officer to issue show cause notice in terms of s.28; Commissioner of Customs (Preventive) not "proper officer"; Reconsideration of Sayed Ali's case; Inter-dependence between two provisions; Assessment of duty; Method of assessment of bills of entry and shipping bills; Assessment; Verification of self-assessment; Re-assessment; Notice for payment of duties, interest; Entry of consignments and clearance of bills of entry; Quasi-judicial proceeding; Circular No. 44/2011-Customs dated 23.11.2011; Short-levy, non-levy, part payment, non-payment or erroneous refund; Notice for payment of duties, interest; Use of article 'the' in the expression "the proper officer"; DRI officers as proper officers u/s 2(34); Notification No. 40/2012-Customs (N.T.) dated 02.05.2012; Finance Act, 2011; Appointment of "Officers of Customs; Entrustment of functions of Board and customs officers on certain other officers; Recovery of duties not levied or short-levied or erroneously refunded; Constitutional validity of s.28(11); Review of judgments or orders by the Supreme Court; Grounds

of review; Validation of legislation to validate earlier acts declared illegal; Possibility of misuse or abuse of law.

Case Arising From

INHERENT JURISDICTION: Review Petition (Civil) No. 400 of 2021

In

Civil Appeal No. 1827 of 2018

From The Judgment And Order Dated 09.03.2021 of The Supreme Court of India In C.A. No. 1827 of 2018

With

C.A. Nos. 6142, 6161,6160 and 6159 of 2019, C.A. No. 8828 of 2016, C.A. Nos. 6157 and 6158 of 2019, C.A. No. 9313 and 9406 of 2016, C.A. No. 6153 of 2019, C.A. Nos. 9315, 10140, 9436, 9317, 10012, 10739, 10422, 10421, 10991, 10952 and 12345 of 2016, C.A. No. 6149-6152 of 2019, C.A. No. 430 of 2017, C.A. No. 8749 of 2016, C.A. No. 6127 of 2019, C.A. No. 8752 of 2017, C.A. Nos. 6139-6140, 6143, 6148, 6248, 6156 and 7292 of 2019, C.A. No. 2666-2695 of 2020, C.A. No. 1738 of 2021, R.P.(C) No. 402 of 2021 In C.A. No. 1875 of 2018, R.P.(C) No. 403 of 2021 In C.A. No. 1832 of 2018, R.P.(C) No. 401 of 2021 In C.A. No. 3213 of 2018, SLP(C) No. 2504 of 2022, C.A. No. 2367-2368 of 2022, C.A. No. 10788 of 2024, C.A. No. 3253 of 2017, C.A. Nos. 10873 and 10819 of 2024, C.A. No. 4559 of 2022, SLP(C) No. 12970 of 2022, W.P.(C) Nos. 501, 499, 502, 504, 522, 507, 526, 534, 537, 548, 575, 566 and 568 of 2022, C.A. Nos. 10698, 10693, 10752, 10697, 10753, 10754, 10755, 10712, 10756, 10757, 10710 – 10711, 10758, 10759, 10760, 10709, 10761, 10762, 10763, 10764, 10765, 10766, 10767, 10768, 10769, 10770, 10771, 10772 and 10774 of 2024, C.A. No. 4566 of 2022, Diary No. 33597 of 2022, C.A. Nos.10707 - 10708, 10781, 10854 and 10694-10695 of 2024, R.P.(C) No. 155 of 2022 In C.A. No. 3411 of 2020, R.P.(C) No. 1289 of 2021 In C.A. No. 5053 of 2021, C.A. Nos. 10782, 10784, 10785, 10706 and 10705 of 2024, Diary No. 30895 of 2022, C.A. Nos. 10699 - 10704, 10786, 10787 of 2024, Diary. No. 38691 of 2022, C.A. Nos. 10845 and 10809 of 2024, T.P.(C) No. 1576-1597/2023 and WP (C) D. No. 37678 and 37700 of 2024

Appearances for Parties

N. Venkataraman, A.S.G., A. K. Panda, S. Nandakumar, Arshad Hidayatullah, Rupesh Kumar, Dr. Purvish Malkan, R.K. Sanghi, Sr. Advs., Gurmeet Singh Makker, Kartikeya Asthana, Ms. Nisha Bagchi, Merusagar Samantaray, Shovan Mishra, Ms. Charanya Lakshmikumaran, Mukesh Kumar Maroria, Ms. Sharmila Upadhyay, Sarvjit Pratap Singh, Pawan R Upadhyay, Ms. Shobha Ramamoorthy, Shilp Vinod, Gokulakrisnan, Ms. Deepika Nandakumar, Naresh Kumar, Raja S, Aakash Elango, Ms. Rohini Musa, B. Krishna Prasad, Brajesh Kumar, Deepak Agrawal, Shivam Singh, Shubham Janghu, Gopal Singh, S. Hariharan, Ms. Jaikriti S. Jadeja, Shivang Goel, K M Kalidharun, Ishaan Aggarwal, A.R. Madhav Rao, Mukunda Rao Angara, Krishna Rao, Tushar Joshi, Siddhant Buxy, Ms. Pankhuri Shrivastava, Ms. Neelam Sharma, Makarand Joshi, Alekshendra Sharma, Shariq Ahmed, Tariq Ahmed, Vinay Vats, Sunil Kumar Verma, Shekhar Vyas, Ms. Mrinal Kanwar, Ms. Neha Warrier, Vaibhav, Pulkit Srivastava, Ms. Khushboo Aakash Sheth, Ms. Dharita Malkan, Alok Kumar, Kush Goel, Suraj Pandey, Ms. Qurratulain, Ms. Aakriti Mathur, Ms. Shagun Mishra, V Lakshmikumaran, Ms. Apeksha Mehta, Ms. Umang Motiyani, Ms. Neha Choudhary, Ms. Falguni Gupta, S Vasudevan, Ayush Agarwal, Rachit Jain, Dhruv Matta, Nikhil Jain, Ram Krishna, Rahul Yadav, Dinesh Bahadur Singh, Nitish Messy, Ms. Rashi Bansal, Ravi Bharuka, Prateek Gattani, Rohit Agarwal, Mrs. Vanita Bhargava, Ajay Bhargava, Ms. Nandita Chauhan, Ms. Tijil Thakur, M/s. Khaitan & Co., Ms. Shilpa Singh, Jitendra Singh, Saurabh Suman Sinha, Chitray Parande, M/s. Ap & J Chambers, Somanadri Goud Katam, Ashok K. Mahajan, Rameshwar Prasad Goyal, Satyendra Kumar, Ambuj Ojha, Rajeev Singh, Manoj Chauhan, Vikramaditya Singh, Ujjawal Parmar, Ms. Neha Raj Singh, Sajal Singhai, Hardeep, Yashika Gupta, Ms. Poornima Ojha, K. Paari Vendhan, Pawanshree Agrawal, Kumar Visalaksh, Rahul Khurana, Udit Jain, Arihant Tater, Ms. Akanksha Dikshit, Abhishek Vikas, M. P. Devanath, T. L. Garg, Rajat Bose, Ankit Sachdeva, Ms. Shohini Bhattacharya, Neeladri Chakrabarty, S. S. Shroff, Raj Bahadur Yadav, Ms. Manju Jetley, Prasannan Namboodiri, Ms. Prathiibha Namboodiri, Deepak Goel, Ms. Alka Goyal, Aditya Goel, Mrs. Anjali Jha Manish, Rajat Mittal, Suprateek Neogi, Vivek Singh, Ritik Dwivedi, Rajesh Kumar Chaurasia, Sahil Tagotra, Prabhakar Mishra, Sujay Jain, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

For the convenience of exposition, this judgment is divided into the following parts: -

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* Ed. Note: Pagination as per the original Judgment.

1. Since the pivotal question of law involved in all the captioned petitions is the same, they were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the Review Petition No. 400 of 2021 filed by the Customs Department is treated as the lead matter.

3. This Review Petition has been filed by the Customs Department through the Commissioner of Customs, New Delhi (the "**Department**") under Order XLVII of the Supreme Court Rules, 2013 seeking review of the judgment and order dated 09.03.2021 passed by this Court in Civil Appeal No. 1827 of 2018 titled ***M/s Canon India Private Ltd. v. Commissioner of Customs***.

A. FACTUAL BACKGROUND OF THE REVIEW PETITION

4. A two-Judge Bench of this Court in the case of ***Commissioner of Customs v. Sayed Ali and Another*** reported in **(2011) SCC 537,** had held that the Commissioner of Customs (Preventive) is not a "proper officer" as defined in Section 2(34) of the Customs Act, 1962 ("**the Act, 1962**") and therefore did not have the jurisdiction to issue a show cause notice in terms of Section 28 of the Act, 1962. The Court observed that while all proper officers must be "officers of customs", all "officers of customs" are not proper officers. It also held that only those officers of customs who were assigned the functions of assessment, which would include re-assessment, working under the jurisdictional collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and consignments had been cleared for home consumption, would have the jurisdiction to issue show cause notice under Section 28 or else it would lead to a situation of utter chaos and confusion, in as much as all officers of customs in a particular area, be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would fall under the definition of "proper officers". Section 2(34) is extracted below:

> *"(34) proper officer in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs"*

5. As a result of the decision in ***Sayed Ali*** *(supra)*, the Central Board of Excise and Customs (the "**Board**") issued Notification No. 44/2011-Cus-NT dated 06.07.2011 under Section 2(34) of the

Act, 1962, assigning the functions of the "proper officers" to the Commissioners of Customs (Preventive), Directorate of Revenue Intelligence ("**DRI**"), Directorate General of Anti Evasion ("**DGAE**") and Officers of Central Excise. The notification specified that it would operate prospectively. With a view to account for the past periods, Section 28(11) was introduced *vide* the Customs (Amendment and Validation) Act, 2011 (Act No.14 of 2011) dated 16.09.2011 by virtue of which all persons appointed as Officers of Customs under sub-section (1) of Section 4 before the 06.07.2011 were deemed to have and always had the power of assessment under Section 17 and were deemed to be and always have been "proper officers" for the purpose of the said section.

6. The constitutional validity of Section 28(11) of the Act, 1962, came to be challenged before the High Court of Delhi in the case of ***Mangali Impex Ltd. v. Union of India*** reported in **(2016) SCC Online Del 2597** and a batch of matters were disposed of by the High Court *vide* a common judgment on 03.05.2016.

7. The High Court held that although Section 28(11) of the Act, 1962 begins with a *non-obstante* clause, it neither explicitly nor implicitly seeks to overcome the legal position brought about by Explanation 2 which states that the cases of non-levy, short-levy or erroneous refund prior to 08.04.2011 would continue to be governed by the unamended Section 28 of the Act, 1962 as it stood prior to said date. On this basis, it held that the newly enacted Section 28(11) would not empower officers of DRI or DGAE to either to adjudicate the show-cause notices already issued by them for the period prior to 08.04.2011 or to issue fresh show-cause notices for said period.

8. The High Court also held that Section 28(11) of the Act, 1962 is overbroad in as much as it confers jurisdiction on a plurality of officers on the same subject matter which may result in utter chaos, unnecessary harassment and conflicting decisions. It held that such untrammelled power would be arbitrary and violative of Article 14 of the Constitution. The issue as to the constitutional validity and effect of Section 28(11) of the Act, 1962 was answered accordingly. The Department preferred an appeal against the decision in ***Mangali Impex*** *(supra)* in Civil Appeal No. 6142 of 2019 before this Court and *vide* order dated 01.08.2016, a two-Judge Bench of this Court stayed the operation of that decision.

9. The constitutional validity of Section 28(11) of the Act, 1962 was also challenged before the High Court of Bombay in the case of ***Sunil Gupta v. Union of India and Others*** reported in **(2014) SCC Online Bom 1742**. The two-Judge Bench *vide* its Judgement dated 03.11.2014 held thus:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28(11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail."*

10. Since the decision in ***Sunil Gupta*** *(supra)* was anterior in time, the same was relied upon by the Department before the High Court of Delhi during the hearing in ***Mangali Impex*** *(supra)*. However, the High Court of Delhi did not agree with the view taken therein.

11. A batch of four statutory appeals came to be decided by this Court on 09.03.2021 in ***Canon India*** *(supra)* wherein this Court decided

the following two issues – *first*, whether the officers of DRI would be "proper officers" under Section 2(34) for the purposes of Sections 17 and 28 of the Act, 1962 respectively; and *second,* whether such officers are empowered to issue show cause notices demanding customs duty under section 28 of the Act, 1962. To elaborate:

(a) Whether the Directorate of Revenue Intelligence (DRI) had the legal authority to issue a show cause notice under Section 28(4) of the Act, 1962, when the goods were cleared for import by a Deputy Commissioner of Customs (who had decided that the goods are exempted from being taxed on import)?

(b) Whether an Additional Director General of DRI, who has been appointed as an "officer of Customs" under the Notification dated 07.03.2002, has been entrusted with the functions of "the proper officer" for the purpose of Section 28 of the Act, 1962?

12. This Court while disposing of the aforesaid batch of matters proceeded to reiterate the principles laid down in ***Sayed Ali*** *(supra)* that only such officers who are vested with the power of assessment under Section 17 can be empowered to issue show cause notices under Section 28 or else this would result in a state of chaos and confusion. It also held that unless it is shown that the officers of DRI are at the first instance, customs officers under the Act, 1962 and are entrusted with the functions of a proper officer under Section 6 of the Act, 1962, they would not be competent to issue show-cause notices. It was held that, since no entrustment was made under Section 6 of the Act, 1962, the officers of DRI who were not otherwise officers of customs, could not have been assigned as the "proper officers".

13. It also observed that from a conjoint reading of Section 2(34) and Section 28 respectively of the Act, 1962, it is manifest that only such a custom officer who has been assigned the specific functions of assessment and reassessment in the jurisdictional area where the import concerned has been affected, either by the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

14. It appears from the decision in ***Canon India*** *(supra)* that the Notification No. 44/2011-Cus-NT dated 06.07.2011 designating officers of DRI

as "proper officers" for the purposes of both Sections 17 and 28 of the Act, 1962 respectively; the introduction of Section 28(11) *vide* the Validation Act, 2011 introducing Section 28(11) empowering such officers for the period prior to 06.07.2011; the statutory scheme as envisaged under Sections 3, 4, 5 and 2(34) of the Act, 1962 respectively; and the pendency of the appeal against the decision in ***Mangali Impex*** *(supra)* and the stay of the operation of the said decision by this Court was either not noticed or not brought to the notice of the Court.

15. The Department preferred the present Review Petition against the judgement delivered in ***Canon India*** *(supra)* on 09.03.2021. This judgement was followed in other cases adjudicated by this Court and the High Courts, resulting in various other Review Petitions, Special Leave Petitions and Civil Appeals. This Court *vide* order dated 15.02.2022 in the present Review Petition allowed an open court hearing to be conducted and after hearing the parties, issued notice on the Review Petition *vide* order dated 19.05.2022. A co-ordinate Bench of this Court later in ***Union of India and Another v. Godrej and Boyce Manufacturing*** **(SLP (C) No. 1513/2022)** through order dated 11.02.2022 also issued notice.

16. The aforesaid developments led to a hiatus. As a result, the appeals pending before the Tribunals and other authorities could not be decided. This necessitated the introduction of the following provisions by Parliament: Sections 86, 87 and 88 in the Finance Act, 2022 (Act No. 6 of 2022) to amend Sections 2(34), 3 and 5 of the Act, 1962 respectively. Further, Sections 94 and 97 of the Finance Act, 2022 introduced a new Section 110AA and a validation enactment respectively. These amendments came to be challenged before this Court in **W.P. (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd v. Union of India.***

17. The present batch comprises of three clusters of matters:

    (i) The Review Petitions in the ***Canon India*** *(supra)* batch;

    (ii) The ***Mangali Impex*** *(supra)* appeal and other appeals pending before this Court on the issue of whether the officers of DRI would be proper officers in light of Section 28(11); and

    (iii) The petitions challenging the constitutional validity of Section 97 of the Finance Act, 2022.

B. SUBMISSIONS ON BEHALF OF THE DEPARTMENT

18. Mr. N. Venkataraman, the learned Additional Solicitor General of India, made extensive submissions on the following broad issues –

(i) The Review Petitions filed in the case of ***Canon India*** *(supra)* are maintainable as there is an error apparent on the face of the record.

(ii) The decision rendered by this Court in ***Sayed Ali*** *(supra)* requires reconsideration.

(iii) The decision rendered by the Delhi High Court in ***Mangali Impex*** *(supra)* should be overruled and the view expressed by the Bombay High Court in ***Sunil Gupta*** *(supra)* should be upheld.

(iv) The changes introduced by the Finance Act, 2022 are merely clarificatory in nature and the crux of the issue before the Court can be answered without reference to and reliance upon the changes introduced by the said Act.

i. Error apparent in the judgment under review

19. It was submitted that the judgement rendered by this Court in ***Canon India*** *(supra)* requires review as there are errors apparent on the face of the record. The Ld. ASG submitted that it is equally important that the legality and validity of the decision rendered by the High Court of Delhi in ***Mangali Impex*** *(supra)* which is a part of the present batch of pending appeals be considered since the issues in both ***Canon India*** *(supra)* and ***Mangali Impex*** *(supra)* are one and the same. He submitted that the fact that an appeal against ***Mangali Impex*** *(supra)* was pending before this Court and that the operation of the said judgement was stayed went unnoticed in ***Canon India*** *(supra)*. He submitted that this would have a direct bearing both in the review and in the batch of appeals before this Court.

20. He submitted that ***Canon India*** *(supra)* proceeded on the assumption that DRI officers are not officers of Customs and therefore need to be entrusted with such powers under Section 6 of the Act, 1962 and only upon such entrustment, the functions of a proper officer can be assigned to them. This, he submitted, is in the teeth of the provisions of the Act, 1962 more particularly Sections 3, 4, and 5 thereof. He further submitted that there is no discussion worth the name on

these provisions as regards its applicability to the DRI officers who are none other than a class of officers of customs under Section 3 appointed pursuant to Section 4 and consequently, no entrustment is required under Section 6. He submitted that Section 6 would come into play for such of those officers of the Central or State Government or Local Authority, who are not a class of officers of customs under Section 3 appointed in accordance with Section 4 of the Act, 1962. He explained this clear distinction between the two provisions by relying on the notifications issued under Section 4 of the Act, 1962 proclaiming DRI officers to be a class of officers of Customs under Section 3 of the Act.

21. He submitted that this Court erred in not taking into consideration Sections 3, 4 and 5 of the Act, 1962 respectively and its interplay, if any, with Section 6, as duly indicated by the notifications issued from time to time. More particularly, the Court did not take into account the origin and history of the DRI and how it was always a part of the Ministry of Finance since its inception except for a brief period between 1970 and 1977.

22. He adverted to Sections 3, 4, 5 and 6 of the Act, 1962 respectively along with the relevant notifications issued under the respective provisions. The provisions and relevant notifications are reproduced hereinbelow:

Section 3 as introduced in 1962:

"3. There shall be the following classes of officers of custom namely: —

(a) Collectors of Customs;

(b) Appellate Collectors of Customs;

(c) Deputy Collectors of Customs;

(d) Assistant Collectors of Customs; and

(e) such other class of officers of customs as may be appointed for the purposes of this Act."

The provision was amended by the Finance Act, 1995 and underwent only one change wherein the expression 'collector' was replaced by the expression 'commissioner'. The amended provision reads as under:

"3. Classes of officers of customs.-

There shall be the following classes of officers of customs, namely.-

(a) Chief Commissioners of Customs;

(b) Commissioners of Customs;

(c) Commissioners of Customs (Appeals);

(d) Deputy Commissioners of Customs;"

23. He submitted that Section 3 refers to the class of officers of customs. All officers of the same rank irrespective of the functions and roles they play would fall under Section 3 as class of officers of customs. Class in this sense would refer to the same rank.

24. Sections 4 and 5 of the Act, 1962 are extracted below:

Section 4:

"(1) The Board may appoint such persons as it thinks fit to be officers of customs.

(2) Without prejudice to the provisions of sub-section (7), the Board may authorise a Commissioner of Customs or a Deputy or Assistant Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs."

Section 5:

"(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge custom the duties conferred or imposed on him under this Act.

(2) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.

(3) Notwithstanding anything contained in this section, an Appellate Collector of Customs shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and section 108."

25. Section 4 relates to appointment of officers of customs and Section 5 deals with the powers and duties of officers of customs. There is only one significant change carried out in Section 4 on 11.05.2002. Prior to that date, the appointing Authority was the Central Government and post 11.05.2002, the Board became the appointing Authority.

26. Some of the relevant notifications issued under Sections 4 and 5 of the Act, 1962 respectively are reproduced below:

> *"**G.S.R. 214**-In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints—*
>
> *(a) the officers specified below to be Collectors of Customs within their respective jurisdictions, namely:—*
>
> *1. Director, Directorate of Revenue Intelligence.*
>
> *2. Collector of Customs and Central Excise, Cochin.*
>
> *3. Collectors of Land Customs and Central Excise, Delhi, Calcutta and Shillong.*
>
> *4. Collectors of Central Excise, Baroda, Bombay, Poona, Bangalore, Madras, Hyderabad, Calcutta, Nagpur, Patna, Allahabad and Kanpur.*
>
> *(b) the Deputy Collectors posted under the Collectors specified in clause (a) to be Deputy Collectors of Customs within their respective jurisdictions;*
>
> *(b) the Assistant Collectors posted under the Collectors specified in clause (a) to be Assistant Collectors of Customs within their respective jurisdictions.*
>
> *[No. 37/F. No. 4/1/63-CAR]*
>
> ***G.S.R. 215**-In exercise of the powers conferred by sub-section (1) of section 4 of the Customs Act, 1962 (52 of 1962), the Central Government hereby appoints the following persons to be officers of Customs, namely:-*
>
> *1. Principal Appraisers, Appraisers, Examiners, Chief Inspectors, Additional Chief Inspectors, Inspectors, Preventive Officers, Women*

searches, Mnisterial officers and Class IV officer in the Customs Department at Bombay, Calcutta, Madras, Cochin, Visakhapatnum and Kandla.

2. *Reverificadors, Verficiadores, Appraisers, Preventive Inspectors, Preventive Officers, Officials Probationary Officials, Fiscal Guards, Cabos, Sub-Chefes, and Auxiliaries of the Technical Cadre, borne on the establishment of Customs and Central Excise Administration, Goa.*

3. *Superintendents, Deputy Superintendent, Inspectors, Sub-Inspectors, women searchers, Ministerial staff and Class IV staff of Central Excise Department, who are for the time being posted to a Customs-port, Customs-airport, land-customs station, coastal port, Customs Preventive post, Customs Intelligence post or a Customs warehouse.*

4. *Superintendents, Duty Superintendents and Inspectors of Central Excise Department in any place in India.*

5. *All officers of the Directorate of Revenue Intelligence.*

[No. 38/F. No. 4/1/63-CAR.]"

27. Our attention was specifically drawn to S. No. 1 of GSR 214 as extracted above wherein the Central Government appointed the Director, Directorate of Revenue Intelligence as an officer of customs and also to S. No. 5 of GSR 215 by which the Central Government appointed all the officers of DRI as officers of customs.

28. He also placed before us the origin and history of the DRI as a part of the Ministry of Finance. From 04.12.1957 till 24.06.1970, DRI was with the Ministry of Finance. From 25.06.1970 to 28.07.1970, it was with the Ministry of Home Affairs. Between 29.07.1970 and 06.04.1977, it was with the Cabinet Secretariat and from 07.04.1977 onwards, DRI has remained with the Ministry of Finance.

29. Placing reliance on the decision of the Delhi High Court in the case of ***S.K. Srivastava v. Union of India*** reported in **1971 SCC OnLine Del 134**, he submitted that DRI was always a part of the Customs Department, working under a common Board and the Ministry of Finance. The relevant paragraphs from this decision are extracted below:

> *"(2) Therefore, on 3-12-1970 the order dated 27-7-1970 was cancelled.*
>
> *(3) On 16-12-1970 the President was pleased to order that the petitioner "be posted as Collector of Central Excise, Hyderabad".*
>
> *The petitioner however refused to join his posting at Hyderabad and has filed the present writ petition challenging his transfer from the post of Director of Revenue Intelligence to the post of Collector of Customs as being illegal and unconstitutional.*
>
> *Let us first consider the legality of the transfer. Under Article 310 of the Constitution, the petitioner held office during the pleasure of the President. The conditions of service of the petitioner could be regulated by Parliament by legislation under Article 309 of the Constitution. In the absence of such legislation the President could also frame rules to do so under the proviso to Article 309. But neither any such legislation nor any such rules exist. The formation of the Indian Customs and Central Excise Service Class I was itself brought about by purely executive action. It is well-established that the administration of service by the Government of India can be carried on by executive instructions and executive action even though no statute or statutory rules may have been made.*
>
> ***The distinction between the personnel forming a Service and the posts which may be manned by the members of such a Service has to be noted at the outset in this case. The petitioner along with others belong to the Indian Customs and Central Excise Service Class I. The members of this Service stood in relation to each other in a particular order of seniority.***

There was no statute or rules, however, restricting the appointments of the members of the Service to any particular post. Initially the officers of the Collectorate of Customs and Excise working under the Ministry of Finance, Department of Revenue, used to do all the work relating to customs and excise. In 1939, the work of inspection in the Departments of Customs and Central Excise which was till then performed by the departments themselves as carved out and given to a separate Directorate of Inspection (Customs and Central Excise) as a part of the office of the Central Board of Revenue which was formed by an Act of 1924 and which was split later by an Act of 1963 into two Boards, namely:—

(a) Board of Direct Taxes under which functions the Department of Income-tax;

(b) The Central Board of Excise and Customs under which functioned the Collectorates of Customs and Central Excise, Directorate of Inspection and Directorate of Revenue Intelligence.

It was in 1957 that the intelligence work till then performed by the Central Revenue Intelligence Bureau functioning as a unit in the Directorate of Inspection, was constituted as a third unit in the Department of Revenue, Ministry of Finance styled as Directorate of Revenue, Intelligence. All this and more information is contained in the Government publication Organisation Set-up and Functions of the Ministries/Departments of the Government of India ", 4th Edition, 1968, pages 68-70 (Annexure R XIII).

As the work of Directorates of Inspection and Revenue Intelligence has been carved out from the work originally performed by the Collectorates of Customs and Central Excise and as no separate personnel was recruited to man the posts in these two Directorates, the members of the Indian Customs and Central Excise Service Class I have been manning those posts. There have been therefore numerous transfers

of officers of the Indian Customs and Central Excise Service Class I from their posts in the Collectorates to the subsequently created posts in the Directorates. Equally frequently these officers have been transferred back to the posts in the Collectorates. The important fact to be noted is that only one set of personnel originally recruited for the Customs and Central Excise Collectorates has been used to fill the posts not only in the Collectorates but also in the Directorates. The reason is obvious. The Central Board of Excise and Customs in 1963 and prior to that the Central Board of Revenue functioning as a part of the Department of Revenue, Ministry of Finance of the Government of India administered and controlled the work of the Collectorates of Customs and Central Excise as well as of the Directorates of Inspection and Revenue Intelligence. These three units form one whole working under the Board and the Ministry. This position is reflected in the following documents*:—*

(1) The Central Civil Services [Revised Pay Rules, 1960 (Annexure R xiv)] have a Schedule in which the various posts which could be manned by the Central Civil Services are shown with the emoluments attached to those posts. In this Schedule section 10 forms the Ministry of Finance (Department of Revenue)...."

[emphasis supplied]

30. Having adverted to Sections 3, 4 and 5 of the Act, 1962, he submitted that the officers of DRI would fall under Section 3 as "class of officers" and under Section 4 as "officers of customs" and that the Board is empowered to assign and fix powers and assign duties to such DRI officers similar to other classes of officers and officers of customs.

31. In the aforesaid context, he submitted that having failed to advert to these three sections and the various notifications referred to above, this Court erred in placing sole reliance on Section 6 of the Act, 1962 to conclude that DRI officers are not officers of customs as they belong to a different department and require specific entrustment under Section 6 of the Act, 1962 by the Central Government before

the powers of a proper officer under Section 2(34) of the Act, 1962 can be assigned to them. Section 6 is reproduced below:

> "*(6) The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act.*"

32. He submitted that the question of entrustment would arise only in relation to an officer of Central or State Government or Local Authority who does not fall within the class of officers of customs under Section 3 appointed under Section 4 of the Act, 1962. Some instances of the Central Government entrusting such functions of customs officers under Section 6 are M.F. (D.R.) Notification No. 161-Cus dated 22.06.1963 and M.F.(D.R.&I.) Notification No. 33-Cus., dated 27.04.1974 which entrusted functions of customs officer to police officers in a particular jurisdiction and officers of the Border Security Force respectively. However, in the case of DRI officers, they would clearly fall under Sections 3, 4 and 5 of the Act, 1962 and the notifications conferring powers and duties are already on record.

33. Our attention was also drawn to Notification 161-Cus dated 22.06.1963 issued under Section 6 entrusting powers of search to DRI officers. As per Notifications GSR 214 and GSR 215 issued in the same year under Section 4 of the Act, 1962, all officers of DRI were appointed as officers of customs. Therefore, an inadvertent reference to Section 6 under Notification No. 161 dated 22.06.1963 should not lead to the drawing of any adverse inferences as at the highest, it may only be a case of misquoting of a Section. Secondly, till 11.05.2002, it was the Central Government which was the appointing authority under Section 4 for officers of customs as well as for entrustment under Section 6. It is only from 11.05.2002 that the powers under Section 4 were delegated to the Board since Notification No. 161 dated 22.06.1963 was issued prior to 11.05.2002 and the authority being the Central Government under both Sections, any incorrect reference to a provision would be totally inconsequential.

34. He submitted that by virtue of the aforesaid and also without reference to the Notification No. 44/2011 – Cus (N.T.) dated 06.07.2011, erroneous conclusions came to be rendered in paragraphs 17 to 23

of the decision under review. The findings in ***Canon India*** *(supra)* in paragraphs 13 and 14 respectively that DRI officers belong to a different department and therefore cannot become proper officers under Section 28, and if done so, would result in anarchical and unruly operation of the statute, too, is erroneous in light of the aforesaid submissions.

35. He further submitted that despite being a conceded position that issuance of a show cause notice under Section 28 is a quasi-judicial exercise of power, this Court fell in error in holding the same to be an administrative review in paragraph 15. The Court also erred in concluding that the expression "the proper officer" can only signify an officer empowered to undertake assessment and re-assessment under Section 17, by placing unfounded reliance on the decision in ***Consolidated Coffee Ltd. and Anr. v. Coffee Board, Bangalore*** reported in **1980 AIR 1468** as it relates to a totally different scenario envisaged under Article 286 read with Section 5 of the Central Sales Tax Act, 1956.

36. After pointing out the aforesaid aspects as errors apparent on the face of the record, he prayed that the present review petition be allowed.

ii. Why the decision in Sayed Ali (supra) requires reconsideration

37. He submitted that there are two fundamental errors in the dictum laid in ***Sayed Ali*** *(supra)* –

(i) *Firstly*, it casts an obligation that an officer of customs who is empowered to undertake assessment or reassessment under Section 17 alone is qualified to become a proper officer under Section 28 for the purpose of raising demand of short levy, non-levy or erroneous refund. No other officer can be assigned the functions of the proper officer under Section 28.

(ii) *Secondly*, the judgment was rendered in connection with officers of the Customs (Preventive), who were not assigned the powers and duties of a proper officer, and no notifications to this effect were produced or brought to the notice of this Court.

38. It was pointed out by him that ***Sayed Ali*** *(supra)* did not deal with DRI officers who were indeed vested with the powers of proper

officers *vide* the Circular No. 437/9/98-Cus.IV dated 15.02.1999 issued by the Board in terms of Section 2(34). Under Section 2(34), the power of assigning functions of a proper officer to an officer of customs vests with the Board or the Commissioner of Customs. Since the Board issued this assignment, the DRI officers became proper officers with effect from 15.02.1999. As a result, the decision rendered in ***Sayed Ali*** *(supra)* which was with reference to only Customs (Preventive) would have no application to the DRI and DGAE officers. The circular dated 15.02.1999 is reproduced hereinbelow:

"F. No. 437/9/98-Cus.IV

Circular No. 4/99-Cus
Dated 15/2/1999

Government of India
Ministry of Finance
(Department of Revenue)
Central Board of Excise & Customs, New Delhi

Subject: Issuance of Show Cause Notice by the Officers of directorate of Revenue Intelligence -regarding-

A doubt has been recently raised as to whether the Officers of Directorate of Revenue Intelligence could issue show cause notices in cases investigated by them – a practice started last year apparently in tune with the practice of the Directorate General of Anti Evasion. The matter has been examined in the Board.

2. It has been observed that in terms of Customs Notification No. 19/90-Cus (NT.), dated 26.4.90, as amended from time to time, the Officers of Directorate of Revenue Intelligence of different categories have been notified and appointed as Commissioners of Customs, Deputy Commissioners of Customs or Assistant Commissioners of Customs for the are specified. These officers, therefore, can legally be entrust with discharge of functions normally performed by Commissioners, Deputy Commissioners or Assistant Commissioners of Customs in their jurisdiction, as the case may be. Board can no doubt subject these powers/functions

to certain restrictions/limitations as may be imposed, as provided under section 5(1) of the Customs Act.

3. Directorate of Revenue Intelligence Officer are, therefore, to undertake investigations of cases detected by them, and to issue the Show Cause Notices on completion of investigations. In line with the instructions issued (vide F.No. 208/23/97-CX-8, dated 20.1.98) in respect of Officers of Directorate General Anti Evasion, Board has decided that in impact of cases investigated by the Directorate General of Revenue intelligence, the officers of said Directorate will be competent to and may issue show cause notices in cases investigated by them – though these will continue to be adjudicated by the concerned jurisdictional Commissioners, Additional Commissioners, Deputy Commissioners or Assistant Commissioners of Customs, as the case may be.

4. The Board has also decided that these instructions may kindly be brought to the notice of all departmental officers by issuing suitable standing orders.

Sd/-
(Rajendra Singh)
Under Secretary to the Government of India"

39. As regards the observations in ***Sayed Ali*** *(supra)* on the *inter se* link between Sections 17 and 28 of the Act, 1962 respectively, he submitted that no such mandate flows from either of the two sections and reading any such linkage into the scheme of the Act, 1962 would directly undermine the powers of search, seizure and investigation of the DRI officers under the Act, 1962 along with the assignment of functions as proper officers to issue show cause notices post such search and investigation. Although no disability is to be found in any provisions of the Act, 1962, yet ***Sayed Ali*** *(supra)* creates such an embargo and also proceeds to hold that empowering such officers to issue show cause notices would result in multiple persons dealing with the same issue leading to utter chaos and confusion. He submitted that the Board has been issuing circulars and notifications from time to time with a view to ensure that no such overlap occurs. He also argued that the respondents have not adduced any evidence

or empirical statistics to even remotely indicate that an importer has been visited with either multiple show cause notices or adjudication orders on the same subject.

40. He further submitted that the Board had vested DRI with the power to issue only show cause notices and the adjudication orders in furtherance of the show cause notices were to be passed by the respective port officers. In cases involving multiple ports, common adjudicators were assigned powers by the Board and later also by the DRI and these adjudicators never involved themselves either in the investigation of the case or in the issuance of show cause notices. In such circumstances, he submitted that both the findings in ***Sayed Ali*** *(supra)* require reconsideration.

41. He further drew our attention to Circular No. 18/2015 – Customs dated 09.06.2015 issued by the Board pertaining to the appointment of common adjudicating authority and the mode and manner of assignment of functions for adjudication with a view to avoid multiplicity or plurality. The same is extracted below:

"Circular No. 18/2015- Customs

F.No. 450/145/2014- Cus IV

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise and Customs

To

All Chief Commissioner of Customs / Customs (Preventive)

All Chief Commissioners of Customs and Central Excise

All Commissioners of Customs

All Commissioners of Customs and Central Excise

Sir / Madam,

Subject: Appointment of common adjudicating authority -regarding

Reference is invited to Notification No 60/2015-Customs (N.T.), dated 04.06.2015 whereby the power to appoint

common adjudicating authority in cases investigated by DRI upto the level of Commissioner of Customs has been delegated to Principal Director General of Directorate of Revenue Intelligence in terms of section 152 of the Customs Act, 1962. This notification was issued in the interest of expediting decision making with resultant benefits to both trade and revenue in terms of faster settlement of outstanding disputes. These appointments were done hitherto by the Central Board of Excise and Customs under sections 4 and 5 of the Customs Act 1962.

2. In the light of the aforementioned notification, all cases of appointment of common adjudicating authority in respect of cases investigated by DRI will be handled by Principal DG, DRI. In this regard, the Board has prescribed the following guidelines for Principal DG, DRI:

(a) The following cases initiated by DRI shall be assigned to Additional Director General (Adjudication), DRI:

(i) Cases involving duty of Rs.5 crores and above;

(ii) Group of cases on identical issues involving aggregate duty of Rs.5 crores or more;

(iii) Cases involving seizure value of Rs.5 crores or more;

(iv) Cases of over-valuation irrespective of value involved; and

(v) Existing DRI cases with erstwhile Commissioner (Adjudication).

(b) Cases other than at (a) above involving more than one Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs on the basis of the maximum duty evaded;

(c) Cases other than at (a) above involving a single Customs Commissionerate would be assigned to the jurisdictional Commissioner of Customs;

(d) Non-DRI cases pending with erstwhile Commissioner (Adjudication) would be assigned to Additional Director General (Adjudication), DRI;

(e) Past DRI cases pending for adjudication with jurisdictional Commissioners of Customs would continue with these officers;

(f) Remand cases would be decided by the original adjudicating authority.

3. All other cases of appointment of common adjudicator i.e. other than the cases mentioned in paragraph 2 above would continue to be dealt by the Board. This would include cases made by Commissionerates or cases made by DRI wherein the adjudicating officer is an officer below the level of Additional Director General (Adjudication), DRI.

4. Board has also decided that all the pending cases where common adjudicating authorities have not been appointed so far or where the common adjudicating authorities have been appointed but adjudications have not been done should be disposed of expeditiously in terms of aforementioned guidelines. However, while doing so in regard to the latter category of cases, Principal DG, DRI will take into consideration the fact whether or not personal hearings have taken place and the stage of passing the adjudication order. This is to ensure that cases about to be finalized are not reallocated to another adjudicating authority thereby defeating the objective of expediting the finalization of disputes.

5. Difficulty faced, if any, may be brought to the notice of the Board at an early date.

Yours faithfully
(Pawan Khetan)

OSD (Customs IV)"

42. He also brought to our notice similar notifications and circulars issued subsequently to plead that all steps have been taken with a view to ensure that there is no overlap of jurisdiction. In the absence of any evidence or proof adduced by the importer, the dictum as laid in ***Sayed Ali*** *(supra)* declaring that this would result in utter chaos and confusion and only such officers vested with the power of assessment and re-assessment can issue notices under Section 28, requires reconsideration.

iii. The decision in *Mangali Impex (supra)* is liable to be set aside and the decision in *Sunil Gupta (supra)* ought to be affirmed

43. He submitted that the decision in ***Mangali Impex*** *(supra)* too observed that the assignment of powers to DRI officers for issuing show cause notices under Section 28 of the Act, 1962 would create a situation of utter confusion and chaos and declared Section 28(11) of the Act, 1962 to be unconstitutional for being violative of Article 14 owing to its inherent arbitrariness. The decision also directed the Department to issue suitable instructions and ensure avoidance of multiplicity or plurality of proceedings. He submitted that the instructions have been scrupulously followed and complied with since 1999 through various notifications and Board circulars, thereby avoiding any overlap. He submitted that it was because of this reason that the importers were not able to produce any material to support such adverse inferences. Thus, he submitted that the decision in ***Mangali Impex*** *(supra)* also deserved to be set aside.

44. On the correctness of the decision in ***Mangali Impex*** *(supra)*, he further submitted that the reasoning in the decision i.e., the Validation Act, 2011 does not extend its non-obstante clause to anything contained elsewhere in the same statute or in any other law for the time being in force, is incorrect and not legally unsustainable. On the finding of the High Court that since Explanation 2 remains on the statute even after the insertion of Section 28(11), it places an embargo for the period prior to 08.04.2011, for the application of Section 28(11). The Ld. ASG submitted that Explanation 2, in no way, had interfered or can interfere with the validating power introduced *vide* Section 28(11). He delineated the sequence of events leading to the insertion of Section 28(11) in the Act, 1962 to make good his submission.

(i) This Court delivered the judgment in ***Sayed Ali*** *(supra)* on 18.02.2011.

(ii) Parliament *vide* the Finance Act, 2011 introduced certain amendments to Section 28 on 08.04.2011.

(iii) On 06.07.2011, the Central Government issued Notification 44/2011 assigning the functions of proper officers to officers of Customs (Preventive), DRI, DGAE and officers of Commissioner of Central Excise. The same is extracted below:

"Proper officers for Customs Sections 17 and 28

In exercise of the powers conferred by sub-section (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs hereby assigns the functions of the proper officer to the following officers mentioned in column (2) of the Table below, for the purposes of section 17, section 28, section 28AAA and second proviso to Section 124 of the said Act, namely:-

TABLE

Sl.No.	***Designation of the officers***
(1)	*(2)*
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise."*

[Notification No. 44/2011-Cus. (N.T.), dated 6-7-2011]

(iv) The Validation Bill, 2011, introducing Section 28(11) along with the Statement of Reasons came to be issued on 02.08.2011 and the same is extracted below:

"Introduction of Sub-section 11 in Section 28 as per the Customs (Amendment And Validation) Bill, 2011

"(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."

STATEMENT OF OBJECTS AND REASONS

The Customs Act, 1962 consolidates and amends the law relating to customs. Clause (34) of section 2 of the said Act defines the expression "proper officer" in relation to the functions under the said Act to mean the officer of customs who is assigned those functions by the Central Board of Excise and Customs or the Commissioner of Customs. Recently, a question has arisen as to whether the Commissioner of Customs (Preventive) is competent to exercise and discharge the powers of a proper officer for issue of a notice for the demand of duty. The Hon'ble Supreme Court of India in Commissioner of Customs versus Sayed Ali and Anr. (Civil Appeal Nos. 4294-4295 of 2002) held that only a customs officer who has been specifically assigned the duties of assessment and re-assessment in the jurisdiction area is competent to issue a notice for the demand of duty as a proper officer. As such the Commissioner of Customs (Preventive) who has not been assigned the function of a "proper officer" for the purposes of assessment or re-assessment of duty and issue of show cause Notice to demand Customs duty under Section 17 read with Section 28 of the Act in respect of goods entered for home consumption is not competent to function as a proper officer which has not been the legislative intent.

2. In view of the above the Show Cause Notices issued over the time by the Customs officers such as those of the Commissionerates of Customs (Preventive),

Directorate General of Revenue Intelligence and others, who were not specifically assigned the functions of assessment and re-assessment of customs duty may be construed as invalid. The result would be huge loss of revenue to the exchequer and disruption in the revenue already mobilized in cases already adjudicated. However, having regard to the urgency of the matter, the Government issued notification on 6th July, 2011 specifically declaring certain officers as proper officers for the aforesaid purposes.

3. In the circumstances, it has become necessary to clarify the true legislative intent that Show Cause Notices issued by Customs officers, i.e., officers of the Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded in respect of goods imported are valid, irrespective of the fact that any specific assignment as proper officer was issued or not. It is, therefore, purposed to amend the Customs Act, 1962 retrospectively and to validate anything done or any action taken under the said Act in pursuance of the provisions of the said Act at all material times irrespective of issuance of any specific assignment on 6th July, 2011.

4. The Bill seeks to achieve the above objects."

(v) Finally, the Validation Act came to be passed on 16.09.2011 and Sub-Section (11) became part of Section 28.

45. He contended that Explanation 2 and the introduction of Section 28(11) are for distinct purposes and are not connected to each other in any way. Prior to 08.04.2011, the period of limitation available under the statute for demanding short levy, non-levy or erroneous refund was six months. Whereas after 08.04.2011, it was enhanced to one year. As the amendment substituted the then-existing Section 28, it provided a saving provision to protect the notices issued

prior to 08.04.2011 from the extension of limitation period from 6 months to one year. He submitted that the purport of Explanation 2 was only to ensure that those rights envisaged under old Section 28 stand preserved. Explanation 2 did not deal with the jurisdictional exercise of the power of DRI officers in issuing show cause notices under Section 28, whereas, the Validation Act, 2011, introducing Section 28(11) addressed precisely only that issue.

46. He submitted that the conclusion drawn in ***Mangali Impex*** *(supra)* was legally incorrect for holding that Section 28(11) is overbroad in assuming every officer of customs to be deemed as proper officers both for Sections 17 and 28. The Validation Act, 2011, was enacted to regularize only past actions and not future actions, which are governed by Notification No. 44/2011 dated 06.07.2011 which even according to the High Court is valid and proper. Consequently, the validation has a very limited role to play as it travels back only to empower such of those officers of customs who had issued show cause notices in the past and vesting them also with the power under Section 17.

47. He submitted that the decision in ***Sunil Gupta*** *(supra)* clarifies the correct legal position and should be held to be so by this Court.

iv. Changes introduced by the Finance Act, 2022 are in the nature of surplusage

48. Lastly, he referred to the amendments brought about by the Finance Act, 2022, *vide* Sections 86, 87, 88, 94 and 97. The same are extracted below:

Section 86 - Amendment of section 2 of the Act, 1962

"86. In the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act), in section 2, in clause (34), after the words "Principal Commissioner of Customs or Commissioner of Customs", the words and figure "under section 5" shall be inserted."

Section 87 - Substitution of new section for section 3 of the Act, 1962

"87. For section 3 of the Customs Act, the following section shall be substituted, namely:

3. Classes of officers of customs.-

"There shall be the following classes of officers of customs, namely:--

(a) Principal Chief Commissioner of Customs or Principal Chief Commissioner of Customs (Preventive) or Principal Director General of Revenue Intelligence;

(b) Chief Commissioner of Customs or Chief Commissioner of Customs (Preventive) or Director General of Revenue Intelligence;

(c) Principal Commissioner of Customs or Principal Commissioner of Customs (Preventive) or Principal Additional Director General of Revenue Intelligence or Principal Commissioner of Customs (Audit);

(d) Commissioner of Customs or Commissioner of Customs (Preventive) or Additional Director General of Revenue Intelligence or Commissioner of Customs (Audit);

(e) Principal Commissioner of Customs (Appeals);

(f) Commissioner of Customs (Appeals);

(g) Additional Commissioner of Customs or Additional Commissioner of Customs (Preventive) or Additional Director of Revenue Intelligence or Additional Commissioner of Customs (Audit);

(h) Joint Commissioner of Customs or Joint Commissioner of Customs (Preventive) or Joint Director of Revenue Intelligence or Joint Commissioner of Customs (Audit);

(i) Deputy Commissioner of Customs or Deputy Commissioner of Customs (Preventive) or Deputy Director of Revenue Intelligence or Deputy Commissioner of Customs (Audit);

(j) Assistant Commissioner of Customs or Assistant Commissioner of Customs (Preventive) or Assistant Director of Revenue Intelligence or Assistant Commissioner of Customs (Audit);

(k) such other class of officers of customs as may be appointed for the purposes of this Act."

Section 88 - Amendment of section 5 of the Act, 1962

"88. In section 5 of the Customs Act,--

(a) after sub-section (1), the following sub-sections shall be inserted, namely:--

"(1A) Without prejudice to the provisions contained in sub-section (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.

(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an officer of customs, who shall be the proper officer in relation to such functions.";

(b) after sub-section (3), the following sub-sections shall be inserted, namely:-

"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board may consider any one or more of the following criteria, including, but not limited to--

(a) territorial jurisdiction;

(b) persons or class of persons;

(c) goods or class of goods;

(d) cases or class of cases;

(e) computer assigned random assignment;

(f) any other criterion as the Board may, by notification, specify.

(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act."

Section 94 - Insertion of new section 110AA to the Act, 1962

"94. After section 110A of the Customs Act, the following section shall be inserted, namely:--

110AA. Action subsequent to inquiry, investigation or audit or any other specified purpose.-

"Where in pursuance of any proceeding, in accordance with Chapter XIIA or this Chapter, if an officer of customs has reasons to believe that--

(a) any duty has been short-levied, not levied, short-paid or not paid in a case where assessment has already been made;

(b) any duty has been erroneously refunded;

(c) any drawback has been erroneously allowed; or

(d) any interest has been short-levied, not levied, short-paid or not paid, or erroneously refunded, then such officer of customs shall, after causing inquiry, investigation, or as the case may be, audit, transfer the relevant documents, along with a report in writing.

(i) to the proper officer having jurisdiction, as assigned under section 5 in respect of assessment of such duty, or to the officer who allowed such refund or drawback; or

(ii) in case of multiple jurisdictions, to an officer of customs to whom such matter is assigned by the Board, in exercise of the powers conferred under section 5, and thereupon, power exercisable under sections 28, 28AAA or Chapter X, shall be exercised by such proper officer or by an officer to whom the proper officer is subordinate in accordance with sub-section (2) of section 5."

Section 97 - Validation of certain actions taken under the Act, 1962

"97. Notwithstanding anything contained in any judgment, decree or order of any court, tribunal, or other authority, or

in the provisions of the Customs Act, 1962 (52 of 1962), (hereinafter referred to as the Customs Act):-

(i) anything done or any duty performed or any action taken or purported to have been taken or done under Chapters V, VAA, VI, IX, X, XI, XII, XIIA, XIII, XIV, XVI and XVII of the Customs Act, as it stood prior to its amendment by this Act, shall be deemed to have been validly done or performed or taken;

(ii) any notification issued under the Customs Act for appointing or assigning functions to any officer shall be deemed to have been validly issued for all purposes, including for the purposes of section 6;

(iii) for the purposes of this section, sections 2, 3 and 5 of the Customs Act, as amended by this Act, shall have and shall always be deemed to have effect for all purposes as if the provisions of the Customs Act, as amended by this Act, had been in force at all material times.

Explanation. -- For the purposes of this section, it is hereby clarified that any proceeding arising out of any action taken under this section and pending on the date of commencement of this Act shall be disposed of in accordance with the provisions of the Customs Act, as amended by this Act."

49. He submitted that the amendments carried out in the Act, 1962 *vide* Sections 87 and 88 of the Finance Act, 2022 respectively are a mere surplusage done *ex abundanti cautela* and are clarificatory in nature. He further submitted that Section 3 deals with classes of officers and officers of the same rank will constitute the same class. The amended Section 5 only expands the very same class with designation and functions and nothing more.

50. He submitted that Section 94 of the Finance Act, 2022 introducing Section 110AA to the Act, 1962 is only a way forward for the future wherein post search and investigation by the DRI, certain category of cases have now been directed to be handed over to the port authorities for issuing necessary show cause notices and this, in no way, can vitiate notices issued by DRI earlier especially in the absence of a constitutional or statutory embargo.

51. Finally, he submitted that a provision of law should appear arbitrary or abusive to be declared illegal or unconstitutional or invalid. A possible misuse of the provision by the authorities or a perceived misuse or mere presumptions and conjectures of a possible misuse cannot constitute basis to hold that a provision is arbitrary and violative of Article 14. He relied on the following decisions to fortify his submission:

    a. ***Collector of Customs v. Nathella Sampathu Chetty,*** **1962 SCC OnLine SC 30**

    b. ***Shreya Singhal v. Union of India*** **(2015) 5 SCC 1**

    c. ***Commissioner of Customs v. Dilip Kumar & Co.*** **(2018) 9 SCC 1**

    d. ***Goodyear India Ltd. v. State of Haryana*** **(1990) 2 SCC 71**

C. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

52. Mr. Mukul Rohatgi, Mr. Arvind Datar and Mr. V. Lakshmikumaran, learned Senior Counsel appeared on behalf of the various importers and vehemently objected to the review of ***Canon India*** *(supra)* and also contended that both ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)* are correct in their conclusions and need no interference.

53. Mr. Mukul Rohatgi contended that the power of review is extremely circumscribed and limited. It is not a means to provide a second innings to anyone. The Department in the guise of a review is seeking to re-argue the whole matter. Even if a different view is possible, the same cannot give rise to a review. He relied on the following decisions:

    (i) ***Col. Avtar Singh Sekhon v. Union of India*** **(1980) Supp SCC 562**

    (ii) ***Lily Thomas Vs Union of India*** **(2000) 6 SCC 224**

    (iii) ***Champsey Bhara & Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.*** **(1923) SCC OnLine PC 10**

    (iv) ***State of Telangana v. Mohd. Abdul Qasim*** **(2024) 6 SCC 461.**

54. Mr. Arvind Datar too submitted that the scope of review is extremely limited and further contended that Section 97 of the Finance Act, 2022 is a clear overreach and needs to be considered separately.

55. Mr. V. Lakshmikumaran made the following submissions:

(i) The scheme of the Act, 1962 clearly indicates that Sections 17, 46, 47 and 28 of the Act, 1962 respectively are interlinked to and inter-dependent on each other. These provisions involve a sequential flow of events to be processed by a single officer, and therefore, empowering DRI officers who are not connected to this scheme, is illegal.

(ii) Section 17 deals with assessment and reassessment. Section 46 obligates filing of bills of entries. Section 47 allows clearance of goods for home consumption post the assessment under Section 17 and Section 28 pertains to demand of duty in the nature of short levy, short paid and erroneously refunded. Since all these statutory action points are interrelated, it is the same proper officer who should be empowered to perform all of these four functions and the same cannot be assigned to different sets of officers.

(iii) The amendment to Section 17 in 2011 allowing self-assessment is inconsequential since the power to assess and reassess and allow clearances is still with the officer of customs.

(iv) On the issue of whether there are any statutory limitations to the assignment of powers under Section 28 only to those officers who do assessment or re-assessment under Section 17, he submitted that the scheme of the Act, 1962 as explained in ***Sayed Ali*** *(supra)* and ***Mangali Impex*** *(supra)*, clearly indicates that Sections 17 and 28 of the Act, 1962 respectively are interconnected and interdependent.

(v) ***Canon India*** *(supra)* is correct in holding that DRI officers should be entrusted with the functions under Section 6 of the Act, 1962. Since the Central Government has not done so, they cannot be assigned the functions of proper officer.

(vi) Section 5 of the Act, 1962 deals only with powers and duties but not the functions, whereas, Section 6 deals with functions and thus, a notification under Section 6 is necessary. He emphasised on the different consequences arising from the use of the words “powers” and “duties” in Section 5 and use of the word “functions” in Section 6.

(vii) It was contended that Section 28 deals with short levy, non-levy and erroneous refund. Levy means determination of duty through a process of assessment/reassessment. Section 28 therefore involves rendering a finding that the earlier assessment was not correct. Section 28 is intended to revise or upset the original assessment done under Section 17 and once an order gets passed under Section 28, the original assessment would not survive and therefore, the same officer can issue the show cause notice.

(viii) The Board's Circular dated 15.02.1999 cannot come to the rescue of the Department because there was no assignment of function of assessment/reassessment as required by ***Sayed Ali*** *(supra)***.** According to the learned counsel, both Notification No. 44/2011 dated 06.07.2011 and Section 28(11) were brought to the notice of this Court in ***Canon India*** *(supra)***.**

(ix) Having accepted the principles laid down in ***Sayed Ali*** *(supra)* on the interlinkage between Sections 17 and 28 of the Act, 1962 respectively, both *vide* Section 28(11) and Notification No. 44/2011 dated 06.07.2011, it is not open to the Department to now contend the contrary as reaffirmed in ***Canon India*** *(supra)***.**

(x) All proper officers are officers of customs, but all officers of customs are not proper officers. Mere conferment of power or assignment of functions of assessment/reassessment under Sections 17 and 28 of the Act, 1962 respectively is not enough. Out of the various proper officers who have been empowered under Sections 17 and 28, only that proper officer who had actually carried out the assessment will be the proper officer. There can be concurrent conferment of power but there cannot be concurrent exercise of powers as the same may result in chaos and utter confusion.

(xi) The decision rendered by the High Court in ***Mangali Impex*** *(supra)* is correct and need not be disturbed for the following reasons:

a. Section 28(11) does not validate the show cause notices issued by various officers. It merely deems all officers who were appointed as officers of customs under Section 4(1) to

have always had the powers under Sections 17 and 28 the Act, 1962 respectively. This would not automatically revive the show cause notices issued by such officers of customs.

b. In order to hold that Section 28(11) validates past actions, this Court will have to insert words in the statute, that too in a taxing statute which imposes liabilities on assesses, that too retrospectively.

c. Several unintended consequences may arise if it is held that show cause notices issued by other officers of customs will be revived. There are instances wherein many show cause notices have been issued after the ***Sayed Ali*** *(supra)* judgment by the jurisdictional commissionerate wherever the limitation period permitted for demands to be made. In those cases, assessees will be faced with two show cause notices. He laid emphasis on the need to take an undertaking from the Department to avoid such a situation if it were to arise.

d. The High Court has correctly held that Section 28(11) perpetrates the very chaos that the judgment in ***Sayed Ali*** *(supra)* sought to prevent.

e. Explanation 2 to Section 28 should be given a plain meaning. It was in the statute before Section 28(11) was introduced, hence the framers of the statute were well aware of the implications of the Explanation 2.

f. On 08.4.2011, Section 28 of the Act, 1962 underwent a drastic change and not just a mere change in terms of time period being changed from six months to one year. The mode & manner of issuing the show cause notice, the manner of adjudication and payment of duty, etc. have been amended making it more beneficial to the assessee. That is the reason why the old notices were to be dealt with under the old Section.

g. It is impossible to read Section 28(11) and Explanation 2 together as validating any action prior to 08.04.2011. Such is the plain meaning and only such an interpretation is warranted in the present case.

(xii) Section 97 of the Finance Act, 2022 is liable to be struck down as manifestly arbitrary and thus violative of Article 14. According to him, the Finance Act, 2022 does not cure the defects pointed out by this Court in its decision rendered in ***Canon India*** *(supra)* for the following reasons:

a. The amendments introduced *vide* the Finance Act, 2022 continue to violate the principles laid down in the judgment of this Court in ***Sayed Ali*** *(supra)* wherein it was held that granting jurisdiction to multiple officers will create utter chaos and confusion. He highlighted that the review filed against the decision in ***Sayed Ali*** *(supra)* has already been dismissed.

b. The validation of past actions by way of Section 97(i) of the Finance Act, 2022 violates the principles enshrined in the judgment of ***Canon India*** *(supra)* since it will lead to a very anarchical and unruly operation of a statute which was sought to be avoided in ***Canon India*** *(supra)*.

c. A Validation Act can only validate the law but cannot validate a fact. Once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department. Thereafter, only that officer or his superiors (known as the Customs group) who had undertaken assessment under Section 17 in the first place shall have the jurisdiction to issue notices for recovery of duty under Section 28.

d. This Court in its judgment in ***Canon India*** *(supra)* found that factually the assessments were initially not undertaken by officers of DRI and such a defect cannot be cured retrospectively by a validating law. Therefore, the present amendments seek to validate and effectively change a judicially determined fact, which cannot be done by a legislation.

(xiii) The Finance Act, 2022 also introduced a provision, i.e. Section 110AA, providing a mechanism for actions to be taken subsequent to inquiry, investigation or audit by any officer of

customs. Section 110AA operates only prospectively. This provision is Parliament's recognition of the importance of maintaining the jurisdiction for issuing show cause notices within the assessing group.

(xiv) Further, by retrospectively modifying the scheme of appointment and assignment of functions to officers of customs, a larger lacuna has been created as there exist no valid notifications for assignment of functions of a 'proper officer' under Section 5 for the period prior to 01.04.2022. Thus, all actions performed by any officer of Customs prior to 01.04.2022 have in fact been performed without jurisdiction. In such circumstances referred to above, it was prayed that there being no merit in the Review Petition filed by the Department, the same may be dismissed.

D. ISSUES FOR CONSIDERATION

56. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(i) Whether there is an "error apparent on the face of the record" for the purpose of entertaining the review petition?

(ii) If the answer to the aforesaid question is in the affirmative, then whether the exposition of law propounded by this Court in ***Canon India*** *(supra)* as regards the power of the DRI to issue show cause notices could be said to be the correct statement of law?

This would entail addressal of the following questions:

a. Whether officers of DRI are the proper officers for the purposes of Section 28 of the Act, 1962?

b. What would be the extent, scope and domain of Section 6 of the Act, 1962 *vis-à-vis* Section 2(34), Section 3, Section 4 and Section 5 of the Act, 1962 and whether an entrustment by the Central Government under Section 6 of the Act, 1962 is mandatory to empower the Officers of the DRI for the purpose of issuing show cause notices?

c. Whether the power under Section 28 can be exercised only by someone who is empowered to exercise the power

under Section 17 of the Act, 1962 for the goods in question? In other words, how best the meaning of the expression "proper officer" should be construed for the purposes of exercise of functions under Section 28?

d. Whether "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962? If no, whether the use of the definite article "the" in the expression "the proper officer" in Section 28 is in the context of that proper officer who has been assigned the powers of discharging the functions under Section 28 by virtue of powers conferred under Section 5 of the Act, 1962?

e. Whether issuance of show cause notices followed by adjudication under Section 28 of the Act, 1962 is an administrative review as held in ***Canon India*** *(supra)* or a quasi-judicial exercise of power under administrative law?

(iii) Whether the introduction of Section 28(11) *vide* the Validation Act of 2011 which retrospectively validates the show cause notices issued under Section 28 with effect from 06.07.2011, is discriminatory and arbitrary for not curing the defect highlighted in ***Sayed Ali*** *(supra)* and, therefore, is violative of Article 14 of the Constitution of India?

(iv) Whether the judgment delivered by the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* expounds the correct interpretation of Section 28(11)?

(v) Whether Section 97 of the Finance Act, 2022, which retrospectively validates the show cause notices with effect from 01.04.2023, is manifestly arbitrary and therefore, violative of Article 14 of the Constitution of India?

E. ANALYSIS

i. *Review jurisdiction*

57. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court. It reads as under:

> *"**137. Review of judgments or orders by the Supreme Court**. — Subject to the provisions of any law made*

by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

58. Further, Part IV Order XLVII of the Supreme Court Rules, 2013 deals with the review and consists of five rules. Rule 1 is relevant for our purposes. It reads as under:

> *"**1.** The Court may review its judgment or order, but no application for review will be entertained in a civil proceeding except on the ground mentioned in Order 47 Rule 1 of the Code and in a criminal proceeding except on the ground of an error apparent on the face of the record."*

59. Order XLVII Rule 1(1) of the Code of Civil Procedure, 1908 provides for an application for review which reads as under:

> *"**1. Application for review of judgment**. — Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*
>
> *(b) by a decree or order from which no appeal is allowed, or*
>
> (c) *by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."*

60. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

(i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge

of the petitioner or could not be produced by him at the time when the decree was passed or order made;

(ii) Mistake or error apparent on the face of the record; or

(iii) Any other sufficient reason.

61. The words "any other sufficient reason" have been interpreted by the Privy Council in the case of ***Chhajju Ram v. Neki*** reported in **1922 SCC OnLine PC 11** and approved by this Court in ***Moran Mar Basselios Catholicos v. Mar Poulose Athanasius*** reported in **1954 SCC OnLine SC 49** to mean a reason sufficient on grounds, at least analogous to those specified in the rule.

62. In the case of ***Tinkari Sen v. Dulal Chandra Das*** reported in **1966 SCC OnLine Cal 103**, the Calcutta High Court held that if the court overlooks or fails to consider a legal provision that grants it the authority to act in a specific manner, this may amount to an error analogous to one apparent on the face of the record. Such an oversight would fall within the scope of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 which allows for reviews. Relevant parts are extracted below:

> "*18. Consider, in this context, Sir Hari Sankar Pal v. Anath Nath Mitter, AIR 1949 FC 106. Mr. Chittatosh Mookerjee refers me to Mukherjee, J. (as his Lordship then was), observed, Kania C.J. Fazl Ali, Patanjali Sastri and Mahajan, JJ. (as their Lordships then were) agreeing:*
>
> *"**That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it "When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, rule 1 of the CPC.**"*
>
> **[Emphasis supplied]**

63. *In* ***Girdhari Lal Gupta v. D. H. Mehta*** reported in **(1971) 3 SCC 189**, this Court allowed the review on the ground that its attention was not given to a particular provision of the statute. The relevant observations read as follows:

> ***"15. The learned counsel for the respondent State urges that this is not a case fit for review because it is only a case of mistaken judgment. But we are unable to agree with this submission because at the time of the arguments our attention was not drawn specifically to sub-section 23-C(2) and the light it throws on the interpretation of sub-section (1)****.*
>
> ***16.*** *In the result the review petition is partly allowed and the judgment of this Court in Criminal Appeal No. 211 of 1969 modified to the extent that the sentence of six months' rigorous imprisonment imposed on Girdharilal is set aside. The sentence of fine of Rs 2000 shall, however, stand."*
>
> **[Emphasis supplied]**

64. In ***M/s Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi*** reported in **(1980) 2 SCC 167**, the scope of the power of review was explained by this Court wherein it was held that:

> "***8.*** *It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case.* ***The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so****: Sajjan Singh v. State of Rajasthan [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377] .* ***For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment****: G.L. Gupta v. D.N. Mehta [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750] . The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: O.N. Mohindroo v. Distt. Judge, Delhi [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27]. ….*
>
> **[Emphasis supplied]**

65. This Court in ***Yashwant Sinha v. CBI*** reported in **(2020) 2 SCC 338**, has observed that if a relevant law has been ignored while arriving at a decision, it would make the decision amenable to review. The relevant observations read as follows:

> *"**78.** The view of this Court, in Girdhari Lal Gupta [Girdhari Lal Gupta v. D.H. Mehta (1971) 3 SCC 189 : 1971 SCC (Cri) 279 : AIR 1971 SC 2162 : (1971) 3 SCR 748] as also in Deo Narain Singh [Deo Narain Singh v. Daddan Singh, 1986 Supp SCC 530] , has been noticed to be that **if the relevant law is ignored or an inapplicable law forms the foundation for the judgment, it would provide a ground for review**. If a court is oblivious to the relevant statutory provisions, the judgment would, in fact, be per incuriam. No doubt, the concept of per incuriam is apposite in the context of its value as the precedent but as between the parties, **certainly it would be open to urge that a judgment rendered, in ignorance of the applicable law, must be reviewed. The judgment, in such a case, becomes open to review as it would betray a clear error in the decision**."*
>
> **[Emphasis supplied]**

66. In ***Sow Chandra Kant and Anr. v. Sheikh Habib*** reported in **(1975) 1 SCC 674**, this Court held:

> *"1. Mr Daphtary, learned counsel for the petitioners, has argued at length all the points which were urged at the earlier stage when we refused special leave thus making out that a review proceeding virtually amounts to a re-hearing. May be, we were not right is refusing special leave in the first round; but, once an order has been passed by this Court, a review thereof must be subject to the rules of the game and cannot be lightly entertained. **A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility**. A mere repetition, through different counsel, of old and overruled arguments, a second trip over ineffectually covered ground or minor mistakes of inconsequential import are obviously insufficient. The*

very strict need for compliance with these factors is the rationale behind the insistence of counsel's certificate which should not be a routine affair or a habitual step. It is neither fairness to the Court which decided nor awareness of the precious public time lost what with a huge backlog of dockets waiting in the queue for disposal, for counsel to issue easy certificates for entertainment of review and fight over again the same battle which has been fought and lost. The Bench and the Bar, we are sure, are jointly concerned in the conservation of judicial time for maximum use. We regret to say that this case is typical of the unfortunate but frequent phenomenon of repeat performance with the review label as passport. Nothing which we did not hear then has been heard now, except a couple of rulings on points earlier put forward. May be, as counsel now urges and then pressed, our order refusing special leave was capable of a different course. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality."

[Emphasis supplied]

67. Thus, the decisions referred to above make it abundantly clear that when a court disposes of a case without due regard to a provision of law or when its attention was not invited to a provision of law, it may amount to an error analogous to one apparent on the face of record sufficient to bring the case within the purview of Order XLVII Rule 1 of the Code of Civil Procedure, 1908. In other words, if a court is oblivious to the relevant statutory provisions, the judgment would in fact be *per incuriam*. In such circumstances, a judgment rendered in ignorance of the applicable law must be reviewed.

68. From here onwards, our endeavour is to ascertain whether the relevant provisions of law including the notifications issued by the Board from time to time were brought to the notice of the Court while deciding ***Canon India*** *(supra)*.

69. A three-Judge Bench in ***Canon India*** *(supra)* examined whether officers of the DRI are proper officers for the purpose of issuing recovery notices under the provisions of Section 28 of the Act, 1962.

70. The Court while deciding the aforesaid question held as under:

> *"**11.** There are only two articles "a (or an)" and "the". "A (or an)" is known as the indefinite article because it does not specifically refer to a particular person or thing. On the other hand, "the" is called the definite article because it points out and refers to a particular person or thing. There is no doubt that, if Parliament intended that any proper officer could have exercised power under Section 28(4), it could have used the word "any".*
>
> ***12.** Parliament has employed the article "the" not accidently but with the intention to designate the proper officer who had assessed the goods at the time of clearance. It must be clarified that the proper officer need not be the very officer who cleared the goods but may be his successor in office or any other officer authorised to exercise the powers within the same office. In this case, anyone authorised from the Appraisal Group. Assessment is a term which includes determination of the dutiability of any goods and the amount of duty payable with reference to, inter alia, exemption or concession of customs duty vide Section 2(2)(c) of the Customs Act, 1962 ["**2. Definitions**.— In this Act, unless the context otherwise requires— ***(2) "**assessment**" means determination of the dutiability of any goods and the amount of duty, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, with reference to—(a)-(b)***(c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;"] .*
>
> ***13.** The nature of the power to recover the duty, not paid or short-paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred*

> *by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to reopen assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.*
>
> ***14.** Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute."*

71. The aforesaid observations are in line with the decision of this Court in ***Sayed Ali*** *(supra)*. However, it is relevant to note that when ***Sayed Ali*** *(supra)* was decided, Section 17 read differently and the true purport of Section 4 of the Act, 1962 was not considered. We shall deal with this aspect subsequently.

72. The Court further held as under:

> *"16. At this stage, we must also examine whether the Additional Director General of the DRI who issued the recovery notice under Section 28(4) was even a proper officer. The Additional Director General can be considered to be a proper officer only if it is shown that he was a Customs officer under the Customs Act. In addition, that he was entrusted with the functions of the*

proper officer under Section 6 of the Customs Act. The Additional Director General of the DRI can be considered to be a Customs officer only if he is shown to have been appointed as Customs officer under the Customs Act. 17. Shri Sanjay Jain, Learned Additional Solicitor General, relied on a Notification No. 17/2002-Customs (N.T.), dated 7-3-2002 to show all Additional Directors General of the DRI have been appointed as Commissioners of Customs. At the relevant time, the Central Government was the appropriate authority to issue such a notification. This notification shows that all Additional Directors General, mentioned in Column (2), are appointed as Commissioners of Customs.

18. The next step is to see whether an Additional Director General of the DRI who has been appointed as an officer of Customs, under the notification dated 7-3-2002, has been entrusted with the functions under Section 28 as a proper officer under the Customs Act. In support of the contention that he has been so entrusted with the functions of a proper officer under Section 28 of the Customs Act, Shri Sanjay Jain, Learned Additional Solicitor General relied on a Notification No. 40/2012, dated 2-5-2012 issued by the Central Board of Excise and Customs. The notification confers various functions referred to in Column (3) of the notification under the Customs Act on officers referred to in Column (2). The relevant part of the notification reads as follows :-

"[To be published in the Gazette of India,

Extraordinary, Part I, Section 3, Sub-section (i)]

Government of India

Ministry of Finance

(Department of Revenue)

Notification No. 40/2012-Customs (N.T.)

New Delhi, dated the 2nd May, 2012

S.O. (E). - In exercise of the powers conferred by subsection (34) of section 2 of the Customs Act, 1962 (52 of 1962), the Central Board of Excise and Customs, hereby assigns the officers and above the rank of officers mentioned in Column (2) of the Table below, the functions as the proper officers in relation to the various sections of the Customs Act, 1962, given in the corresponding entry in Column (3) of the said Table :-

Sl. No.	*Designation of the officers*	*Functions under Section of the Customs Act, 1962*
(1)	*(2)*	*(3)*
	Commissioner of Customs	*(i) Section 33*
	Additional Commissioner or Joint Commissioner of Customs	*(i) Sub-section (5) of section 46; and (ii) Section 149*
	Deputy Commissioner or Assistant Commissioner of Customs and Central Excise	*(i) ….. (ii) ….. (iii) ….. (iv)….. (v) ….. (vi) Section 28; ……"*

19. It appears that a Deputy Commissioner or Assistant Commissioner of Customs has been entrusted with the functions under Section 28, vide Sl. No. 3 above. By reason of the fact that the functions are assigned to officers referred to in Column (3) and those officers above the rank of officers mentioned in Column (2), the Commissioner of Customs would be included as an officer entitled to perform the function under Section 28 of the Act conferred on a Deputy Commissioner or Assistant Commissioner but the notification appears to be ill-founded. The notification is purported to have been issued in exercise of powers under sub-section (34) of Section 2 of the Customs Act. This section does not confer any powers on any authority to entrust any functions to officers. The sub-Section is part of the definitions clause of the Act, it merely defines a proper officer, it reads as follows :-

> *"2. Definitions. - In this Act, unless the context otherwise requires, - … 136/163 https://www.mhc.tn.gov.in/judis W.P.Nos.33099 of 2015 & etc., (34) 'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs."*

20. Section 6 is the only Section which provides for entrustment of functions of Customs officer on other officers of the Central or the State Government or local authority, it reads as follows:-

> *"6. Entrustment of functions of Board and customs officers on certain other officers. - The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally to any officer of the Central or the State Government or a local authority any functions of the Board or any officer of customs under this Act."*

21. If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act. The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 4-12-1957 issued by the Ministry of Finance and Customs officers who, till 11- 5-2002, were appointed by the Central Government. The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is

obviously invalid having been issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power.

22. In the above context, it would be useful to refer to the decision of this Court in the case of Commissioner of Customs v. Sayed Ali and Another [(2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.)] wherein the proper officer in respect of the jurisdictional area was considered. The consideration made is as hereunder :-

> *"16. It was submitted that in the instant case, the import manifest and the bill of entry were filed before the Additional Collector of Customs (Imports), Mumbai; the bill of entry was duly assessed, and the benefit of the exemption was extended, subject to execution of a bond by the importer which was duly executed undertaking the obligation of export. The Learned Counsel argued that the function of the preventive staff is confined to goods which are not manifested as in respect of manifested goods, where the bills of entry are to be filed, the entire function of assessment, clearance, etc. is carried out by the appraising officers functioning under the Commissioner of Customs (Imports).*
>
> *17. Before adverting to the rival submissions, it would be expedient to survey the relevant provisions of the Act. Section 28 of the Act, which is relevant for our purpose, provides for issue of notice for payment of duty that has not been paid, or has been short-levied or erroneously refunded, and provides that :*
>
> > *"**28. Notice for payment of duties, interest, etc. -** (1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -*

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words 'one year' and 'six months', the words 'five years' were substituted."

18. It is plain from the provision that the 'proper officer' being subjectively satisfied on the basis of the material that may be with him that customs duty has not been levied or short levied or erroneously refunded on an import made by any individual for his personal use or by the Government or by any educational, research or charitable institution or hospital, within one year and in all other cases within six months from the relevant date, may cause service of notice on the person chargeable, requiring him to show cause why he should not pay the amount specified in the notice. It is evident that

the notice under the said provision has to be issued by the 'proper officer'.

19. Section 2(34) of the Act defines a 'proper officer', thus :

'2. Definitions. –

.....

(34)'proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Commissioner of Customs;'

It is clear from a mere look at the provision that only such officers of customs who have been assigned specific functions would be 'proper officers' in terms of Section 2(34) the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore, the governing test to determine whether an 'officer of customs' is the 'proper officer'.

20. From a conjoint reading of Sections 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions."

23. We, therefore, hold that the entire proceeding in the present case initiated by the Additional Director General of the DRI by issuing show cause notices in all the matters before us are invalid without any authority of law and liable to be set aside and the ensuing demands are also set aside."

73. It is not in dispute that ***Canon India*** *(supra)* is based on the decision of this Court in ***Sayed Ali*** *(supra)*. We say so because in ***Canon India*** *(supra)*, the petitioner had not questioned the jurisdiction of the officers of DRI either before the departmental authorities or before the Tribunal. We must, therefore, first look into the judgment rendered in ***Sayed Ali*** *(supra)*.

ii. *The decision in Commissioner of Customs v. Sayed Ali*

74. In ***Sayed Ali*** *(supra)*, a show cause notice dated 28.08.1991 was issued by the Assistant Collector of Customs (Preventive), Mumbai, alleging a violation of the provisions of Section 111(d) of the Act, 1962. It culminated in an order dated 03.02.1993 which was appealed before the Collector of Customs (Appeals). An order was passed by the Collector of Customs (Appeals) on 14.12.1993. The Collector of Customs (Appeals) allowed the appeal by holding that the matter involved demand of duty beyond a period of six months and therefore the show cause notice could have been issued only by the Collector and not by the Assistant Collector of Customs (Preventive). At that point of time, there were circulars of the Board, which stipulated pecuniary limits for officers to exercise powers under various provisions of the Act. Thus, the Collector (Appeals) granted liberty to the department to re-adjudicate the case by issuing a proper show cause notice.

75. The Collector of Customs (Preventive) thus issued a show cause notice dated 16.04.1994, calling upon the importer to show cause as to why the goods seized should not be confiscated, why the customs duty amounting to Rs.5,07,274/- should not be levied in terms of Section 28(1) of the Act, 1962, by invoking the extended period of limitation, and why the penalties under Sections 112(a) and (b)(i) and (ii) of the Act, 1962, should not be imposed on the said importer.

76. The jurisdiction of the Collector of Customs (Preventive) to issue the show cause notice was questioned in the reply to the show cause notice by referring to Notification No. 251/83 and Notification No.250/83. The Collector of Customs (Preventive) rejected the submission on the point of jurisdiction. The demand was thus affirmed by the Collector of Customs (Preventive) *vide* Order dated 19.08.1996.

The matter was taken up before the Tribunal, which held that the Commissioner of Customs (Preventive) had no jurisdiction to issue the show cause notice and therefore did not have the jurisdiction to adjudicate the matter when the imports had taken place within the Bombay Customs House.

77. This Court, after referring to Section 28 of the Act, 1962 as it stood during the period in dispute, concluded that from a conjoint reading of Section 2(34) and Section 28 of the Act, 1962, it is manifest that only such a customs officer who has been assigned the specific functions of assessment and re-assessment of duty in the jurisdictional area where the import concerned has been effected, either by the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act, 1962, was competent to issue notice under Section 28 of the Act, 1962.

78. This Court further held that *"…any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose in as much as the test contemplated under Section 2(34) of the Act of the Act is that of specific conferment of such functions"*. It further held that "*Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act, 1962 is accepted, it would lead to a situation of utter chaos and confusion, in as much as all officers of customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officers"* ".

79. This Court concluded that *"It is only the officers of customs, who are assigned the functions of assessment, which of course, would include re- assessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act"*. Thus, the proceedings impugned therein were set aside.

80. Thereafter, a Review Petition was filed by the Department in the aforesaid case. This Court dismissed the Review Petition on the ground of delay in filing the review.

81. The decision in ***Sayed Ali*** *(supra)* proceeds on the assumption that for the "proper officer" to exercise the functions under Section 28 of the Act, 1962, such officer must necessarily possess the power of assessment and reassessment under Section 17. However, a plain reading of Sections 17 and 28 of the Act, 1962 does not bring out any such inter-dependence between the two provisions. Having looked into the statutory scheme of the Act, 1962, we are of the view that the observations pertaining to the interlinkage between Sections 17 and 28 respectively of the Act, 1962 made in ***Sayed Ali*** *(supra)* do not lay down the correct position of law.

82. Even otherwise, the decision in ***Sayed Ali*** *(supra)* could have been arrived at without deciding on the interdependence of Section 17 and Section 28 of the Act, 1962 as the Customs (Preventive) officers, whose jurisdiction to issue show cause notices was under challenge in that case, were not assigned the functions of the "proper officer" for the purposes of Section 28 through a notification issued by the appropriate authority. As we have observed in the foregoing parts of this judgment, assignment of functions is a mandatory requirement for the exercise of jurisdiction by the "proper officer". The observations made in ***Sayed Ali*** *(supra)* on the connection between Sections 17 and 28 of the Act, 1962 are *obiter dicta* at best and do not constitute the binding *ratio decidendi* of that judgment.

83. Further, ***Sayed Ali*** *(supra)* could not have been relied upon by this Court in ***Canon India*** *(supra)* as it could not have been applied for the period subsequent to 08.04.2011 in view of the fact that Section 17 of the Act, 1962 has undergone a radical change by virtue of the amendments made by the Finance Act, 2011.

iii. *Changes to Section 17 w.e.f. 11.04.2011 – the assessment of bill(s) of entry and shipping bill(s)*

84. Section 17 of the Act, 1962 was amended by Section 38 of the Finance Act, 2011 with effect from 08.04.2011. The amendment altered the method of assessment of bill(s) of entry and shipping bill(s). This change appears not to have been brought to the notice of this Court while ***Canon India*** *(supra)* was heard.

85. We note that with effect from 08.04.2011, the functions of the proper officer under Section 17 also underwent certain changes. One such

change is that the assessment of bill(s) of entry and shipping bill(s) was no longer the task of the "proper officer". With effect from 08.04.2011, Bill(s) of Entry and/or Shipping Bill(s) are self-assessed. This self-assessment is to be accepted or rejected by the proper officer subject to verification in certain cases.

86. The "proper officer" appointed for the purpose of Section 17 of the Act, 1962 under a notification issued under Section 2(34) of the Act, 1962 could only make a re-assessment of the bill(s) of entry and shipping bill(s) in case they did not agree with the self-assessment of the importer or the exporter as the case may be.

87. The purport of Section 17 as it stood before 08.04.2011 and after 08.04.2011 was analysed by a learned Single Judge of the Madras High Court in the case of ***M/s. N.C. Alexander v. The Commissioner of Customs, Chennai*** in W.P. Nos. 33099 of 2015. The relevant paragraphs of the judgment are reproduced below:

> *"207. Thus, there was a paradigm shift in the method of assessment with effect from 08.04.2011. Till 07.4.2011, the assessment of Bill of Entry(s) or the Shipping Bill(s) was by a "proper officer" appointed for that purpose under Section 2(34) of the Custom Act, 1962. The assessment was left to the Group 'B' Gazetted Officers and it is only such officers were appointed as "proper officers" for assessment under Section 17.*
>
> *208. However, after 08.04.2011, Bill(s) of Entry (in the case of import) or Shipping Bill(s) (in the case of export) are to be self assessed by an importer or an exporter under Sections 46 and 50 of the Customs Act, 1962 respectively. The changes are shown in bold in the above Table.*
>
> *209. A "proper officer" has to merely verify the entries made in the Bill(s) of Entry under Section 46 (in case of import) or Shipping Bill(s) under Section 50 (in case of export). The "Proper Officer" may examine or test imported goods or export goods or such part thereof as may be necessary. If required, such an officer can only re-assess the goods under Section 17 of the Act.* ***Thus, a "Proper Officer" under Section 17(1) & 17(4) of***

the Act is merely required to re-assess the imported goods or export goods where he differs with the self assessment of an importer or an exporter. This important change was not brought to the attention of the Hon'ble Supreme Court in Canon India Pvt Ltd Case.

210. As mentioned above, an importer or an exporter is merely required to make a self-assessment in the Bill(s) of Entry or Shipping Bill(s) as may be in the case of import or export respectively and file the same.

211. Officers who are appointed as "Proper Officers" for the purpose of Section 17 of the Customs Act, 1962 are "Officers of Customs" like any "Officer of Customs" as per Section 3 and 4 read with notification issued under these provisions. There is delegation of functions by the Board and senior officers to different class of officers by the Board. This is an internal arrangement with a view for better tax administration. Thus, officers of Directorate of Revenue Intelligence are also one among the class "Officers of Customs" like any Officer of Customs as per Section 3 and 4 read with notification issued for the said purpose are competent to issue show cause notice. ***The "proper officer" at the Port at the time of clearance of import or export, merely reassess the self-assessment already made on the Bill(s) of Entry and/or Shipping Bill(s). They are normally not assigned with the function to adjudicate Show Cause Notices and/or Demand Notices under the various provisions of the Customs Act, 1962.***

212. With effect from, 08.04.2011, there was no question of assessment of Bill(s) of Entry /Shipping Bill(s) by a "proper officer". There is only self assessment by an importer or an exporter. There could be only re-assessment of Bill of Entry(s) or the Shipping Bill(s) by the "proper officer" under Section 17 of the Customs Act,1962.

213. If the "proper officer" was inclined to disagree with the self assessment made by an importer or an

exporter as the case may be, the "proper officer" could make a re-assessment and pass a speaking order under Section 17(5) of the Customs Act, 1962.

214. If the self assessment is accepted, the "proper officer" appointed under Section 17 of the Customs Act, 1962 becomes "functus officio" under the scheme of the Act and the Notification issued for the aforesaid purpose.

215. Likewise, where there was a re-assessment, again such an officer becomes "functus officio", after such an order of re-assessment and a speaking order under Section 17(5) of the Customs Act, 1962 is passed.

216. An importer or an exporter aggrieved by such an order of reassessment and the speaking order is entitled to file an appeal under Section 128 of the Custom Act,1962 before the Appellate Commissioner. Only circumstances, where such an officer who makes an order of reassessment can re-visit the re-assessment and/or speaking order is under Section 28 (if specifically authorized) or under Section 149 or under Section 154 of the Customs Act, 1962.

217. The power to issue Show Cause Notice whether under Section 28 or under Chapter XIV of Customs Act, 1962 or under any other provisions and to pass orders has been by and large exercised by the Superior Officers from Group 'A' Cadre Officer of the Custom Department in terms of Notification issued under Section 2(34) of the Act. The Officers from the Directorate of Revenue Intelligence (DRI) being "Officers of Custom" have been recognized as a "Proper Officer" for the aforesaid purpose.

218. ***The "proper officer" who is/was involved at the stage of assessment under Section 17 of the Act upto 08.04.2011 and reassessment after 08.04.2011 have rarely been involved in collateral adjudication of notices issued under Section 28 of the Act.***

However, once again at the stage of recovery of duty or penalty under other provision of the Customs Act, 1962 or redemption fine under Section 125 of the Customs Act, 1962, they are authorized.

219. Mostly, at the time of clearance of imported goods or export goods for the purpose of assessment under Section 17 of the Custom Act,1962, it is the Superintendent/Appraisers of Customs from Group 'B' Executive - Gazetted Officers who act as "proper officers". They are merely required to verify the entries made in the Bill(s) of Entry filed under Section 46 of the Act (in case of import) and or Shipping Bill(s) filed under Section 50 of the Act (in case of export). As "proper officers" are required to merely examine or test any imported or export goods or such parts thereof. Such Officer of Customs under the Scheme of the Act and Notification issued thereunder can only re-assess the self-assessment made by the importer or the exporter.

220. ***Earlier, the Officers from the Directorate of Revenue Intelligence (DRI) were mostly confined with the task of investigation. Over a period of time, they were empowered to issue Show Cause Notices and/or Demand Notices under various provisions of the Customs Act. Adjudication of the Show Cause Notices/Demand Notices were however left to the senior officer of customs from Group 'A' cadre of the Customs Department. However, they are empowered to act as "proper officers" not only for issuance of Show Cause Notice and/or Demand Notices but also for adjudication of such Show Cause Notices and/or Demand Notices.****"*

[Emphasis supplied]

88. In case of re-assessment, such a "proper officer" is bound to pass a "Speaking Order" to enable the aggrieved party to file an appeal. Section 17 as it read before 08.04.2011 and after 08.04.2011 is reproduced below to better appreciate the nuances of the issue:

Section 17: Assessment of Duty	
Before 08.04.2011	***Between 08.04.2011 and 28.03.2018***
(1) After an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50, the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.	*(1) An importer entering any imported goods under section 46, or an exporter entering any export goods under section 50, shall, save as otherwise provided in section 85, self-assess the duty, if any, leviable on such goods.*
(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.	*(2) The proper officer may verify the* ***self-assessment*** *of such goods and for this purpose, examine or test any imported goods or export goods or such part thereof as may be necessary.*
(3) For the purpose of assessing duty under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.	*(3) For verification of self-assessment under sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's note, insurance policy, catalogue or other document, whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon, the importer, exporter or such other person shall produce such document or furnish such information.*

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.	*(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, re-assess the duty leviable on such goods. Amendment of section 18.*
(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.	*(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification issued therefor under this Act and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.*

	*[(6) Where re-assessment has not been done or a speaking order has not been passed on re-assessment, the proper officer may audit the assessment of duty of the imported goods or export goods at his office or at the premises of the importer or exporter, as may be expedient, in such manner as may be prescribed.] * Explanation.— For the removal of doubts, it is hereby declared that in cases where an importer has entered any imported goods under section 46 or an exporter has entered any export goods under section 50 before the date on which the Finance Bill, 2011 receives the assent of the President, such imported goods or export goods shall continue to be governed by the provisions of section 17 as it stood immediately before the date on which such assent is received."*

89. The examination of Section 17, as amended *vide* the Finance Act, 2011 vis-à-vis the provisions of the old Section 17 as it stood prior to 08.04.2011, highlights the following major changes:

(a) **Self-assessment of duty**: The concept of self-assessment of duty was introduced by way of the amendment to Section 17 wherein there is no role of the proper officer to assess the duty at the first instance. The onus for providing the duty leviable has been shifted to the assessee itself.

(b) **Discretion to verify**: Sub-section (2) of the new Section 17 states that "*The proper officer **may** verify the self-assessment of the goods…*". The use of the word "may" indicates two things:

(i) that the actions to be taken by the proper officer under the old Section 17 are no longer compulsory. The proper officer may choose to accept the self-assessment made by the assessee, thereby becoming *functus officio* and there is no compulsion on him or her to examine or test any goods for reaching a first instance assessment;

(ii) The proper officer is not involved in the assessment of duty under Section 17 at the first instance except for his or her role in accepting or not accepting the self-assessed duty. There can be three situations that may result from such limited role of the proper officer:

- The proper officer accepts the self-assessed duty without verification of such duty under sub-section (2) of the new Section 17,
- The proper officer accepts the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17,
- The proper officer does not accept the self-assessed duty after verifying the same in accordance with sub-sections (2) and (3) of the new Section 17, in which case, the re-assessment of duty will be undertaken by the proper officer as per sub-sections (4) and (5) of the new Section 17.

In the first two cases, the scope of the function of the proper officer is limited. Such proper officer is not entitled to exercise the function of the assessment of duty, which is a noteworthy deviation from the earlier procedure.

The proper officer is entitled to exercise his or her functions of re-assessment of duty only if the verification process shows that the self-assessment done by the assessee was incorrect.

(c) **Condition precedent for re-assessment**: It is worthwhile to note that the old Section 17 allowed for self-assessment of duty, only under sub-section (4) and that too with the permission of the proper officer. However, upon a subsequent finding that the statements made by the assessee were not true, the proper officer was entitled to re-assess the duty so levied. Therefore,

re-assessment was allowed under both the old and the new Section 17 only after a self-assessment by the assessee. The only point of difference with respect to re-assessment is that self-assessment was not a matter of course prior to the amendment and was possible only upon the proper officer permitting for the same. After 08.04.2011, self-assessment is *ipso jure* the procedure and has replaced the assessment process previously undertaken by the proper officer.

(d) **Scheme of Section 17(5)**: The old Section 17(5) requires the proper officer to provide a speaking order within 15 days of the date of assessment of duty if the same is contrary to the claim of the assessee or is not accepted in writing by the assessee. The new Section 17(5) is analogous to the old sub-section (5) except that it requires a speaking order within 15 days from the date of the "re-assessment" of duty. Such change shows the legislative intent to transfer the process of "assessment" under the old Section 17 to the stage of "re-assessment" under the new Section 17 and replace the "assessment" to be done by the proper officer under the old Section 17 with the process of "self-assessment".

90. These changes highlight that the competence of the proper officer to conduct "assessment" is completely taken away by the legislature *vide* the amendment to Section 17. The new Section 17 empowers the proper officer to perform the functions of verification of self-assessment and subsequent re-assessment, if found necessary. However, such re-assessment is not a mandatory function on the same footing as "assessment" under the old Section 17. Therefore, in our considered view the scope of the functions of the proper officer under the new Section 17 is limited.

91. It is evident from the aforesaid that the attention of this Court in ***Canon India*** (supra) was not drawn to the important changes brought to Section 17 of the Act, 1962 *vide* Section 38 of the Finance Act, 2011 with effect from 08.04.2011.

92. The observation in paragraph 13 in ***Canon India*** *(supra)* that *"where one officer has exercised his powers of assessment, the power to order reassessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank"* has been made

without taking note of the changes to Section 17 of the Act, 1962 with effect from 08.04.2011.

93. Similarly, the observation in paragraph 14 in ***Canon India*** *(supra)* is erroneous. The relevant paragraph is reproduced below:

> *"We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or any other officer who has been assigned the function of assessment."*

In other words, the conclusion that an officer who did the assessment, could only undertake reassessment under Section 28(4) was arrived at without taking note of the abovementioned amendment to Section 17 of the Act, 1962 with effect from 08.04.2011 *vide* Section 38 of the Finance Act, 2011. The judgment in ***Canon India*** *(supra)* also recorded an erroneous finding that the function of re-assessment is with reference to Section 28(4) when in fact it is an exercise of function under Section 17.

94. Further, in ***Canon India*** *(supra)* the subject show cause notice was dated 19.09.2014 in respect of the Bill of Entry filed on 20.03.2012. This Court appears to have erroneously applied the provisions of Section 17 of the Act, 1962, as they stood prior to 08.04.2011 as opposed to the amended Section 17 which ought to have been applied.

iv. ***Scheme of Sections 17 and 28 of the Act, 1962***

95. Section 17 read with Sections 46 and 47 of the Act, 1962 deals with the assessment and re-assessment at the first instance that is, upon entry of the consignments and clearance of bill(s) of entry. The amendment to Section 17 introduces the process of

self-assessment and subsequent re-assessment upon verification by the proper officer, if so required, for undertaking a check at the first instance.

96. The proceedings under Section 28 are subsequent to the completion of the process set out in Section 17 of the Act, 1962. The procedure envisaged under Section 28 is in the nature of a quasi-judicial proceeding with the issuance of the show cause notice by the proper officer followed by adjudication of such notices by the field customs officers. It is also worth noting that in the case of DRI, the proceedings under Section 28 start only after an investigation has been undertaken by DRI. This is reaffirmed by Circular No. 4/99-Cus dated 15.02.1999 and Circular No. 44/2011-Customs dated 23.11.2011. Therefore, the nature of review under Section 28 is significantly different from the nature of assessment and re-assessment under Section 17. The ambit of Section 28 has also been restricted to the review of assessments and re-assessments done under Section 17 for ascertaining if there has been a short-levy, non-levy, part-payment, non-payment or erroneous refund.

97. Keeping this statutory scheme in mind, we are unable to subscribe to the view taken in both ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra),* namely, that the vesting of the functions of assessment and re-assessment under Section 17 is a threshold, mandatory condition for a proper officer to perform functions under Section 28. This scheme does not flow from the scheme of the statute and was judicially read in to avoid the possibility of chaos and confusion due to the potential for multiple proper officers exercising jurisdiction under Section 28. We find that such apprehensions of misuse are unfounded considering that no substantial empirical evidence has been brought forth by the respondents in this case to support such a view. Regardless, the the parameters under Section 28 cannot be reduced to an administrative review of assessment/re-assessment done under Section 17.

98. We are conscious of the fact that Section 110AA of the Act, 1962, which has been introduced by the Finance Act, 2022, stipulates that a show cause notice under Section 28 of the Act, 1962 can only be issued by that “proper officer” who has been conferred with the jurisdiction, by an assignment of functions under Section 5 of the Act, 1962,

to conduct assessment under Section 17 of the Act in respect of such duty. However, we are of the view that the introduction of Section 110AA doesn't alter the statutory scheme of Sections 17 and 28 of the Act, 1962 as it stood prior to the introduction of Section 110AA. The legislature in its wisdom may introduce certain new provisions keeping in mind the exigencies of administration and taking into account the evolution of law. However, this would not by itself mean that the procedure which was being followed prior to the introduction of such changes was incorrect or in contravention of the law. The legality and correctness of an action has to be adjudged based on the statutory scheme prevailing at the time when such action took place, and incorrectness or invalidity cannot be imputed to it on the basis of subsequent changes in law. Seen thus, the contention of the respondents that Section 110AA of the Act, 1962 amounts to an admission by the petitioner on the invalidity of the legal position existing prior to its introduction, deserves to be rejected.

99. Therefore, in our considered view, the scheme of Sections 17 and 28 of the Act, 1962 indicates that there cannot be a mandatory condition linking the two provisions and the interpretation of this Court in the cases of ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)* is patently erroneous.

v. *Use of the article 'the' in the expression "the proper officer"*

100. This Court in ***Canon India*** *(supra)*, while laying much emphasis on the use of the expression "the proper officer" observed that the Parliament had employed the article "the" instead of "a/an" in Section 28 of the Act, 1962 so as to give effect to its intention of specifying that the proper officer referred to in Section 28 is the same officer as the one referred to in Section 17. The Court further observed that the use of a definite article instead of an indefinite article is indicative of the fact that the proper officer referred to in Section 28 is not "any" proper officer but "the" proper officer assigned with the function of assessment and reassessment under Section 17.

101. However, there is an error apparent in the aforesaid view. Undoubtedly, a definite article "the" has been used before "proper officer" with a view to limit the exercise of powers under Section 28 by a specific proper officer and not any proper officer. But, in the absence of any statutory linkage between Sections 17 and 28 of the

Act, 1962 respectively, there was no legal footing for this Court in ***Canon India*** *(supra)* to hold that "the proper officer" in Section 28 must necessarily be the same proper officer referred to under Section 17 of the Act, 1962.

102. As we have discussed in the foregoing parts of this judgment, the statutory scheme of the Act, 1962 necessitates that a proper officer can only perform specific functions under the Act if he has been assigned as "the proper officer" to perform such functions by an appropriate notification issued by the competent authority. Seen thus, it becomes clear that an officer of Customs can only perform the functions under Section 28 of the Act, 1962 if such officer has been designated as "the proper officer" for the purposes of Section 28 by an appropriate notification. The use of the article "the" in the expression "the proper officer" should be read in the context of that proper officer who has been conferred with the powers of discharging the functions under Section 28 by conferment under Section 5. In other words, the proper officer is *qua* the function or power to be discharged or exercised.

103. Thus, the definite article "the" in Section 28 refers to a "proper officer" who has been conferred with the powers to discharge functions under Section 28 by virtue of a notification issued by the competent authority under Section 5. In other words, the use of article "the" in Section 28 has no apparent relation with the proper officer referred to under Section 17. The proper officer under Section 28 could be said to be determinable only in the sense that he is a proper officer who has been empowered to perform the functions under Section 28 by means of a notification issued under Section 5 of the Act, 1962.

104. In ***Canon India*** *(supra)*, this Court held that DRI officers did not have the power of issuing show cause notices under Section 28 as they did not fall within the meaning of the expression "the proper officers" used in Section 28 for the reason that they did not possess the power of assessment under Section 17 of the Act, 1962. However, as we have discussed in the previous parts of this judgment, contrary to the aforesaid observations of the Court, DRI officers were notified as "the proper officer" for the purposes of Sections 17 and 28 of

the Act, 1962 respectively *vide* Notification No. 44/2011–Cus–N.T. dated 06.07.2011 issued by the Central Government. Hence, those officers of DRI who were designated as "the proper officer" for the purpose of Section 28 by the aforesaid notification were competent to issue show cause notices under Section 28.

105. Craies on Statute Law[1] has stated that "*the language of statutes is not always that which a rigid grammarian would use, it must be borne in mind that a statute consists of two parts, the letter and the sense*". It was observed by this Court in ***State of Andhra Pradesh v. Ganesweara Rao***, reported in **AIR 1963 SC 1850** that the aforesaid rule of construction that the provisions of a statute are to be read together and given effect to and that it is the duty of the court to construe a statute harmoniously has gained general acceptance. In ***Management, S.S.L. Rly. Co. v. S.S.R.W. Union*** reported in **AIR 1969 SC 513**, this Court observed that the principle that literal meaning of the word in a statute is to be preferred is subject to the exception that if such literal sense would give rise to any anomaly or would result in something which would defeat the purpose of the Act, a strict grammatical adherence to the words should be avoided as far as possible. The above principles would help us to desist from affording undue stress on the definite article "the" used before the expression "proper officer" in Section 28 of the Act, 1962.

vi. *DRI officers as proper officers under section 2(34)*

106. In ***Canon India*** *(supra)*, this Court erroneously concluded that an officer from the Directorate of Revenue Intelligence (DRI) was not an officer of customs and therefore cannot function as a "Proper Officer". The finding of the Court that the power conferred by the Board under Notification No. 40/2012-Customs (N.T.) dated 02.05.2012 was ill-founded is an error apparent.

107. By way of Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, the Board appointed several persons including the Officers of Directorate of Revenue Intelligence (DRI) as "Proper Officers" under Section 2(34) of the Act, 1962.

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108. Section 2(34) of the Act, 1962 also stood amended under the Finance Act, 2022. Section 2(34) of the Act, 1962 together with the amendment is reproduced below:

Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	***Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022***
"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 till passing of Finance Act, 2022	*"Proper Officer", in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Section 2(34) of the Customs Act, 1962 after amendment vide Finance Act, 2022*
Customs.	*Customs under Section 5.*

109. The Notification No. 40/2012-Customs (N.T.) dated 02.05.2012, issued under Section 2(34) of the Act, 1962 cannot be read in isolation. It has to be read in conjunction with Section 4(1) of the Act, 1962 and the Notification issued thereunder.

110. The view that the "Proper Officer" for the purpose of Section 28 and other provisions of the Act, 1962 could only mean the person who cleared the goods or the officer who succeeds such officer and not any other officer from any other department requires reconsideration in view of the changes to the Act, 1962 *vide* the Finance Act, 2011 and also in the light of Section 4 and the notification issued thereunder.

111. This Court in paragraphs 11 to 15 of ***Canon India*** *(supra)* proceeded on the footing that under the provisions of the Act, 1962, the Board has no power to appoint "Proper Officers".

112. As per Section 4 of the Act, 1962, the Board constituted under the provisions of Central Board of Revenue Act, 1963 is vested with the power to appoint such persons as it thinks fit to be "officers of customs".

113. Under sub-section (1) to Section 4(1) of the Act, 1962, the Board may appoint such person as Officers of Customs as it thinks fit. Under Section 4(2) of the Act, 1962 the Board can even authorize a Chief Commissioner of Customs or a Joint or Assistant or Deputy Commissioner of Customs to appoint any officers below the rank of Assistant Commissioner of Customs as an "officer of customs". It appears that this aspect was also not brought to the notice of this Court in ***Canon India*** *(supra).*

vii. *Section 4 of the Act, 1962*

114. For an easy reference, Section 4 of the Act, 1962 is reproduced below:

> *"Section 4 : Appointment of "Officers of Customs":*
>
> *1) The Board may appoint such persons as it thinks fit to be Officers of Customs.*
>
> *2) Without prejudice to the provisions of sub-section (1), [Board may authorise a* ***Principal Chief Commissioner of Customs or a Chief Commissioner of Customs Principal Commissioner of Customs or Commissioner of Customs)*** *or Joint or Assistant Commissioner of Customs or Joint or Assistant Commissioner of Customs or Deputy Commissioner of Customs to appoint officers of customs below the rank of Assistant Commissioner of Customs.]"*

115. It is relevant to note that it is only an officer of customs, appointed under Section 4(1) of the Act, 1962 who can be designated as the "proper officer" as defined in Section 2(34) of the Act, 1962 by a notification. The notifications issued under Section 2(34) and 4(1) of the Act, 1962 are nothing but an internal arrangement for the purpose of allocation of work among the officers of customs.

116. In ***M/s. N.C. Alexander*** *(supra)*, the High Court has extensively explained how officers of the DRI are officers of customs. We quote the relevant observations:

> *"236. The officers of the Directorate of Revenue Intelligence (DRI) have already been appointed as "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act, 1962 vide Notification of the Government of*

India in the Ministry of Finance (Department of Revenue) No.186-Cus, dated 4 th August, 1981. The said Notification was later superseded by Notification No.19/90- Cus (N.T.), dated 26.04.1990.

237. By Notification No.19/90- Cus (N.T.), dated 26.04.1990, the officers from the Directorate of Revenue Intelligence (DRI) were appointed as Collectors and Assistant Collectors of Customs in the area mentioned in Column-I of the said notification.

238. Notification No.19/90- Cus (N.T.), dated 26.04.1990 was later superseded by Notification No.17/2002-Cus. (N.T.) dated 07.03.2002, whereby, various officers from the Directorate General of Revenue Intelligence and Directorate of Revenue Intelligence were appointed as Commissioner of Customs and as Additional Commissioner and Joint Commissioner of Customs and Deputy Commissioner/ Assistant Commissioner of Customs. Thus, they were appointed as Officers of Customs. Relevant portion Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 is reproduced below:- Directorate of Revenue Intelligence (D.R.I.) Officers appointed as Customs Officers – Notification No.19/90 - Cus. (N.T.) superseded. In exercise of the powers conferred by sub-section (1) of Section 4 of the Customs Act, 1962 (52 of 1962) and in supersession of notification of the Government of India in the Ministry of Finance (Department of Revenue) No.19/90- Customs (N.T.), dated the 26th April, 1990, the Central Government appoints the officers mentioned in Column (2) of the Table below to the Commissioner of Customs, the officers mentioned in column (3) thereof to be the Additional Commissioners or Joint Commissioners of Customs and Officers mentioned in column(4) thereof to be the Deputy Commissioners or Assistant Commissioners of Customs for the areas mentioned in the corresponding entry in column(1) of the said Table with effect from the date to be notified by the Central Government in the Official Gazette:-

Area of Jurisdiction	***Designation of the Officers***		
(1)	*(2)*	*(3)*	*(4)*
Whole of India	*Additional Director*	*Additional Directors or Joint*	*Deputy Directors, or*
	General, Directorate General of Revenue Intelligence posted at Headquarters and Zonal/ regional units	*Directors, of Directorate of Revenue Intelligence posted at Headquarters and Zonal/ regional units.*	*Assistant Directors of Directorate of Revenue Intelligence posted at Headquarters and Zonal/ region al units*

239. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 came into force on 25.10.2002 vide Notification No.63/2002-Cus. (N.T.) dated 03.10.2002. Notification No.17/2002-Cus. (N.T.), dated 07.03.2002 was further amended by Notification No.82/2014-Cus. (N.T.), dated 16.09.2014.

240. Thus, the officers from the Directorate of Revenue Intelligence have been appointed as "Officers of Customs" under Section 4 of the Customs Act, 1962 and therefore they are "Proper Officers" for the purpose of Section 2(34) of the Customs Act, 1962. This aspect was not brought to the attention of the Hon'ble Supreme Court in Canon India Private Ltd. case referred to supra.

241. With a view to streamline the allocation of work and for the purposes of Section 17 and Section 28 of the Customs Act, 1962, Notification No. 44/2011-Cus. (N.T.), dated 06.07.2011 was issued by the Board under Section 2(34) of the Act.

242. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was issued under Section 2(34) of the Customs Act, 1962 for the purpose of identifying officers of customs for exercising the power and function under the Customs Act,1962.

243. Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 was later amended by Notification No.53/2012-Cus. (N.T.) dated 21.06.2012 and still later by Notification No.43/2019-Cus. (N.T.) dated 18.06.2019 and eventually has been rescinded/superseded by Notification No.25/2022-Cus. (N.T.) dated 31.03.2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

244. Among various officers of the Customs, following officers were also assigned to act and function as the "Proper Officer" under Notification No.44/2011 – Cus. (N.T.) dated 06.07.2011:-

TABLE

Sl.No.	***Designation of the officers***
(1)	***(2)***
1.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Revenue Intelligence.*
2.	*Commissioners of Customs (Preventive), Additional Commissioners or Joint Commissioners of Customs (Preventive), Deputy Commissioners or Assistant Commissioners of Customs (Preventive).*
3.	*Additional Director Generals, Additional Directors or Joint Directors, Deputy Directors or Assistant Directors in the Directorate General of Central Excise Intelligence.*
4.	*Commissioners of Central Excise, Additional Commissioners or Joint Commissioners of Central Excise, Deputy Commissioners or Assistant Commissioners of Central Excise.*

245. Thus, over a period of time, the officers of Directorate of Revenue Intelligence (DRI) who are primarily drawn from the Customs Department were also given the task

of issuing show cause notice and adjudicating the same in terms of Notifications issued as "Proper Officer", as defined in Section 2(34) of the Customs Act, 1962.

246. Now, under the amended Section 2(34), the word "under Section 5" has been inserted. Thus, what was implicit in the Customs Act, 1962 has now been made explicit in the amendment to the Customs Act, 1962 vide Finance Act, 2022.

247. As per Section 5(1) of the Act, an "Officer of Customs" may exercise the powers and discharge the duties conferred or imposed on him under the Customs Act, 1962, subject to such conditions and limitations as the Board may impose.

248. The power to be exercised may be subject to such conditions and limitations as the Board may impose on such an "Officer of Customs". Such officers can also exercise the powers and discharge the duties conferred or imposed on any other officers of customs who is subordinate to such officers. This aspect was also not brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs case referred to supra.

249. Only exception that has been provided was in Sub-Section (3) to Section 5 of the Act. As per Sub-Section 3 to Section 5 of the Act, a Commissioner (Appeals) cannot exercise the power and discharge the duties conferred or imposed on an "Officer of Customs" other than those specified in Section 108 of the Act and Chapter XV deals with the Appeals and Revisions.

250. Section 5 of the Customs Act, 1962 has also been amended in the Finance Act, 2022. Sub-Section (1A), (1B) and Sub-Section (4) and (5) to Section 5 of the Customs Act, 1962 have been now inserted. Section 5 as it stood prior to amendment and as it stands after amendment read as under:-

TABLE

5. Powers of Officers of Customs of the Customs Act, 1962	
Before the amendment Section	***After the 2022 amendment***
(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.	
	1(A) : Without prejudice to the provisions contained in subsection (1), the Board may, by notification, assign such functions as it may deem fit, to an officer of customs, 91 who shall be the proper officer in relation to such functions.
	(1B) Within their jurisdiction assigned by the Board, the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, may, by order, assign such functions, as he may deem fit, to an "Officer of Customs", who shall be the "Proper Officer" in relation to such functions."
(2) An Officer of Customs may excise the powers and discharge the duties conferred or imposed under this Act on any other officer of Customs who is subordinate to him.	
(3) Notwithstanding anything contained in this Section, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and Section 108.	
	"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A),

	the Board may consider any one or more of the following criteria, including, but not limited to—– a) territorial jurisdiction; b) persons or class of persons; c) goods or class of goods; d) cases or class of cases; e) computer assigned random assignment; f) any other criterion as the Board may, by notification, specify.
	(5) The Board may, by notification, wherever necessary or appropriate, require two or more officers of customs (whether or not of the same class) to have concurrent powers and functions to be performed under this Act.".

251. ***During the interregnum in 2012, a more comprehensive notification was issued vide Notification No.40/2012-Cus. (N.T.), dated 02.05.2012. This notification fell for consideration in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C). However, No.40/2012-Cus. (N.T.), dated 02.05.2012 cannot be read in isolation. It had to be read along with notifications issued under Section 4 of the Customs Act, 1962.***

252. Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was also amended from time to time and has now been eventually rescinded/superseded by Notification No.26/2022-Cus. (N.T.), dated 31- 3-2022 in tune with the amendment proposed in the Finance Bill, 2022 and passed by Finance Act, 2022.

253. Both Notification No.44/2011-Cus. (N.T.), dated 06.07.2011 and Notification No. 40/2012-Cus. (N.T.), dated 02.05.2012 as amended from time to time have also not been challenged directly by any of the petitioners.

254. ***Although, the vires of Notification No.40/2012-Cus. (N.T.), dated 02.05.2012 was neither challenged or questioned before the Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C) nor the issue of jurisdiction was canvassed before the Tribunal, the Hon'ble Supreme has held that the officers of the Directorate of Revenue Intelligence were not "Proper Officers" as they are not Officers of Customs and therefore there had to be issue of an independent Notification under Section 6 of the Customs Act, 1962****."*

[Emphasis supplied]

viii. ***Section 6 of the Act, 1962***

117. This Court in ***Canon India*** *(supra)* made certain observations on the purport of Section 6 of the Act, 1962 and held that the Notification No. 40/2012 dated 02.05.2012 which empowered the DRI officers to perform functions under Section 28 was invalid. The relevant portion of the judgment is reproduced below:

"21. ***If it was intended that officers of the Directorate of Revenue Intelligence who are officers of Central Government should be entrusted with functions of the Customs officers, it was imperative that the Central Government should have done so in exercise of its power under Section 6 of the Act.*** *The reason why such a power is conferred on the Central Government is obvious and that is because the Central Government is the authority which appoints both the officers of the Directorate of Revenue Intelligence which is set up under the Notification dated 04.12.1957 issued by the Ministry of Finance and Customs officers who, till 11.5.2002, were appointed by the Central Government.* ***The notification which purports to entrust functions as proper officer under the Customs Act has been issued by the Central Board of Excise and Customs in exercise of non-existing power under Section 2(34) of the Customs Act. The notification is obviously invalid having been***

issued by an authority which had no power to do so in purported exercise of powers under a section which does not confer any such power."

[Emphasis supplied]

118. It was held that Section 6 is the only section which provides for the entrustment of the functions of customs officers to other officers of the Central or State Government or local authority. As a result of the judgment in ***Canon India*** *(supra)*, the respondents herein vociferously argued that Section 5 of the Act, 1962 only deals with the powers and duties and not functions and it is Section 6 which refers to functions. Such argument proceeded on the erroneous footing that any notification empowering the DRI should have been issued under Section 6 of the Act, 1962 and not having been done so, the show cause notice issued by the DRI was without jurisdiction.

119. Section 6 of the Act, 1962 reads thus:

*"**6. Entrustment of functions of Board and customs officers on certain other officers**.—The Central Government may, by notification in the Official Gazette, entrust either conditionally or unconditionally **to any officer of the Central or the State Government or a local authority** any functions of the Board or any officer of customs under this Act."*

[Emphasis supplied]

120. It is evident on a plain reading of Section 6 of the Act, 1962 referred to above that the same contemplates the entrustment of the functions of the Board or any officer of customs under the Act, 1962 to any of the officers of the Central or the State Government or a local authority. Such entrustment could be either conditional or unconditional. As per Section 6 of the Act, 1962, the Central Government may by notification in the Official Gazette entrust the functions of the Board or the officers of Customs to any of the following officers, namely, any officer of:

(i) The Central Government; or

(ii) The State Government; or

(iii) A local authority.

121. Section 6 replaced Section 8 of the erstwhile Sea Customs Act, 1878 under which the powers of officers of customs, at places where there is no Customs House, are exercised by the land revenue officers of the district. This is no longer necessary as the Central Excise officers are available all over the country. Further the powers of customs officers at times need to be conferred on other officers, like police officers. Section 6, therefore, makes a general provision empowering the Central Government to entrust the functions of the Board or an officer of customs to any officer of the Central or State government or a local authority.

122. The object of this Section is to confer powers of search, seizure, arrest and recording of statements, to the officers working in border states like officers of police service, Border Security Force, Tehsildar, Indo Tibet Border Police Force and others. Similarly, officers working in the coast guard or the navy may also be given such powers as they may be involved in anti-smuggling operations.

123. The Board has notified entrustment of powers to various officers working in different departments either under the State services or Central services from time to time. An illustration of this is M.F.(D.R.) Notification No. 161-Cus. dated the 22.06.1963 which empowered specified officers of DRI with the power to search premises. It is worth noting that this notification under Section 6 was issued prior to the notification no. 17/2002 dated 07.03.2002.

124. Notification No. 17/2002 dated 07.03.2002 was issued under Section 4(1) of the Act appointing DRI officers as officers of customs. The powers of officers of customs to discharge duties under the Act is derived from Section 5.

125. A plain reading of Section 6 of the Act, 1962 referred to above, makes it abundantly clear that it applies only to officers from departments other than the officers of the customs under Section 4 of the Act, 1962. The officers of DRI are not any other officers of the Central Government or the State Government or the local authority to be entrusted with the functions of the Board and the Customs Officers. It has been rightly observed by the High Court of Madras in ***M/s N.C. Alexander*** *(supra)* that post 07.03.2002, a notification of the Central Government under Section 6 is not required to recognise the officers from DRI as officers of customs.

126. The observations of the High Court in ***M/s N.C. Alexander*** *(supra)* in the aforesaid context with which we are in complete agreement are reproduced hereinbelow:

> *"269.* ***By such entrustment, these officers of other Departments do not become Officers of Customs. They can merely function as such officers. Since entrustment under Section 6 is on the officers from other department, the Parliament by design has given the powers to the Central Government and not to the Board.***
>
> *270. As the Officers from the Directorate of Revenue Intelligence, Ministry of Finance (MOF) are already "Officers of Customs" before their induction and deputation to the Board in various Directorates, there is no impediment on their being appointed as proper officers for the purpose of Section 2(34) of the Customs Act, 1962.*
>
> *271. Merely because the Officers of the Customs and Central Excise Department are selected and are deputed in the respective Directorates does not mean that they cease to be Officers of the respective Departments as these Directorates are created only to assist the Board to implement the object of respective fiscal enactments. It is an internal arrangement within the Ministry of Finance, Department of Revenue (DRI).*
>
> *272. If Section 3 and Section 4 of the Act and the Notification issued thereunder referred to supra were perhaps brought to the attention of the Hon'ble Supreme Court in Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.), the Hon'ble Supreme Court would have given a different interpretation. In any event, these discussion are academic in the light of the validation in Section 97 of the Finance Act, 2022.*
>
> *273. It must also be remembered that the "Officers of Customs" in Section 3(1)(a) to (h) of the Customs Act, 1962 (as amended under Section 3(1) (a) to (j) after 2022 amendment) are Officers from Group 'A' Cadre of the Customs Department (IRS) like their counterparts from*

the Central Excise Department as Central Tax Officers under GST.

274. ***A reading of Section 2(34) with Section 4 of the Customs Act, 1962 also makes it clear that the expression "proper officer" means the "Officer of Customs" who has been assigned those functions either by the Board or by the Principal Commissioner of Customs or by Commissioner of Customs in relation to any function to be performed under the Act.***

275. ***Notifications which have been issued to appoint these officers from Directorate of Revenue Intelligence (DRI) to act as "Proper Officers" are enabling Notification notwithstanding the fact that they are already "Officers of Customs" under Notification issued under Section 4(1) of the Customs Act,1962.***

276. Further, the Board can also authorize the Principal Commissioner of Customs or Chief Commissioner of Customs or Principal Chief Commissioner or Commissioner of Customs or Joint or Assistant or Deputy Commissioner of Customs, to appoint Officers of Customs below the rank of Assistant Commissioner of Customs. Thus, the following Group 'B' Executive - Gazetted and Non-Gazetted Officers assist in the initial stage of assessment of goods as:-

Sl. No.	*Group 'B' Executive Gazetted Officer*	*Group 'B' Executive Non – Gazetted Officer*
1	*Superintendent of Customs (Preventive)*	*Preventive Officers (Customs)*
2	*Appraiser of Customs*	*Examiner (Customs)*

277. As mentioned above, assessment is neither by the Group 'B' Executive – Gazetted Officer nor by Group 'B' Executive – Non-Gazetted Officer after 08.04.2011. Only, prior to 08.04.2011, the assessment of goods at the port was vested with the Group 'B' Executive – Gazetted Officer. However, after the said date, the fundamental of assessment has undergone a sea change and changed permanently as mentioned above.

> *278. These fundamental changes brought to the manner of the assessment under the Customs Act, 1962 with effect from 08.04.2011 appear to have not been brought to the attention of the Hon'ble Supreme Court and therefore the assumption in the paragraph Nos.12 to 15 in the case of Canon India Private Limited Vs. Commissioner of Customs, 2021 (376) E.L.T.3(S.C.) may require a re-consideration insofar as pending cases before the Hon'ble Supreme Court and other Courts."*
>
> **[Emphasis supplied]**

127. Mr. N. Venkataraman, the Ld. ASG is correct in his submission that the distinction sought to be made between Section 5 and Section 6 of the Act, 1962 (powers and duties *vis-à-vis* functions) could be said to be imaginary and may have very serious legal implications.

128. The assignment of functions of the proper officer for the purposes of any section under the Act to an officer of customs is expressly mentioned in Section 2(34). Section 5 empowers the customs officer to discharge the duties of proper officer so conferred. Even prior to the amendment to Sections 2(34) and 5, this could be the only understanding with respect to the question of entrustment of functions of the proper officer to a customs officer.

129. In our view, the assignment of functions of proper officers as mentioned in Section 2(34) and entrustment of functions of customs officers as mentioned in Section 6 operate on different planes. The assignment of functions of the proper officer is to be done only to officers of customs (whether they be appointed under Section 4 or entrusted with certain functions under Section 6). There may be some overlap between the assignment of functions of proper officers under Section 2(34) read with Section 5 and the entrustment of functions of officers of customs under Section 6 in some instances but there can be no scenario in which we can hold that the "functions" under Section 6 and Section 2(34) are congruent.

130. One of the bases for the decision in ***Canon India*** *(supra)* was that no entrustment of functions under Section 6 was done in favour of the DRI officers. This, however, is a glaring misapplication of Section 6 of the Act and is in ignorance of the applicable law which is in fact Sections 2(34) read with Section 5 of the Act, 1962. Therefore, in light

of the judgment of this Court in ***Yashwant Sinha*** ***(supra)***, we find that it is necessary to allow this review petition to do complete justice.

ix. *Observations on the constitutional validity of Section 28(11) of the Act, 1962*

131. The question as to who are the "proper officers" for the purpose of issuance of show cause notices under Section 28 was raised before the High Court of Delhi in the case of ***Mangali Impex*** *(supra).* The specific challenge therein was to the constitutional validity of Section 28(11) of the Act which was inserted by the Customs (Amendment and Validation) Act, 2011 (the "**Validation Act**") with effect from 16.09.2011.

132. A Division Bench of the High Court held that sub-section (11) of Section 28 could not validate the show cause notices issued by the DRI officers prior to 08.04.2011, i.e., the date when Section 28 was amended.

133. With a view to understanding the true purport of Section 28(11) and the issues pertaining thereto, it is necessary to first examine the changes to Section 28 that were introduced prior to the Validation Act. Section 28 as it stood prior to the Finance Bill 2011 is reproduced below:

> ***"28. Notice for payment of duties, interest, etc.*** *(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-*
>
> *(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;*
>
> *(b) in any other case, within six months,*
>
> *from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*

Provided that where any duty has been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.

Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him:

Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this subsection shall be served except with the prior approval of the Chief Commissioner of Customs.

Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(2A) Where any notice has been served on a person under sub-section (1), the proper officer –

(i) in case any duty has not been levied or has been short-levied, or the interest has not been paid or

has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and

(ii) in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months,

from the date of service of the notice on the person under sub-section (1).

(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:

Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.

(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.

(3) For the purposes of sub-section (1), the expression "relevant date" means,-

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest."

134. Thereafter, Section 28 was re-cast and a new scheme of the section was introduced *vide* the Finance Act, 2011 promulgated with effect from 08.04.2011. Section 28, as it stands after the amendment, is reproduced below:

"***28. Recovery of duties not levied or short-levied or erroneously refunded.***

(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).

(4) Where any duty has not been levied or has been short-levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person

chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short-levied or the interest has not been charged or has been part-paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty five per cent. of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub- section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount

actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).

(7) In computing the period of one year referred to in clause (a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub-section (8),- (a) within six months from the date of notice in respect of cases falling under clause (a) of sub- section (1); (b) within one year from the date of notice in respect of cases falling under sub-section (4).

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

Explanation 1 – For the purposes of this section, "relevant date" means,-

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

> *(d) in any other case, the date of payment of duty or interest.*
>
> *Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."*

135. Parliament, therefore, made changes to the scheme of Section 28 and added the Explanation 2 which stated that any non-levy, short-levy or erroneous refund before the date of presidential assent to the Finance Bill, 2011 shall be governed by the provisions of Section 28 as it stood prior to the amendment.

136. On 06.07.2011, Customs Notification No. 44/2011 was issued under Section 2(34), which designated *inter alia* DRI officers as proper officers for the purposes of Sections 17 and 28 of the Act, 1962 and empowered such officers to perform functions under Section 28 including the function of issuing show cause notices.

137. Subsequently, on 16.09.2011, sub-section (11) of Section 28 came to be enacted *vide* the Validation Act. It provided that:

> "*(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub-section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section."*

138. As stated in the foregoing extract, sub-section (11) was introduced in the statute to remedy the defects highlighted by this Court in the case of ***Sayed Ali*** *(supra)* and the same retrospectively empowered all officers of customs appointed under Section 4(1) before 06.07.2011 to conduct assessments under Section 17 of the Act and to be proper officers for the purpose of Section 28.

139. The Statement of Objects and Reasons of the Validation Act explained that the introduction of Section 28(11) was necessary because the position of law on the functions of proper officers as interpreted by this Court in ***Sayed Ali*** *(supra)* and the consequent invalidation of show cause notices issued by the Commissionerates of Customs (Preventive), DRI and others, was not the legislative intent. Parliament clarified that show cause notices issued by officers of the Commissionerates of Customs (Preventive), DRI, Directorate General of Central Excise Intelligence (DGCEI) and Central Excise Commissionerates for demanding customs duty not levied or short levied or erroneously refunded under Section 28 in respect of goods imported are valid, irrespective of whether any specific assignment as proper officer was issued.

140. The Validation Act was first challenged before the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* on the grounds that it is violative of Articles 14, 19 and 21 of the Constitution and that it fails to take note of Explanation 2 to Section 28. Relying on ***Sayed Ali*** *(supra)*, the petitioners therein challenged the Validation Act on the ground that it is only the officers of customs who are assigned functions of assessment including the reassessment and they alone are competent to issue notice under Section 28.

x. *Bombay High Court decision in Sunil Gupta (supra)*

141. Similar grounds were taken by the petitioners before the High Court of Delhi in the case of ***Mangali Impex*** *(supra)* wherein it was submitted that there was an apparent conflict between Explanation 2 and Section 28(11) which rendered the Validation Act inapplicable to show cause notices issued prior to 08.04.2011 i.e., the date on which the new Section 28 came into force. It was further submitted that Section 28(11), by conferring powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit, would result in utter chaos and confusion as envisaged in ***Sayed Ali*** *(supra)* and therefore, does not cure the defects pointed out therein.

142. The very same argument has been canvassed before us by the respondents herein. To comprehensively address the submissions

made before us, we find it necessary to address the following three issues:

(i) What is the scope of Explanation 2 to Section 28?

(ii) Whether the field of operation of Section 28(11) and Explanation 2 overlaps? In other words, what is the scope of the non-obstante clause in sub-section (11)?

(iii) Whether Section 28(11) cures the defect pointed out in ***Sayed Ali*** *(supra)*?

143. Explanation 2 was introduced as a part of the new Section 28 enacted by the Finance Act, 2011 with effect from 08.04.2011. Explanation 2 to Section 28 reads as follows:

> "*Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.*"

144. It was vehemently argued on behalf of the respondents that reading Section 28(11) with Explanation 2 narrows down the period for the purposes of retrospective validation of the show cause notices issued and limits the application of sub-section (11) to the period from 08.04.2011 (enactment of new Section 28) to 16.09.2011 (enactment of the Validation Act). This challenge is based on the reasoning that the non-obstante clause contained in Section 28(11) is limited to "*…judgment, decree or order of any court of law, tribunal or other authority…*" and does not oust the application of other provisions of the Act including Explanation 2. It was argued that the phrase "*…this section…*" in sub-section (11) when read harmoniously with Explanation 2 refers to the new Section 28 only and will not be applicable to the old provision as it stood prior to 08.04.2011.

145. The determination of the soundness of the aforesaid argument necessitates a comparison of Section 28, prior to the amendment and subsequent to the amendment.

Provisions of old Section 28 [running in continuation from sub-sections (1) to (3)]	**Corresponding provisions of new Section 28**	**Comparison and Remarks**
28. Notice for payment of duties, interest, etc.	***28. Recovery of duties not levied or short-levied or erroneously refunded.***	
(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer ***may****,* *(a) in the case of any import made by any individual for his personal use or by government or by any educational, research or charitable institution or hospital, within one year;* *(b) in any other case,* ***within six months****, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:*	*(1) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,* *(a) the proper officer* ***shall****, within* ***one year*** *from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;*	The legislature *vide* the amendment, has removed the distinction between the purposes for which the imports are to be used. Sub-section (1)(b) of the old Section 28 is analogous to the sub-section (1)(a) of the new Section 28. The only change that has been made herein is the period of limitation for service of show cause notice which has been increased from six months to one year.
Provided that where any duty has been levied or has been short- levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the	*(4) Where any duty has not been levied or has been short-* *levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of,-* *(a) collusion; or* *(b) any wilful mis-statement; or*	In respect of the provision relating to issuance of show cause notice for non-levy, short-levy, not-paid, part-paid and erroneous refund of duty by reasons of collusion, wilful mis-statement or suppression of facts, no change

provisions of this sub-section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted.	*(c) suppression of facts, by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.* *(5) Where any duty has not been levied or has been short- levied or the interest has not been charged or has been part- paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub- section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty- five per cent of the duty specified in the notice or the duty so accepted by that person, within thirty*	has been made and the time period of five years for service of notice has been retained. The legislature has further clarified the procedure following the service of notice. Sub-section (5) of the new Section 28 provides for the levy of interest on the amount due and permits part-payment of the amount mentioned in the notice to the extent that the short-fall in duty has been accepted by the notice. Sub-section (6) of the new Section 28 lays down the manner in which the proceedings following the service of the show cause notice will be either closed on payment of the full amount mentioned The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.

	days of the receipt of the notice and inform the proper officer of such payment in writing. *(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion-* *(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or* *(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the*	

	period of one year shall be computed from the date of receipt of information under sub-section (5).	
Provided further that where the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable has not been paid, part paid or erroneously refunded is one crore rupees or less, a notice under this sub-section shall be served by the Commissioner of Customs or with his prior approval by any officer sub-ordinate to him: *Provided also that where the amount of duty has not been levied or has been short-levied or erroneously refunded or the interest payable thereon has not been paid, part paid or erroneously refunded is more than one crore rupees, no notice under this sub- section shall be served except with the prior approval of the Chief Commissioner of Customs.*		The legislature has removed the pecuniary distinction and the consequent approvals from different authorities for issuance of show cause notices.
Explanation : Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.	*(7) In computing the period of one year referred to in clause* *(a) of sub-section (1) or five years referred to in sub-section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.*	This is an analogous provision.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.	*(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.*	This is an analogous provision and pertains to the adjudication / determination of the amount specified in the show-cause notice when issued under sub-section (1) of the new Section 28.
(2A) Where any notice has been served on a person under sub- section (1), the proper officer - (i) *in case any duty has not been levied or has been short-levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year: and* (ii) *in any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short-levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub- section (1).*	*(9) The proper officer shall determine the amount of duty or interest under sub-section (8),-* *(a) within six months from the date of notice in respect of cases falling under clause (a) of sub-section (1);* *(b) within one year from the date of notice in respect of cases falling under sub-section (4).*	This is an analogous provision. Sub-section (9)(a) of the new Section 28 is analogous to sub-section (2A)(ii) of the old provision and provides for a time period of six months for adjudication of notices issued under new Section 28(1)(a). Sub-section (9)(b) of the new Section 28 is analogous to sub-section (2A)(i) of the old provision and provides for a time period of one year for adjudication of notices issued in cases of collusion, wilful mis-statement and suppression of facts.

(2B) Where any duty has not been levied, or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub-section (1) in respect of the duty or the interest so paid:	*(1) …* *(a) …* *(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,-* *(i) his own ascertainment of such duty; or* *(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.* *(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub-section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.*	In both the old and new Section 28, the law has provided an opportunity to the person chargeable with duty or interest to make payment before the show cause notice is issued to him and inform the proper officer of such payment in writing. The legislature, in the new Section 28(1)(b) has clarified the basis for ascertainment of amount to be paid prior to issuance of show cause notice.
Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the	*(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub-section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in*	These provisions are analogous.

manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.	*clause (a) of that sub-section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (2).*	
Explanation 2. For the removal of doubts, it is hereby declared that the interest under Section 28AB shall be payable on the amount paid by the person under this sub-section and also on the amount of short-payment of duty, if any, as may be determined by the proper officer, but for this sub-section.	*(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.*	This provision is for the recovery of interest.
(2C) The provisions of sub-Section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill 2001 receives the assent of the President.		
(3) For the purposes of sub-section (1), the expression "relevant date" means,- *(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;* *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;*	*Explanation 1 - For the purposes of this section, "relevant date" means,-* *(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;* *(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;*	This provision is identical to the old provision.

(c) in a case where duty or interest has been erroneously refunded, the date of refund; *(d) in any other case, the date of payment of duty or interest."*	*(c) in a case where duty or interest has been erroneously refunded, the date of refund;* *(d) in any other case, the date of payment of duty or interest.*	
	Explanation 2. - For the removal of doubts, it is hereby declared that any non-levy, short-levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of Section 28 as it stood immediately before the date on which such assent is received."	The Explanation 2 was added to the new Section 28 to demarcate the date from which the said section shall become applicable and any recoveries of duty prior to such date would be governed by the old Section 28.

146. What is discernible from the aforesaid modifications made by the Parliament is as under:

(a) **Distinction in the time-period**: In sub-section (1) of new Section 28, the difference in the purpose of the duty has been removed and for all cases of short-levy, non-levy, part-payment, non-payment and erroneous refund except for cases falling under new Section 28(4), the period of one year has been provided for the service of the show cause notice, which under the old provision was six months.

(b) **Additional provision in respect of short-levy, non-levy, part-payment, non-payment and erroneous refund by reasons of collusion, willful misstatement and suppression of facts**: An additional provision has been inserted by way of Section 28(5) stipulating that, to the extent the amount mentioned in the show cause notice has been accepted by the person chargeable with payment of such duty, the payment of a part of such amount is allowed.

(c) **Self-ascertainment of recovery amount before the issuance of a show cause notice**: Parliament introduced the mechanism

of self-ascertainment of the recovery amount by the person chargeable with the payment of duty and payment of such amounts before the service of a show cause notice, subject to final adjudication or determination by the proper officer.

(d) **Insertion of Explanation 2**: For the removal of doubts regarding the applicable provision for recoveries of duty arising before and after the enactment of new Section 28, Parliament added Explanation 2 to clarify that recoveries arising prior to 08.04.2011 shall be governed by old Section 28 of the Act.

147. Having analysed the aforesaid modifications made by Parliament to old Section 28, we can say with certainty that none of the changes made by the amendments to Section 28 has any impact on the competence of the proper officer for the purposes of fulfilment of functions under Section 28. In our considered view, the only major change that warrants the clarification provided under Explanation 2 is the distinction with respect to the limitation period for the issuance of show cause notices.

148. Therefore, the application of sub-section (11), which pertains only to the empowerment of proper officers to issue show cause notices under Section 28, cannot be said to be limited only to new Section 28 but also to the provision as it stood prior to 08.04.2011. The legislative intent is that sub-section (11) was meant to apply to Section 28 without any restriction as to time. This is apparent from the Statement of Objects and Reasons of the Validation Act. Therefore, the contention of the respondent that the phrase *"…this section…"* in sub-section (11) means only new Section 28, which was also accepted by the High Court of Delhi in ***Mangali Impex*** *(supra)*, is erroneous.

149. Since, there is no overlap in the field of operation of Section 28(11) and Explanation 2, the interpretation of the non-obstante clause in Section 28(11) and the consequent harmonious construction of the two provisions in ***Mangali Impex*** *(supra)* is otiose.

150. Thus, we are in complete agreement with the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)* with respect to the first two questions raised by us in this case. The relevant portion of that judgment is reproduced below:

> *"25. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which*

was specifically dealt with by sub- section (11) of section 28 of the Act, that we are of the opinion that the challenge in the writ petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to the Finance Bill therein denotes the Bill by the section itself was substituted by Act 8 of 2011 with effect from April 8, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. ***Explanation 2 clarifies that they will proceed in terms of the unamended provision. The position dealt with by insertion of section 28 (11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 unamended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub-section must fail.****"*

[Emphasis supplied]

151. Further, the finding in ***Mangali Impex*** *(supra)* that Section 28(11) is overbroad and confers the powers of the proper officer to multiple sets of customs officers without any territorial or pecuniary jurisdictional limit which in turn may lead to "utter chaos and confusion" as highlighted in ***Sayed Ali*** *(supra)*, is misconceived in our view. The apprehension of the petitioner therein was that plurality of proper officers empowered under Section 28 would result in more than one show cause notice and a consequent misuse of the provision, which would be detrimental to the interests of the persons chargeable with the payment of duty. Although, ***Mangali Impex*** *(supra)* declared Section 28(11) to be invalid on this ground, it suggested that the Board should issue instructions in its administrative capacity that once a show cause notice is issued specifying an adjudicating authority

subject to such an officer being the proper officer for the purposes of Section 28, then he or she alone should proceed to adjudicate that particular show cause notice to the exclusion of all other officers who may have power in relation to that subject matter. We find this to be a reasonable construal of the import and application of Section 28(11).

152. It is a settled position of law that the possibility of misuse or abuse of a law which is otherwise valid cannot be a ground for invalidating it. This principle of law has been expounded by this Court in the case of ***Shreya Singhal v. Union of India*** reported in **(2015) 5 SCC 1**. The relevant portion of the judgment is reproduced below:

> *"In The* ***Collector of Customs, Madras v. Nathella Sampathu Chetty & Anr.,*** *[1962] 3 S.C.R. 786, this Court observed: "....This Court has held in numerous rulings, to which it is unnecessary to refer, that* ***the possibility of the abuse of the powers under the provisions contained in any statute is no ground for declaring the provision to be unreasonable or void.*** *Commenting on a passage in the judgment of the Court of Appeal of Northern Ireland which stated:*
>
> > *"If such powers are capable of being exercised reasonably it is impossible to say that they may not also be exercised unreasonably" and treating this as a ground for holding the statute invalid Viscount Simonds observed in Belfast Corporation v. O.D. Commission [1960 AC 490 at pp. 520-521] : "It appears to me that the short answer to this contention (and I hope its shortness will not be regarded as disrespect) is that the validity of a measure is not to be determined by its application to particular cases.... If it is not so exercised (i.e. if the powers are abused) it is open to challenge and there is no need for express provision for its challenge in the statute."*
>
> ***The possibility of abuse of a statute otherwise valid does not impart to it any element of invalidity. The converse must also follow that a statute which is otherwise invalid as being unreasonable cannot be saved by its being administered in a reasonable manner. The constitutional validity of***

> ***the statute would have to be determined on the basis of its provisions and on the ambit of its operation as reasonably construed. If so judged it passes the test of reasonableness, possibility of the powers conferred being improperly used is no ground for pronouncing the law itself invalid*** *and similarly if the law properly interpreted and tested in the light of the requirements set out in Part III of the Constitution does not pass the test it cannot be pronounced valid merely because it is administered in a manner which might not conflict with the constitutional requirements." (at page 825)"*
>
> **[Emphasis supplied]**

153. We were apprised by the learned Additional Solicitor General during the course of the hearing that the Customs department has been following the protocol suggested in ***Mangali Impex*** *(supra)* since 1999. Further, no substantial empirical evidence of the misuse of Section 28(11) which was enacted over a decade ago, was presented by the parties. Therefore, we are inclined to accept the policy of the Customs department that once a show cause notice is issued, the jurisdiction of other empowered proper officers shall be excluded for such notice. We find that such policy acts as a sufficient safeguard against the apprehension of chaos or confusion or misuse.

154. Thus, we are of the considered view that the enactment of sub-section (11) of Section 28 cures the defect pointed out in ***Sayed Ali*** *(supra)* and the judgment in ***Mangali Impex*** *(supra)* deserves to be set aside.

155. It follows from the above discussion that sub-section (11) of Section 28 is constitutionally valid, and its application is not limited to the period between 08.04.2011 and 16.09.2011.

156. For the reasons in the foregoing paragraphs, we hold that the Bombay High Court judgment in ***Sunil Gupta*** *(supra)* lays down the correct position of law, whereas the Delhi High Court decision in ***Mangali Impex*** *(supra)* is incorrect and is consequently set aside.

xi. *Amendments made by the Finance Act, 2022*

157. The third cluster of the present batch of cases relates to the challenge to the constitutional validity of Sections 86, 87, 88, 94 and 97 of the

Finance Act, 2022 respectively. We take this opportunity to consider this issue as the constitutional validity of the said provisions has been challenged with specific reference to the findings made in ***Canon India*** *(supra)*, which is the judgment under review herein.

158. The validation amendment *vide* Section 97 has been challenged before this Court specifically in **WP (C) 526 of 2022** titled ***Daikin Air Conditioning India Pvt. Ltd. v. Union of*** **India**. The respondent herein has canvassed the following grounds for declaring the provision unconstitutional on the touchstone of Article 14 of the Constitution:

(i) The Finance Act, 2022 does not cure the defect pointed out in ***Canon India*** *(supra)* and no notification or amendment of law deeming DRI officers to be the proper officers would cure the defect of ouster of jurisdiction of DRI once the original act of assessment has been undertaken by a different group of officers. The Finance Act, 2022 is manifestly arbitrary as no attempt has been made to cure the defect highlighted in ***Canon India*** *(supra)*.

(ii) This Court in ***Canon India*** *(supra)* made a determination of fact that the DRI officers did not have jurisdiction to perform functions under Section 28 of the Act, 1962. Such judicial determination of fact relating to actual exercise of jurisdiction cannot be retrospectively overruled.

(iii) The legislature has selectively adhered to the legal findings made in ***Canon India*** *(supra)* only for future actions by enactment of Section 110AA and has proceeded to ignore the findings for past show cause notices by validating the same *vide* Section 97 of the Finance Act, 2022. Such a distinction creates two classes of assessees without any reasonable basis for this differentiation.

(iv) Section 97 of the Finance Act, 2022 fails the test of proportionality as it is a sweeping validation of all acts under the chapters specified in the section and does not provide certainty to the assessees as to which rights have been abrogated.

(v) The writ petitioner in the **WP (C) No. 520 of 2022** titled ***Dish TV India Ltd. v. Union of India and Ors.*** has also challenged the application of Section 97 on the ground that Section 97(iii) of the Finance Act, 2022 gives the amendments made to Sections 2, 3 and 5 retrospective effect which would make sub-sections (4) and (5) of Section 5 applicable to the show cause notices issued

in the past. It is the case of the writ petitioner that Customs Notifications Nos. 44/2011 dated 06.07.2011 and 40/2012 dated 02.05.2012 do not in any way satisfy the mandatory and salutary criteria laid down in Sections 5(4) and 5(5).

159. From the grounds summarized above, we find that the writ petitioners have challenged the constitutionality of the validation of past actions by Section 97 of the Finance Act, 2022. Therefore, we shall limit our ruling to this provision alone.

160. It is a settled position of law that the legislature is empowered to enact validating legislations to validate earlier acts declared illegal and unconstitutional by courts by removing the defect or lacuna which led to the invalidation of the law. With the removal of the defect or lacuna resulting in the validation of any act held invalid by a competent court, the act may become valid, if the validating law is lawfully enacted.

161. This Court in the case of ***Empire Industries Ltd. v. Union of India*** reported in **(1985) 3 SCC 314** observed that:

> "*51. In the view we have taken of the expression "manufacture", the concept of process being embodied in certain situation in the idea of manufacture, the impugned legislation is only making "small repairs" and that is a permissible mode of legislation. In 73rd vol. of Harvard Law Review p. 692 at p. 795, it has been stated as follows:*
>
> > *"**It is necessary that the Legislature should be able to cure inadvertent defects in statutes or their administration by making what has been aptly called "small repairs". Moreover, the individual who claims that a vested right has arisen from the defect is seeking a windfall since had the legislature's or administrator's action had the effect it was intended to and could have had, no such right would have arisen. Thus, the interest in the retroactive curing of such a defect in the administration of government outweighs the individual's interest in benefiting from the defect** .... The Court has been extremely reluctant to override the legislative judgment as to the necessity for retrospective taxation, not only because of*

the paramount governmental interest in obtaining adequate revenues, but also because taxes are not in the nature of a penalty or a contractual obligation but rather a means of apportioning the costs of government among those who benefit from it…"

[Emphasis supplied]

162. This Court has laid down the tests for determining whether a validating law is enacted within permissible limits in the case of ***Indian Aluminium Company Co. vs. State of Kerala*** reported in **(1996) 7 SCC 637** and the relevant observations therein are reproduced below:

*"**56.** From a resume of the above decisions the following salient principles would emerge:*

…

(3) In a democracy governed by rule of law, the Legislature exercises the power under Articles 245 and 246 and other companion Articles read with the entries in the respective Lists in the Seventh Schedule to make the law which includes power to amend the law.

*(4) The Court, therefore, need to carefully scan the law to find out: **(a) whether the vice pointed out by the Court and invalidity suffered by previous law is cured complying with the legal and constitutional requirements; (b) whether the Legislature has competence to validate the law; (c) whether such validation is consistent with the rights guaranteed in Part III of the Constitution**.*

(5) The Court does not have the power to validate an invalid law or to legalise impost of tax illegally made and collected or to remove the norm of invalidation or provide a remedy. These are not judicial functions but the exclusive province of the Legislature. Therefore, they are not an encroachment on judicial power.

*(6) **In exercising legislative power, the Legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decisions ineffective by enacting valid law on the topic within its legislative field,***

> ***fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the Court, if those conditions had existed at the time of declaring the law as including power to amend the law.*** *It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date."*
>
> **[Emphasis supplied]**

163. We shall now proceed to determine whether the enactment of Section 97 of the Finance Act, 2022 fulfils the tests laid down by this Court for a validation Act to be legally sustainable. The first leg of such determination would be to satisfy ourselves as to whether Section 97 cures the defect pointed out by this Court in ***Canon India*** *(supra)*. In this respect, the following aspects are relevant:

a) The Coordinate Bench in ***Canon India*** *(supra)* observed that:

> *"**14.** It is well known that when a statute directs that the things be done in a certain way, it must be done in that way alone. As in this case, when the statute directs that "the proper officer" can determine duty not levied/not paid, it does not mean any proper officer but that proper officer alone. We find it completely impermissible to allow an officer, who has not passed the original order of assessment, to re-open the assessment on the grounds that the duty was not paid/not levied, by the original officer who had decided to clear the goods and who was competent and authorised to make the assessment. The nature of the power conferred by Section 28(4) to recover duties which have escaped assessment is in the nature of an administrative review of an act. The section must therefore be construed as conferring the power of such review on the same officer or his successor or **any other officer who has been assigned the function of assessment**. In other words, an officer who did the assessment, could only undertake re-assessment [which is involved in Section 28(4)]"*
>
> **[Emphasis supplied]**

b) According to ***Canon India*** *(supra)*, only "the proper officer" empowered to undertake the exercise of assessment or re-assessment under Section 17 in a jurisdictional area can perform the functions of "the proper officer" under Section 28 of the Act, 1962 as the exercise involved in Section 28 is the re-assessment of duty. The defect pointed out by the Court in ***Canon India*** *(supra)* is that the DRI officers were not "the proper officers" who undertook the exercise of assessment under Section 17. Hence, they lacked the jurisdiction to issue show cause notices under Section 28. The reasoning given by the Court was that any other reading of the expression "proper officers" would lead to a multiplicity of proper officers competent to perform functions under Section 28, which would result in the perpetuation of chaos and confusion as pointed out in ***Sayed Ali*** *(supra).*

c) However, the apprehension expressed is unfounded in our opinion especially in context of the Customs department's policy of exclusion of jurisdiction of other competent proper officers once a particular proper officer empowered to issue a show cause notice under Section 28 has issued it. Such a policy acts as an adequate safeguard in our view.

d) We find that the ouster of jurisdiction of DRI to issue show cause notices under Section 28 once an assessment has been done under Section 17 is not a defect at all in light of Notification No. 44/2011 dated 06.07.2011 and new Section 17 as amended by the Finance Act, 2011. We have already recorded a finding in the foregoing segments of this judgment that these facts were not considered in ***Canon India*** *(supra)* and therefore, become the basis of the review petition herein.

e) Notification No. 44/2011 dated 06.07.2011 specifically assigned the functions of the proper officers under Sections 17 and 28 to DRI officers. Such assignment of functions of assessment is sufficient for the DRI officers to fall in the category of "*any other officer who has been assigned the function of assessment*" as mentioned in ***Canon India*** *(supra)*.

f) Furthermore, as discussed previously, the functions of assessment and re-assessment under Section 17 and recovery

of duty under Section 28 are distinct. ***Canon India*** *(supra)* held erroneously that Section 28(4) involves the function of re-assessment. The function of recovery of short-levy, non-levy, part-paid, non-paid and erroneous refund under Section 28 is not the same as the assessment or re-assessment of the bill(s) of entry. It necessarily has to be a process subsequent to the completion of functions under Section 17. Further, such function of determining duty to be recovered requires application of judicial mind and therefore, cannot be an administrative review of an act. This is especially so after the introduction of self-assessment in Section 17 *vide* the Finance Act, 2011.

g) Therefore, the validating provision under Section 97 of the Finance Act, 2022 is a mere surplusage with respect to validation of the show cause notices issued by DRI officers under Section 28. It cannot be challenged on the ground that it does not cure the defect pointed out in ***Canon India*** *(supra)* when no defect can be made out therein as a result of this review petition.

164. The contention that Section 97 could not have overruled the finding of fact relating to the actual exercise of jurisdiction in ***Canon India*** *(supra)* is untenable for the following reasons:

(a) The argument that once a particular officer has exercised the function of assessment, it is a jurisdictional fact that has occurred to the exclusion of all other groups in the Customs Department and therefore, only that officer or his superiors, who had undertaken assessment under Section 17 in the first place, shall have the jurisdiction to issue notices for recovery of duty under Section 28, does not hold water.

(b) As discussed above, the functions of assessment and re-assessment under Section 17 and the recovery of duty under Section 28 are distinct. Therefore, the exercise of functions under Section 17 can only act as a "jurisdictional fact" for the purpose of excluding the jurisdiction of other proper officers empowered under that section for the exercise of the rest of the functions specified therein. Similarly, the exercise of the function of issuing show cause notices under Section 28 by a particular proper officer serves as a jurisdictional fact which would exclude the jurisdiction of other proper officers empowered under Section 28.

(c) ***Canon India*** *(supra)* proceeded on an erroneous assumption that the jurisdiction of the proper officer under Sections 17 and 28 is linked. This is due to the erroneous understanding of the provisions of Act, 1962 that functions under Section 28 involve re-assessment.

(d) Therefore, the very basis of the determination of jurisdictional fact for exercise of functions under Section 28 has been clarified by us. Thus, we are of the considered view that the challenge to Section 97, on the ground of inability of a validating Act to overrule a finding of fact, is unfounded and liable to be dismissed.

165. While challenging the constitutional validity, it was argued that the insertion of Section 110AA for future actions while validating the past actions (which in words of the writ petitioners was contrary to the intent of Section 110AA) does not create a reasonable classification as there is no intelligible differentia. It was further argued that Section 97 is manifestly arbitrary and fails the test of proportionality under Article 14. In our view, these submissions are not tenable in law for the following reasons:

a) It is a settled position of law that matters of economic policy are best left to the wisdom of the legislature and in policy matters, the accepted principle is that the courts should not interfere. This principle has been laid down in the case of ***Bhavesh D. Parish v. Union and India*** reported in **(2000) 5 SCC 471**, wherein this Court held that:

> *"26. The services rendered by certain informal sectors of the India economy could not be belittled. However, in the path of economic progress, if the informal system was sought to be replaced by a more organised system, capable of better regulation and discipline, then this was an economic philosophy reflected by the legislation in question.* ***Such a philosophy might have its merits and demerits. But these were matters of economic policy. They are best left to the wisdom of the legislature and in policy matters the accepted principle is that the courts should not interfere. Moreover in the context of the changed economic***

scenario the expertise of people dealing with the subject should not be lightly interfered with. *The consequences of such interdiction can have large-scale ramifications and can put the clock back for a number of years. The process of rationalisation station of the infirmities in the economy can be put in serious jeopardy and, therefore, it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all."*

[Emphasis supplied]

b) A Constitution Bench of this Court in the case of ***Shri Prithvi Cotton Mills Ltd. and Ors.*** v. ***Broach Borough Municipality & Ors.***, reported in **(1969) 2 SCC 283** set out the modus of validation of tax through validating statutes and observed as follows:

"4. …

Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. ***Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts.*** *The Legislature may follow any one method or all of them and while it does so it may neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be*

within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."

[Emphasis supplied]

c) We are of the opinion that the introduction of Section 110AA was a valid exercise of legislative power to amend the provisions of the Act, 1962 and it was done with the objective of following the principle of comity to give effect to the suggestions of this Court in ***Sayed Ali*** *(supra)* and ***Canon India*** *(supra)*. However, we clarify that a change in law, which the legislature was competent to enact, having prospective application cannot be a ground for the writ petitioners to question the sanctity and wisdom of the legislature in following a different mechanism to assess/ re-assess bills of entry(s) and recover duty under Sections 17 and 28 respectively.

d) No occasion arises for us to discuss the validity of Section 97 with respect to the test of reasonable classification as the introduction of Section 110AA does not create a class of assessees to whom the law would apply differentially to, at the same point in time. The differential mechanism for the exercise of functions under Section 28 is not for a different class of assessees but rather for the show cause notices issued during different periods of time that is, prior to the Finance Act, 2022 and after its enactment.

e) On the strength of such reasoning, we are of the view that Section 97 is not manifestly arbitrary and discriminatory and is not disproportional to the object sought to be achieved by it.

166. It is also the contention of the writ petitioners that Section 97(iii) gives retrospective effect to the amendments made in Section 5 thereby making previous show cause notices subject to the provisions of the newly inserted provisions, i.e., sub-sections (4) and (5) of Section 5. It is their case that the previous notifications empowering DRI officers to issue show cause notices under Section 28 do not fulfil the mandate of Section 5(4) as they cannot be placed in any of the criteria envisaged therein. We find no merit in the said contention:

a) Section 5(4) reads as follows:

> *"(4) In specifying the conditions and limitations referred to in sub-section (1), and in assigning functions under sub-section (1A), the Board* ***may*** *consider any one or more of the following criteria, including,* ***but not limited to***
>
> *(a) territorial jurisdiction;*
>
> *(b) persons or class of persons;*
>
> *(c) goods or class of goods;*
>
> *(d) cases or class of cases;*
>
> *(e) computer assigned random assignment;*
>
> *(f)* ***any other criterion as the Board may, by notification, specify****."*
>
> **[Emphasis supplied]**

b) From a plain reading of the above-referred sub-section, we find that the Board has been entrusted with wide powers in respect of determination of criteria and the use of the word "may" is indicative of the Board's discretion in this regard. Therefore, the writ petitioners are wrong in construing the sub-section as a mandatory provision for the purpose of invalidation of the show cause notices issued.

c) A purposive interpretation of Section 97 indicates that clause (i) therein is the object of its enactment and clause (iii) is an extension thereof to further clarify that any deficiencies in law under Sections 2, 3 and 5 of the Act, 1962 as they stood prior to the Finance Act, 2022 would not be an obstacle to the validating act under clause (i).

d) Therefore, the retrospective application of Sections 2, 3 and 5 of the Act, 1962 respectively is not stand-alone but is restricted to achievement of the ultimate object of validation under clause (i) of Section 97. Any interpretation of the amended Sections 2, 3 and 5 arising from the retrospective application thereof, which is contrary to or not in furtherance of the Section 97(i) would not hold good in law.

e) This Court in the case of ***Vivek Narayan v. Union of India*** reported in **(2023) 3 SCC 1** has held that:

> *"**140.** The principle of purposive interpretation has also been expounded through a catena of judgments of this Court. A Constitution Bench of this Court in M. Pentiah v. Muddala Veeramallappa [M. Pentiah v. Muddala Veeramallappa (1961) 2 SCR 295 : AIR 1961 SC 1107] was considering a question, as to whether the term prescribed in Section 34 would apply to a member of a "deemed" committee under the provisions of the Hyderabad District Municipalities Act, 1956. An argument was put forth that, upon a correct interpretation of the provisions of Section 16, the same would be permissible. Rejecting the said argument, K. Subba Rao, J., observed thus : (AIR pp. 1110-11, para 6)*
>
> > *"6. Before we consider this argument in some detail, it will be convenient at this stage to notice some of the well-established rules of construction which would help us to steer clear of the complications created by the Act. Maxwell on the Interpretation of Statutes, 10th Edn., says at p. 7 thus:*
> >
> > ***'… if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate***

only for the purpose of bringing about an effective result.'*…"*

[Emphasis supplied]

f) A seven-Judge Bench of this Court in the case of ***Abhiram Singh v. C.D. Commachen (Dead) By Lrs. & Ors.,*** reported in **(2017) 2 SCC 629** has held that:

> "***36.*** *The conflict between giving a literal interpretation or a purposive interpretation to a statute or a provision in a statute is perennial. It can be settled only if the draftsman gives a long-winded explanation in drafting the law but this would result in an awkward draft that might well turn out to be unintelligible. The interpreter has, therefore, to consider not only the text of the law but the context in which the law was enacted and the social context in which the law should be interpreted. This was articulated rather felicitously by Lord Bingham of Cornhill in R. (Quintavalle) v. Secy. of State for Health [R. (Quintavalle) v. Secy. of State for Health, 2003 UKHL 13 : (2003) 2 AC 687 : (2003) 2 WLR 692 (HL)] when it was said : (AC p. 695 C-H, paras 8-9)*
>
> > *"8.* ***The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise.*** *It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute.* ***Every statute other than***

a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

[Emphasis supplied]

g) Thus, we are of the opinion that the retrospective application of Section 5(4) cannot be the basis for the challenge to the validity of Section 97 of the Finance Act, 2022.

167. For the foregoing reasons, we hold that the challenge to the constitutional validity of the Finance Act, 2022 and more particularly Section 97 thereof, being unfounded should fail. We say so more particularly in light of the judgment in the review of ***Canon India*** *(supra)* and the various judicial pronouncements of this Court. Therefore, we hold that Section 97 of the Finance Act, 2022 is constitutionally valid and the challenge to it is rejected accordingly.

F. CONCLUSION

168. In view of the aforesaid discussion, we conclude that:

(i) DRI officers came to be appointed as the officers of customs *vide* Notification No. 19/90-Cus (N.T.) dated 26.04.1990 issued by the Department of Revenue, Ministry of Finance, Government of India. This notification later came to be superseded by Notification No. 17/2002 dated 07.03.2002 issued by the Department of Revenue, Ministry of Finance, Government of India, to account for administrative changes.

(ii) The petition seeking review of the decision in ***Canon India*** *(supra)* is allowed for the following reasons:

a. Circular No. 4/99-Cus dated 15.02.1999 issued by the Central Board of Excise & Customs, New Delhi which empowered the officers of DRI to issue show cause notices

under Section 28 of the Act, 1962 as well as Notification No. 44/2011 dated 06.07.2011 which assigned the functions of the proper officer for the purposes of Sections 17 and 28 of the Act, 1962 respectively to the officers of DRI were not brought to the notice of this Court during the proceedings in ***Canon India*** *(supra)*. In other words, the judgment in ***Canon India*** *(supra)* was rendered without looking into the circular and the notification referred to above thereby seriously affecting the correctness of the same.

b. The decision in ***Canon India*** *(supra)* failed to consider the statutory scheme of Sections 2(34) and 5 of the Act, 1962 respectively. As a result, the decision erroneously recorded the finding that since DRI officers were not entrusted with the functions of a proper officer for the purposes of Section 28 in accordance with Section 6, they did not possess the jurisdiction to issue show cause notices for the recovery of duty under Section 28 of the Act, 1962.

c. The reliance placed in ***Canon India*** *(supra)* on the decision in ***Sayed Ali*** *(supra)* is misplaced for two reasons – *first*, ***Sayed Ali*** *(supra)* dealt with the case of officers of customs (Preventive), who, on the date of the decision in ***Sayed Ali*** *(supra)* were not empowered to issue show cause notices under Section 28 of the Act, 1962 unlike the officers of DRI; and *secondly*, the decision in ***Sayed Ali*** *(supra)* took into consideration Section 17 of the Act, 1962 as it stood prior to its amendment by the Finance Act, 2011. However, the assessment orders, in respect of which the show cause notices under challenge in ***Canon India*** *(supra)* were issued, were passed under Section 17 of the Act, 1962 as amended by the Finance Act, 2011.

(iii) This Court in ***Canon India*** *(supra)* based its judgment on two grounds: (1) the show cause notices issued by the DRI officers were invalid for want of jurisdiction; and (2) the show cause notices were issued after the expiry of the prescribed limitation period. In the present judgment, we have only considered and reviewed the decision in ***Canon India*** *(supra)* to the extent that it pertains to the first ground, that is, the jurisdiction of the DRI officers to issue show cause notices under Section 28. We clarify that the observations made by this Court in ***Canon India***

(supra) on the aspect of limitation have neither been considered nor reviewed by way of this decision. Thus, this decision will not disturb the findings of this Court in ***Canon India*** *(supra)* insofar as the issue of limitation is concerned.

(iv) The Delhi High Court in ***Mangali Impex*** *(supra)* observed that Section 28(11) could not be said to have cured the defect pointed out in ***Sayed Ali*** *(supra)* as the possibility of chaos and confusion would continue to subsist despite the introduction of the said section with retrospective effect. In view of this, the High Court declined to give retrospective operation to Section 28(11) for the period prior to 08.04.2011 by harmoniously construing it with Explanation 2 to Section 28 of the Act, 1962. We are of the considered view that the decision in ***Mangali Impex*** *(supra)* failed to take into account the policy being followed by the Customs department since 1999 which provides for the exclusion of jurisdiction of all other proper officers once a show cause notice by a particular proper officer is issued. It could be said that this policy provides a sufficient safeguard against the apprehension of the issuance of multiple show cause notices to the same assessee under Section 28 of the Act, 1962. Further, the High Court could not have applied the doctrine of harmonious construction to harmonise Section 28(11) with Explanation 2 because Section 28(11) and Explanation 2 operate in two distinct fields and no inherent contradiction can be said to exist between the two. Therefore, we set aside the decision in ***Mangali Impex*** *(supra)* and approve the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra)*.

(v) Section 97 of the Finance Act, 2022 which, *inter-alia,* retrospectively validated all show cause notices issued under Section 28 of the Act, 1962 cannot be said to be unconstitutional. It cannot be said that Section 97 fails to cure the defect pointed out in ***Canon India*** *(supra)* nor is it manifestly arbitrary, disproportionate and overbroad, for the reasons recorded in the foregoing parts of this judgment. We clarify that the findings in respect of the *vires* of the Finance Act, 2022 is confined only to the questions raised in the petition seeking review of the judgment in ***Canon India*** *(supra)*. The challenge to the Finance Act, 2022 on grounds other than those dealt with herein, if any, are kept open.

(vi) Subject to the observations made in this judgment, the officers of Directorate of Revenue Intelligence, Commissionerates of Customs (Preventive), Directorate General of Central Excise Intelligence and Commissionerates of Central Excise and other similarly situated officers are proper officers for the purposes of Section 28 and are competent to issue show cause notice thereunder. Therefore, any challenge made to the maintainability of such show cause notices issued by this particular class of officers, on the ground of want of jurisdiction for not being the proper officer, which remain pending before various forums, shall now be dealt with in the following manner:

a. Where the show cause notices issued under Section 28 of the Act, 1962 have been challenged before the High Courts directly by way of a writ petition, the respective High Court shall dispose of such writ petitions in accordance with the observations made in this judgment and restore such notices for adjudication by the proper officer under Section 28.

b. Where the writ petitions have been disposed of by the respective High Court and appeals have been preferred against such orders which are pending before this Court, they shall be disposed of in accordance with this decision and the show cause notices impugned therein shall be restored for adjudication by the proper officer under Section 28.

c. Where the orders-in-original passed by the adjudicating authority under Section 28 have been challenged before the High Courts on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, the respective High Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT).

d. Where the writ petitions have been disposed of by the High Court and appeals have been preferred against them which are pending before this Court, they shall be disposed of in accordance with this decision and this Court shall grant eight weeks' time to the respective assessee to prefer appropriate appeals before the CESTAT.

e. Where the orders of CESTAT have been challenged before this Court or the respective High Court on the ground of maintainability due to lack of jurisdiction of the proper officer to issue show cause notices, this Court or the respective High Court shall dispose of such appeals or writ petitions in accordance with the ruling in this judgment and restore such notices to the CESTAT for hearing the matter on merits.

f. Where appeals against the orders-in-original involving issues pertaining to the jurisdiction of the proper officer to issue show cause notices under Section 28 are pending before the CESTAT, they shall now be decided in accordance with the observations made in this decision.

169. In view of the aforesaid, we allow the Review Petition No. 400/2021 titled ***Commissioner of Customs v. M/s Canon India Pvt. Ltd.*** and the connected Review Petition Nos. 401/2021, 402/2021 and 403/2021 insofar as the issue of jurisdiction of the proper officer to issue show cause notice under Section 28 is concerned. As discussed, the findings of this Court in ***Canon India*** *(supra)* in respect of the show cause notices having been issued beyond the limitation period remain undisturbed.

170. We set aside the decision of the High Court of Delhi rendered in the case of ***Mangali Impex*** *(supra)* and uphold the view taken by the High Court of Bombay in the case of ***Sunil Gupta*** *(supra).* We also uphold the constitutional validity of Section 97 of the Finance Act, 2022.

171. The Registry shall take steps to list the connected civil appeals and writ petitions before the appropriate Bench and they shall be disposed in terms of the observations made in this judgment.

172. The review petitions are accordingly disposed of.

Result of the case: Review petitions disposed of.

†*Headnotes prepared by:* Nidhi Jain