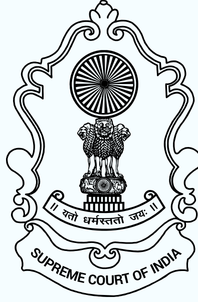

Supreme Court Reports

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[2024] 2 S.C.R. 1 : 2024 INSC 87

Velthepu Srinivas and Others
v.
State of Andhra Pradesh (Now State of Telangana) and Anr.

(Criminal Appeal No. 2852 of 2023)

06 February 2024

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

Issue for Consideration

The courts below, if justified in convicting the four accused u/ss. 302/34 IPC and imposing sentence for life for committing murder of the victim.

Headnotes

Penal Code, 1860 – ss. 302/34, s. 304 Part II – Murder with common intention – Culpable homicide not amounting to murder, when – Political animosity between two groups led to the murder of the deceased – Prosecution witnesses corroborating incident of accused A 1 stopping an auto, dragging the deceased to the house of A-4, and the other accused-A2, A4 joined A-1 and assaulted the deceased with various weapons, whereas, A-3 used a stone to assault the deceased – Conviction u/ss. 302/34 and sentence for life imposed by the courts below – Correctness:

Held: As regards A1, A2 and A4, the decision of the trial court and the High Court is concurred with – Their analyses and conclusions are based on correct appreciation of evidence and law – However, as regards, the culpability of A-3 for murder, testimonies of four eye-witnesses state that the A-3 had used a stone to hit the deceased's head, he never took axe in his hands – Perusal of the evidence would reveal that it is not the case of the prosecution that A-3 was along with the other accused while the deceased was dragged to the house – After the other accused assaulted the deceased with sword, A-3 came thereafter and assaulted the deceased with stone lying there – Evidence insufficient to deduce a conclusion that A-3 shared the common intention with the other accused to cause the murder of the deceased – In fact, both the courts mechanically drew an inference against A3 u/s. 34 merely

* Author

based on his presence near the scene of offence and his familial relations with the other accused – Even though, A-3 might not have had the common intention to commit the murder, nevertheless, his participation in the assault and the wielding of the stone certainly makes him culpable for the offence that he has committed – A-3 should have had the knowledge that the use of a stone to hit the head of the deceased is likely to cause death – Thus, he is held guilty of the offence u/s. 304 Part II – Conviction and sentence of A-1, A-2 and A-4 u/s. 302/34 is upheld, however, the conviction of A-3 is modified to s. 304 Part II and sentenced to 10 years imprisonment. [Paras 17, 23, 28, 30, 31, 32]

Case Law Cited

Camilo Vaz v. State of Goa, [2000] 2 SCR 1088 **: (2000) 9 SCC 1;** *Bawa Singh v. State of Punjab* **1993 Supp (2) SCC 754;** *Sarup Singh v. State of Haryana* **(2009) 16 SCC 479;** *Ghana Pradhan & Ors. v. State of Orissa* **1991 Supp (2) SCC 451 – referred to.**

List of Acts

Penal Code, 1860

List of Keywords

Murder; Common intention; Witnesses; Corroboration; Sentence for life; Evidence; Eye-witnesses; Appreciation of evidence and law; Testimonies; Oral and documentary evidence; Scene of offence; Post-mortem report; Likely to cause death.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.2852 of 2023

From the Judgment and Order dated 26.04.2022 of the High Court for the State of Telangana at Hyderabad in CRLA No.308 of 2005

Appearances for Parties

Gaurav Agrawal, D. Abhinav Rao, Ms. Prerna Robin, Rahul Jajoo, Devadipta Das, Advs. for the Appellants.

Sirajudeen, Sr. Adv., Krishna Kumar Singh, Sri Harsha Peechara, Duvvuri Subrahmanya Bhanu, Ms. Pallavi, Ms. Kriti Sinha, Akshat

Kulshreshtha, Rajiv Kumar Choudhry, G.Seshagiri Rao, Gaichangpou Gangmei, Rahul Aggarwal, Amit Pratap Singh, Ms. Lothungbeni T. Lotha, Yimyanger Longkumer, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. This criminal appeal by appellants (accused 1 to 4) is against the concurrent conviction under Section 302 read with Section 34 and sentence for life imposed by the Trial as well as the Telangana High Court. For the reasons to follow, while we confirm the judgment and sentence with respect to A-1, A-2 and A-4, the conviction and sentence of A-3 is however modified to Section 304 Part II and sentenced to 10 years imprisonment. The details of the crime, trial, decisions of the Courts, followed by our analyses and conclusions are as follows.

2. The case of the prosecution is that the accused 1 to 4 belonging to the same family, and the deceased, come from the same village - Janda Venkatpur, Asifabad, Telangana. It is alleged that the sister of the deceased and the wife of A-4 were political aspirants and they contested the Gram Panchayat elections. In the said elections, the sister of the deceased succeeded and the wife of A-4 lost and that, unfortunately, led to an animosity between the two groups, eventually leading to the murder of the deceased which is described as follows.

3. On 15.11.2001, at about 8AM, the deceased was going to Luxettipet on some work in an auto-rikshaw. In the same auto-rikshaw, one Sanga Swamy @ Thruputhi (PW-6) and Smt. Chetimala Rajitha (PW-9) were travelling as co-passengers. When the auto reached the house of A-4, it is alleged that A-1 stopped the auto-rickshaw and dragged the deceased out by pulling his legs. At the same time, A-2 joined A-1 and both the accused dragged the deceased towards the house of A-4. At that point, it is alleged that A-1 to A-4 attacked the deceased with an axe, a sword, a stone and a knife, thereby inflicting severe bleeding injuries leading to death of the deceased on the spot.

4. The son of the deceased, Kona Kiran Kumar, later examined as PW-1, being an eyewitness, proceeded to the police station and reported the incident at about 9PM by way of a complaint (Exhibit

P-1). The Sub-Inspector of Police (PW-17), Luxettipet received the complaint and registered an FIR (Exhibit P-32), and took up the investigation. He then recorded the statement of PW-1.

5. In view of the gravity of the crime, the Circle Inspector of Police (PW-18) took up further investigation and immediately proceeded to the village to examine the scene of offence. He found the body of the deceased in the front yard of A-4's house. He enabled PW-15 to take photographs of the dead body (Exhibits P-21 to 30) and himself drew the sketch of the scene of offence (Exhibit P-37). He also conducted an inquest over the body of the deceased in the presence of PW-10 and PW-12 (panch witnesses). The inquest report was marked as Exhibit P-5. He also seized a stick (MO.4), control earth (MO.5), blood-stained earth (MO.6), cotton full shirt (MO.7) and a baniyan under cover of a panchnama. PW-18 recorded the statements of PWs 4, 5, 6, 7, 8, 9, and 15. The prosecution maintained that PWs 1, 3, 4, 6, 7 and 8 are eyewitnesses to the incident.

6. The Judicial Magistrate First-Class (PW-16) also recorded the statements of PWs 1 to 9 under Section 164 of the CrPC. The Post-mortem over the dead body of the deceased was conducted by Dr Victor Dinesh (PW-11) at 3PM on 15.11.2001 at the Government Civil Hospital. PW-11, in his report, found 8 incised wounds, 3 partial amputations and 1 deep lacerated wound. It was his opinion that the cause of death was due to cardio-pulmonary arrest due to transaction spinal cord at atlanto occipital joint.

7. The Sub-Inspector (PW-17) is said to have apprehended all the accused on 23.11.2001 and produced them before PW-18 in his office. PW-18 recorded the confessional statement of the accused in the presence of PW-13 and PW-14 (panch witnesses). In pursuance of the confession, all the accused led him and the panch witnesses to the field of one Mr. Appani Gangaiah at Laximpur Shivar. There, A-1 recovered and showed an axe, A-2 a sword and A-4 a knife which were all hidden behind the bushes in the field. PW-18 seized these objects in front of PW-11 to PW-13, later came to be marked as Exhibits MOs 1 to 3. PW-18 also recovered a lungi belonging to A-1 and one belonging to A-2 (Exhibit MO's 9 and 10, respectively). These material objects were sent to a Forensic Lab in Hyderabad, the report of which is marked as Exhibit P-16.

8. After completion of the above referred investigation, a charge-sheet was filed on 09.01.2002. The Judicial First-Class Magistrate, Luxettipet took cognizance of the offence under Section 302 read with Section 34 of IPC, against all the accused. On production of the accused, the Magistrate furnished copies of the charge-sheet and other connected documents and committed the case to the Court of Sessions and the Learned Sessions Judge numbered the trial as Sessions Case No. 523 of 2003. After the charges were framed, the accused pleaded not guilty and sought trial.

9. At the trial, the prosecution examined 18 witnesses being PW-1 to PW-18, and marked 37 documents and 10 Material Objects (MO's). After the closure of evidence, the accused were examined under Section 313 CrPC with reference to the incriminating material found against them in the evidence of the prosecution witnesses, and they denied the same. There are no defence witnesses.

10. The Trial Court, by its elaborate judgment dated 24.02.2005, found all four accused guilty for the murder of the deceased and convicted them under Section 302 read with Section 34 of the IPC. Accordingly, they were sentenced to undergo imprisonment for life and to pay a fine of Rs. 500 each, in default, to undergo simple imprisonment of one month. All the accused appealed to the High Court.

11. For the completeness of narration, we may indicate that the High Court initially acquitted all the accused by its judgment dated 21.06.2007, but in appeal to this Court, their conviction and sentences were set-aside, and the criminal appeal was remanded back to the High Court for fresh consideration. It is in this background that the order impugned came to be passed by the High Court.

12. After remand, the High Court confirmed the judgment of the Trial Court and dismissed the criminal appeals. The Special Leave Petition filed by the accused was admitted on 01.08.2022 and this is how we have heard Shri Gaurav Agrawal, learned counsel for the appellants and Shri Krishan Kumar Singh learned counsel for the State and Shri Sirajudeen, learned senior counsel for the respondent No. 2.

13. ***Findings of the Trial Court:*** The Trial Court had examined the credibility of the Prosecution witness in great detail. According to the Trial Court, PWs 1, 3, 4, 6, 7 and 8 were eyewitnesses to the incident and their testimonies were consistent. Among them, PW-6's

testimony was a clinching piece of evidence as he was privy to the incident from the very beginning. He was subjected to intense cross-examination with respect to his residence and other details about the incident. Except for minor variations, the Trial Court found his testimony unshaken, being consistent and natural. The Trial Court found the testimonies PW-1, PW-3, PW-4, PW-7, PW-8 corroborating the incident of stopping an auto, dragging the deceased out, and subsequently assaulting the deceased with various weapons.

14. Collectively, the witnesses reiterated that A-1 stopped the auto-rickshaw and pulled the deceased out and A-2 attacking the deceased's hands with a sword. As they reached A-4's house, A-4 took the sword from A-2 and struck the deceased on his head. A-4 also inflicted injuries by a knife. The common account about A-3 is that he hit the deceased on the head with a stone. Accused No. 1 continued the attack and hit the deceased with an axe. Largely, these witnesses recounted a consistent narrative of the attack, identifying the weapons used and the roles of each accused.

15. ***Judgment of the High Court:*** According to the High Court, the accounts of PWs 1, 3, 4, 6, 7 and 8, who witnessed the incident, converge and are consistent with the injuries, weapons and motive for the murder of the deceased. The High Court correctly relied on the evidence of PW-6 who was in an auto-rickshaw along with the deceased on the day of the incident. PW6's evidence that he boarded the auto-rickshaw of PW-5, followed by the deceased and Rajitha (PW-9) joining him, was believed by the High Court.

16. The account of PW6 being corroborated by the evidence of PWs 1, 3, 4, 7 and 8, the High Court held that the evidence conclusively establishes the guilt of the accused beyond reasonable doubt. The High Court also noted the submission relating to the contradictions in the Complaint (Ex. P1) and the testimonies of PWs 1, 3, 4, 6, 7 and 8, specifically relating to the acts of assault, however, the High Court came to the conclusion that they were minor in nature.

17. Though the High Court saw that the trial court extensively examined the evidence and considered all the submissions, it has nevertheless considered the evidence afresh and after a detailed examination, arrived at the same conclusion. We have given our anxious consideration and have scrutinised the evidence of all the eye-

witnesses in detail. We are in full agreement with the decision of the Trial Court and the High Court. Their analyses and conclusions are based on correct appreciation of evidence and law. However, there is one aspect which stands out in the above-referred analyses of the Trial Court and the High Court, and that pertains to the conclusion on the culpability of A-3 for murder. We will now examine the evidence as against A-3.

18. ***Evidence against Accused No.3:*** To commence with, the FIR states that A-3 hit the deceased on the head, thereby causing death. The Chargesheet states that A3 used a stone to do the same. However, no further details have been provided. Further as we examine the testimonies of all the eyewitnesses the following picture emerges. PWs 1, 3, 4 and 6 state that the A-3 had used a stone to hit the deceased's head. PW-7 and PW-8 do not speak about his role.

19. PW-1, in his examination-in-chief and cross-examination, has respectively stated as follows:

> Chief - *"When I was trying to go near the deceased, A-3 threatened me saying that if I go there he would kill me. A-3 hit the deceased with a stone."*
>
> Cross - *"I read Ex. P-1 complaint and it does not show that A-1 and A-3 threatened me and other eye witnesses to kill if we tried to rescue the deceased"*

20. PW-3, in his examination-in-chief and cross-examination, has respectively stated as follows:

> Chief - *"After hearing the cries of the said Rajitha and Swamy I, PW1, Kona Mallesh Akireeddy Ramesh, T.Odaiah rushed to the spot. By the time we reached the spot the deceased was lying on ground with injuries and on seeing us A-3 took a stone and gave threats to us saying that he would hit us if we go there."*
>
> Cross - *"It is not true to say that I did not state before the police that when land other eye witnesses were going near· the place of the incident A-3 armed with a stone threatened to kill us. It is not true to say that for the first time before this court I am deposing that A-3 armed with a stone threatened me and other witnesses to kill"*

21. P.W. 4, in his examination-in-chief, has stated as follows:

    "A-3 took a stone and hit on the head of the deceased."

22. P.W. 6, in his examination-in-chief, has stated as follows:

    "A-3 took a stone and hit on the head of the deceased."

23. A reading of the judgment and order passed by the Trial as well as the High Court would indicate that neither the prosecution or defence, nor the court, have focussed on the role of A-3 as evidenced by the oral and documentary evidence. There is nothing to attribute A-3 with the intent to murder the deceased. In fact, both the Courts have mechanically drawn an inference against A-3 under Section 34 of the Act merely based on his presence near the scene of offence and his familial relations with the other accused.

24. As per the *post-mortem report*, the cause of death is "*cardio pulmonary arrest due to transaction spinal cord at atlanto occipital joint*". The atlanto occipital joint is at the back of the neck, which is the exact place where A-1 assaulted the deceased with the help of an axe. This axe was then taken by A-2 and thereafter, by A-4, who also assaulted the deceased. All the eye-witnesses are clear in this account. In other words, it was only A-3 who never took the axe in his hand. He only used a stone to assault the deceased.

25. Considering the statements of the eye-witnesses, coupled with the post-mortem report, it is not possible to contend that A-3 would have had the intention to commit the murder of the deceased and as such, he cannot be convicted under Section 302 IPC.

26. In fact, Victor Dinesh (PW-11), who gave the post-mortem report had indicated the injuries as under:

    "1. Incised wound extending from right ear to left cheek 19 cm long 6 cm deep 2 mm wide grievous sharp weapon, Ante mortem.

    2. Incised wound on the right eye brow (4cms) simple sharp weapon Ante mortem.

    3. Incised wound on the left side of fore head about 9 cms above left eye brow measuring 8 cms sharp weapon Ante mortem.

4. Incised wound on left shoulder measuring 4 cm long 3mm wide. Sharp weapon ante mortem.

5. Incised wound on right should of 8 cm long 1 ½ cm wide sharp weapon, ante mortem.

6. 5 cm x 6 Incised wound (slice) on the vertex. Sharp weapon ante mortem.

7. 8 cms long incised wound backs of left wrist, sharp weapon ante mortem.

8. 12 cms incised wound on the front of left hand, sharp weapon, ante mortem.

9. Partial amputation of middle 3 fingers of left hand, ante mortem.

10. Partial amputation of right thumb. Measuring 2 cms sharp weapon ante mortem.

11. Partial amputation of right index finger measuring 3 cms sharp weapon, ante mortem.

12. Deep lacerated wound on the back of neck measuring 18 cms 7 cms with complete transaction of spinal card and Atlanta occipital joint. Blunt weapon, ante mortem."

27. It is evident from the evidence of PW-11 that the deceased suffered 12 injuries, of which 10 are caused by sharp-edged weapons. The 11th injury is a partial amputation of the middle 3 fingers of left hand. The final injury is a lacerated wound on the back of neck measuring 18 cms x 7 cms with complete transaction of spinal cord and atlanto occipital joint. The Trial Court and the High Court have not analysed the evidence as against A-3. They have proceeded to convict him along with others under Section 302 with the aid of Section 34. The cumulative circumstances in which A-3 was seen participating in the crime would clearly indicate that he had no intention to commit murder of the deceased for two clear reasons. Firstly, while every other accused took the axe used by A1 initially and contributed to the assault with this weapon, A-3 did not wield the axe at any point of time. Secondly, A-3 only had a stone in his hand, and in fact, some of the witnesses said that he merely threatened in case they seek

to intervene and prevent the assault. Under these circumstances, we hold that A-3 did not share a common intention to commit the murder of the deceased. Additionally, there is no evidence that A-3 came along with the other accused evidencing a common intention. The description of the incident is that when the deceased came to the scene of occurrence, A-1 dragged him to the house of A-4, and the other accused joined A-1. In this context, A-3 picked up a stone to assault the deceased.

28. Even though, A-3 might not have had the common intention to commit the murder, nevertheless, his participation in the assault and the wielding of the stone certainly makes him culpable for the offence that he has committed. While we acquit A-3 of the offence under Section 302 read with Section 34 of the IPC, he is liable for the offence under 304 Part II IPC. The law on Section 304 Part II has been succinctly laid down in ***Camilo Vaz v. State of Goa*, (2000) 9 SCC 1,** where it was held that:

> 14. This section is in two parts. If analysed, the section provides for two kinds of punishment to two different situations: (1) if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death. Here the important ingredient is the "intention"; (2) if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death. When a person hits another with a danda on a vital part of the body with such force that the person hit meets his death, knowledge has to be imputed to the accused….

29. In the past, this Court has considered factors such as lack of medical evidence to prove whether the act/injury was individually sufficient to cause death[1], a single blow on head with a hammer[2] and lack of cogent evidence of the eye-witnesses that the accused shared a common intention to commit murder[3] as some factors to commute a sentence from Section 302 to Section 304 Part II IPC.

1 Bawa Singh v. State of Punjab, 1993 Supp (2) SCC 754.

2 Sarup Singh v. State of Haryana, (2009) 16 SCC 479.

3 Ghana Pradhan & Ors. v. State of Orissa, 1991 Supp (2) SCC 451.

30. Returning back to the facts of the case, there is certainly no escape from coming to the conclusion that A-3 should have had the knowledge that the use of a stone to hit the head of the deceased is likely to cause death. However, as demonstrated before, the evidence is insufficient to deduce a conclusion that he shared a common intention with the other accused to commit the murder of the deceased. Considering the role that A-3 has played, we hold him guilty of the offence under Section 304 Part II IPC.

31. The perusal of the evidence would reveal that it is not the case of the prosecution that A-3 was along with the other accused while the deceased was dragged to the house. The deposition would reveal that after the other accused assaulted the deceased with sword, A-3 came thereafter and assaulted the deceased with stone lying there. We, therefore, find that the prosecution has not been in a position to establish that A-3 shared the common intention with the other accused to cause the murder of the deceased.

32. For the reasons stated above, we uphold the conviction and sentence of A-1, A-2 and A-4 under Section 302 read with Section 34 IPC and dismiss their Criminal Appeal No. 2852 of 2023 against the judgment of the High Court of Telangana in Criminal Appeal No. 308 of 2005 dated 26.04.2022. We acquit A-3 of the conviction and sentence under Section 302 read with Section 34 and convict him under Section 304 Part II and sentence him to undergo imprisonment for 10 years. To this extent, the appeal of A-3 is allowed by altering the conviction under Section 302 to Section 304 Part II IPC.

33. Pending applications, if any, are disposed of.

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

[2024] 2 S.C.R. 12 : 2024 INSC 80

The Authorised Officer, Central Bank of India
v.
Shanmugavelu

(Civil Appeal No(s). 235-236 of 2024)

02 February 2024

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

Issue for Consideration

(i)Whether, the underlying principle of Section(s) 73 & 74 respectively of the Contract Act, 1872 Act is applicable to forfeiture of earnest-money deposit under Rule 9(5) of the SARFAESI Rules. In other words, whether the forfeiture of the earnest-money deposit under Rule 9(5) of the SARFAESI Rules can be only to the extent of loss or damages incurred by the Bank; (ii) Whether, the forfeiture of the entire amount towards the earnest-money deposit under Rule 9(5) of the Rules amounts to unjust enrichment. In other words, whether the quantum of forfeiture under the SARFAESI Rule is limited to the extent of debt owed; (iii) Whether a case of exceptionable circumstances could be said to have been made out by the respondent to set aside the order of forfeiture of the earnest money deposit.

Headnotes

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Security Interest (Enforcement) Rules, 2002 – Contract Act, 1872 – ss. 73 and 74 – Whether, the underlying principle of Section(s) 73 & 74 respectively of the Contract Act, 1872 Act is applicable to forfeiture of earnest-money deposit under Rule 9(5) of the SARFAESI Rules:

Held: The SARFAESI Act is a special legislation with an overriding effect on the general law, and only those legislations which are either specifically mentioned in Section 37 or deal with securitization will apply in addition to the SARFAESI Act – Being so, the underlying principle envisaged under Section(s) 73 & 74 of the 1872 Act which is a general law will have no application, when it comes to the SARFAESI Act more particularly the forfeiture of earnest-money deposit which has been statutorily provided under Rule 9(5) of the

* Author

SARFAESI Rules as a consequence of the auction purchaser's failure to deposit the balance amount – The forfeiture can be justified if the terms of the contract are clear and explicit – If it is found that the earnest money was paid in accordance with the terms of the tender for the due performance of the contract by the Promisee, the same can be forfeited in case of non-performance by him or her – Since, the forfeiture under Rule 9(5) of the SARFAESI Rules is also taking place pursuant to the terms & conditions of a public auction – Suffice to say, Section(s) 73 and 74 of the 1872 Act will have no application whatsoever, when it comes to forfeiture of the earnest-money deposit under Rule 9 sub-rule (5) of the SARFAESI Rules. [Paras 68, 89, 91]

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Security Interest (Enforcement) Rules, 2002 – Contract Act, 1872 – The High Court held that forfeiture of the entire deposit u/r. 9 sub-rule (5) of the SARFAESI Rules by the appellant bank after having recovered its dues from the subsequent sale amounts to unjust enrichment – Whether, the forfeiture of the entire amount towards the earnest-money deposit under Rule 9(5) of the Rules amounts to unjust enrichment:

Held: The consequence of forfeiture of 25% of the deposit under Rule 9(5) of the SARFAESI Rules is a legal consequence that has been statutorily provided in the event of default in payment of the balance amount – The consequence envisaged under Rule 9(5) follows irrespective of whether a subsequent sale takes place at a higher price or not, and this forfeiture is not subject to any recovery already made or to the extent of the debt owed – In such cases, no extent of equity can either substitute or dilute the statutory consequence of forfeiture of 25% of deposit under Rule 9(5) of the SARFAESI Rules – The High Court erred in law by holding that forfeiture of the entire deposit under Rule 9 sub-rule (5) of the SARFAESI Rules by the appellant bank after having already recovered its dues from the subsequent sale amounts to unjust enrichment. [Paras 111, 113]

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Security Interest (Enforcement) Rules, 2002 – Contract Act, 1872 – Whether a case of exceptionable circumstances could be said to have been made out by the respondent to set aside the order of forfeiture of the earnest money deposit:

Held: Where extraneous conditions exist that might have led to the inability of the successful auction purchaser despite best efforts from depositing the balance amount to no fault of its own, in such cases the earnest-money deposited by such innocent successful auction purchaser could certainly be asked to be refunded – In the instant case, it is the respondent's case that he was unable to make the balance payment owing to the advent of the demonetization – The same led to a delay in raising the necessary finance – It has been pleaded by the respondent that the appellant bank failed to provide certain documents to him in time as a result of which he was not able to secure a term loan – However, the aforesaid by no stretch can be said to be an exceptional circumstance warranting judicial interference – Because demonetization had occurred much before the e-auction was conducted by the appellant bank – As regards the requisition of documents, the sale was confirmed on 07.12.2016, and the respondent first requested for the documents only on 20.12.2016, and the said documents were provided to him by the appellant within a month's time i.e., on 21.01.2017 – It may also not be out of place to mention that the respondent was granted an extension of 90-days' time period to make the balance payment, and was specifically reminded that no further extension would be granted, in-spite of this the respondent failed to make the balance payment – The e-auction notice inviting bids along with the correspondence between the appellant bank and the respondent are unambiguous and clearly spelt out the consequences of not paying the balance amount within the specified period. [Paras 117, 118, 119, 120]

Doctrines/Principles – Principle of 'Reading-Down' a provision:

Held: The principle of "reading down" a provision refers to a legal interpretation approach where a court, while examining the validity of a statute, attempts to give a narrowed or restricted meaning to a particular provision in order to uphold its constitutionality – This principle is rooted in the idea that courts should make every effort to preserve the validity of legislation and should only declare a law invalid as a last resort – When a court encounters a provision that, if interpreted according to its plain and literal meaning, might lead to constitutional or legal issues, the court may opt to read down the provision –Reading down involves construing the language of the provision in a manner that limits its scope or application, making it consistent with constitutional or legal principles – The rationale

behind the principle of reading down is to avoid striking down an entire legislation – Courts generally prefer to preserve the intent of the legislature and the overall validity of a law by adopting an interpretation that addresses the specific constitutional concerns without invalidating the entire statute. [Paras 93, 94, 95]

Security Interest (Enforcement) Rules, 2002 – Rule 9 sub-rule (5) – Harshness of a provision is no reason to read down the same:

Held: Harshness of a provision is no reason to read down the same, if its plain meaning is unambiguous and perfectly valid – A law/rule should be beneficial in the sense that it should suppress the mischief and advance the remedy – The harsh consequence of forfeiture of the entire earnest-money deposit has been consciously incorporated by the legislature in Rule 9(5) of the SARFAESI Rules so as to sub-serve the larger object of the SARFAESI Act of timely resolving the bad debts of the country – The idea behind prescribing such a harsh consequence is not illusory, it is to attach a legal sanctity to an auction process once conducted under the SARFAESI Act from ultimately getting concluded – Any dilution of the forfeiture provided under Rule 9(5) of the SARFAESI Rules would result in the entire auction process under the SARFAESI Act being set at naught by mischievous auction purchaser(s) through sham bids, thereby undermining the overall object of the SARFAESI Act of promoting financial stability, reducing NPAs and fostering a more efficient and streamlined mechanism for recovery of bad debts. [Paras 101 and 102]

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – Legislative History and scheme – Discussed.

Case Law Cited

Fateh Chand v. Balkishan Dass, [1964] SCR 515 **: AIR 1963 SC 1405 – followed.**

Madras Petrochem Ltd. & Anr. v. Board for Industrial and Financial Reconstruction & Ors., [2016] 11 SCR 419 **: (2016) 4 SCC 1;** *Karsandas H. Thacker v. M/s. The Saran Engineering Co. Ltd.*, **AIR 1965 SC 1981;** *K. P. Subbarama Sastri and others v. K. S. Raghavan & Ors.*, [1987] 2 SCR 767 **: (1987) 2 SCC 424;** *Rakesh*

Birani (Dead) through LRs v. Prem Narain Sehgal & Anr., [2018] 3 SCR 750 **: (2018) 5 SCC 543;** *Agarwal Tracom Private Limited v. Punjab National Bank & Ors.*, [2017] 11 SCR 164 **: (2018) 1 SCC 626;** *Celir LLP. v. Bafna Motors (Mumbai) Pvt. Ltd. & Ors.,* **2023 SCC OnLine SC 1209;** *R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited & Anr.*, **[1978] 1 SCR 338 : (1977) 4 SCC 98;** *Maula Bux v. Union of India*, [1970] 1 SCR 928 **: 1969 (2) SCC 554;** *Kailash Nath Associates v. Delhi Development Authority & Anr.*, [2015] 1 SCR 627 **: (2015) 4 SCC 136;** *B.R. Enterprises v. State of U.P. & Ors.*, [1999] 2 SCR 1111 **: (1999) 9 SCC 700;** *Calcutta Gujarati Education Society & Anr. v. Calcutta Municipal Corpn. & Ors.*, [2003] 2 Suppl. SCR 915 **: (2003) 10 SCC 533;** *Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs*, [2005] 2 SCR 606 **: (2005) 3 SCC 738;** *National Spot Exchange Ltd. v. Anil Kohli, Resolution Professional for Dunar Foods Ltd.*, [2021] 7 SCR 1024 **: (2022) 11 SCC 761;** *Alisha Khan v. Indian Bank (Allahabad Bank) & Ors*, **2021 SCC OnLine SC 3340;** *Authorized Officer State Bank of India v. C. Natarajan*, [2023] 5 SCR 1067**: 2023 SCC Online SC 510 – relied on.**

Mardia Chemicals Ltd. & Ors. v. Union of India & Ors., [2004] 3 SCR 982 **: (2004) 4 SCC 311;** *United Bank of India v. Satyawati Tondon & Ors.*, [2010] 9 SCR 1 **: (2010) 8 SCC 110;** *Satish Batra v. Sudhir Rawal*, [2012] 9 SCR 662 **: (2013) 1 SCC 345;** *Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories & Ors.*, [2003] 6 Suppl. SCR 1197 **: (2004) 3 SCC 711;** *Shree Hanuman Cotton Mills & Ors. v. Tata Air Craft Limited*, [1970] 3 SCR 127 **: (1969) 3 SCC 522;** *Delhi Development Authority v. Grihshapana Cooperative Group Housing Society Ltd.*, [1995] 2 SCR 115 **: 1995 Supp (1) SCC 751;** *V. Lakshmanan v. B.R. Mangalagiri & Ors.*, **1995 Supp (2) SCC 33;** *HUDA v. Kewal Krishnan Goel*, [1996] 2 Suppl. SCR 587 **: 1996 (4) SCC 249 – referred to.**

Dinanath Damodar Kale v. Malvi Mody Ranchhoddas and Co., **AIR 1930 Bom 213 – referred to.**

Hadley & Anr. v. Baxendale & Ors., **(1843-60) ALL E.R. Rep. 461;** *Victoria Laundry (Windsor) Ltd v. Newman Industrial Ltd.*, **[1949] 2 K.B. 528;** *Kunwar Chiranjit Singh v. Har Swarup*, **(1926) 23 LW 172;** *Vide Howe v. Smith*, **(1884) 27 Ch.D. 89;** *Stockloser v. Johnson*, **(1954) 1 All. E.R. 630 – referred to.**

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List of Acts

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; Security Interest (Enforcement) Rules, 2002; Contract Act, 1872.

List of Keywords

Simple mortgage; Default in payment; e-auction notice; Secured asset; Public auction; Auction purchaser; Failure in remitting balance amount; Cancellation of sale; Forfeiture under the SARFAESI Rules; Secured creditor; Earnest money; Law on forfeiture of earnest money; Principle of 'Reading-Down'; Unjust enrichment; Compensation for loss or damage caused by breach of contract.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.235-236 of 2024.

From the Judgment and Order dated 27.10.2021 of the High Court of Judicature at Madras in CRP Nos.1892 and 2282 of 2021.

Appearances for Parties

Dhruv Mehta, Sr. Adv., Amit K. Nain, PBA Srinivasan, Keith Verghese, V. Aravind, Ms. Srishti Bansal, Sumit Swami, Ms. Pooja Kumari, Advs. for the Appellant.

Dr. S. Muralidhar, Sr. Adv., S. Sethuraman, M. A. Karthik, Ms. Aswathi M. K., Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

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

1. Since the issues raised in both the captioned appeals are the same, the parties are also the same and the challenge is also to the self-same judgment and order passed by the High Court, those were taken up for hearing analogously and are being disposed of by this common judgment and order.

2. For the sake of convenience, the appellant shall hereinafter be referred to as the Bank being the Secured Creditor, and the respondent shall hereinafter be referred to as the original Auction-Purchaser.

3. These appeals are at the instance of a Nationalized Bank and are directed against the common judgment and order dated 27.10.2021 passed by the High Court of judicature at Madras in C.R.P No(s). 1892 & 2282 respectively of 2021 ("**Impugned Order**") by which the High Court allowed the respondent's writ petition and held that the forfeiture of the earnest money deposit by the appellant bank could only be to the extent of the loss suffered by it.

A. FACTUAL MATRIX

4. It appears from the materials on record that the appellant bank herein had sanctioned credit facilities to one 'Best and Crompton Engineering Projects' against a parcel of land admeasuring 10581 sq.ft. (approx.) with superstructures situated in Survey Nos. 60 and 65/2, Block 6, Alandur village, Mambalam-Guindy, Chennai (for short the, "**Secured Asset**") as security interest in the form of a simple mortgage in lieu of the sanctioned credit. Sometime thereafter the said borrowers defaulted and the said loan account was classified as a non-performing asset ("**NPA**") by the appellant bank on 28.05.2013.

5. In order to recover its dues, the appellant bank took measures under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "**SARFAESI Act**"), more particularly under Section 13(4) by taking over the possession of the Secured Asset and putting the same for sale by way of public auction.

6. Accordingly, on 24.10.2016 an e-auction notice for the sale of the Secured Asset at a reserve price of Rs. 9,62,00,000/- came to be issued by the appellant bank, with the following terms and conditions: -

"__TERMS & CONDITIONS__

1. *The e-Auction is being held on "AS IS WHERE IS" and "AS IS WHAT IS" basis and "NO COMPLAINT" condition.*
2. *The auction sale will be Online E-Auction/Bidding through website https://www.bankeauctions.com on 07-12-2016 from 11.00 a.m. to 12. Noon*
3. *Intending bidders shall hold a valid Digital Signature Certificate, e-mail address and PAN number. For details with regard to Digital Signature Certificate please contact M/s C1 India Pvt. Ltd., E-Mail ID: support@bankeauctions.com or shankar.ganesh@c1india.com*
4. *Bidders are required to go through the website https://www.bankeauctions.com for detailed terms and conditions of auction sale before submitting their bids and taking part in the e- Auction sale proceedings.*
5. *To the best of knowledge and information of the Authorized Officer, there is no encumbrance on property affecting the security interest. However, the intending bidders should make their own independent inquiries regarding the encumbrances, title of property put on auction and claims / rights / dues affecting the property, prior to submitting their bid. The e-Auction advertisement does not constitute and will not be deemed to constitute any commitment or any representation of the bank. The property is being sold with all the existing and future encumbrances whether known or unknown to the bank. The Authorized Officer / Secured Creditor shall not be responsible in any way for any third party claims / rights / dues.*
6. *It shall be the responsibility of the bidders to inspect and satisfy themselves about the asset and specification before submitting the bid. The inspection of property put on auction will be permitted to interested bidders at site on 23-11-2016 from 10.00 a.m. to 5.00 p.m.*
7. *The above mentioned amount should be remitted towards EMD through RTGS/NEFT to Account No. 3227870680 of Central Bank of India, CFB, Chennai 600008 IFSC Code CBIN0283507. Cheques or demand draft shall not be accepted as EMD amount.*

8. *Prospective bidders are advised to obtain user id and password which are mandatory for bidding in the above e-auction from M/s C1India Pvt. Ltd., helpline 01244302020/2021/2022/2023/2024 E-mail support@bankerauctions.com or K.N. SHRINATH-9840446485. Passwords will be allotted only to those bidders who fulfil all the terms and conditions of e-auction and have deposited the requisite EMD. And for further property related query you may contact Mr. G.S. Prasad, Chief Manager, Central Bank of India, CFB, Chennai Tel. No. 044-42625259 Mobile 9962029300 e-mail ID: bmchen3507@centralbank.co.in during officer hours i.e. 10 AM to 5 PM during the working days.*

9. *After Registration by the bidder in the Web-Portal, the intending bidder / purchaser is required to get the copies of the following documents uploaded in the Web Portal before last date of submission of the bid viz. i) Copy of the NEFT/RTGS Challan; ii) Copy of PAN Card; iii) Proof of Identification (KYC) viz. self-attested copy of Voter ID Card / Driving License / Passport etc. iv) Copy of proof of address; without which the bid is liable to be rejected.*

10. *The interested bidders, who have submitted their bid not below the Reserve price through online mode before 4.00 p.m. on 05-12-2016 shall be eligible for participating in the e-bidding process. The e-Auction of above properties would be conducted exactly on the scheduled Date & Time as mentioned against each property by way of inter-se bidding amongst the bidders. The bidder shall improve their offer in multiple of the amount mentioned under the column "Bid Increase Amount". In case bid is placed in the last 5 minutes of the closing time of the e-Auction, the closing time will automatically get extended for 3 minutes (subject to maximum of unlimited extensions of 3 minutes each). The bidder who submits the highest bid amount (not below the Reserve Price) on closure of e-Auction process shall be declared as Successful Bidder and a communication to that effect will be issued which shall be subject to approval by the Authorized Officer/Secured Creditor.*

11. *The Earnest Money Deposit (EMD) of the successful bidder shall be retained towards part sale consideration and the EMD of unsuccessful bidders shall be refunded. The Earnest Money Deposit shall not bear any interest. The successful bidder shall*

have to deposit 25% of the auction price less the EMD already paid, within 24 hours of the acceptance of bid price by the Authorized Officer and the balance 75% of the sale price on or before 15th day of sale or within such extended period as agreed upon in writing by and solely at the discretion of the Authorized Officer. If any such extension is allowed, the amount deposited by the successful bidder shall not carry any interest. In case of default in payment by the highest and successful bidder, the amount already deposited by the bidder shall be liable to be forfeited and property shall be put to re-auction and the defaulting bidder shall have no claim / right in respect of property/amount.

12. The authorized Officer is not bound to accept the highest offer and the authorized officer has absolute right to accept or reject any or all offer(s) or adjourn / postpone / cancel the e-auction without assigning any reasons thereof. ...”

7. Pursuant to the same, the e-auction was conducted on 07.12.2016 and a total of four bids were received wherein the respondent also participated and submitted its bid to the tune of Rs. 12,27,00,000/-. The respondent’s bid was found to be the highest and was classified as H1 and accordingly, the respondent was declared as the successful auction purchaser.

8. Pursuant to the aforesaid, the respondent on the same day deposited 25% of the bid amount i.e., Rs. 3,06,75,000/- as the earnest money deposit upon which, the appellant confirmed the sale of the Secured Asset in favour of the respondent *vide* its letter dated 07.12.2016 which *inter-alia* stipulated that in the event of default in payment of the balance amount, the sale shall be liable to be cancelled and the earnest money would be forfeited. The said sale confirmation letter is being reproduced below: -

“CFB/CHEN/2016-17/685 December 7, 2016

Mr. R Shanmugavelu

Managing Director

M/s Sunbright Designers Private Limited

Module No – 4, Readymade Garment Complex

SIDCO Industrial Estate, Guindy

Chennai-600032

Sir,

Reg: Recovery Proceedings under the provision of SARFAESI Act 2002 in our borrowal account M/s Best & Crompton Engineering Projects Limited – E Auction of property held on 07/12/2016.

We have to inform you that in the E auction held on 07/12/2016 pursuant to the E-auction sale notice dated 24/10/2016 issued by the Authorized Officer. In respect of Schedule property covered in the E auction sale notice i.e.,

Lot no. 1: Property belonging to M/s Futuretech Industries Ltd. presently known as Candid Industries Ltd. All that piece and parcel of the immovable property being industrial land together with the superstructure/shed standing thereon admeasuring 10581 sq. ft. or thereabouts comprised in survey nos. 60 part and 65/2, Block no. 6, Alandur village, Mambalam-Guindy Taluk, sub-registration district Alandur, registration district Chennai South presently situated at plot no. A-19, Thiru Vi Ka Industrial Estate, South by: Plot no. A-18, Thiru Vi Ka Industrial Estate East by: 80 feet Road, West by: Service Road.

You have been declared as successful bidder at the sale price of Rs. 12,27,00,000/- (Rupees Twelve Crore Twenty Seven Lac only). You are now required to remit as per E auction Sale notice 25% of the sale price less Earnest Money Deposit amount already remitted by you i.e., Rs. 3,06,75,000/- minus EMD remitted Rs. 96,20,000/- = Rs. 2,10,55,000/- (Rupees Two Crore Ten Lac Fifty Five Thousand only) by RTGS/NEFT to the same account number to which you have remitted the Earnest Money Deposit within 24 hours of acceptance of bid.

The balance amount amounting to Rs. 9,20,25,000/- (Rupees Nine Crore Twenty Lac Twenty Five Thousand Only) is to be remitted by you by RTGS to the same account number on or before 15 days from today; failing which the sale is liable to be cancelled and the EMD will be forfeited.

Please note that the E Auction sale has been conducted strictly as per the terms and conditions spelt out in the E Auction notice dated 24/10/2016.

Thanking You

Yours sincerely,

Sd/-

AUTHORIZED OFFICER"

9. The respondent *vide* its email dated 19.12.2016, requested the appellant bank for grant of extension of three-months' time for the payment of the balance amount on the ground that its term-loan was still under-process.

10. The appellant bank *vide* its letter dated 20.12.2016, acceded to the request of the respondent and granted a further extension of three-months' time i.e., till 07.03.2017 in terms of Rule 9(4) of the Security Interest (Enforcement) Rules, 2002 (for short, the "**SARFAESI Rules**"). The said letter also stated that no further extension of time shall be granted and in the event the respondent fails to pay the balance amount, the sale shall be cancelled and the amount already paid shall be forfeited. The said letter is being reproduced below: -

"CFB/CHEN/2016-17/718 December 20, 2016

Mr. R Shanmugavelu

Managing Director

M/s Sunbright Designers Private Limited

Module No – 4, Readymade Garment Complex

SIDCO Industrial Estate, Guindy

Chennai-600032

Sir,

Reg: Recovery Proceedings under the provision of SARFAESI Act 2002 in the account M/s Best & Crompton Engineering Projects Limited – E Auction of property held on 07/12/2016.

We may once again inform you that in the E auction held on 07/12/2016 pursuant to the E-auction sale notice dated 24/10/2016 issued by the Authorized Officer in respect of Schedule property covered in the E auction sale notice i.e., Property belonging to M/s Futuretech Industries Ltd. presently known as Candid Industries Ltd. Al that piece and parcel of the immovable property being industrial land together with the superstructure/shed standing thereon admeasuring 10581 sq.

ft. or thereabouts comprised in survey nos. 60 part and 65/2 part, Block no. 6, Alandur village, Mambalam-Guindy Taluk, sub-registration district Alandur, registration district Chennai South presently situated at plot no. A-19, Thiru Vi Ka Industrial Estate, South by: Plot no. A-18, Thiru Vi Ka Industrial Estate East by: 80 feet Road, West by: Service Road, you have been declared as successful bidder at the sale price of Rs. 12,27,00,000/- (Rupees Twelve Crore Twenty Seven Lac only).

You had remitted Rs. 2,10,55,000/- (Rupees Two Crore Ten Lac Fifty Five Thousand only) as per E auction Sale notice 25% of the sale price less Earnest Money Deposit amount already remitted by you (i.e., Rs. 3,06,75,000/- minus Rs.96,20,000/-) on 08/12/2016 as per the bid terms.

The balance amount amounting to Rs. 9,20,25,000/- (Rupees Nine Crore Twenty Lac Twenty Five Thousand Only) was to be remitted by you before 15 days from the date of bid failing which the sale is liable to be cancelled and the EMD will be forfeited.

However, you had vide your mail dated 19/12/2016 requested to give you three (3) months time to pay the balance 75% payment of the bid amount and also assured that you will honour the offer in the time frame.

After carefully going through your request, the Authorized officer hereby permit/ allow you to pay the balance amount of Rs 9,20,25,000/- (Rupees Nine crore Twenty Lac Twenty Five Thousand Only) within 90 days from the date of BID. Further we may also inform you that no further extension of time will be granted and if you fail to pay the balance sale amount the sale will be cancelled and the amount already paid will be forfeited by the Bank.

Thanking You

Yours sincerely,

Sd/-

AUTHORIZED OFFICER"

11. The respondent being unable to pay the balance amount within the extended period sought an additional 15-days for making the balance-payment *vide* its letter dated 06.03.2017.

12. However, the appellant *vide* its letter dated 27.03.2017 turned down the said request for further extension and intimated the respondent that due to its failure in remitting the balance amount within the stipulated time, the sale is cancelled and the amount already deposited stands forfeited. The said sale cancellation letter is being reproduced below: -

    "CFB/CHEN/2016-17/919 March 27, 2017

    Mr. R. Shanmugavelu

    Managing Director

    M/s Sunbright Designers Private Limited

    Module No.-4, Readymade Garment Complex

    SIDCO Industrial Estates, Guindy

    Chennai-600032

    Sir,

    Reg: Recovery Proceedings under the provision of SARFAESI Act 2002 in the account M/s Best & Crompton Engineering Projects Limited

    Ref: E Auction of property held on 07/12/2016

    You were declared as successful bidder at the sale price of Rs. 12,27,00,000/- (Rupees Twelve Crore Twenty Seven Lac only) in the E auction held on 07/12/2016 pursuant to the E auction sale notice dated 24/10/2016 issued by the Authorised Officer in respect of Schedule property covered in the E auction sale notice i.e., mortgaged property belonging to M/s Futuretech Industries Ltd presently known as Candid Industries Ltd.

    Schedule

    All that place and parcel of the immovable property being industrial land together with the superstructure/shed standing thereon admeasuring 10581 sq.ft. or thereabouts comprised in survey nos. 60 part and 65/2 part. Block no. 6, Alandur village, Mambalam-Guindy Taluk, sub-registration district Alandur, registration district Chennai South presently situated at plot no. A-19. Thiru Vi Ka Industrial Estate, South by: Plot no. A-18, Thiru Vi Ka Industrial Estate, and East by: 80 feet Road, West by: Service Road.

You had remitted a total of Rs. 3,06,75,000 towards 25% of the sale price on (i.e. Rs. 96,20,000 on 7-12-2016 towards EMD and Rs. 2,10,55,000 on 08/12/2016 as per the terms of the bid.

The balance sale price amount to Rs. 9,20,25,000/- (Rupees Nine Crore Twenty Lac Twenty Five Thousand only) was to be remitted by you before 15 days from the date of bid failing which the sale was liable to be cancelled and the amount deposited by you had to be forfeited. However, you had vide your mail dated 19/12/2016 requested to give you three (3) months' time to pay the balance 75% payment of the bid amount and also assured that you will honour the offer in the time frame.

After carefully going through your request, the Authorized officer permitted/allowed you to pay the balance amount of Rs.9,20,25,000/-(Rupees Nine crore Twenty Lac Twenty Five Thousand Only) within 90 days from the date of BID vide our letter No. CFB/CHEN/2016-17/718 dated 20/12/2016. Further we also informed you that no further extension of time will be granted and if you fail to pay the balance sale amount the sale will be cancelled and the amount already paid was liable to be forfeited by the Bank.

You had again requested for extension of time for another 15 days vide your letter dated 06/03/2017. After going through your representation/request, we permitted you to remit the balance of Rs. 9,20,25,000/- (Rupees Nine Crore Twenty Lac Twenty Five Thousand Only) by 22/03/2017 thereby giving three months time from the 15th day of confirmation of sale as per the Security Interests (Enforcement) Rules, 2002.

We hereby inform you that as you have failed to remit the balance amount of Rs. 9,20,25,000/- (Rupees Nine crore Twenty Lac Twenty Five Thousand Only) by 22/03/2017, the amount of Rs. 3,06,75,000/- which was already paid by you stands forfeited. This letter issued without prejudice to the bank's rights to bring the property for fresh auction sale.

Thanking you

Yours sincerely,

Sd/-

AUTHORISED OFFICER"

13. Despite the aforesaid letter, the respondent on 05.04.2017 addressed one another letter to the appellant seeking further extension of 90 days for making the balance sale payment by enclosing a cheque of Rs.50,00,000/- to show its *bona fides*. However, the appellant returned the cheque and declined the said request *vide* its letter dated 06.04.2017.

14. Aggrieved by the aforesaid, the respondent filed an application being SA No. 143 of 2018 before the Debts Recovery Tribunal-II ("**DRT**") assailing the appellant's sale cancellation and forfeiture letters dated 27.03.2017 and 06.04.2017 respectively.

15. During the pendency of the proceedings before the DRT as aforesaid a fresh auction of the Secured Asset was conducted by the appellant bank on 13.03.2019, and it appears that pursuant to the same the sale was completed at an enhanced price of Rs. 14.76 crore i.e., more than the price fetched in the previous auction.

16. The DRT-II *vide* its order dated 06.05.2019 allowed the application being SA No. 143 of 2018 and directed the appellant bank to refund the earnest money deposited by the respondent after deducting a sum of Rs. 5,00,000/- towards the expenditure incurred. The DRT-II in its order observed that the respondent had requested the appellant bank to provide certain documents required for the grant of term loan which was not provided, as a result of which the term loan was not granted and the respondent failed to remit the balance amount. It further observed that as the Secured Asset had been sold for an amount higher than the initial bid, no loss was caused to the appellant.

17. The aforesaid order was challenged by the appellant before the Debt Recovery Appellate Tribunal, Chennai ("**DRAT**") by way of RA(SA) No. 119 of 2019. The DRAT *vide* its order dated 30.07.2021 observed that the secured creditor was not entitled to forfeit the entire amount deposited, but partly allowed the appeal and enhanced the forfeiture from Rs. 5 Lac to Rs. 55 Lac.

B. IMPUGNED ORDER

18. Aggrieved with the aforesaid, both the appellant and the respondent approached the High Court of judicature at Madras by way of C.R.P. No(s). 1892 & 2282 of 2021 respectively, assailing the order dated 30.07.2021 passed by the DRAT, Chennai, wherein

the High Court *vide* the impugned judgment and final order dated 27.10.2021 allowed the respondent's civil revision petition. The operative portion is reproduced below: -

> "*19. For the reasons aforesaid, the enhancement of the quantum of forfeiture as permitted by the Appellate Tribunal in the impugned order of July 30, 2021 cannot be sustained and the same is set aside. The quantum as awarded by the DRT-II, Chennai in its order of May 06, 2019 is restored and to such extent the order of the appellate authority is set aside."*

19. The impugned judgment of the High Court is in two-parts. In other words, the High Court allowed the respondent's civil revision petition setting aside the DRAT's order on two grounds: -

    (i) *First,* the High Court took the view that the forfeiture of an amount or deposit by a secured creditor under the SARFAESI Rules cannot be more than the loss or damage suffered by it. The High Court held that Rule 9 sub-rule (5) of the SARFAESI Rules which provides for forfeiture cannot override the underlying ethos of Section 73 of the Indian Contract Act, 1872 (for short, "the 1872 Act"). The relevant observations are reproduced below: -

    > *"10. Section 74 of the Contract Act, 1872 provides for compensation for breach of contract where the penalty is stipulated. Section 73 of the Contract Act is the general rule that provides for compensation for loss or damage caused by breach of contract and Section 74 is where the quantum is specified. What Section 73 of the Contract Act mandates is that a party who suffers as a result of a breach committed by the other party to the contract "is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it." Any detailed discussion on such provision would be beyond the scope of the present lis and may require many more sheets that may be conveniently expended in the present exercise. Indeed, Section 73 of the Contract Act is in the nature of a jurisprudential philosophy that is*

accepted as a part of the law in this country. In short, it implies that only such of the loss or damage suffered by the party not in breach, may be recovered from the party in breach, as a consequence of the breach. It is possible that as a result of the breach, the party not in breach does not suffer any adverse impact. It is also possible, as in the present case, that as a consequence of the breach, the party not in breach obtains a benefit, in such cases, where no loss or damage has been occasioned to the party not in breach, such party cannot extract any money merely on account of such breach, as the entitlement in law to compensation is not upon the commission of breach, but only upon any loss or damage suffered as a consequence thereof. That is elementary.

xxx xxx xxx

12. Rule 9(5) of the said Rules of 2002 has to be seen as an enabling provision that permits forfeiture in principle. However, such Rule cannot be conferred an exalted status to override the underlying ethos of Section 73 of the Contract Act. In other words, Rule 9(5) has to yield to the principle recognised in Section 73 of the Contract Act or it must be read down accordingly. Thus, notwithstanding the wide words used in Rule 9(5) of the said Rules, a secured creditor may not forfeit any more than the loss or damage suffered by such creditor as a consequence of the failure on the part of a bidder to make payment of the consideration or the balance consideration in terms of the bid. It is only if such principle as embodied in Section 73 of the Contract Act, is read into Rule 9(5) of the said Rules, would there be an appropriate answer to the conundrum as to whether a colossal default of the entirety of the consideration or the mere default of one rupee out of the consideration would result in the identical consequence of forfeiture as indicated in the provision.

13. In any event, notwithstanding the reference to Section 35 of the Act of 2002, the apparent overriding effect of the provisions of the Act of 2002 has to be tempered in the light of Section 37 of the Act. Though Section 37 of

> *the Act refers to several statutes by name, the residual limb of such provision recognises "or any other law for the time being in force", which would embrace the Contract Act within its fold. It is completely unacceptable that by virtue of the delegated legislation as in the Rules of 2002, the fundamental principle envisaged in the Contract Act would get diluted or altogether disregarded."*
>
> (Emphasis supplied)

(ii) *Secondly,* the High Court was of the view that the forfeiture of the entire earnest money deposit by the appellant amounts to unjust enrichment which is not permissible. It observed that under the SARFAESI Act, a secured creditor is not entitled to obtain any amount more than the debt due to it, and as such any forfeiture under the SARFAESI Act ought to be assessed by computing damages on the basis of evidence. The relevant observations are reproduced below: -

> *"18. It was completely open to the appellate authority to enhance the quantum as awarded by the DRT. However, such exercise could have been undertaken by inviting evidence in such regard. The appellate authority purported to enhance the quantum from Rs 5 lakh to Rs 55 lakh without indicating any or cogent grounds for such enhancement. Though an element of guesstimation is permitted while assessing damages, when an initial authority has indicated a ballpark figure, any tinkering with such figure at the appellate stage would require material in support thereof, which is completely lacking in the judgment and order impugned dated July 30, 2021 passed by the appellate authority in the present case.*
>
> *xxx xxx xxx*
>
> *20. Before parting, there is another aspect that has to be referred to for the completeness of the discussion. The purpose of the Act of 2002 is to ensure speedy recovery of the debt due to secured creditors covered by such statute. Towards such end, the provisions of the said Act and the Rules made thereunder give primacy to the secured creditor in initially assessing the quantum of debt*

> *due and in proceeding against the securities furnished for realising such debt due. However, no secured creditor, not even by embracing the provisions of the said Act of 2002, can unjustly enrich itself or obtain any more by way of resorting to any of the measures contemplated under Section 13(4) of the Act or otherwise than the debt that is due to it and the costs that may have been incurred in course of trying to recover the debt due. In a sense, if the forfeiture provision in Rule 9(5) of the said Rules is ready to imply what the secured creditor in this case seeks to, it may result in a secured creditor unjustly enriching itself, which is not permissible."*
>
> (Emphasis supplied)

20. The plain reading of the aforesaid findings recorded by the High Court lays down three propositions of law as follows:

    (1) Rule 9(5) of the SARFAESI Rules is merely an enabling provision that permits forfeiture in principle. It cannot override the underlying ethos of Section 73 of the 1872 Act. It should yield to the principle recognised in Section 73 of the 1872 Act or must be read down accordingly.

    (2) By virtue of the delegated legislation as in the SARFAESI Rules, the fundamental principle envisaged in the 1872 Act should not be permitted to be diluted or altogether disregarded.

    (3) Rule 9(5) of the SARFAESI Rules if not read along with the principle recognised in Section 73 of the 1872 Act, the same may result in a secured creditor unjustly enriching itself which is not permissible.

21. In view of the aforesaid, the Bank being aggrieved with the impugned order passed by the High Court is here before this Court with the present appeals.

C. SUBMISSIONS OF THE APPELLANT

22. Mr. Dhruv Mehta, the learned Senior Counsel appearing for the appellants submitted that the issue framed by the High Court in its Impugned Judgment is wholly alien to the sale conducted under the SARFAESI Rules, more particularly Rule 9.

23. It was submitted that the High Court was not correct in reading down Rule 9(5) and holding that the same must yield to the principles recognized in Section 73 of the 1872 Act, notwithstanding the wide words used in Rule 9(5) of SARFAESI Rules.

24. It was further submitted that the High Court failed to appreciate that the auction sale under consideration was a statutory sale conducted by the appellant in accordance with the SARFAESI Rules and as Section 35 of the SARFAESI Act gives an overriding effect, this would not be a case of breach of contract which would attract principles underlying Section 73 of the 1872 Act.

25. Mr. Mehta placed strong reliance on a recent decision of this Court in ***Authorized Officer State Bank of India v. C. Natarajan*** reported in 2023 SCC Online SC 510, wherein whilst dealing with a similar issue, it was held that Rule 9 which is part of a special enactment will have precedence over Sections 73 and 74 respectively of the 1872 Act which is a general provision.

26. It was further submitted that Rule 9(5) of the SARFAESI Rules, ought to be interpreted strictly because often the borrowers use subversive methods to hinder the auction process which may lead to erosion of the secured asset's value in light of reauctions.

27. In the last, Mr. Mehta submitted that clause 11 of the e-auction notice dated 24.10.2016 explicitly provided that the failure of the auction purchaser in paying the balance amount would result in forfeiture of the earnest-money deposit.

28. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his appeals, the same be allowed and the impugned judgment and order of the High Court be set aside.

D. SUBMISSIONS OF THE RESPONDENT

29. Dr. S. Muralidhar, the learned Senior Counsel appearing for the respondent on the other hand vehemently submitted that no error not to speak of any error of law could be said to have been committed by the High Court in passing the impugned judgment and order.

30. It was submitted that Section 35 of the SARFAESI Act only gives the Act an overriding effect over other laws, and is not applicable to the SARFAESI Rules made under it. Therefore Rule 9(5) of SARFASI Rules is only an enabling provision and cannot override the statutory provisions of the 1872 Act.

31. It was submitted that the High Court committed no error in holding that the appellant bank could not have forfeited the amount deposited by a third party being the auction purchaser without any real damage or loss being caused to it.

32. It was further submitted that under the SARFAESI Rules, the authorized officer is left with an unguided power of forfeiture. Such unguided power conferred on a delegated authority like the authorized officer in a bank is opposed to public policy and would result in unjust enrichment. Therefore, the said Rule 9(5) is liable to be struck down as unconstitutional being opposed to public policy and principles of fair play and unreasonableness.

33. In such circumstances referred to above, it was prayed on behalf of the respondent that there being no merit in the appeals, the same may be dismissed.

E. ANALYSIS (Points for Determination)

34. 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, the underlying principle of Section(s) 73 & 74 respectively of the 1872 Act is applicable to forfeiture of earnest-money deposit under Rule 9(5) of the SARFAESI Rules? In other words, whether the forfeiture of the earnest-money deposit under Rule 9(5) of the SARFAESI Rules can be only to the extent of loss or damages incurred by the Bank?

    II. Whether, the forfeiture of the entire amount towards the earnest-money deposit under Rule 9(5) of the Rules amounts to unjust enrichment? In other words, whether the quantum of forfeiture under the SARFAESI Rule is limited to the extent of debt owed?

    III. Whether a case of exceptionable circumstances could be said to have been made out by the respondent to set aside the order of forfeiture of the earnest money deposit?

i) Legislative History and Scheme of the SARFAESI Act

35. Till early 1990s, the civil suits were being filed for recovery of the dues of banks and financial institutions under the Act 1882 and the Code of Civil Procedure, 1908 ("**CPC**"). Due to various difficulties the

banks and financial institutions had to face in recovering loans and enforcement of securities, the Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, the "**RDBFI Act**").

36. On account of lack of infrastructure and manpower, the regular civil courts were not in a position to cope up with the speed in the adjudication of recovery cases. In the light of recommendations of the Tiwari Committee the special tribunals came to be set up under the provisions of the RDBFI Act referred to above for the recovery of huge accumulated NPA of the Bank loans.

37. On the continuing rise in number of Non-Performing Assets (NPA) at banks and other financial institutions in India; a poor rate of loan recovery and the failure of the existing legislation in redressing the difficulties of recovery by banks; the Narasimham Committee I & II and Andyarujina Committee were constituted by the Government for examining and suggesting banking reforms in India. These Committees in their reports observed that one out of every five borrower was a defaulter, and that due to the long and tedious process of existing frame work of law and the overburdening of existing forums including the specialised tribunals under the 1993 Act, any attempt of recovery with the assistance of court/tribunal often rendered the secured asset nearly worthless due to the long delays. In this background the Committees thus, proposed new laws for securitisation in order to permit banks and financial institutions to hold securities and sell them in a timely manner without the involvement of the courts.

38. On the recommendations of the Narasimham Committee and Andyarujina Committee, the SARFAESI Act was enacted to empower the banks and financial institutions to take possession of the securities and to sell them without intervention of the court.

39. The statement of objects and reasons for which the Act has been enacted reads as under: -

"*STATEMENT OF OBJECTS AND REASONS*

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices

there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction."

40. This Court in ***Mardia Chemicals Ltd. & Ors. v. Union of India & Ors.*** reported in (2004) 4 SCC 311, examined the history and legislative backdrop that ultimately led to the enactment of the SARFAESI Act as under: -

"34. Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered

to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

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36. In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

> *"8.1. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries…."*

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

41. In this regard, reference may be made to the following observations of this Court in the case of ***United Bank of India v. Satyawati Tondon & Ors.*** reported in (2010) 8 SCC 110. The relevant paras are being reproduced hereunder:

> *"1. ... With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them did not repay the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures.*
>
> *2. In order to redeem the situation, the Government of India constituted a committee under the Chairmanship of Shri T. Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noted that the existing procedure for recovery was very cumbersome and suggested that special tribunals be set up for recovery of the dues of banks and financial institutions by following a summary procedure. The Tiwari Committee also prepared a draft of the proposed legislation which contained a provision for disposal of cases in three months and conferment of power upon the Recovery Officer for expeditious execution of orders made by adjudicating bodies."*

42. Section 13 of the SARFAESI Act contains the provisions relating to the enforcement of the security interest and the manner in which the same may be done by the secured creditor without the intervention of the court or ribunal in accordance with its provisions.

43. Rules 8 and 9 respectively of the SARFAESI Rules prescribe the procedure and formalities to be followed for the sale of immovable secured asset as per Section 13 of the SARFAESI Act. In the present

lis, we are concerned with Rule 9 more particularly sub-rule (5) of the SARFAESI Rules which provides for forfeiture of 25% of the deposit made under sub-rule (3) in the event the successful auction purchaser fails to pay the balance amount within the stipulated time period under sub-rule (4). The said Rule reads as under: -

> *"**9. Time of sale, issue of sale certificate and delivery of possession, etc.**–(1) No sale of immovable property under these rules, in first instance shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) of rule 8 or notice of sale has been served to the borrower:*
>
> *Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.*
>
> *(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:*
>
> *Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 8:*
>
> *Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.*
>
> *(3) On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent. of the amount of the sale price, which is inclusive of earnest money deposited, if any, to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again;*

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him.

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days, from date of finalisation of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make, the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

44. Section 35 of the SARFAESI Act contains the overriding clause and provides that the Act shall override any other law which is inconsistent with its provisions, and reads as under: -

> "***35. The provisions of this Act to override other laws.****– The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

45. Section 37 of the SARFAESI Act provides that the provisions of the SARFAESI Act shall be in addition to the Acts mentioned in or and any other law for the time being in force and that the other laws shall also be applicable alongside the SARFAESI Act, and reads as under: -

> *"**37. Application of other laws not barred.**–The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."*

46. This Court in ***Madras Petrochem Ltd. & Anr. v. Board for Industrial and Financial Reconstruction & Ors.*** reported in (2016) 4 SCC 1, recapitulated the object behind the enactment of the SARFAESI Act and in that context examined the purpose of Sections 13, 35 and 37 respectively of the SARFAESI Act with the following observations given as under: -

> *"16. It is important at this stage to refer to the genesis of these three legislations. Each of them deals with different aspects of recovery of debts due to banks and financial institutions. Two of them refer to creditors' interests and how best to deal with recovery of outstanding loans and advances made by them on the one hand, whereas the Sick Industrial Companies (Special*

Provisions) Act, 1985, on the other hand, deals with certain debtors which are sick industrial companies [i.e. companies running industries named in the Schedule to the Industries (Development and Regulation) Act, 1951] and whether such "debtors" having become "sick", are to be rehabilitated. The question, therefore, is whether the public interest in recovering debts due to banks and financial institutions is to give way to the public interest in rehabilitation of sick industrial companies, regard being had to the present economic scenario in the country, as reflected in parliamentary legislation.

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19. While this Act had worked for a period of about 7 years, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was brought into force, pursuant to various committee reports. The Statement of Objects and Reasons for this Act reads as follows:

Statement of Objects and Reasons of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993

"1. Banks and financial institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the banks and financial institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorates with the passage of time. The Committee on the Financial System headed by Shri M. Narasimham has considered the setting up of the Special Tribunals with special powers for adjudication of such matters and speedy recovery as critical to the successful implementation of the financial sector reforms. An urgent need was, therefore, felt to work out a suitable mechanism through which the dues to the banks and financial institutions could be realised without delay. In 1981, a Committee under the Chairmanship of Shri T. Tiwari had examined the legal and other difficulties faced by banks and financial institutions and suggested remedial measures including changes in law. The Tiwari Committee had also suggested setting up of Special Tribunals for

> *recovery of dues of the banks and financial institutions by following a summary procedure. The setting up of Special Tribunals will not only fulfil a long-felt need, but also will be an important step in the implementation of the Report of Narasimham Committee. Whereas on 30-9-1990 more than fifteen lakhs of cases filed by the public sector banks and about 304 cases filed by the financial institutions were pending in various courts, recovery of debts involved more than Rs 5622 crores in dues of public sector banks and about Rs 391 crores of dues of the financial institutions. The locking up of such huge amount of public money in litigation prevents proper utilisation and recycling of the funds for the development of the country.*
>
> *2. The Bill seeks to provide for the establishment of Tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions. Notes on clauses explain in detail the provisions of the Bill."*

20. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 took away the jurisdiction of the courts and vested this jurisdiction in tribunals established by the Act so as to ensure speedy recovery of debts due to the banks and financial institutions mentioned therein. This Act also included one appeal to the Appellate Tribunal, and transfer of all suits or other proceedings pending before any court to tribunals set up under the Act. The Act contained a non obstante clause in Section 34 stating that its provisions will have effect notwithstanding anything inconsistent contained in any other law for the time being in force or in any instrument having effect by virtue of any other law. In the year 2000, this Act was amended so as to incorporate a new sub-section (2) in Section 34 together with a saving provision in sub-section (1). It is of some interest to note that this Act was to be in addition to and not in derogation of various Financial Corporation Acts and the Sick Industrial Companies (Special Provisions) Act, 1985. Clearly, therefore, the object of the 2000 Amendment to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was to make the Sick Industrial Companies (Special Provisions) Act, 1985 prevail over it.

21. Regard being had to the poor working of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was brought into force in the year 2002. …

22. This 2002 Act was brought into force as a result of two committee reports which opined that recovery of debts due to banks and financial institutions was not moving as speedily as expected, and that, therefore, certain other measures would have to be put in place in order that these banks and financial institutions would better be able to recover debts owing to them.

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24. The "pivotal" provision, namely, Section 13 of the said Act makes it clear that banks and financial institutions would now no longer have to wait for a tribunal judgment under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 to be able to recover debts owing to them. They could, by following the procedure laid down in Section 13, take direct action against the debtors by taking possession of secured assets and selling them; they could also take over the management of the business of the borrower. They could also appoint any person to manage the secured assets possession of which has been taken over by them, and could require, at any time by notice in writing to any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due from the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt.

25. In order to further the objects of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Act contains a non obstante clause in Section 35 and also contains various Acts in Section 37 which are to be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Three of these Acts, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act,

1992, relate to securities generally, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 relates to recovery of debts due to banks and financial institutions. Significantly, under Section 41 of this Act, three Acts are, by the Schedule to this Act, amended. We are concerned with the third of such Acts, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, in Section 15(1) of which two provisos have been added. It is the correct interpretation of the second of these provisos on which the fate of these appeals ultimately hangs."

(Emphasis supplied)

ii) Applicability of Section(s) 73 & 74 of the 1872 Act to Forfeiture under the SARFAESI Rules.

47. Before we proceed to answer the first question formulated by us in para 34 of this judgment, we must look into the principles underlying Section 73 of the 1872 Act.

48. Section 73 of the 1872 Act deals with the compensation for loss or damage caused by breach of contract. The same is extracted below:

> *"**73. Compensation for loss or damage caused by breach of contract. —** When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*
>
> *Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*
>
> ***Compensation for failure to discharge obligation resembling those created by contract. —** When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

> *Explanation. In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."*

49. The principles underlying Section 73 of the 1872 Act are well settled. The classic case dealing with remoteness of damages is ***Hadley & Anr. v. Baxendale & Ors.*** reported in (1843-60) ALL E.R. Rep. 461, wherein it was observed:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the circumstances been known, the parties might have provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them."*

50. The above principles were explained and clarified by the Court of Appeal in ***Victoria Laundry (Windsor) Ltd v. Newman Industrial Ltd.,*** [1949] 2 K.B. 528 as under:

"(1.) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: …

(2.) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

(3.) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4.) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in Hadley v. Baxendale 9 Exch. 341. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

(5.) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result ….

(6.) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that

> *a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a "real danger." …"*

51. The above principles apply to grant of compensation under Section 73 of the 1872 Act. This is clear from the decision of this Court in ***Karsandas H. Thacker v. M/s. The Saran Engineering Co. Ltd.*** reported in AIR 1965 SC 1981. The Court held that when a party commits breach of contract, the other party is entitled to receive compensation for any loss by the damage caused to him which naturally arose in the usual course of business from such breach or which the parties knew when they made the contract to be likely to result from the breach of it. Remote and indirect loss or damage sustained by reason of the breach will not entitle the party complaining breach, to any compensation. Referring to the facts of the case and Illustration (k) to Section 73 of the 1872 Act, the Court held:

> *"13. …On account of the non-delivery of scrap iron, he could have purchased the scrap iron from the market at the same controlled price and similar incidental charges. This means that he did not stand to pay a higher price than what he was to pay to the respondent and therefore he could not have suffered any loss on account of the breach of contract by the respondent. The actual loss, which, according to the appellant, he suffered on account of the breach of contract by the respondent was the result of his contracting to sell 200 tons of scrap iron for export to the Export Corporation. It may be assumed that, as stated, the market price of scrap iron for export on January 30, 1953, was the price paid by the Export Corporation for the purchase of scrap iron that day. As the parties did not know and could not have known when the contract was made in July 1952 that the scrap iron would be ultimately sold by the appellant to the Export Corporation, the parties could not have known of the likelihood of the loss actually suffered by the appellant, according to him, on account of the failure of the respondent to fulfil the contract.*

> *14. Illustration (k) to S. 73 of the Contract Act is apt for the purpose of this case. According to that illustration, the person committing breach of contract has to pay to the other party the difference between the contract price of the articles agreed to be sold and the sum paid by the other party for purchasing another article on account of the default of the first party, but the first party has not to pay the compensation which the second party had to pay to third parties as he had not been told at the time of the contract that the second party was making the purchase of the article for delivery to such third parties."*

52. Damages can be awarded only for the loss directly suffered on account of the breach and not for any remote or indirect loss sustained by reason of the breach of contract. The general rule is that where two parties enter into a contract and one of them commits breach, the other party will be entitled to receive as damages in respect of such breach of contract, such sum as may fairly and reasonably be considered arising naturally, that is according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. If any special circumstances about the dependency of the performance of other contract(s) by the party complaining of the breach, on the performance of the contract in dispute by the party in breach, had been communicated to the party in breach, and thus known to both parties at the time of entering into the contract, then the damages for the breach of the contract in dispute, may include the compensation for the loss suffered in regard to such other dependent contracts. But, on the other hand, if the special circumstances were not made known to the party breaking the contract, the party breaking the contract, at the most, could only be supposed to have had in its contemplation the amount of injury which would arise generally and directly and not any remote or unknown loss or damage.

53. What would be a 'penalty' under Section 74 of the 1872 Act was explained by this Court in ***K. P. Subbarama Sastri and others v. K. S. Raghavan & Ors.*** reported in (1987) 2 SCC 424 as under:

> *"5. …The question whether a particular stipulation in a contractual agreement is in the nature of a penalty has to be determined by the court against the background of various*

relevant factors, such as the character of the transaction and its special nature, if any, the relative situation of the parties, the rights and obligations accruing from such a transaction under the general law and the intention of the parties in incorporating in the contract the particular stipulation which is contended to be penal in nature. If on such a comprehensive consideration, the court finds that the real purpose for which the stipulation was incorporated in the contract was that by reason of its burdensome or oppressive character it may operate in terrorem over the promiser so as to drive him to fulfil the contract, then the provision will be held to be one by way of penalty."

54. The SARFAESI Rules, more particularly Rule 9 was first examined by this Court in ***Rakesh Birani (Dead) through LRs v. Prem Narain Sehgal & Anr.*** reported in (2018) 5 SCC 543, wherein the entire auction process under Rule 9 was explained. The relevant observations read as under: -

"8. In order to comprehend the rival submissions, it is necessary to ponder as to intendment of Rule 9 of the 2002 Rules which deals with the time of sale, issues of sale certificate and delivery of possession, etc. Public notice of sale is to be published in the newspaper and only after thirty days thereafter, the sale of immovable property can take place. Under Rule 9(2) of the 2002 Rules, the sale is required to be confirmed in favour of the purchaser who has offered the highest sale price to the authorised officer and shall be subject to confirmation by the secured creditor. The proviso makes it clear that sale under the said Rule would be confirmed if the amount offered and the whole price is not less than the reserved price as specified in Rule 9(5). It is apparent that Rule 9(1) does not deal with the confirmation by the authorised officer. It only provides confirmation by the secured creditor.

9. Rule 9(3) makes it clear that on every sale of immovable property, the purchaser on the same day or not later than next working day, has to make a deposit of twenty-five per cent of the amount of the sale price, which is inclusive of earnest money deposited if any. Rule 9(4) makes it clear

> *that balance amount of the purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of "confirmation of sale of the immovable property" or such extended period as may be agreed upon in writing between the purchaser and the secured creditor. Thus, Rule 9(2) makes it clear that after confirmation by the secured creditor the amount has to be deposited. Rule 9(3) also makes it clear that period of fifteen days has to be computed from the date of confirmation."*

55. This Court in ***Rakesh Birani*** (supra) while interpreting Rule 9(5) of the SARFAESI Rules made the following pertinent observations: -

    a. That, the liability of a successful auction purchaser to deposit the requisite amount begins from the date when the sale is confirmed by the secured creditor and communicated to the auction purchaser, wherein 25% of the amount has to be deposited as earnest money no later than the next working day from the date of confirmation and the balance amount within 15 days from the said date.

    b. That for forfeiture of the 25% earnest money deposit of the auction purchaser, twin conditions have to be satisfied being (i) *First,* that the sale must have been confirmed by the secured creditor and (ii) *second,* there is a default in payment of the balance 75% of the amount.

    c. Once the afore-stated conditions are satisfied i.e., the auction purchaser after confirmation of sale fails to deposit the balance amount within the stipulated time, the secured creditor is required to forfeit the original auction purchaser's earnest money deposit and the secured assets have to be resold.

    d. The relevant observations are being reproduced below: -

    > *"10. In this case, confirmation has been made and communicated on 27-2- 2013 and within fifteen days thereof i.e. on 13-3-2018, the amount of twenty-five per cent had been deposited. Thereafter, sale certificate has been issued under Rule 9(6). Rule 9(5) also makes it clear that in default of payment within the period mentioned in Rule 9(4), the deposit shall be forfeited. There cannot be any forfeiture of the amount of 25%*

> *in deposit until and unless the sale is confirmed by the secured creditor and there is a default of payment of 75% of the amount. The interpretation made by the High Court thus cannot be accepted.*
>
> *11. If we read the provisions otherwise then we find even before the confirmation of sale within fifteen days, the amount would be forfeited by the authorised officer who may decide not to confirm the sale that would be a result not contemplated in Rules 9(2), 9(4) and 9(5) which fortify our conclusion that it is only after the confirmation is made under Rule 9(4) that amount has to be deposited and on failure to deposit the amount, twenty-five per cent amount has to be forfeited and property has to be resold….”*

(Emphasis supplied)

56. In ***Agarwal Tracom Private Limited v. Punjab National Bank & Ors.*** reported in (2018) 1 SCC 626, this Court held that the act of forfeiture of the earnest money deposit by the secured creditor is a measure under Section 13(4) of the SARFAESI Act and thus, challengeable before the DRT under Section 17 of the SARFAESI Act. The relevant observations are reproduced below: -

> *“28. We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction-purchaser in case the auction-purchaser commits any default in paying instalment of sale money to the secured creditor. Such action taken by the secured creditor is, in our opinion, a part of the measures specified in Section 13(4) and, therefore, it is regarded as a measure taken Under Section 13(4) read with Rule 9(5)….”*

(Emphasis supplied)

57. It appears that the High Court whilst passing the impugned order was of the view that the legislature had provided for forfeiture under the SARFAESI Rules as a relief to the secured creditor for the breach of obligation by the auction purchaser. Thus, it was of the view that Section 73 of the 1872 Act will be applicable to forfeiture under Rule 9(5) of the SARFAESI Rules and any forfeiture will only be allowed to the extent of the loss or damage suffered by the secured creditor.

58. This Court in ***C. Natarajan*** (supra) whilst dealing with a similar issue pertaining to the applicability of Section(s) 73 and 74 of the 1872 Act on forfeiture under Rule 9(5) of the SARFAESI Rules, answered the same in a negative. The said decision is in two parts: -

    a) It held that as the SARFAESI Act is a special enactment with overriding effect over other laws by virtue of Section(s) 35 and 37, the 1872 Act more particularly Section(s) 73 and 74 will not be applicable to Rule 9(5) of the SARFAESI Rules especially since the rules framed under a statute become part of the statute.

    > *"20. In terms of the Indian Contract Act, 1872 (for brevity "Contract Act", hereafter), a person can withdraw his offer before acceptance. However, once a party expresses willingness to enter into a contractual relationship subject to terms and conditions and makes an offer which is accepted but thereafter commits a breach of contract, he does so at his own risk and peril and naturally has to suffer the consequences. We are not oblivious of the terms of section 73 and section 74 of the Contract Act, being part of Chapter VI thereof titled "Of the Consequence of Breach of Contract". These sections, providing for compensation for breach of contract and for liquidated damages, have remained on the statute book for generations and permit the party suffering the breach to recover such quantum of loss or damage from the party in breach. However, with changing times, the minds of people are also changing. The judiciary, keeping itself abreast of the changes that are bound to occur in an evolving society, must interpret new laws that are brought in operation to suit the situation appropriately. In the current era of globalization, the entire philosophy of society, mainly on the economic front is making rapid strides towards changes. Unscrupulous people have been inventing newer modes and mechanisms for defrauding and looting the nation. It is in such a scenario that provisions of enactments, particularly those provisions which have a direct bearing on the economy of the nation, must receive such interpretation so that it not only fosters economic growth but is also in tune with the intention of the law-makers in introducing a provision such as sub-rule (5) of rule 9, which though harsh in its operation, is intended to*

suppress the mischief and advance the remedy. If indeed section 73 and section 74, which are part of the general law of contract, were sufficient to cater to the remedy, the need to make sub-rule (5) of rule 9 as part of the Rules might not have arisen. Additionally, insertion of sub-rule (5) with such specificity regarding forfeiture must not have been thought of only for reiterating what is already there. It was visualized by the law makers that there was a need to arrest cases of deceptive manipulation of prices at the instance of unscrupulous borrowers by thwarting sale processes and this was the trigger for insertion of such a provision with wide words conferring extensive powers of forfeiture. The purpose of such insertion must have also been aimed at instilling a sense of discipline in the intending purchasers while they proceed to participate in the auction-sale process. At the cost of repetition, it must not be forgotten that the SARFAESI Act was enacted because the general laws were not found to be workable and efficient enough to ensure liquidity of finances and flow of money essential for any healthy and growth-oriented economy. The decision of this Court in Mardia Chemicals v. Union of India [(2004) 4 SCC 311], while outlawing only a part of the SARFAESI Act and upholding the rest, has traced the history of this legislation and the objects that Parliament had in mind in sufficient detail. Apart from the law laid down in such decision, these are the other relevant considerations which ought to be borne in mind while examining a challenge to a forfeiture order.

21. There is one other aspect which is, more often than not, glossed over. In terms of sub-rule (5) of rule 9, generally, forfeiture would be followed by an exercise to resell the immovable property. On the date an order of forfeiture is in contemplation of the authorized officer of the secured creditor for breach committed by the bidder, factually, the position is quite uncertain for the former in that there is neither any guarantee of his receiving bids pursuant to a future sale, much to the satisfaction of the secured creditor, nor is there any gauge to measure the likely loss to be suffered by it (secured creditor) if no bidders were interested to purchase the immovable property. Since the extent of

loss cannot be immediately foreseen or calculated, such officers may not have any option but to order forfeiture of the amount deposited by the defaulting bidder in an attempt to recover as much money as possible so as to reduce the secured debt. That the immovable property is later sold at the same price or at a price higher than the one which was offered by the party suffering the forfeiture is not an eventuality that occurs in each and every case. Sections 73 and 74 of the Contract Act would not, therefore, be sufficient to take care of the interest of the secured creditor in such a case and that also seems to be another reason for bringing in the provision for forfeiture in rule 9. Ordinarily, therefore, validity of an order of forfeiture must be judged considering the circumstances that were prevailing on the date it was made and not based on supervening events.

22. Does sub-rule (5) of rule 9, which is part of a delegated legislation, i.e., the Rules, have the effect of diluting section 73 and section 74 of the Contract Act? We have considered it necessary to advert to this question as it is one of general importance and are of the considered opinion that the answer must be in the negative. While the Contract Act embodies the general law of contract, the SARFAESI Act is a special enactment, inter alia, for enforcement of security interest without intervention of court. Rule 9(5) providing for forfeiture is part of the Rules, which have validly been framed in exercise of statutory power conferred by section 38 of the SARFAESI Act. Law is well settled that rules, when validly framed, become part of the statute. Apart from the presumption as to constitutionality of a statute, the contesting respondent did not mount any challenge to sub-rule (5) of rule 9 of the Rules. The applicability and enforcement of sub-rule (5) of rule 9 on its terms, therefore, has to be secured in appropriate cases."

(Emphasis supplied)

b) That if Rule 9(5) is interpreted in light of Section(s) 73 and 74 of the 1872 Act, then the very auction process could be set at naught by a mischievous or devious borrower by 'gaming' the auction through sham bids.

"18. Having regard to the terms of rule 9, the notice for auction constitutes the 'invitation to offer'; the bids submitted by the bidders constitute the 'offer' and upon confirmation of sale in favour of the highest bidder under sub-rule (2) of rule 9, the contract comes into existence. Once the contract comes into existence, the bidder is bound to honour the terms of the statute under which the auction is conducted and suffer consequences for breach, if any, as stipulated. Rule 9(5) legislatively lays down a penal consequence. 'Forfeiture' referred to in sub-rule (5) of rule 9, in the setting of the SARFAESI Act and the Rules, has to be construed as denoting a penalty that the defaulting bidder must suffer should he fail to make payment of the entire sale price within the period allowed to him by the authorized officer of a secured creditor.

19. Though it is true that the power conferred by sub-rule (5) of rule 9 of the Rules ought not to be exercised indiscriminately without having due regard to all relevant facts and circumstances, yet, the said sub-rule ought also not be read in a manner so as to render its existence only on paper. Drawing from our experience on the Bench, it can safely be observed that in many a case the borrowers themselves, seeking to frustrate auction sales, use their own henchmen as intending purchasers to participate in the auction but thereafter they do not choose to carry forward the transactions citing issues which are hardly tenable. This leads to auctions being aborted and issuance of fresh notices. Repetition of such a process of participation-withdrawal for a couple of times or more has the undesirable effect of rigging of the valuation of the immovable property. In such cases, the only perceivable loss suffered by a secured creditor would seem to be the extent of expenses incurred by it in putting up the immovable property for sale. However, what does generally escape notice in the process is that it is the mischievous borrower who steals a march over the secured creditor by managing to have a highly valuable property purchased by one of its henchmen for a song, thus getting such property freed from the clutches of mortgage and by diluting the

> *security cover which the secured creditor had for its loan exposure. Bearing in mind such stark reality, sub-rule (5) of rule 9 cannot but be interpreted pragmatically to serve twin purposes — first, to facilitate due enforcement of security interest by the secured creditor (one of the objects of the SARFAESI Act); and second, to prohibit wrong doers from being benefitted by a liberal construction thereof."*
>
> (Emphasis supplied)

a. Forfeiture under the SARFAESI Rules:

59. We, first come to the aspect of applicability of Section 73 of the 1872 Act vis-à-vis the SARFAESI Act, more particularly Rule 9(5) of the SARFAESI Rules. In ***Madras Petrochem*** (supra) this Court made a pertinent observation that Sections 35 and 37 respectively of the SARFAESI Act form a unique scheme of overriding provisions, however the scope and ambit of Section 37 is restricted only to the securities law. The relevant portion is reproduced as under: -

> *"39. This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither Section 35 nor Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Obviously this could not have been the parliamentary intendment, after providing in Section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has, therefore, necessarily to be taken. According to us, the two apparently conflicting sections can best be harmonised by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force"*

contained in Section 37. This expression will, therefore, have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market."

(Emphasis supplied)

60. The aforesaid view came to be reaffirmed by this Court in another decision in ***Celir LLP. v. Bafna Motors (Mumbai) Pvt. Ltd. & Ors.*** reported in 2023 SCC OnLine SC 1209, wherein it was held that only those laws which have been either enumerated in Section 37 of the SARFAESI Act or which occupy and deal with the same field as the SARFAESI Act will be applicable in addition to the SARFAESI Act. The relevant observations are being reproduced below: -

"72. Thus, it appears from a combined reading of the decisions rendered by this Court in Madras Petrochem (supra) and M.D. Frozen Foods Exports (supra) that this Court has consistently construed that only those laws which have either been enumerated in Section 37 SARFAESI Act or similar to it would be applicable in addition to the SARFAESI Act i.e., laws which deal with securities or occupy the same field as the SARFAESI Act. Thus, even on this aspect, we are of the view that the Act, 1882 would not be applicable in addition to the SARFAESI Act. Suffice to say, that in view of the above discussion, the statutory right of redemption under the Act, 1882 will not be applicable to the SARFAESI Act at least in view of the amended Section 13(8) and any right of redemption of a borrower must be found within the SARFAESI Act in terms of the amended Section 13(8)."

(Emphasis supplied)

61. The legislature through Rule 9(5) of the SARFAESI Rules, has made a conscious departure from the general law by statutorily providing for the forfeiture of earnest-money deposit of the successful auction purchaser for its failure in depositing the balance consideration within the statutory period. No doubt, the forfeiture is a result of a breach of obligation, but the consequence of forfeiture in such case is taking place not because of the breach but because of operation of the statutory provision providing for forfeiture that is attracted as a result of the breach.

62. If the consequence of forfeiture was purely a matter of breach of contract, then there would have been no occasion for the legislature to specifically provide for forfeiture through the statutory provisions, and it would have *simpliciter* relegated the consequences of such breach to already existing general law under Section(s) 73 and 74 of the 1872 Act. [See ***C. Natarajan*** (supra) at Para 20]

63. However, the legislature has consciously provided for only one consequence in the event of failure of the successful auction purchaser in depositing the balance amount i.e., forfeiture and has not provided for imposition of any other stipulation by the secured creditor in the event of a breach. This has been done, keeping in mind the larger object of the SARFAESI Act, which is to facilitate recovery of debt in a time-bound manner by giving teeth to the measures enumerated within Section 13 of the SARFAESI Act, more particularly sale of the secured asset in the event the borrower fails to repay the debt.

64. If Section(s) 73 and 74 respectively of the 1872 Act are interpreted so as to be made applicable to a breach in payment of balance amount by the successful auction purchaser, it would lead to a chilling effect in the following ways: -

    (i) *First*, it would be quite preposterous to suggest that in an auction which is a process meant for recovery of debt due to default of the borrower, the balance amount if not paid by the successful auction purchaser, another recovery proceeding would have to be initiated by the secured creditor in terms of Section(s) 73 and 74 of the 1872 Act to recoup the loss and expenditure occasioned to it by the defaulting successful auction purchaser.

(ii) *Secondly,* such an interpretation would allow unscrupulous borrowers being hands-in-glove with the auction purchasers to use subversive methods to participate in an auction only to not pay the balance amount at the very end and escape relatively unscathed under the guise of Section(s) 73 and 74 of the 1872 Act, thereby gaming the entire auction process and leaving any possibility of recoveries under the SARFAESI Act at naught. [See; ***C. Natarajan*** (supra) at Para 19]

65. Thus, such an interpretation would completely defeat the very purpose and object of the SARFAESI Act and would reduce the measures provided under Section 13 of the SARFAESI Act to a farce and thereby undermine the country's economic interest.

66. At this stage, we may also answer the submission of the respondent that the authorised officer under Rule 9(5) of the SARFAESI Rules has been conferred with unguided and unfettered power of forfeiture and as such the said rule is liable to be struck down. However, we are not impressed with such submission. *First,* there was no challenge to the constitutional validity of Rule 9 sub-rule (5) of the SARFAESI Rules. *Secondly,* even as per ***Agarwal Tracom*** (supra) it is always open for a person aggrieved by an order of forfeiture under the SARFAESI Rules to challenge the same before the DRT under Section 17 of the SARFAESI Act.

67. As regards the contention that the SARFAESI Rules being a delegated legislation cannot override the substantive provisions of a statutory enactment more particularly Section(s) 73 & 74 of the 1872 Act, the same was negatived by this Court in ***C. Natarajan*** (supra) with the following observations: -

> *"22. .... We have considered it necessary to advert to this question as it is one of general importance and are of the considered opinion that the answer must be in the negative. While the Contract Act embodies the general law of contract, the SARFAESI Act is a special enactment, inter alia, for enforcement of security interest without intervention of court. Rule 9(5) providing for forfeiture is part of the Rules, which have validly been framed in exercise of statutory power conferred by section 38 of the SARFAESI Act. Law is well settled that rules, when validly framed, become part of the statute. …"*

68. What can be discerned from the above is that the SARFAESI Act is a special legislation with an overriding effect on the general law, and only those legislations which are either specifically mentioned in Section 37 or deal with securitization will apply in addition to the SARFAESI Act. Being so, the underlying principle envisaged under Section(s) 73 & 74 of the 1872 Act which is a general law will have no application, when it comes to the SARFAESI Act more particularly the forfeiture of earnest-money deposit which has been statutorily provided under Rule 9(5) of the SARFAESI Rules as a consequence of the auction purchaser's failure to deposit the balance amount.

b. Concept of Earnest-Money & Law on Forfeiture of Earnest-Money Deposit:

69. This aforesaid aspect may be looked at from another angle. Section(s) 73 and 74 of the 1872 Act deal with the consequences and compensation for a breach of contract. It enables a suffering party to recover such quantum of loss or liquidated damages from a party in breach so as to make good the loss incurred by it and be put in the same position prior to its losses.

70. At this juncture, it would be apposite to refer to the meaning of 'forfeiture'. The word forfeiture is derived from the French word '*forfaiture'* which means the loss of property by violation of his own duty. The Black's Law Dictionary defines 'forfeiture' as follows [See: Henry Campbell Black on "Black's Law Dictionary", 1968, 4th Edition]: -

> "*the loss of a right, privilege, or property because of a crime, breach of obligation, or neglect of duty."*
>
> *"something (especially money or property) lost or confiscated by this process; a penalty"*
>
> *"a destruction or deprivation of some estate or right because of the failure to perform some obligation or condition contained in a contract"*

71. This Court in ***R.S. Joshi, Sales Tax Officer, Gujarat & Ors. v. Ajit Mills Limited & Anr.*** reported in (1977) 4 SCC 98, while explaining the true purport and meaning of the term 'forfeiture' observed that whether a forfeiture clause is penal in nature must be decided in the specific setting of a statute. The relevant observations read as under: -

"18. Coming to 'forfeiture', what is the true character of a 'forfeiture' ? Is it punitive in infliction, or merely another form of exaction of money by one from another? If it is penal, it falls within implied powers. If it is an act of mere transference of money from the dealer to the State, then it falls outside the legislative entry. Such is the essence of the decisions which we will presently consider. There was a contention that the expression 'forfeiture' did not denote a penalty. This, perhaps, may have to be decided in the specific setting of a statute. But, speaking generally and having in mind the object of Section 37 read with Section 46, we are inclined to the view that forfeiture has a punitive impact. Black's Legal Dictionary states that 'to forfeit' is 'to lose, or lose the right to, by some error, fault, offence or crime' 'to incur a penalty.' 'Forfeiture', as judicially annotated, is 'a punishment annexed by law to some illegal act or negligence. . . .'; 'something imposed as a punishment for an offence or delinquency.' The word, in this sense, is frequently associated with the word 'penalty', According to Black's Legal Dictionary.

The terms 'fine', 'forfeiture' and 'penalty', are often used loosely and even confusedly; but when a discrimination is made, the word 'penalty' is found to be generic in its character, including both fine and forfeiture. A 'fine' is a pecuniary penalty and is commonly (perhaps always) to be collected by suit in some form. A 'forfeiture' is a penalty by which one loses his rights and interest in his property.

More explicitly, the U. S. Supreme Court has explained the concept of 'forfeiture' in the context of statutory construction. Chief Justice Taney, in the State of Maryland v. The Baltimore & Ohio RR Co. 11 L ED. 714, 712 observed:

> *And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode*

> *in which one person can become liable to pay a penalty to another for breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law; and such, very clearly, is the meaning of the word in the act in question*

19. The same connotation has been imparted by our Court too. A Bench has held: Bankura Municipality v. Lalji Raja and Sons, 1953 Cri LJ 1101:

> *According to the dictionary meaning of the word 'forfeiture' the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture*

This word 'forfeiture' must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegal collections made by the dealers and the amounts forfeited to the State cannot create a conceptual confusion that what is provided is not punishment but a transference of funds. If this view be correct, and we hold so, the legislature, by inflicting the forfeiture, does not go outside the crease when it hits out against the dealer and deprives him, by the penalty of the law, of the amount illegally gathered from the customers…."

(Emphasis supplied)

72. The privy council in ***Kunwar Chiranjit Singh v. Har Swarup*** reported in (1926) 23 LW 172, while dealing with the concept of earnest money, had observed as follows: -

> *"Earnest money is part of the purchase price when the transaction goes forward: it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."*

(Emphasis supplied)

73. The above referred decision of the Privy Council has been referred to and relied upon by the High Court of Bombay in the case of ***Dinanath Damodar Kale v. Malvi Mody Ranchhoddas and Co.*** reported in AIR 1930 Bom 213. The Court observed as under: -

> *"Turning to the law in England we have a series of decisions showing that a deposit by way of earnest in a contract for the sale of land is distinguishable from a penalty for breach of the contract. The cases cited to us by the appellant's counsel are all cases in which either an instalment of the price or a part payment was by the terms of the contract to be forfeited on breach by the purchaser. If any authority be needed to show what the law in England is, it may be found in the passage in Halsbury, Vol. 25, p. 398, para 681, which was cited to us by respondents' counsel. There it is clearly laid down that there is a distinction between a deposit and a penalty. This distinction was referred to by the majority of the Bench in the case of Bishan Chand v. Radha Kishan Das [(1897) 19 All. 489 = (1897) A.W.N. 123], where it was stated that a deposit is a payment actually made or advanced and therefore Ss. 73 and 74 of the Contract Act, have no application in such a case and are not intended to apply to it. These sections show what is the compensation to the seller, who is not responsible for the breach. They contemplate a case in which he is seeking to recover compensation for the breach. They do not contemplate a case in which a sum of money has been paid by way of earnest. Nor is the Contract Act necessarily exhaustive: see P. R. & Co. v. Bhagwandas [(1909) 34 Bom. 192, = 2 I.C. 475 = 11 Bom. L.R. 335].*
>
> *Furthermore, it is to be noted that in this particular contract there was a specific condition of the sale by auction that the deposit was to be forfeited in case of default by the purchaser and we think that such a clause is not unreasonable and must be given effect to. Our own High Court rules regarding the sale by the Sheriff's office (R. 391) specifically allow a deposit to be forfeited and the mere fact that the word "may" is used in that Rule cannot be taken to mean that only such sum out of the deposit can be forfeited as the Court may think proper as damages following the failure of the buyer to complete the sale."*

(Emphasis supplied)

74. Subsequently, a 5-Judge Bench of this Court in its decision in ***Fateh Chand v. Balkishan Dass*** reported in AIR 1963 SC 1405, held that a forfeiture clause in an ordinary contract would fall within the meaning of the words "*any other stipulation by way of penalty*" of Section 74 of the 1872 Act, and thus only a reasonable amount can be forfeited. The relevant observations are reproduced below: -

> *"(10) Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach and (ii) where the contract contains any other stipulation by way of penalty. We are in the present case not concerned to decide whether a covenant of forfeiture of deposit for due performance of a contract falls within the first class. The measure of damages in the case of breach of a stipulation by way of penalty is by S. 74 reasonable compensation not exceeding the penalty stipulated for. In assessing damages the Court has, subject to the limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to all the circumstances of the case. Jurisdiction of the Court to award compensation in case of breach of contract is unqualified except as to the maximum stipulated; but compensation has to be reasonable, and that imposes upon the Court duty to award compensation according to settled principles. The section undoubtedly says that the aggrieved party is entitled to receive compensation from the party who has broken the contract, whether or not actual damage or loss is proved to have been caused by the breach. Thereby it merely dispenses with proof of "actual loss or damages"; it does not justify the award of compensation when in consequence of the breach no legal injury at all has resulted, because compensation for breach of contract can be awarded to make good loss or damage which naturally arose in the usual course of things, or which the parties knew when they made the contract, to be likely to result from the breach.*
>
> *(11) Before turning to the question about the compensation which may be awarded to the plaintiff, it is necessary to consider whether S. 74 applies to stipulations for forfeiture of amounts deposited or paid under the contract. It was*

urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that S. 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases where upon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon Courts by S. 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount specified in the contract as liable to forfeiture. We may briefly refer to certain illustrative cases decided by the High Courts in India which have expressed a different view.

xxx xxx xxx

(14) … The words "to be paid" which appear in the first condition do not qualify the second condition relating to stipulation by way of penalty. The expression "if the contract contains any other stipulation by way of penalty" widens the operation of the section so as to make it applicable to all stipulations by way of penalty, whether the stipulation is to pay an amount of money, or is of another character, as, for example, providing for forfeiture of money already paid. There is nothing in the expression which implies that the stipulation must be one for rendering something after the contract is broken. There is no ground for holding that the expression "contract contains any other stipulation

> *by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited.*
>
> *(15) Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract pre-determining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the Court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the Court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."*
>
> (Emphasis supplied)

75. It is apposite to mention that in ***Fateh Chand*** (supra) this Court had clarified that so far as forfeiture of earnest-money is concerned, Section 74 of the 1872 Act will not be applicable. The relevant observations are reproduced below:

> *"(7) The Attorney-General appearing on behalf of the defendant has not challenged the plaintiff's right to forfeit Rs. 1,000/- which were expressly named and paid as*

> *earnest money. He has, however, contended that the covenant which gave to the plaintiff the right to forfeit Rs. 24,000/- out of the amount paid by the defendant was stipulation in the nature of penalty, and the plaintiff can retain that amount or part thereof only if he establishes that in consequence of the breach by the defendant, he suffered loss, and in the view of the Court the amount or part thereof is reasonable compensation for that loss. We agree with the Attorney-General that the amount of Rs. 24,000/- was not of the nature of earnest money. The agreement expressly provided for payment of Rs. 1,000/- as earnest money, and that amount was paid by the defendant. The amount of Rs. 24,000/- was to be paid when vacant possession of the land and building was delivered, and it was expressly referred to as "out of the sale price." If this amount was also to be regarded as earnest money, there was no reason why the parties would not have so named it in the agreement of sale. We are unable to agree with the High Court that this amount was paid as security for due performance of the contract. No such case appears to have been made out in the plaint and the finding of the High Court on that point is based on no evidence. It cannot be assumed that because there is a stipulation for forfeiture the amount paid must bear the character of a deposit for due performance of the contract."*
>
> (Emphasis supplied)

76. In another decision of this Court in ***Maula Bux v. Union of India*** reported in 1969 (2) SCC 554, a similar view was reiterated and it was held that forfeiture of earnest money is not a penalty and that Section 74 of the 1872 Act will only apply where the forfeiture is in the nature of a penalty. The relevant observations read as under: -

> *"4. Under the terms of the agreements the amounts deposited by the plaintiff as security for due performance of the contracts were to stand forfeited in case the plaintiff neglected to perform his part of the contract. The High Court observed that the deposits so made may be regarded as earnest money. But that view cannot be accepted. According to Earl Jowitt in "The Dictionary of English Law" at p. 689; "Giving an earnest or*

earnest-money is a mode of signifying assent to a contract of sale or the like, by giving to the vendor a nominal sum (e.g. a shilling) as a token that the parties are in earnest or have made up their minds". As observed by the Judicial Committee in Kunwar Chiranjit Singh v. Har Swarup:

> *"Earnest money is part of the purchase price when the transaction goes forward; it is forfeited when the transaction falls through, by reason of the fault or failure of the vendee."*

In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money. ...

5. Forfeiture of earnest money under a contract for sale of property — Movable or immovable — If the amount is reasonable, does not fall within Section 74. That has been decided in several cases: Kunwar Chiranjit Singh v. Har Swarup (supra); Roshan Lal v. Delhi Cloth and General Mills Company Ltd. Delhi, ILR 33 All. 166.; Muhammad Habibullah v. Muhammad Shafi, ILR 41 All. 324.; Bishan Chand v. Radhakishan Das, ILR 19 All. 490. These cases are easily explained, for forfeiture of reasonable amount paid as earnest money does not amount to imposing a penalty. But if forfeiture is of the nature of penalty, Section 74 applies. Where under the terms of the contract the party in breach has undertaken to pay a sum of money or to forfeit a sum of money which he has already paid to the party complaining of a breach of contract, the undertaking is of the nature of a penalty."

(Emphasis supplied)

77. In ***Satish Batra v. Sudhir Rawal*** reported in (2013) 1 SCC 345, this Court after a review of the entire case law starting from ***Fateh Chand*** (supra), ***Videocon Properties Ltd. v. Dr. Bhalchandra Laboratories & Ors.*** reported in (2004) 3 SCC 711 and ***Shree Hanuman Cotton Mills & Ors. v. Tata Air Craft Limited*** reported in (1969) 3 SCC 522, laid down the principles regarding earnest money, which read as under: -

> *"9. …*
>
> > *"21. From a review of the decisions cited above, the following principles emerge regarding 'earnest':*
> >
> > *'(1) It must be given at the moment at which the contract is concluded.*
> >
> > *(2) It represents a guarantee that the contract will be fulfilled or, in other words, "earnest" is given to bind the contract.*
> >
> > *(3) It is part of the purchase price when the transaction is carried out.*
> >
> > *(4) It is forfeited when the transaction falls through by reason of the default or failure of the purchaser.*
> >
> > *(5) Unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.'""*

78. This Court in ***Satish Batra*** (supra) after taking note of the decisions in ***Delhi Development Authority v. Grihshapana Cooperative Group Housing Society Ltd.*** reported in 1995 Supp (1) SCC 751, ***V. Lakshmanan v. B.R. Mangalagiri & Ors.*** reported in 1995 Supp (2) SCC 33 and ***HUDA v. Kewal Krishnan Goel*** reported in 1996 (4) SCC 249 concluded that only that deposit which has been given as an earnest-money for the due performance of the obligation is liable to be forfeited in the event of a breach. The relevant observations read as under: -

> *"15. The law is, therefore, clear that to justify the forfeiture of advance money being part of 'earnest money' the terms of the contract should be clear and explicit. Earnest money is paid or given at the time when the contract is entered into and, as a pledge for its due performance by the depositor to be forfeited in case of non-performance by the depositor. There can be converse situation also that if the seller fails to perform the contract the purchaser can also get double the amount, if it is so stipulated. It is also the law that part-payment of purchase price cannot be forfeited unless it is a guarantee for the due performance of the contract. In other words, if the payment is made only towards part-payment of consideration and not intended as earnest money then the forfeiture clause will not apply."*

79. Since Rule 9 sub-rule (5) provides for the forfeiture of only the earnest-money deposit of the successful auction purchaser i.e. only 25% of the total amount, by no stretch of imagination it can be regarded as a penal clause by virtue of the afore-stated decisions of this Court in ***Fateh Chand*** (supra), ***Maula Bux*** (supra) and ***Satish Batra*** and as such Section(s) 73 and 74 of the 1872 Act will have no application.

80. Even otherwise, what is discernible from the above referred decisions of ***Fateh Chand*** (supra), ***Maula Bux*** (supra) and ***Satish Batra*** (supra) is that there lies a difference between forfeiture of any amount and forfeiture of earnest money with the former being a penal clause and the latter a general forfeiture clause. A clause providing for forfeiture of an amount could fundamentally be in the nature of a penalty clause or a forfeiture clause in the strict sense or even both, and the same has to be determined in the facts of every case keeping in mind the nature of contract and the nature of consequence envisaged by it.

81. Ordinarily, a forfeiture clause in the strict sense will not be a penal clause, if its consequence is intended not as a sanction for breach of obligation but rather as security for performance of the obligation. This is why ***Fateh Chand*** (supra) ***Maula Bux*** (supra) and ***Satish Batra*** (supra) held that forfeiture of earnest-money deposit is not a penal clause, as the deposit of earnest money is intended to signify assent of the purchaser to the contract, and its forfeiture is envisaged as a deterrent to ensure performance of the obligation.

82. We are conscious of the fact that in ***Maula Bux*** (supra) this Court observed that the deposit of a sum by the purchaser as security for guaranteeing due performance was held as a penalty. However, a close reading would reveal that the reason why this Court held the said deposit as a penal clause was because the said amount was paid over and above the earnest-money deposit already paid by the purchaser in the said case and more importantly the said sum was not liable to be adjusted against the total consideration. Hence, this Court held the same to be a penalty rather than earnest money. The relevant observation read as under: -

> *"4. ... In the present case the deposit was made not of a sum of money by the purchaser to be applied towards part payment of the price when the contract was completed and till then as evidencing an intention on the part of the purchaser to buy property or goods. Here the plaintiff had*

> *deposited the amounts claimed as security for guaranteeing due performance of the contracts. Such deposits cannot be regarded as earnest money. …"*
>
> (Emphasis supplied)

83. The difference between an earnest or deposit and an advance part payment of price is now well established in law. Earnest is something given by the Promisee to the Promisor to mark the conclusiveness of the contract. This is quite apart from the price. It may also avail as a part payment if the contract goes through. But even so it would not lose its character as earnest, if in fact and in truth it was intended as mere evidence of the bargain. An advance is a part to be adjusted at the time of the final payment. If the Promisee defaults to carry out the contract, he loses the earnest but may recover the part payment leaving untouched the Promisor's right to recover damages. Earnest need not be money but may be some gift or token given. It denotes a thing of value usually a coin of the realm given by the Promisor to indicate that the bargain is concluded between them and as tangible proof that he means business. ***Vide Howe v. Smith (1884) 27 Ch.D. 89***.

84. The practice of giving earnest is current in the present day commercial contracts. An advance is made and accepted by way of deposit or guarantee for the due performance of the contract. The distinction between a deposit and a part payment is thus described by Benjamin, in his book "Treatise on the Law of Sale of Personal Property", 1950, 8th Edition at page 946: -

> *"A deposit is not recoverable by the buyer, for a deposit is a guarantee that the buyer shall perform his contract and is forfeited on his failure to do so. As regards the recovery of part payments, the question must depend upon the terms of the particular contract. If the contract distinguishes between the deposit and instalments of price and the buyer is in default, the deposit is forfeited and that is all. And in ordinary circumstances, unless the contract otherwise provides, the seller, on rescission following the buyer's default, becomes liable to repay the part of the part of the price paid."*

85. In Halsbury's Laws of England, third edition, volume XXXIV, page 118 the distinction between the two is thus pointed out: -

"Part of the price may be payable as a deposit. A part payment is to be distinguished from a deposit or earnest.

A deposit is paid primarily as security that the buyer will duly accept and pay for the goods, but, subject thereto, forms part of the price. Accordingly, if the buyer is unable or unwilling to accept and pay for the goods, the seller may repudiate the contract and retain the deposit. If the seller is unable or unwilling to deliver the goods, or to pass a good title thereto, or the contract is voidable by the buyer for any reason, the buyer may repudiate the contract and recover the deposit. The buyer may also recover it where, without the default of either party, the contract is rescinded by either party pursuant to an express power in the contract in that behalf."

86. In G. C. Cheshire and C.H.S. Fifoot on the Law of Contracts (fifth edition) at pages 496- 497, the position is thus summed up: -

"Where, therefore, it has been agreed that a sum of money shall be paid by the one to the other immediately or at certain stated intervals, the question whether in the event of rescission repayment will be compelled depends upon the proper construction of the contract. The object that the parties had in view in providing for the payment must first be ascertained.

Where the intention was that the money should form a part payment of the full amount due, then, as we have seen, if the contract is rescinded for the payer's default the payee is required at law to restore the money, subject to a cross-claim for damages. If, on the other hand, the intention was that the money should be deposited as earnest or as a guarantee for the due performance of the payer's obligation, the rule at common law is that if the contract is rescinded by reason of his default the deposit is forfeited to the payer and cannot be recovered.

In the latter case, however, and also where it has been expressly agreed that a part payment shall be forfeited in the event of the payer's default, equity is prepared within limits to grant relief against the forfeiture."

87. The observations of Mellish, L.J., in ***Ex parte Barrell: [L.R.] In Re. Parnell 10 Ch. App. 512*** assume importance. The learned Judge observed that even when there is no clause in the contract as to the forfeiture of the deposit if the purchaser repudiates the contract, he cannot have back the money if it was a deposit, as the contract has gone off through his default. It is characteristic of a deposit to entail forfeiture if the depositor commits breach of his obligation. On the contrary it is inherent in a part payment of price in advance that it should be returned to the buyer if the sale does not fructify. The buyer is not disentitled to recover, even if he is the party in breach, because breach of contract on the part of the buyer would only entitle the seller to sue for damages but not to forfeit the advance. A specific forfeiture clause might operate to defeat the buyer's right of recovery of even an advance payment. But equity might step in to relieve the buyer from forfeiture. If the amount forfeited cannot stand the test of a genuine pre-estimate of damages, it would be unconscionable for the seller to retain it. The question whether the amount is a deposit (earnest) or a part payment cannot be determined by the presence or absence of a forfeiture clause. Whether the sum in question is a deposit to ensure due performance of the contract or not is not dependent on the phraseology adopted by the parties or by the presence or otherwise of a forfeiture clause. The proportion the amount bears to the total sale price, the need to take a deposit intended to act *in terrorem*, the nature of the contract and other circumstances which cannot be exhaustively listed have to be taken into account in ascertaining the true nature of the amount. In essence the question is one of proper interpretation of the terms of a contract.

88. We would like to refer to a decision of the Court of Appeal in England in ***Stockloser v. Johnson*** reported in (1954) 1 All. E.R. 630 and particularly to the observations of Denning, L.J., which, if we may say so with respect, has set out the legal position succinctly and with great clarity. The facts of that case need not be set out and it would be sufficient to refer only to the principle of law laid down by the Court of Appeal. At page 637 Denning L.J., observes thus:

> *"It seems to me that the cases show the law to be this. (i) When there is no forfeiture clause, if money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance,*

> *the buyer cannot recover the money, but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages: see Palmer v. Temple 112 E.R. 1304, Mayson v. Clouet (1924) A.C. 980, Dies v. British and International Mining and Finance Corporation Ltd. (1939) 1 .K.B. 724 and Williams on Vendor and Purchaser 4th ed., vol. 2, p. 1006. (ii) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause) then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the Court thinks fit."*

89. Therefore, it is clear that the forfeiture can be justified if the terms of the contract are clear and explicit. If it is found that the earnest money was paid in accordance with the terms of the tender for the due performance of the contract by the Promisee, the same can be forfeited in case of non-performance by him or her.

90. We are conscious of the decision of this Court in ***Kailash Nath Associates v. Delhi Development Authority & Anr.*** reported in (2015) 4 SCC 136 wherein it was held that Section 74 of the 1872 Act will be applicable to cases of forfeiture of earnest-money deposit, however, where such forfeiture takes place under the terms and conditions of a public auction, Section 74 will have no application. The relevant observations are reproduced below: -

> "*43.1. Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only*

reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2. Reasonable compensation will be fixed on well-known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4. The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5. The sum spoken of may already be paid or be payable in future.

43.6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

(Emphasis supplied)

91. Since, the forfeiture under Rule 9(5) of the SARFAESI Rules is also taking place pursuant to the terms & conditions of a public auction, we need not dwell any further on the decision of ***Kailash Nath*** (supra) and leave it at that. Suffice to say, in view of the above discussion, Section(s) 73 and 74 of the 1872 Act will have no application whatsoever, when it comes to forfeiture of the earnest-money deposit under Rule 9 sub-rule (5) of the SARFAESI Rules.

c. Law on the principle of 'Reading-Down' a provision:

92. We must deal with yet one another aspect that weighed with the High Court while passing the Impugned Order. In the Impugned Order, the High Court also took the view that Rule 9(5) of the SARFAESI Rules must be read down so as to yield to the underlying principle recognized in Section(s) 73 & 74 of the 1872 Act. This reading down of the relevant rules in the opinion of the High Court was necessary, as otherwise irrespective of whether the default is of the entire balance amount or only one rupee, the same harsh consequence of forfeiture would ensue in both the cases. The relevant observations are reproduced below: -

> *"12. Rule 9(5) of the said Rules of 2002 has to be seen as an enabling provision that permits forfeiture in principle. However, such Rule cannot be conferred an exalted status to override the underlying ethos of Section 73 of the Contract Act. In other words, Rule 9(5) has to yield to the principle recognised in Section 73 of the Contract Act or it must be read down accordingly. Thus, notwithstanding the wide words used in Rule 9(5) of the said Rules, a secured creditor may not forfeit any more than the loss or damage suffered by such creditor as a consequence of the failure on the part of a bidder to make payment of the consideration or the balance consideration in terms of the bid. It is only if such principle as embodied in Section 73 of the Contract Act, is read into Rule 9 (5) of the said Rules, would there be an appropriate answer to the conundrum as to whether a colossal default of the entirety of the consideration or the mere default of one rupee out of the consideration would result in the identical consequence of forfeiture as indicated in the provision."*
>
> (Emphasis supplied)

93. The principle of "reading down" a provision refers to a legal interpretation approach where a court, while examining the validity of a statute, attempts to give a narrowed or restricted meaning to a particular provision in order to uphold its constitutionality. This principle is rooted in the idea that courts should make every effort to preserve the validity of legislation and should only declare a law invalid as a last resort.

94. When a court encounters a provision that, if interpreted according to its plain and literal meaning, might lead to constitutional or legal issues, the court may opt to read down the provision. Reading down involves construing the language of the provision in a manner that limits its scope or application, making it consistent with constitutional or legal principles.

95. The rationale behind the principle of reading down is to avoid striking down an entire legislation. Courts generally prefer to preserve the intent of the legislature and the overall validity of a law by adopting an interpretation that addresses the specific constitutional concerns without invalidating the entire statute.

96. It is a judicial tool used to salvage the constitutionality of a statute by giving a provision a narrowed or limited interpretation, thereby mitigating potential conflicts with constitutional or legal principles.

97. In ***B.R. Enterprises v. State of U.P. & Ors.*** reported in (1999) 9 SCC 700, this Court observed that the principles such as "Reading Down" emerge from the concern of the courts towards salvaging a legislation to ensure that its intended objectives are achieved. The relevant observations read as under: -

> *"81. … It is also well settled that first attempt should be made by the courts to uphold the charged provision and not to invalidate it merely because one of the possible interpretations leads to such a result, howsoever attractive it may be. Thus, where there are two possible interpretations, one invalidating the law and the other upholding, the latter should be adopted. For this, the courts have been endeavouring, sometimes to give restrictive or expansive meaning keeping in view the nature of legislation, maybe beneficial, penal or fiscal etc. Cumulatively it is to subserve the object of the legislation. Old golden rule is of respecting the wisdom of legislature that they are aware of the law and would never have intended for an invalid legislation. This also keeps courts within their track and checks individual zeal of going wayward. Yet in spite of this, if the impugned legislation cannot be saved the courts shall not hesitate to strike it down. Similarly, for upholding any provision, if it could be saved by reading it down, it should be done, unless plain words are so clear to be in defiance of the*

> *Constitution. These interpretations spring out because of concern of the courts to salvage a legislation to achieve its objective and not to let it fall merely because of a possible ingenious interpretation. The words are not static but dynamic. This infuses fertility in the field of interpretation. This equally helps to save an Act but also the cause of attack on the Act. Here the courts have to play a cautious role of weeding out the wild from the crop, of course, without infringing the Constitution. For doing this, the courts have taken help from the Preamble, Objects, the scheme of the Act, its historical background, the purpose for enacting such a provision, the mischief, if any which existed, which is sought to be eliminated. …"*
>
> (Emphasis supplied)

98. A similar view was reiterated by this Court in its decision in ***Calcutta Gujarati Education Society & Anr. v. Calcutta Municipal Corpn. & Ors.*** reported in (2003) 10 SCC 533, wherein this Court observed that the rule of "Reading Down" is only for the limited purpose of making a provision workable so as to fulfil the purpose and object of the statute. The relevant observations read as under: -

> *"35. The rule of "reading down" a provision of law is now well recognised. It is a rule of harmonious construction in a different name. It is resorted to smoothen the crudities or ironing out the creases found in a statute to make it workable. In the garb of "reading down", however, it is not open to read words and expressions not found in it and thus venture into a kind of judicial legislation. The rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute. It is to be used keeping in view the scheme of the statute and to fulfil its purposes. …"*
>
> (Emphasis supplied)

99. Thus, the principle of 'Reading Down" a provision emanates from a very well settled canon of law, that is, the courts while examining the validity of a particular statute should always endeavour towards upholding its validity, and striking down a legislation should always be the last resort. "Reading Down" a provision is one of the many

methods, the court may turn to when it finds that a particular provision if for its plain meaning cannot be saved from invalidation and so by restricting or reading it down, the court makes it workable so as to salvage and save the provision from invalidation. Rule of "Reading Down" is only for the limited purpose of making a provision workable and its objective achievable.

100. The High Court in its Impugned Order resorted to reading down Rule 9(5) of the SARFAESI Rules not because its plain meaning would result in the provision being rendered invalid or unworkable or the statute's objective being defeated, but because it would result in the same harsh consequence of forfeiture of the entire earnest-money deposit irrespective of the extent of default in payment of balance amount.

101. However, harshness of a provision is no reason to read down the same, if its plain meaning is unambiguous and perfectly valid. A law/rule should be beneficial in the sense that it should suppress the mischief and advance the remedy. The harsh consequence of forfeiture of the entire earnest-money deposit has been consciously incorporated by the legislature in Rule 9(5) of the SARFAESI Rules so as to sub-serve the larger object of the SARFAESI Act of timely resolving the bad debts of the country. The idea behind prescribing such a harsh consequence is not illusory, it is to attach a legal sanctity to an auction process once conducted under the SARFAESI Act from ultimately getting concluded.

102. Any dilution of the forfeiture provided under Rule 9(5) of the SARFAESI Rules would result in the entire auction process under the SARFAESI Act being set at naught by mischievous auction purchaser(s) through sham bids, thereby undermining the overall object of the SARFAESI Act of promoting financial stability, reducing NPAs and fostering a more efficient and streamlined mechanism for recovery of bad debts.

103. This Court in ***Mardia Chemical*** (supra) observed that the provisions of the SARFAESI Act & SARFAESI Rules must be interpreted keeping in mind the economic object which is sought to be achieved by the legislature, the relevant observations read as under: -

> *"34. Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered.*

Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved."

(Emphasis supplied)

104. Thus, the High Court committed an egregious error by proceeding to read down Rule 9(5) of the SARFAESI Rules in the absence of the said provision being otherwise invalid or unworkable in terms of its plain and ordinary meaning without appreciating the purpose and object of the said provision.

iii) Whether, the forfeiture of the entire earnest-money deposit amounts to Unjust Enrichment?

105. The High Court whilst passing the impugned order thought fit to reduce the extent of amount forfeited in view of the subsequent sale of the Secured Asset by the appellant bank at much higher price than the previous auction. This in the High Court's opinion meant that no loss had been caused to the appellant bank, as it had duly recovered more than its dues from the subsequent sale and as such was not entitled to forfeit the entire amount of deposit as doing so would amount to unjust enrichment, which is not permissible by the SARFAESI Act.

106. However, we are not in agreement with the aforesaid observations of the High Court. When an auction fails and a fresh auction is required to be conducted in respect of the Secured Asset, there looms a degree of uncertainty as to the extent of bids that may be received in the future auction or whether the fresh auction would even be successful or not. More often than not, with the efflux of time, the value of the Secured Asset erodes. In such a case it would be preposterous to tie or limit the forfeiture under Rule 9(5) of the SARFAESI Rules on an eventuality or a contingency of a subsequent sale of the secured asset if any.

107. As regards whether, the forfeiture of the entire amount of deposit even after having recovered the entire debt amounts to unjust enrichment or not? It would be apposite to understand what is meant by 'unjust enrichment'.

108. In ***Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs*** reported in (2005) 3 SCC 738, the Court observed that the doctrine of unjust enrichment is based on equity and refers to the inequitable retention of a benefit. The relevant observations are reproduced below: -

> *"31. Stated simply, "unjust enrichment" means retention of a benefit by a person that is unjust or inequitable. "Unjust enrichment" occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.*
>
> *32. The doctrine of "unjust enrichment", therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of "unjust enrichment" arises where retention of a benefit is considered contrary to justice or against equity.*
>
> *xxx xxx xxx*
>
> *45. From the above discussion, it is clear that the doctrine of "unjust enrichment" is based on equity and has been accepted and applied in several cases. ..."*
>
> (Emphasis supplied)

109. Thus, from the aforesaid, it is clear that the concept of 'Unjust Enrichment' is a by-product of the doctrine of equity and it is an equally well settled cannon of law that equity always follows the law. In other words, equity cannot supplant the law, equity has to follow the law if the law is clear and unambiguous.

110. This Court in ***C. Natarajan*** (supra) had held that forfeiture of 25% of the deposit does not constitute as an unjust enrichment with the following relevant observations being reproduced below: -

> *"35. In the light of guidance provided by the above decisions, what needs to be ascertained first is whether the Bank received or derived any benefit or advantage by forfeiture of 25% of the sale price. We do not think that the Bank has been enriched, much less unjustly enriched, by reason of the impugned forfeiture. Receipt of 25% of the sale price by the Bank from the contesting respondent was not the outcome of any private negotiation or arrangement between them. It was pursuant to a public auction, involving a process of offer and acceptance, and it was in terms of statutory provisions contained in the Rules, particularly rule 9(3), that money changed hands for a definite purpose. Receipt of 25% of the sale price does not constitute a benefit, a fortiori, retention thereof by*

forfeiture cannot be termed unjust or inequitable, so as to attract the doctrine of unjust enrichment. The Bank, as a secured creditor, is entitled in law to enforce the security interest and in the process to initiate all such steps and take all such measures for protection of public interest by recovering the public money, lent to a borrower and who has squandered it, in a manner authorized by law. The contesting respondent participated in the auction well and truly aware of the risk of having 25% of the sale price forfeited in case of any default or failure on his part to make payment of the balance amount of the sale price. Question of the Bank being enriched by a forfeiture, which is in the nature of a statutory penalty, does not and cannot therefore arise in the circumstances."

(Emphasis supplied)

111. The consequence of forfeiture of 25% of the deposit under Rule 9(5) of the SARFAESI Rules is a legal consequence that has been statutorily provided in the event of default in payment of the balance amount. The consequence envisaged under Rule 9(5) follows irrespective of whether a subsequent sale takes place at a higher price or not, and this forfeiture is not subject to any recovery already made or to the extent of the debt owed. In such cases, no extent of equity can either substitute or dilute the statutory consequence of forfeiture of 25% of deposit under Rule 9(5) of the SARFAESI Rules.

112. This Court in ***National Spot Exchange Ltd. v. Anil Kohli, Resolution Professional for Dunar Foods Ltd.*** reported in (2022) 11 SCC 761 after referring to a catena of its other judgments, had held that where the law is clear the consequence thereof must follow. The High Court has no option but to implement the law. The relevant observations made in it are being reproduced below: -

"15.1. In Mishri Lal [BSNL v. Mishri Lal, (2011) 14 SCC 739 : (2014) 1 SCC (L&S) 387], it is observed that the law prevails over equity if there is a conflict. It is observed further that equity can only supplement the law and not supplant it.

15.2. In Raghunath Rai Bareja [Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230], in paras 30 to 37, this Court observed and held as under : (SCC pp. 242-43)

"30. Thus, in Madamanchi Ramappa v. Muthaluru Bojjappa [AIR 1963 SC 1633] (vide para 12) this Court observed: (AIR p. 1637)

> *'12. … [W]hat is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.'*

31. In Council for Indian School Certificate Examination v. Isha Mittal [(2000) 7 SCC 521] (vide para 4) this Court observed: (SCC p. 522)

> *'4. … Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law.'*

32. Similarly, in P.M. Latha v. State of Kerala [(2003) 3 SCC 541 : 2003 SCC (L&S) 339] (vide para 13) this Court observed: (SCC p. 546)

> *'13. Equity and law are twin brothers and law should be applied and interpreted equitably but equity cannot override written or settled law.'*

33. In Laxminarayan R. Bhattad v. State of Maharashtra [(2003) 5 SCC 413] (vide para 73) this Court observed: (SCC p. 436)

> *'73. It is now well settled that when there is a conflict between law and equity the former shall prevail.'*

34. Similarly, in Nasiruddin v. Sita Ram Agarwal [(2003) 2 SCC 577] (vide para 35) this Court observed: (SCC p. 588)

> *'35. In a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising therefrom.'*

35. Similarly, in E. Palanisamy v. Palanisamy [(2003) 1 SCC 123] (vide para 5) this Court observed: (SCC p. 127)

> *'5. Equitable considerations have no place where the statute contained express provisions.'*

> *36. In India House v. Kishan N. Lalwani [(2003) 9 SCC 393] (vide para 7) this Court held that: (SCC p. 398)*
>
> > *'7. … The period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from for equitable considerations.'…"*

113. Thus, the High Court erred in law by holding that forfeiture of the entire deposit under Rule 9 sub-rule (5) of the SARFAESI Rules by the appellant bank after having already recovered its dues from the subsequent sale amounts to unjust enrichment.

iv) Whether Any Exceptional Circumstances exist to set aside the forfeiture of the earnest money deposit?

114. The last aspect which remains to be determined is whether any exceptional circumstances exist to set aside the forfeiture of the respondent's earnest money deposit?

115. This Court in its decision in ***Alisha Khan v. Indian Bank*** (***Allahabad Bank) & Ors.*** reported in 2021 SCC OnLine SC 3340 had directed the refund of the earnest-money deposit after forfeiture to the successful auction purchaser who was unable to pay the balance amount on account of the Pandemic. The relevant observations are being reproduced below:

> *"3. Having gone through the impugned judgment and orders passed by the High Court, we are of the opinion that the High Court ought to have allowed the refund of the amount deposited being 25% of the auction sale consideration. Considering the fact that though initially the appellant deposited 25% of the auction sale consideration, however, subsequently she could not deposit balance 75% due to COVID-19 pandemic. It is required to be noted that subsequently the fresh auction has taken place and the property has been sold. It is not the case of the respondents that in the subsequent sale, lesser amount is received. Thus, as such, there is no loss caused to the respondents.*
>
> *4. Considering the aforesaid facts and circumstances, we allow these appeals and set aside the order of forfeiture of 25% of the amount of auction sale consideration and direct the respondent Bank to refund/return the amount*

> *earlier deposited by the appellant, deposited as the part auction sale consideration (minus 50,000/- towards the expenditure which were required to be incurred by the respondent Bank for conducting the fresh auction) within a period of four weeks from today."*

116. In ***C. Natarajan*** (supra), this Court while affirming the decision of ***Alisha Khan*** (supra) observed that after the earnest-money deposit is forfeited, the courts should ordinarily refrain from interfering unless the existence of very rare and exceptional circumstances are shown. The relevant observations read as under: -

> *"13. ... If, however, circumstances are shown to exist where a bidder is faced with such a grave disability that he has no other option but to seek extension of time on genuine grounds so as not to exceed the stipulated period of ninety days and the prayer is rejected without due consideration of all facts and circumstances, refusal of the prayer for extension could afford a ground for a judicial review of the decision-making process on valid ground(s). One such exceptional circumstance led to the decision in Alisha Khan v. Indian Bank (Allahabad Bank) [2021 SCC OnLine SC 3340], where this Court intervened and granted relief because, due to COVID complications, the appellant had failed to pay the balance amount.*
>
> *xxx xxx xxx*
>
> *24. The up-shot of the aforesaid discussion is that whenever a challenge is laid to an order of forfeiture made by an authorized officer under sub-rule (5) of rule 9 of the Rules by a bidder, who has failed to deposit the entire sale price within ninety days, the tribunals/courts ought to be extremely reluctant to interfere unless, of course, a very exceptional case for interference is set up. What would constitute a very exceptional case, however, must be determined by the tribunals/courts on the facts of each case and by recording cogent reasons for the conclusion reached. Insofar as challenge to an order of forfeiture that is made upon rejection of an application for extension of time prior to expiry of ninety days and within the stipulated period is concerned, the scrutiny could be a bit more intrusive for ascertaining whether any patent arbitrariness*

> *or unreasonableness in the decision-making process has had the effect of vitiating the order under challenge. However, in course of such scrutiny, the tribunals/courts must be careful and cautious and direct their attention to examine each case in some depth to locate whether there is likelihood of any hidden interest of the bidder to stall the sale to benefit the defaulting borrower and must, as of necessity, weed out claims of bidders who instead of genuine interest to participate in the auctions do so to rig prices with an agenda to withdraw from the fray post conclusion of the bidding process. In course of such determination, the tribunals/courts ought not to be swayed only by supervening events like a subsequent sale at a higher price or at the same price offered by the defaulting bidder or that the secured creditor has not in the bargain suffered any loss or by sentiments and should stay at a distance since extending sympathy, grace or compassion are outside the scope of the relevant legislation. In any event, the underlying principle of least intervention by tribunals/courts and the overarching objective of the SARFAESI Act duly complimented by the Rules, which are geared towards efficient and speedy recovery of debts, together with the interpretation of the relevant laws by this Court should not be lost sight of. Losing sight thereof may not be in the larger interest of the nation and susceptible to interference."*
>
> (Emphasis supplied)

117. Thus, this Court held that where extraneous conditions exist that might have led to the inability of the successful auction purchaser despite best efforts from depositing the balance amount to no fault of its own, in such cases the earnest-money deposited by such innocent successful auction purchaser could certainly be asked to be refunded.

118. In the case at hand, it is the respondent's case that he was unable to make the balance payment owing to the advent of the demonetisation. The same led to a delay in raising the necessary finance. It has been pleaded by the respondent that the appellant bank failed to provide certain documents to him in time as a result of which he was not able to secure a term loan.

119. However, the aforesaid by no stretch can be said to be an exceptional circumstance warranting judicial interference. We say so because demonetization had occurred much before the e-auction was conducted by the appellant bank. As regards the requisition of documents, the sale was confirmed on 07.12.2016, and the respondent first requested for the documents only on 20.12.2016, and the said documents were provided to him by the appellant within a month's time i.e., on 21.01.2017. It may also not be out of place to mention that the respondent was granted an extension of 90-days' time period to make the balance payment, and was specifically reminded that no further extension would be granted, in-spite of this the respondent failed to make the balance payment.

120. The e-auction notice inviting bids along with the correspondence between the appellant bank and the respondent are unambiguous and clearly spelt out the consequences of not paying the balance amount within the specified period.

121. Thus, what could be said is that the respondent being aware of his financial capacity, willingly participated in the e-auction and offered his bid fully knowing the reserve price of the Secured Asset and the consequences of its failure in depositing the balance amount.

F. CONCLUSION

122. For all the foregoing reasons, we have reached to the conclusion that the High Court committed an egregious error in passing the impugned judgment and order. We are left with no other option but to set aside the impugned judgment and order passed by the High Court.

123. In the result, the appeals filed by the bank succeed and are hereby allowed. The impugned judgment and order passed by the High Court dated 27.10.2021 is hereby set aside. As a result, the SA No. 143 of 2018 filed by the respondent before the DRT-II also stands dismissed.

124. The parties shall bear their own costs.

125. Pending application(s), if any, also stand disposed of.

Headnotes prepared by: Ankit Gyan

Result of the case: Appeals disposed of.

[2024] 2 S.C.R. 91 : 2024 INSC 83

Union of India and Ors.
v.
M/S. B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd.

(Civil Appeal Nos. 7238 of 2009)

05 February 2024

[Abhay S. Oka and Ujjal Bhuyan,* JJ.]

Issue for Consideration

Entitlement of the respondent to refund of duty drawback and interest for delayed payment thereof.

Headnotes

Customs Act, 1962 – ss.75A, 27A – Central Excise Act, 1944 – Foreign Trade (Development and Regulation) Act, 1992 – Foreign Trade (Regulation) Rules, 1993 – Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 – Exim Policy of 1992-1997 – Duty Exemption Scheme – Duty Drawback Scheme – Supplies in civil construction work, eligibility for 'deemed export' benefit under the Exim Policy – Respondent, a class-I contractor specializing in the field of civil contract works especially funneling and hydro-electric power projects had completed the work awarded to it in 1996 in a project called Koyna Hydro Electric Power Project, Maharashtra funded by the International Bank for Reconstruction and Development, an arm of the World Bank – Respondent claimed duty drawback and interest for the delayed refund thereof – Entitlement:

Held: On a conjoint reading of the relevant provisions of the Exim Policy, 1992-1997 in conjunction with the Central Excise Act and the Customs Act, it is evident that supply of goods to the project in question by the respondent was a case of 'deemed export' and thus entitled to the benefit under the Duty Drawback Scheme – The language employed in the policy made this very clear and there was no ambiguity in respect of such entitlement – Even if there was any doubt, the same was fully explained by the 1995 Rules – It is not correct on the part of the appellants to contend that there was no provision for payment of interest on delayed refund of duty drawback – It is also untenable for the appellants to contend that refund of duty drawback was granted to the respondent as a concession, not to be treated as a precedent – Respondent entitled

* Author

to refund of duty drawback as a deemed export under the Duty Drawback Scheme – Applications for refund were made in 1996 – Decision to grant refund of duty drawback was taken belatedly on 07.10.2002 whereafter the payments were made by way of cheques on 31.03.2003 and 20.05.2003 – Admittedly, there was considerable delay in refund of duty drawback – Under s.75A(1) of the Customs Act, where duty drawback is not paid within three months from the date of filing of claim, the claimant would be entitled to interest in addition to the amount of drawback – It provides that the interest would be at the rate fixed u/s.27A from the date after expiry of the said period of three months till the payment of such drawback – The interest rate prescribed u/s.27A at the relevant point of time was not below ten percent and not exceeding thirty percent per annum – The Central Board of Excise and Customs vide its notification bearing No.32/1995 (NT)- Customs dtd. 26.5.1995 had fixed the rate of interest at fifteen percent for the purpose of s.27A – Since there was belated refund of the duty drawback to the respondent, it was entitled to interest at the rate which was fixed by the Central Government at the relevant point of time being fifteen percent – Order of the Division Bench of the High Court not interfered with. [Paras 33-39]

Case Law Cited

S. S. Grewal v. State of Punjab [1993] 3 SCR 593 **: 1993 Suppl. 3 SCC 234;** *Rajagopal Reddy (dead) by Lrs. v. Padmini Chandrasekharan (dead) by Lrs.* [1995] 1 SCR 715 **: (1995) 2 SCC 630;** *Zile Singh v. State of Haryana* [2004] 5 Suppl. SCR 272 **: (2004) 8 SCC 1 – referred to.**

List of Acts

Central Excise Act, 1944; Customs Act, 1962; Finance Act, 1994, Imports and Exports (Control) Act, 1947; Foreign Trade (Development and Regulation) Act, 1992; Foreign Trade (Regulation) Rules, 1993; Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

List of Keywords

Drawback; Duty drawback; Duty Drawback Scheme; Exim Policy of 1992-1997; Duty Exemption Scheme; Deemed export; Delayed refund of duty drawback; Interest; Multilateral or bilateral agencies; International Bank for Reconstruction and Development; World Bank; Central Board of Excise and Customs; Imports of duty free material; Notification declaratory/clarificatory; Retrospective operation.

Union of India and Ors. v.
M/S. B.T. Patil and Sons Belgaum (Construction) Pvt. Ltd.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.7238 of 2009

From the Judgment and Order dated 22.08.2008 of the High Court of Karnataka at Bangalore in WA No.356 of 2006

Appearances for Parties

V C Bharathi, Raj Bahadur Yadav, Shashank Bajpai, Mrs. Sweta Singh Verma, A. K. Kaul, Praneet Pranab, Advs. for the Appellants.

Basuva Prabhu Patil, Sr. Adv., Amit Sharma, Dipesh Sinha, Ms. Pallavi Barua, Ms. Aparna Singh, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Ujjal Bhuyan, J.

Appellants i.e., Union of India, Director General of Foreign Trade and Joint Director General of Foreign Trade by means of this civil appeal have taken exception to the judgment and order dated 22.08.2008 passed by a Division Bench of the High Court of Karnataka, Circuit Bench at Dharwad in Writ Appeal No.356 of 2006 affirming the judgment and order of the learned Single Judge dated 22.09.2005 allowing Writ Petition No.45525 of 2004 filed by the respondent.

2. Facts lie within a narrow compass. Nonetheless, for a determination of the *lis,* it would be necessary to briefly narrate the relevant facts as projected by the respondent in the related writ petition.

2.1. Respondent is a class-I contractor specializing in the field of civil contract works especially funneling and hydro electric power projects.

2.2. Central Government had approved funding of a project called Koyna Hydro Electric Power Project, Maharashtra by the International Bank for Reconstruction and Development, which is an arm of the World Bank. In the said project, respondent was awarded a sub-contract to execute civil works from Lake Intake to the Emergency Valve Tunnel. Respondent has relied upon a letter dated 08.08.1991 issued by the Chief Engineer of the project. Relevant portion of the letter reads thus:-

> 4.2. Information regarding the benefits available under the "Deemed Export" concept for this World Bank Aided (Loan) Project may please be obtained by the contractors from their own sources and the information gained by them may be utilised, while quoting the rates.

2.3. A deemed export scheme was announced under the Exim Policy, 1992-1997 by the Ministry of Commerce, Government of India and the Director General of Foreign Trade under the Foreign Trade (Development and Regulation) Act, 1992. Certain benefits under 'deemed export' were also included in the said Exim Policy.

2.4. Respondent completed the construction work awarded to it in the month of March, 1996 and thereafter filed applications dated 25.03.1996, 13.09.1996 and 20.12.1996 claiming duty drawback for Rs.35,75,679.00, Rs.88,98,206.00 and Rs.85,05,853.00 respectively.

2.5. By endorsements dated 10.11.1996, 06.12.1996 and 31.12.1996, Director General of Foreign Trade (for short 'DGFT' hereinafter) rejected the applications of the respondent for duty drawback on the ground that supplies in civil construction work were not eligible for 'deemed export' benefit.

2.6. Notwithstanding such rejection, respondent made representations for reconsideration of such decision and sought for duty drawback under the Exim Policy, 1992-1997. One such representation is dated 05.02.1997. However, the same was rejected by the DGFT vide the order dated 10.08.1997 stating that civil construction work did not qualify for drawback.

2.7. On 20.08.1998, DGFT issued a circular under the successor Exim Policy, 1997-2002 clarifying that supply of goods under paragraph 10(2)(d) of the 1997-2002 Exim Policy would be entitled for 'deemed export' benefit. It may be mentioned that the Exim Policy of 1992-1997 had expired with effect from 31.03.1997.

2.8. On 05.12.2000, DGFT issued a circular that drawback was to be paid in respect of excise duty on supply of goods to projects funded by multilateral agencies.

2.9. In the above scenario, respondent once again addressed a letter dated 28.08.2001 to the DGFT to finalize the issue. However, DGFT rejected the claim vide the communication dated 21.06.2002.

2.10. Notwithstanding the same, a Policy Interpretation Committee was constituted which examined the case of the respondent in its meeting held on 07.10.2002. It was decided that the benefit of duty drawback under the 'deemed export' scheme would be extended to the respondent. Consequently, in supersession of the earlier rejection order dated 21.06.2002 and in the light of the decision of the Policy Interpretation Committee dated 07.10.2002, DGFT vide the order dated 01.11.2002 permitted duty drawback of Rs.2,05,79,740.00 to the respondent. Thereafter cheques for Rs.25,00,000.00, Rs.63,23,575.00, Rs.81,05,583.00 and Rs.56,50,312.00, totalling Rs.2,25,79,470.00 vide endorsements dated 31.03.2003 and 20.05.2003 were issued. However, it was clarified that duty drawback granted to the respondent would not be treated as a precedent.

2.11. Respondent thereafter submitted representation addressed to the appellants dated 06.06.2003, 14.06.2003, 17.07.2003, 29.10.2003 and 10.08.2004 seeking interest on the duty drawback amount paid on the ground of delayed payment. However, the request for interest made by the respondent was rejected by the DGFT.

3. Aggrieved by rejection of the request for interest on the amount of duty drawback paid, respondent preferred a writ petition before the High Court which was registered as Writ Petition No.45525 of 2004. After hearing the parties, a learned Single Judge of the High Court vide the judgment and order dated 22.09.2005 referred to the notification dated 05.12.2000 and held that respondent was entitled for duty drawback. After observing that there was delay in payment of duty drawback, learned Single Judge held that respondent would be entitled to interest for delayed payment of duty drawback. Since Customs Act, 1962 provides that interest has to be paid in such a case in the range of five percent to thirty percent, learned Single Judge awarded interest at the rate of fifteen percent. Consequently, directions were issued to the appellants to consider the claim of the respondent for payment of interest on delayed refund from the date of notification dated 05.12.2000 till the date of payment to the respondent within a period of three months.

4. This judgment and order of the learned Single Judge came to be assailed by the appellants before the Division Bench of the High Court which was registered as Writ Appeal No.356 of 2006. Respondent also filed Writ Appeal No.3699 of 2005 assailing the direction of the learned Single Judge to pay interest only from 05.12.2000. The Division Bench took note of the fact that since duty drawback was refunded by the appellants to the respondent, the only question to be considered was the entitlement of the respondent to interest for the delayed refund. In this connection, the Division Bench examined the notification dated 20.08.1998 and observed that this notification had clarified that 'deemed export' would include goods and services of civil construction projects. Thus, duty drawback under the Exim Policy in force was extended even to civil construction. This position was further clarified by the subsequent notification dated 05.12.2000. Such notification was held by the Division Bench to be clarificatory in nature, thus having retrospective effect. After referring to Sections 27A and 75A of the Customs Act, 1962, the Division Bench held that respondent would be entitled to interest after expiry of three months from the date of making the applications for refund of duty drawback. Vide the judgment and order dated 22.08.2008, the Division Bench opined that respondent would be entitled to interest from the date of expiry of three months after submitting the applications for refund of duty drawback in the year 1996 at the rate of fifteen percent as awarded by the learned Single Judge. While the writ appeal of the respondent was allowed, the writ appeal of the appellants was dismissed.

5. Mr. V. C. Bharathi, learned counsel for the appellants submitted a short list of dates and events. He pointed out therefrom that applications filed by the respondent for duty drawback were repeatedly rejected by the DGFT. Notwithstanding such rejection, respondent continued to file one representation after the other claiming duty drawback. It is in such circumstances that a Policy Interpretation Committee was constituted by the DGFT which examined the case of the respondent and vide its decision dated 07.10.2002 decided to extend the benefit of duty drawback to the respondent as a special case. It is in this backdrop that DGFT had passed order dated 01.11.2002 emphasizing that the duty drawback paid to the respondent would not be treated as a precedent. He submitted that duty drawback was extended to the respondent as a special case which was not available to the respondent under the Exim Policy of 1992-1997. In such

circumstances, question of awarding any interest to the respondent on the ground of alleged delay in payment of duty drawback did not arise. There was no provision under the Exim Policy of 1992-1997 for payment of such interest. Therefore, learned Single Judge erred in awarding interest to the respondent, that too, at the high rate of fifteen percent.

5.1. He further argued that the Division Bench had fallen in error taking the view that circulars dated 20.08.1998 and 05.12.2000 were clarificatory in nature and therefore would have retrospective effect covering the case of the respondent. According to him, these circulars were issued under the successor Exim Policy, 1997-2002 and thus could not be applied to cases like that of the respondent under the Exim Policy 1992-1997. He, therefore, submitted that the present is a fit case for interfering with the decision of the learned Single Judge as affirmed by the Division Bench.

6. *Per-contra,* Mr. Basuva Prabhu Patil, learned senior counsel for the respondent supported the orders of the learned Single Judge and that of the Division Bench. He submitted that the appellants having granted the benefit of duty drawback to the respondent though belatedly, it is not open to them to now contend that respondent was not entitled to such duty drawback which was only granted as a concession. Admittedly, there was delay in refund of duty drawback. Respondent is, therefore, entitled to interest on such delayed refund which was rightly awarded by the High Court.

6.1. Referring to the provisions of Section 27A of the Customs Act, 1962 (referred to as the 'Customs Act' hereinafter), learned senior counsel submitted that the High Court had taken a rather conservative figure considering the legislative scheme while awarding interest at the rate of fifteen percent to the respondent. He, therefore, submitted that no interference would be called for in the orders of the High Court and that the civil appeal filed by the appellants should be dismissed.

7. Submissions made by learned counsel for the parties have received the due consideration of the Court.

8. Before we examine the decisions of the High Court, it would be apposite to briefly highlight the statutory framework and the concerned Exim Policy.

9. Section 11A of the Central Excise Act, 1944 (briefly 'Central Excise Act' hereinafter) deals with recovery of duties not levied or not paid or short-levied or short paid or erroneously refunded. Relevant for our purpose is sub-section (1) which says that where any duty of excise has not been levied or not paid or has been short levied or short paid or erroneously refunded, for any reason other than the reason of fraud or collusion etc. with intent to evade payment of duty, the Central Excise Officer shall serve notice on the person so chargeable within two years from the relevant date requiring him to show cause why he should not pay the amount specified in the notice. The person chargeable with duty may either before service of notice pay on the basis of his own ascertainment or the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under Section 11AA. In the event of fraud, collusion etc. the notice period gets extended to five years.

    9.1. Duty is cast upon the person liable to pay duty either voluntarily or after determination under Section 11A to pay interest in addition to the duty under sub-section (1) of Section 11AA. As per sub-section (2), such interest shall not be below ten percent and shall not exceed thirty six percent per annum, as the Central Government may by notification in the Official Gazette fix. Such interest shall be calculated from the date on which the duty becomes due up to the date of actual payment of the amount due.

    9.2. Section 11B of the Central Excise Act entitles any person claiming refund of any duty of excise and interest to make an application for refund of such duty and interest before the expiry of one year from the relevant date (prior to 12.05.2000, it was six months instead of one year).

    9.3. Section 11BB provides for interest on delayed refund. It says that if any duty ordered to be refunded under sub-section (2) of Section 11B to any applicant is not refunded within three months from the date of receipt of the application under sub-section (1) of that section, there shall be paid to such applicant interest at such rate not below five percent and not exceeding thirty percent per annum as for the time being fixed by the Central Government, by notification in the Official Gazette. Prior to 11.05.2001, the rate of interest was not below ten percent.

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The applicant would be entitled to interest after expiry of three months from the date of receipt of such application till the date of refund of such duty.

10. Section 27 of the Customs Act deals with claim for refund of duty. As per sub-section (1), any person claiming refund of any duty or interest paid by him or borne by him, may make an application in the prescribed form and manner, for such refund addressed to the designated authority before the expiry of one year from the date of payment of such duty or interest. Explanation below sub-section (1) clarifies that for the purpose of sub-section (1), the date of payment of duty or interest in relation to a person, other than an importer, shall be construed as the date of purchase of goods by such person.

10.1. Sub-section (2) says that if on the receipt of such application the designated authority is satisfied that the whole or any part of the duty and interest, if any, paid on such duty, paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Consumer Welfare Fund established under Section 12C of the Central Excise Act. However, as per the proviso, the amount of duty and interest so determined shall be paid to the applicant instead of being credited to the Consumer Welfare Fund if such amount is relatable, amongst others, to drawback of duty payable under Sections 74 and 75 of the Customs Act.

11. Section 27A of the Customs Act provides for interest on delayed refund. It says that, if any duty ordered to be refunded under sub-section (2) of Section 27 to an applicant is not refunded within three months from the date of receipt of the application, there shall be paid to that applicant interest at such rate not below five percent and not exceeding thirty percent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

12. Chapter X of the Customs Act comprising of Sections 74 to 76 deals with drawback. While Section 74 allows drawback on re-export of duty-paid goods, Section 75 provides for drawback on imported materials used in the manufacture of goods which are exported. On the other hand, Section 75A deals with interest on drawback. Sub-

section (1) of Section 75A says that, where any drawback payable to a claimant under Section 74 or Section 75 is not paid within a period of one month (earlier it was two months and prior thereto it was three months) from the date of filing a claim for payment of such drawback, there shall be paid to that claimant in addition to the amount of drawback, interest at the rate fixed under Section 27A from the date after the expiry of the said period of one month till the date of payment of such drawback.

13. In exercise of the powers conferred under Section 3 of the Imports and Exports (Control) Act, 1947, the Central Government notified the Export and Import (Exim) Policy for the period 1992-1997. It came into effect from 01.04.1992 and remained in force for a period of five years up to 31.03.1997.

14. After the enactment of The Foreign Trade (Development and Regulation) Act, 1992, the Exim Policy, 1992-1997 was deemed to have been made under the aforesaid Act. That being the position, we will briefly refer to the said enactment.

15. The Foreign Trade (Development and Regulation) Act, 1992 (briefly 'the 1992 Act' hereinafter) is an act to provide for the development and regulation of foreign trade by facilitating imports into and augmenting exports from India and for matters connected therewith or incidental thereto.

    15.1. Section 4 declares that all orders made under the Imports and Exports (Control) Act, 1947 and in force immediately before the commencement of the 1992 Act shall so far as they are not inconsistent with the provisions of the 1992 Act would continue to be in force and shall be deemed to have been made under the 1992 Act.

    15.2. Thus, by virtue of Section 4 of the 1992 Act, the Exim Policy of 1992-1997 continued to be in force and was deemed to have been made under the 1992 Act.

16. Section 5 of the 1992 Act, as it stood at the relevant point of time, dealt with export and import policy. As per Section 5, the Central Government may from time to time formulate and anounce by notification in the Official Gazette, the export and import policy and may also, in the like manner, amend that policy.

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17. Rule 2(e) of the Foreign Trade (Regulation) Rules, 1993, framed under the 1992 Act, defines the word 'policy' to mean export and import policy formulated and announced by the Central Government under Section 5.

18. Let us now revert back to the Exim Policy, 1992 – 1997. Section 7 of the said policy ascribes meaning to the words and expressions for the purpose of the policy. As per Section 7(13), 'drawback' in relation to any goods manufactured in India and exported means the rebate of duty chargeable on any imported materials or excisable materials used in the manufacture of such goods in India.

19. Chapter VII of the policy provides for 'Duty Exemption Scheme'. Section 47, which is the first section in Chapter VII, mentions that under the Duty Exemption Scheme, imports of duty free raw materials, components, intermediates, consumables, parts, spares including mandatory spares and packing materials required for the purpose of export production may be permitted by the competent authority under the five categories of licences mentioned in the said chapter, including special imprest licence. As per Section 56 (ii)(3), supplies made to projects financed by multilateral or bilateral agencies like the International Bank for Reconstruction and Development would be entitled to duty free import of raw materials, components, intermediates, consumables, parts, spares including mandatory spares and packing materials to main/sub-contractors for the manufacture and supply of products to such projects.

20. Chapter X introduced the concept of 'deemed exports'. Section 120 defines 'deemed exports' to mean those transactions in which the goods supplied did not leave the country and the payment for the goods was received by the supplier in Indian rupees but the supplies earned or saved foreign exchange for the country.

21. Under Section 121 (f), supply of goods to projects financed by multilateral or bilateral agencies, such as, the International Bank for Reconstruction and Development under international competitive bidding or under limited tender system would be regarded as 'deemed exports' under the Exim Policy of 1992-1997.

22. Section 122 provides that 'deemed exports' shall be eligible for the benefits in respect of manufacture and supply of goods qualifying as 'deemed exports', including under the Duty Drawback Scheme.

23. In exercise of the powers conferred by Section 75 of the Customs Act, Section 37 of the Central Excise Act and Section 93A read with Section 94 of the Finance Act, 1994, the Central Government has made a set of rules called the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Rule 2(a) defines 'drawback' in relation to any goods manufactured in India and exported, to mean the rebate of duty or tax as the case may be, chargeable on any imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods. 'Excisable material' has been defined under Rule 2(b) to mean any material produced or manufactured in India subject to a duty of excise under the Central Excise Act. Likewise, the expression 'imported material' has been defined under Rule 2(d) to mean any material imported into India and on which duty is chargeable under the Customs Act.

    23.1. Rule 3 provides for allowance of drawback. Sub-rule (1) says that subject to the provisions of the Customs Act, Central Excise Act, the Finance Act, 1994 and the rules made under the aforesaid three enactments, a drawback may be allowed on the export of goods at such amount or at such rates as may be determined by the Central Government.

    23.2. Rule 14 deals with payment of drawback and interest. Sub-rule (1) says that the drawback under the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (briefly 'the 1995 Rules' hereinafter) and interest, if any, shall be paid by the proper officer of customs to the exporter or to the agent specially authorized by the exporter to receive the said amount of drawback and interest. Sub-rule (2) clarifies that the officer of customs may combine one or more claims for the purpose of payment of drawback and interest, if any, as well as adjustment of any amount of drawback and interest already paid and may issue a consolidated order for payment. As per sub-rule (3), the date of payment of drawback and interest, if any, shall be deemed to be, in the case of payment by cheque, the date of issue of such cheque; or by credit in the exporter's account maintained with the Custom House, the date of such credit.

24. At this stage, we may mention that in exercise of the powers conferred by Section 27A of the Customs Act, the Central Board of Excise and Customs had issued notification bearing No.32/1995 (NT)-Customs

dated 26.05.1995 fixing the rate of interest at fifteen percent for the purposes of Section 27A of the Customs Act. This was notified by the Central Government in the Ministry of Finance, Department of Revenue in the Official Gazette of India dated 26.05.1995.

25. Likewise, in exercise of the powers conferred by Section 11BB of the Central Excise Act, the Central Board of Excise and Customs issued notification No.22/95-Central Excises (NT) dated 29.05.1995 fixing the rate of interest at fifteen percent per annum for the purposes of the said section. This was also notified by the Central Government in the Official Gazette of India on 29.05.1995.

26. Though it may not be necessary, still we may refer to the circulars dated 20.08.1998 and 05.12.2000 issued by the DGFT. Circular dated 20.08.1998 says that representations had been received from individual exporters as well as clarifications sought for by different regional licencing authorities with regard to availability of deemed export benefit for supply of goods and services to civil construction projects. Circular dated 20.08.1998 says that the issue as to whether supply of goods and services to civil construction projects would be entitled for deemed export benefit or not had been examined in detail, whereafter it was clarified that supply of goods under paragraph 10(2)(d) of the Exim Policy would be entitled to deemed export benefit. Therefore, if within the scope of a work of turn-key civil construction project, supply of goods is included then supply of such goods would be entitled to deemed export benefit.

26.1. It appears that representations were continued to be received by the DGFT regarding admissibility of duty drawback on supplies made to turn-key projects, considered as deemed export in terms of the Exim Policy. Circular dated 05.12.2000 mentions that the matter was deliberated upon by the Policy Review Committee. It was noted that it was not possible for a single contractor to manufacture himself all the items required for execution of such projects. Hence certain items, either imported or indigenous, had necessarily to be procured from other sources. It was, therefore, clarified that all such directly supplied items, whether imported or indigenous, and used in the projects, the condition 'manufactured in India', a pre-requisite for grant of deemed export benefit, was satisfied in view of the fact that such activities being undertaken at the project

site constituted 'manufacture' as per the definition provided in the Exim Policy. Accordingly, it was clarified that the duties, customs and central excise, suffered on such goods should be refunded through the duty drawback route. Referring to the previous circular dated 20.08.1998, it was further clarified that excise duty paid on supply of inputs, such as, cement, steel etc., would be refunded through the duty drawback route in the same manner as in any other case of excisable goods being supplied to any other project qualifying for deemed export benefit, subject to the project authority certifying the receipt and use of such inputs in the project.

27. As already noted above, a Policy Interpretation Committee was constituted. The said committee held a meeting on 07.10.2002, chaired by the DGFT. One of the agenda items deliberated upon in the said meeting was the claim of the respondent regarding inclusion of excise duty component in the price quoted before the project authority as a case of deemed export and refund of the same through the duty drawback route. The Policy Interpretation Committee discussed the case of the respondent and opined that in case any such firms were still competitive and able to supply goods at international prices despite including the component of excise duty in the price quoted before the project authority, the deemed export benefit could not be denied to such firms. Hence, the committee decided to permit deemed export benefit even in cases where the excise duty component was factored in the pricing quoted provided other conditions of deemed export benefit were adhered to.

27.1. From a perusal of the minutes of the meeting of the Policy Interpretation Committee held on 07.10.2002, it is evident that the committee had opined to extend the deemed export benefit to those firms which included excise duty component in the tender pricing quoted before the project authority such as the respondent. There is nothing in the minutes to indicate that such benefit was being extended to the respondent as a one off case or by way of concession.

28. Based on the minutes of the Policy Interpretation Committee meeting held on 07.10.2002, DGFT issued letter dated 01.11.2002, a copy of which was marked to the respondent, superseding the previous rejection order dated 21.06.2002 and allowing duty drawback to be

paid to the respondent for materials/goods, such as, steel, cement etc., used in the civil works of Koyna Hydro Electric Project. The amount of drawback refundable to the respondent was quantified at Rs.2,05,79,740.00. In the said letter, it was, however, mentioned that grant of drawback should not be treated as a precedent. It was thereafter that cheques were issued paying the aforesaid amount of duty drawback to the respondent. At that stage, respondent submitted representations contending that there was delay in the refund of drawback and therefore, it was entitled to interest from the relevant date at the rate of fifteen percent in terms of the notification No.22/95 dated 29.05.1995 (we may mention that the respondent had placed reliance on the aforesaid notification which fixed interest at the rate of fifteen percent for delayed refund of duty under Section 11BB of the Central Excise Act). However, such representations were rejected by the DGFT on 10.07.2003 and 06.08.2003 respectfully. In the rejection letter dated 10.07.2003, respondent was informed by the office of DGFT that there was no provision for payment of interest on the deemed export duty drawback. Therefore, the request for payment of interest could not be agreed upon.

29. Learned Single Judge referred to the circular dated 05.12.2000 and observed that pursuant thereto appellants had paid the duty drawback to the respondent. However, there was delay in payment of duty drawback at least from the date of the clarificatory circular dated 05.12.2000. Therefore, respondent would be entitled to interest from the date of the clarification till the date of payment. After observing that the Customs Act provides for interest on delayed refund within the range from five percent to thirty percent, learned Single Judge directed the appellants to pay interest on the delayed refund from the date of the clarificatory circular dated 05.12.2000 till the date of payment within a period of three months.

30. Appellants filed Writ Appeal No.356 of 2006 assailing the aforesaid decision of the learned Single Judge. On the other hand, respondent also filed a writ appeal being Writ Appeal No.3699 of 2005 assailing the directions of the learned Single Judge to pay interest only from the date of the circular dated 05.12.2000.

30.1. Before the Division Bench, it was contended on behalf of the appellants that it was only under the Foreign Trade Policy, 2004-2009 that for the first time payment of simple interest

at the rate of six percent per annum in the event of delay in refund of duty drawback was provided. There was no provision for payment of interest on delayed refund of duty drawback on deemed export prior thereto. Therefore, respondent was not entitled to interest even from 05.12.2000 as directed by the learned Single Judge. It was canvassed before the Division Bench on behalf of the appellants that only due to magnanimity on the part of the Central Government refund of duty drawback under deemed export was paid to the respondent. As such, refund would not carry any interest.

30.2. The Division Bench repelled such contentions advanced on behalf of the appellants and held that in view of the circular dated 05.12.2000, it was clarified that even civil construction works were entitled to the benefit of deemed export under the Exim Policy. After saying so, the Division Bench noted that as a matter of fact, an amount of Rs.2,05,79,740.00 was paid to the respondent as duty drawback. Thereafter, the Division Bench analysed the circular dated 05.12.2000 and upon such analysis it was observed that the position *vis-à-vis* refund of duty drawback in civil construction work treating it as deemed export was clarified in an earlier circular dated 20.08.1998. Thus, according to the Division Bench, by the year 1998 itself, DGFT had clarified that civil construction work was entitled to the benefit of duty drawback as deemed export. Having held so, the Division Bench posed a question as to whether the respondent would be entitled to interest after expiry of three months from the date of the applications for refund of duty drawback? Corollary to the above question was an ancillary question as to whether a clarificatory or declaratory notification or circular would have retrospective operation? After referring to decisions of this Court reported in 1993 Supplementary (3) SCC 234 *S. S. Grewal versus State of Punjab*, (1995) 2 SCC 630 *Rajagopal Reddy (dead) by Lrs. Vs. Padmini Chandrasekharan (dead) by Lrs.*, and (2004) 8 SCC 1 *Zile Singh versus State of Haryana*, the Division Bench opined that the minute the Exim Policy came into force the benefit of duty drawback automatically became available to the respondent and that the clarification

was only with regard to the doubts expressed in some quarters as to whether civil construction works were also entitled to such benefit. By virtue of the two circulars dated 20.08.1998 and 05.12.2000, no new right or benefit came to be created; those two circulars were clarificatory in nature only clarifying that the benefit under the Exim Policy 1992-1997 was available to civil construction as well. Therefore, such benefit would take effect from the date of the Exim Policy. It was thereafter that the Division Bench posed the further question as to what would be the rate of interest on the delayed refund. In this connection, the Division Bench referred to Sections 27A and 75A of the Customs Act and came to the conclusion that the date of payment of interest would have to be on expiry of the period of three months from the date of making an application for refund of duty drawback. The Division Bench held that the respondent would be entitled to interest from the date of expiry of three months after submission of applications for refund back in the year 1996 till the time the payment was made at the rate of fifteen percent as awarded by the learned Single Judge. Consequently, the appeal of the appellants was dismissed while the appeal of the respondent was allowed.

31. Reverting back to the Exim Policy of 1992-1997, we have already noted about the Duty Exemption Scheme. We have noted that under the Duty Exemption Scheme, import of duty free raw materials, components, intermediates, consumables, parts, spares including mandatory spares and packing materials required for the purpose of export production could be permitted by the competent authority under five categories of licences mentioned in Chapter VII including special imprest licence. Section 56 provided that a special imprest licence was granted for the duty free import of raw materials, components, consumables, parts, spares including mandatory spares and packing materials to main/sub-contractors for the manufacture or supply of products when such supply were made to projects financed by multilateral or bilateral agencies, such as, the International Bank for Reconstruction and Development under international competitive bidding or under limited tender system.

31.1. In Chapter X 'deemed export' has been defined. It is a transaction in which the goods supplied do not leave the country and the payment for the goods is received by the supplier in Indian rupees, but the supplies earn or save foreign exchange for the country. Section 121 declares that the categories of supply of goods mentioned in the said section would be regarded as 'deemed export' under the Exim Policy provided the goods were manufactured in India and the payment was received in Indian rupees. This included supply of goods to projects financed by multilateral or bilateral agencies or any other agency that may be notified by the Central Government, such as, the International Bank for Reconstruction and Development under international competitive bidding or under limited tender system in accordance with the procedures of those agencies.

31.2. Section 122 clarifies that deemed export would be eligible for benefits under the Duty Drawback Scheme in respect of manufacture and supply of goods by treating those as deemed export.

32. That apart, as already mentioned in the earlier part of the judgement, the Explanation below sub-section (1) of Section 27 of the Customs Act clarifies that the expression 'the date of payment of duty or interest' in relation to a person other than an importer shall be construed as 'the date of purchase of goods' by such person.

33. Therefore, on a conjoint and careful reading of the relevant provisions of the Exim Policy, 1992-1997 in conjunction with the Central Excise Act and the Customs Act, it is evident that supply of goods to the project in question by the respondent was a case of 'deemed export' and thus entitled to the benefit under the Duty Drawback Scheme. The language employed in the policy made this very clear and there was no ambiguity in respect of such entitlement.

34. Even if there was any doubt, the same was fully explained by the 1995 Rules. In fact, under the definition clause of the 1995 Rules, duty drawback, in relation to any goods manufactured in India and exported has been defined to mean the rebate of duty or tax chargeable on any imported materials or excisable materials used

or taxable services used in the manufacture of such goods. In the preceding paragraphs, we have noted the meaning of the expressions 'excisable materials' and 'manufacture'.

34.1. Rule 3 of the 1995 Rules makes it abundantly clear that a drawback may be allowed on the export of goods at such amount or at such rates as may be determined by the Central Government. Further, Rule 14 provides for payment of drawback and interest.

35. It was, therefore, not correct on the part of the appellants to contend that there was no provision for payment of interest on delayed refund of duty drawback. That apart, it is wholly untenable for the appellants to contend that refund of duty drawback was granted to the respondent as a concession, not to be treated as a precedent. As we have seen, respondent is entitled to refund of duty drawback as a deemed export under the Duty Drawback Scheme. The applications for refund were made in 1996. Decision to grant refund of duty drawback was taken belatedly on 07.10.2002 whereafter the payments were made by way of cheques on 31.03.2003 and 20.05.2003. Admittedly, there was considerable delay in refund of duty drawback.

36. As we have already examined, under sub-section (1) of Section 75A of the Customs Act, where duty drawback is not paid within a period of three months from the date of filing of claim, the claimant would be entitled to interest in addition to the amount of drawback. This section provides that the interest would be at the rate fixed under Section 27A from the date after expiry of the said period of three months till the payment of such drawback. If we look at Section 27A, the interest rate prescribed thereunder at the relevant point of time was not below ten percent and not exceeding thirty percent per annum.

37. The Central Board of Excise and Customs vide its notification bearing No.32/1995 (NT) – Customs dated 26.5.1995 had fixed the rate of interest at fifteen percent for the purpose of Section 27A of the Customs Act. The High Court while awarding interest at the rate of fifteen percent per annum, however, did not refer to such notification; rather, there was no discussion at all as to why the rate of interest on the delayed refund should be fifteen percent. Therefore, at the first glance, the rate of interest awarded by the High Court appeared to be on the higher side and without any reason.

38. Be that as it may, having regard to our discussions made above, we have no hesitation in holding that the respondent was entitled to refund of duty drawback. Appellants had belatedly accepted the said claim and made the refund. Since there was belated refund of the duty drawback to the respondent, it was entitled to interest at the rate which was fixed by the Central Government at the relevant point of time being fifteen percent.

39. That being the position, we find no good reason to interfere with the judgment and order of the Division Bench of the High Court dated 22.8.2008. There is no merit in the appeal, which is accordingly dismissed. No costs.

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

[2024] 2 S.C.R. 111 : 2024 INSC 82

Bhaggi @ Bhagirath @ Naran
v.
The State of Madhya Pradesh

(Special Leave Petition (Crl). 2888 of 2023)

05 February 2024

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

Issue for Consideration

The capital punishment awarded to the petitioner-convict for the conviction u/s. 376 AB, IPC was not confirmed and it was commuted to imprisonment for life, which, going by the provisions thereunder, means imprisonment for the remainder of the convict's natural life. The only question is whether the commutation of capital punishment to sentence of life imprisonment requires further interference.

Headnotes

Sentence/Sentencing – Modification of sentence – Allegation that petitioner-convict took 7 year old girl to a temple and raped her – Trial Court convicted petitioner u/s. 376 AB – Though, the petitioner was also convicted u/s. 376 (2) (i) and u/ss. 3/4, s. 5(d)/6 of the POCSO Act taking note of his conviction u/s. 376 AB, IPC, no separate sentences were awarded for the aforesaid offences by the trial Court – The High Court commuted it to imprisonment for life – Propriety:

Held: The evidence would reveal that unmindful of the holiness of the place petitioner disrobed victim and himself and raped her – When such an act was done by the petitioner, who was then aged 40 years and X who was then aged only 7 years and the evidence that when PW-2 and PW-14 reached the place of occurrence, blood was found oozing from the private parts of the disrobed child – The High Court had rightly considered the aggravating and mitigating circumstances while commuting the capital sentence into life imprisonment which going by the provisions u/s. 376 AB, IPC means rest of the convict's natural life – For effecting such commutation, the High Court also considered the question whether there is possibility for reformation and rehabilitation of the petitioner and opined that it is not a case in which the alternative punishment

would not be sufficient in the facts of the case – But then, it is noted that if the victim is religious every visit to any temple may hark back to her the unfortunate, barbaric action to which she was subjected to – So also, the incident may haunt her and adversely impact in her future married life – On consideration of all such aspects, a fixed term of sentence of 30 years, which shall include the period already undergone, must be the modified sentence of imprisonment – The convict is also liable to suffer a sentence of fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim which is quantified as Rupees One Lakh and the same shall be paid to the victim with respect to the conviction u/s. 363, IPC. [Paras 15, 16, 17]

Case Law Cited

Union of India v. V. Sriharan alias Murugan and Ors., [2015] 14 SCR 613 **:(2016) 7 SCC 1 – followed.**

Mulla v. State of U.P, [2010] 2 SCR 633 **: (2010) 3 SCC 508;** *Shiva Kumar @ Shiva @ Shivamurthy v. State of Karnataka,* [2023] 4 SCR 669 **: (2023) 9 SCC 817 – relied on.**

Bantu alias Naresh Giri v. State of M.P., [2001] 4 Suppl. SCR 298 **: (2001) 9 SCC 615;** *Amrit Singh v. State of Punjab,* [2006] 8 Suppl. SCR 889 **: (2006) 12 SCC 79;** *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat,* [2011] 1 SCR 829 **: (2011) 2 SCC 764;** *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka,* [2008] 11 SCR 93 **: (2008) 13 SCC 767 – referred to.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973; Protection of Children from Sexual Offences Act, 2012

List of Keywords

Sentence; Sentencing; Modification of sentence; Fixed term of sentence; Capital Punishment; Capital Punishment commuted to imprisonment for life; Rape of a minor; Fine; Medical expenses and rehabilitation of the victim.

Bhaggi @ Bhagirath @ Naran v. The State of Madhya Pradesh

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Special Leave Petition (Crl.) No.2888 of 2023

From the Judgment and Order dated 11.10.2018 of the High Court of M.P. Principal Seat at Jabalpur in CRA No.5725 of 2018

Appearances for Parties

Mrs. K. Sarada Devi, R. Vijay Nandan Reddy, V. Krishna Swaroop, Advs. for the Appellants.

Mrs. Ankita Chaudhary, AAG, Ms. Mrinal Gopal Elker, Abhimanyu Singh-G.A., Abhijeet Pandove, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. The petitioner-convict seeks to assail the judgment dated 11.10.2018 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 5725 of 2018.

2. In troth, it is a common judgment in Criminal Reference No.6/2018 submitted by the Trial Court under Section 366 of the Code of Criminal Procedure, 1973 (Cr.PC) for confirmation of the conviction under Section 376 AB of the Indian Penal Code, 1860 (IPC) as amended by Act No. 22 of 2018 and in Criminal Appeal No. 5725 of 2018 filed by the petitioner-convict herein aggrieved by the conviction and sentence imposed against him for certain other offences under the IPC, as also against the conviction under the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO Act'). As per the impugned judgment, the capital punishment awarded for the conviction under Section 376 AB, IPC was not confirmed and it was commuted to imprisonment for life, which, going by the provisions thereunder, means imprisonment for the remainder of the convict's natural life.

3. Heard the learned counsel appearing for the petitioner-convict and the learned Additional Advocate General for the State of Madhya Pradesh.

4. It is to be noted that in the instant case, after condoning the delay, limited notice on the question of sentence alone was issued on 24.02.2023. Since we do not find any reason to enlarge the scope, the parties confined their arguments within the permissible scope.

5. We are of the considered view that for considering the aforesaid question it is apposite to refer succinctly to the facts of the case. On 21.05.2018, the complainant Munni Bai (PW-8) who is the grandmother of the victim lodged a report that her granddaughter X, who was examined as PW-1, aged 7 years was kidnapped and raped by the petitioner-convict. After the trial, the Trial Court found that the prosecution had succeeded in bringing damning evidence to establish that the victim, aged 7 years was taken to Rajaram Baba Thakur Mandir by the petitioner-convict and there upon making her and himself nude he committed rape. Upon her screaming, the prosecution witnesses who went there found the convict, belonging to the same village, laying over and violating the victim and at their sight running away from there. The oral testimonies of the prosecution witnesses (PWs-1, 2 and 14) on the culpability of the convict got credence from the medical evidence unerringly pointing to his guilt. The consequential conviction *inter alia*, under Section 376 AB, IPC as amended by Act No. 22 of 2018, originally, brought him capital sentence. Though, the petitioner was also convicted under Section 376 (2) (i) and under Sections 3/4, Sections 5(d)/6 of the POCSO Act taking note of his conviction under Section 376 AB, IPC, no separate sentences were awarded for the aforesaid offences by the trial Court. In view of the commutation of capital punishment awarded for the conviction under Section 376 AB, IPC it is also a matter to be considered if we interfere with the sentence of life imprisonment for the offence under Section 376 AB, IPC as amended under the Act No. 22 of 2018.

6. As noticed hereinbefore, on appreciating the evidence on record and coming to the conclusion that the guilt of the petitioner under Section 376 AB, IPC has been conclusively proved, but capital punishment imposed therefor, is to be commuted while confirming the conviction under Section 376 AB, IPC. The High Court commuted it to imprisonment for life though another alternative punishment was also possible viz. rigorous imprisonment for a term not less than 20 years with fine.

7. In the decision in ***Mulla v. State of U.P.***[1]**,** this Court held:-

1 [2010] 2 SCR 633 : (2010) 3 SCC 508

> *"**85**.........It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment….."*

8. Evidently, the decision in ***Mulla's*** case (supra) and a catena of decisions where death sentence was commuted to the imprisonment for life including the decisions in ***Bantu alias Naresh Giri v. State of M.P.***[2], ***Amrit Singh v. State of Punjab***[3] and ***Rameshbhai Chandubhai Rathod (2) v. State of Gujarat***[4] were considered by the High Court while commuting capital sentence to imprisonment for life. A bare perusal of all those decisions would reveal that those are cases involving rape and murder of young girls aged between 4 to 12 years. It is true that after referring to those decisions the High Court, in the instant case held in paragraph 34 of the impugned judgment thus:-

> "In the present case the important consideration is the manner in which the alleged offence is committed. The evidence of Dr. Saroj Bhuriya (PW -3) is relevant. She stated that there was no external injury on the person of the prosecutrix, specially on her neck, chick, chest, abdomen and thigh. She also did not find any injuries on the outer part of the genital part of the prosecutrix. She has found the hymen was ruptured recently and there was bleeding. The injury was ordinary in nature. She further stated that the same could have been possibly be caused by hard and blunt object as well. The evidence has established that a minor child was violated by the accused. However, there was no other injury inflicted him either on the other parts of the body and also on the private part. Thus the manner in which the offence is committed is not barbaric and brutal. We have given our anxious consideration to the material on record and find that though the offence is condemnable, reprehensible, vicious and a deplorable act of violence but the same does not fall within the aggravating

2 [2001] 4 Suppl. SCR 298 : (2001) 9 SCC 615

3 [2006] 8 Suppl. SCR 889 : (2006) 12 SCC 79

4 [2011] 1 SCR 829 : (2011) 2 SCC 764

> circumstances namely extreme depravity and the barbaric manner in which the crime was committed. Taking into consideration the totality of the facts, nature, motive and the manner of the offence and further that nothing has been brought on record by the prosecution that the accused was having any criminal antecedent and the possibility of being rehabilitation and reformation has abo not been ruled out. Nothing is available on record to suggest that he cannot be useful for the society. In our considered opinion, it is not a ease in which the alternative punishment would not be sufficient to the facts of the case."

9. Now, we will refer to the rival contentions. The contention of the learned counsel for the petitioner is that at the time of commission of offence, the petitioner was aged only 40 years. The High Court after taking note of the manner in which the alleged offence was committed observed that it was not barbaric and brutal and further that owing to the absence of anything on record to suggest that the convict is having criminal antecedents the possibility of rehabilitation and chances for his reformation could not be ruled out and opined that the case is not one where the alternative punishment would not be sufficient. The alternative punishment provided under Section 376 AB, IPC viz., sentence of rigorous imprisonment not less than 20 years and with fine alone may be imposed after altering the life imprisonment for the conviction under Section 376 AB, IPC and no separate sentence be awarded for the conviction under the other offences mentioned above. According to the learned counsel, rigorous imprisonment for 20 years with a minimal fine will be the comeuppance. Per contra, the learned counsel appearing for the respondent State would submit that the question as to what extent the capital sentence could be commuted, in the facts and circumstances of the case was considered in detail with reference to the decisions mentioned in the impugned judgment by the High Court and no case has been made out by the petitioner for further interference qua the quantum of sentence imposed on the petitioner.

10. We have taken note of the observation of the High Court made after referring to the manner of commission of the crime concerned that it was not barbaric and brutal. We are of the concerned view that when the words 'barbaric' and 'brutal' are used simultaneously they are not to take the character of synonym, but to take distinctive meanings.

In view of the manner in which the offence was committed by the petitioner-convict, as observed by the High Court under the above extracted recital, according to us, one can only say that the action of the petitioner-convict is barbaric though he had not acted in a brutal manner. We will take the meanings of the words ‘barbaric’, ‘barbarians’ and ‘brutal’ to know the distinctive meanings of the words ‘barbaric’ and ‘brutal’. As per the New International Webster’s Comprehensive Dictionary of the English Language, Encyclopedia Edition they carry the following meanings:

‘Barbaric’ (adj):	1. of or characteristic of barbarians.
	2. Wild; uncivilized; crude
‘Barbarians’ : (n)	1. One whose state of culture is between savagery and civilization;
	2. Any rude, brutal or uncultured person.
‘Brutal’ (adj) :	Characteristic of or like a brute; cruel; savage.

In the light of the evidence on record and rightly noted by the High Court in the above-extracted paragraph 34 of the impugned judgment it may be true to say that the petitioner-convict had committed the offence of rape brutally, but then, certainly his action was barbaric. In the instant case, the petitioner-convict was aged 40 years on the date of occurrence and the victim was then only a girl, aged 7 years. Thus, the position is that he used a lass aged 7 years to satisfy his lust. For that the petitioner-convict took the victim to a temple, unmindful of the holiness of the place disrobed her and himself and then committed the crime. We have no hesitation to hold that the fact he had not done it brutally will not make its commission non-barbaric.

11. In the circumstances obtained in this case there can be no doubt regarding the requirement of deterrent punishment for the conviction under Section 376 AB, IPC. The only question is whether the commutation of capital punishment to sentence of life imprisonment requires further interference. There can be no doubt with respect to the position that on such commutation of sentence for the conviction under Section 376 AB, IPC, the other alternative available is only imprisonment for a period not less than 20 years with fine. This position is clear from the provision under Section 376 AB, IPC which reads thus:-

> ***"376AB. Punishment for rape on woman under twelve years of age.***—*Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:*
>
> *Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:*
>
> *Provided further that any fine imposed under this section shall be paid to the victim."*

12. Thus, a bare perusal of Section 376 AB, IPC would reveal that imprisonment for life thereunder means imprisonment for the remainder of the convict's natural life and the minimum term of imprisonment under the Section is 20 years. Now, while considering the question whether further interference with the sentence handed down for the conviction of the offence under Section 376 AB, IPC is warranted, it is only appropriate to refer to a decision of this Court in ***Shiva Kumar @ Shiva @ Shivamurthy v. State of Karnataka***[5]**.** In ***Shiva Kumar's*** case (supra) this Court referred to the decision of a Constitution Bench of this Court in ***Union of India v. V. Sriharan alias Murugan and Ors.***[6] and also the decision in ***Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka***[7]***.*** Evidently, this Court in ***V. Sriharan's*** case (supra), upon considering the question whether imprisonment for life in terms of Section 53 read with Section 45 IPC means imprisonment for rest of life of the prisoner or a convict undergoing life imprisonment has a right to claim remission, held after referring to the decision in ***Swamy Shraddananda (2)*** (supra) that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for any specified offence could only be exercised by the High Court and in the event of further appeal only by the Supreme Court. Furthermore, in paragraph 105 of the said decision it was held:- "*to put it differently, the power to impose*

5 [2023] 4 SCR 669 : (2023) 9 SCC 817

6 [2015] 14 SCR 613 : (2016) 7 SCC 1

7 [2008] 11 SCR 93 : (2008) 13 SCC 767

modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court." In ***Shiva Kumar's*** case (supra) this Court further took note of what was held by the Constitution Bench in ***V. Sriharan's*** case (supra) paragraph 104 as well, which reads thus: -

> *"104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed."*

13. After referring to the relevant paragraphs from the said decisions in ***Shiva Kumar*** this Court held as follows: -

> *"13.Hence, we have no manner of doubt that even in a case where capital punishment is not imposed or is not proposed, the Constitutional Courts can always exercise the power of imposing a modified or fixed-term sentence by directing that a life sentence, as contemplated by "secondly" in Section 53 of the IPC, shall be of a fixed period of more than fourteen years, for example, of twenty years, thirty years and so on. The fixed punishment cannot be for a period less than 14 years in view of the mandate of Section 433A of Cr.P.C."*

14. In view of the decisions referred (supra) and taking note of the position that when once the conviction is sustained under Section 376 AB, IPC the fixed term punishment could not be for a period of less than 20 years. Evidently, the High Court had referred, in paragraph 33 of the impugned judgment, to decisions where minor girls were raped and murdered, but did not pointedly consider whether for the conviction under Section 376 AB, IPC involving commission of rape of victim, aged 7 years not coupled with murder what would be the comeuppance, after deciding to commute the capital sentence.

15. We have taken note of the hapless situation of the victim after being taken to a temple by the petitioner-convict. The evidence would reveal that unmindful of the holiness of the place he disrobed her and himself and raped her. When such an act was done by the petitioner, who was then aged 40 years and X who was then aged only 7 years and the evidence that when PW-2 and PW-14 reached the place of occurrence, blood was found oozing from the private parts of the disrobed child. The High Court had rightly considered the aggravating and mitigating circumstances while commuting the capital sentence into life imprisonment which going by the provisions under Section 376 AB, IPC means rest of the convict's natural life. For effecting such commutation, the High Court also considered the question whether there is possibility for reformation and rehabilitation of the petitioner and opined that it is not a case in which the alternative punishment would not be sufficient in the facts of the case. But then, it is noted that if the victim is religious every visit to any temple may hark back to her the unfortunate, barbaric action to which she was subjected to. So also, the incident may haunt her and adversely impact in her future married life.

16. Then, we are also to take into account the present age of the petitioner and the fact that he has already undergone the incarceration. On consideration of all such aspects, we are of the considered view that a fixed term of sentence of 30 years, which shall include the period already undergone, must be the modified sentence of imprisonment.

17. We have already taken note of the fact that while commuting the capital sentence to life imprisonment, the High Court had lost sight of the fact that despite conviction under Section 376 (2) (i) and under Sections 3/4, Sections 5(d)/6 of the POCSO Act, no separate sentences were imposed on the petitioner for the offence under Section 3/4 and 5(m)/6 of the POCSO Act by the Trial Court,

evidently, only on the ground that capital sentence is imposed on the petitioner for the offence under Section 376 AB, IPC. However, it is a fact that the said aspect escaped the attention of the High Court. That apart, in terms of the provisions under Section 376 AB, IPC when a sentence of imprisonment for a term not less than 20 years which may extend upto life imprisonment is imposed, the convict is also liable to suffer a sentence of fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim which we quantify as Rupees One Lakh and the same shall be paid to the victim with respect to the conviction under Section 363, IPC. In that regard also, there is absolutely no consideration in the impugned judgment.

18. It is submitted by the learned counsel, with reference to paragraph 1 of the impugned judgment that the order in paragraph 35 of the impugned judgment that the conviction and sentence under Section 366, IPC is maintained, can also be in relation to the conviction under Section 363, IPC and the sentence imposed therefor.

19. We fully endorse the said contention as paragraph 1 of the impugned judgment itself would reveal that the High Court had actually taken into consideration the fact that the petitioner-convict was convicted only under Section 376 AB, IPC as amended by Act No.22 of 2018 and under Section 363 IPC. In such circumstances, the conviction and sentence imposed on the petitioner-convict is confirmed. We have taken note of the fact that though the petitioner-convict was convicted for the offence under Section 3/4 and 5 (m)/6 of the POCSO Act, no separate sentence was imposed on the petitioner-convict by the Trial Court taking note of the provision under Section 42 of the POCSO Act. The said provision reads thus:-

> *“**42. Alternate punishment.**—Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, [376A, 376AB, 376B, 376C, 376D, 376DA, 376DB], [376E, section 509 of the Indian Penal Code or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.”*

20. Since, even after the interference with the sentence imposed for the conviction of the petitioner-convict under Section 376 AB, IPC and modified sentence imposed on commutation by the High Court, we have awarded 30 years of rigorous imprisonment with a fine of Rupees One Lakh, no separate sentence for the aforesaid offence under POCSO Act is to be imposed on the petitioner-convict. While maintaining the conviction of the petitioner-convict under Section 376 AB, IPC, the sentence imposed thereunder is modified to a sentence of rigorous imprisonment for a term of 30 years, making it clear that this will also include the period of sentence already undergone and the period, if any ordered by the Trial Court for set off. The imprisonment awarded for the conviction under Section 363, IPC shall run concurrently. The amount of fine imposed thereunder shall be added to the fine imposed by us viz., Rupees One Lakh.

21. We further direct that the petitioner-convict shall not be released from jail before completion of actual sentence of 30 years, subject to the observation made in the matter of its computation, as mentioned above.

22. The Special Leave Petition is partly allowed, as above.

Headnotes prepared by: Ankit Gyan

Result of the case: Special Leave Petition Partly allowed.

[2024] 2 S.C.R. 123 : 2024 INSC 86

Jagmohan and Another
v.
Badri Nath And Others

(Civil Appeal No. 1753 of 2024)

06 February 2024

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

Issue for Consideration

Exemption of pre-emption as granted vide notification dated 08.10.1985, if available to the urban immovable property on which right of pre-emption was sought to be exercised by the tenants.

Headnotes

Punjab Pre-emption Act, 1913 – ss. 16, 8(2), 3(1), (3) – Person in whom right of pre-emption vests in an urban immovable property – Tenants were in the property from the year 1949 onwards where the rolling mill had been set up – Property was an urban immovable property, located in a municipal area of Jagadhri – Owners of the property sold the property to the vendee by way of sale deed – Suit filed by the tenant exercising right of pre-emption of sale, claiming preferential right to purchase the property – Vendee's case that pre-emption did not apply – Suit allowed by the courts below – Exemption of pre-emption as granted vide notification dated 08.10.1985, if available to the said property:

Held: If the said notification is read with reference to the powers available with the State Government to grant exemption from pre-emption, it is evident that the same has been granted with reference to land only and not the immovable property – s. 8(2) uses two terms independently, clearly suggests that the land and the immovable property have different meanings – s. 15 also provides right of pre-emption in respect of agricultural land and village immovable property – Thus, the provisions of the 1913 Act, if read with the Scheme of the Act, makes it clear that the land and the immovable property are two different terms – Immovable property is more than the land on which certain construction has been made – As the notification limits its application for taking away the right of pre-emption only with reference to sale of land

* Author

falling in the areas of any municipality, the same will not come to the rescue of the vendee – It is sale of immovable property, which is more than the land as a rolling mill had already been set up on the land, which was in occupation of the tenants – Also, the issue regarding limitation for filing of the suit is misconceived – Thus, orders of the courts below upheld. [Paras 14-19]

Punjab Pre-emption Act, 1913 – s. 3(3) and 2(3) – Term 'land' and 'immovable property' – Distinction between:

Held: Provisions of the 1913 Act, if read with the Scheme of the Act, it is clear that the land and the immovable property are two different terms – s. 8(2) uses two terms independently, clearly suggests that the land and the immovable property have different meanings – Immovable property is more than the land on which certain construction has been made – Definition of immovable property, in s. 3(26) of the 1897 Act, which includes land, means something more than the land. [Paras 15, 16]

Punjab Pre-emption Act, 1913 – s. 3(1), (3) – Term 'agricultural land' and 'urban immovable property' – Definition of. [Para 12]

Punjab Alienation of Land Act, 1900 – s. 2(3) – Term 'land' – Definition of. [Para 12]

General Clauses Act, 1897 – s. 3(26) – Term 'immovable property' – Definition of. [Para 16]

Case Law Cited

Shyam Sunder and others v. Ram Kumar and another, [2001] 1 Suppl. SCR 115 **: (2001) 8 SCC 24;** *Sandeep Bansal v. M. L. Hans and others* **R.S.A. No. 2109 of 1998 – referred to.**

List of Acts

Punjab Pre-emption Act, 1913; Punjab Alienation of Land Act, 1900; General Clauses Act, 1897; Limitation Act, 1963.

List of Keywords

Pre-emption; Exemption of pre-emption; Right of pre-emption; Custom of pre-emption; Notification dated 08.10.1985; Tenants; Preferential right to purchase the property; Urban immovable property; Land; Immovable property; Agricultural land; Village immovable property; Rolling mill; Limitation.

Jagmohan and Another v. Badri Nath and Others

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1753 of 2024

From the Judgment and Order dated 25.02.2015 of the High Court of Punjab & Haryana at Chandigarh in RSA No.2023 of 1992

Appearances for Parties

Shish Pal Laler, Hitesh Kumar, Atul, Vedant Pradhan, Mrs. Kadambini, Ravi Panwar, Advs. for the Appellants.

Neeraj Kumar Jain, Sr. Adv., Sanjay Singh, Siddharth Jain, Umang Shankar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

Leave granted.

2. The defendants are before this Court challenging the concurrent findings of fact recorded by all the courts below.

3. It is a case in which the respondents had filed a suit[1] on 25.01.1984 for possession by pre-emption of the plot measuring 719 square yards, situated at Light Railway Bazar, Jagadhri (hereinafter referred to as 'the property in dispute'). The Trial Court[2] decreed the suit. The judgment and decree[3] of the Trial Court was upheld upto the High Court[4].

4. The facts in brief are that the respondents (plaintiffs in the suit) claimed themselves to be the tenants in the property in dispute since 1949. The property in dispute was owned by Anarkali and others. The same was sold by the owners thereof to the appellants (defendants in the suit) by way of a registered sale-deed dated 25.01.1983. The respondents filed the suit exercising their right of pre-emption of the sale claiming that in terms of the

1 Civil Suit No. 309

2 Additional Senior Sub Judge, Jagadhri

3 Judgment and decree dated 27.05.1989

4 High Cour of Punjab and Haryana at Chandigarh

provisions of the 1913 Act[5], they had preferential right to purchase the property. They offered to pay same sale consideration of ₹43,000/-. The Trial Court decreed the suit subject to payment of ₹50,238/- to the vendee after deducting 1/5th of the pre-emption amount deposited in the Court at the time of filing of the suit. The amount so directed by the Trial Court was including stamp duty, registration fee and miscellaneous expenses incurred on registration of the sale-deed[6].

5. Challenging the judgment of the High Court, learned counsel for the appellants submitted that in view of the notification 08.10.1985, issued by the State in exercise of powers under section 8(2) of the 1913 Act, the suit filed by the respondents deserved to be dismissed as the right of preemption did not exist for sale of land falling in the areas of any municipality in Haryana. It is not a matter of dispute that the sale in question was pertaining to the property located within the municipal limits of Jagadhri (State of Haryana). In terms of the Constitution Bench judgment of this Court in **Shyam Sunder and others v. Ram Kumar and another**[7], the right of pre-emption has to exist on the date of registration of the sale-deed, on the date of filing of suit and also on the date the same is decreed by the first Court. In the case in hand, no doubt, the suit was pending when the aforesaid notification was issued, however, the Trial Court had decided the same on 27.05.1989, hence the decree could not have been passed. The courts below have failed to appreciate that aspect of the matter.

6. He further submitted that the sale deed was registered in favour of the appellants on 25.01.1983, the suit having been filed on 25.01.1984 was time-barred as the limitation thereof is one year, which expired on 24.01.1984. It was further argued that the courts below have wrongly appreciated the issue regarding the custom of pre-emption prevailing in the area. It was not a matter of dispute that the area in which the property is situated, falls within the extended area of municipal limits of Jagadhri. Though some

5 The Punjab Pre-emption Act, 1913

6 Sale-deed dated 25.01.1983

7 [2001] 1 Suppl. SCR 115 : (2001) 8 SCC 24

evidence was led pertaining to the custom prevailing in the urban area of municipal limits of Jagadhri, however, for the extended area, no evidence was produced. In terms of the judgment of the High Court in **Sandeep Bansal v. M. L. Hans and others**[8], decided on 24.08.2009, the same custom cannot be relied upon for any transaction of sale in the extended area.

7. On the other hand, learned counsel for the respondents submitted that though issue of limitation was raised by the appellants before the Trial Court, however, the same was not seriously contested for the reason that the suit filed by the respondents was within limitation. The Schedule attached to the 1963 Act[9] provides for a period of one year for filing of suit for pre-emption. If the same is read along with Section 12 of the aforesaid Act, in terms of which the date of registration of sale deed is to be excluded, the suit filed by the respondents was within limitation. It was for this reason that the appellants did not press the aforesaid issue before the lower Appellate Court[10] or the High Court.

8. It was further submitted that the notification dated 08.10.1985, as is sought to be relied upon by the appellants, will not be applicable in the case in hand. From a perusal thereof, it is evident that the exemption is only with reference to sale of land within the municipal area. In the case in hand, it is not the sale of land, rather immovable property in the form of a rolling mill, which cannot be termed to be land. The aforesaid notification has been issued in exercise of powers under Section 8(2) of the 1913 Act which enables the State Government to exclude any transaction of sale of any land or property or class of land or property for exercise of right of pre-emption. The right to the respondents flows from Section 16 of the 1913 Act which provides that right of pre-emption in respect of urban immovable property vests in the tenant. The term ‘urban immovable property’ has been defined in Section 3(3) of the 1913 Act to mean immovable property within the limits of town, other than agricultural land.

8 R.S.A. No. 2109 of 1998

9 The Limitation Act, 1963

10 Additional District Judge, Yamuna Nagar at Jagadhri

Section 3(1) thereof defines any agricultural land to mean land as defined in 1900 Act[11]. Section 3(2) defines 'village immovable property' to mean immovable property within the limits of a village, other than agricultural land.

9. The expression 'land' is defined in 1900 Act to mean the land which is not occupied by site of any building in a town or village and is occupied or let out for agricultural purposes or for purposes subservient to agriculture. He also referred to the definition of 'immovable property', as provided for in Section 3(26) of the 1897 Act[12]. As the sale in the case in hand was pertaining to not the land situated within the municipal limits but of a constructed area which was being used a rolling mill, the exemption as granted vide notification dated 08.10.1985 will not be applicable in the case of the appellants. Very fairly, he did not dispute the proposition of law as laid down by the Constitution Bench of this Court in **Shyam Sunder and others' case (supra)**. However, he submitted that the same will not be applicable in the facts and circumstances of the case as the notification does not come to the rescue of the appellants.

10. Heard learned counsel for the parties and perused the relevant referred record.

11. The relevant provisions of the 1900 Act and 1913 Act are extracted below:

> **"Sections 3(1) (2) and (3), 8, 15 and 16 of the Punjab Pre-emption 1913 Act**
>
> 3. **Definitions. -** In this Act, unless a different intention appears from the subject or context, -
>
> (1) **'agricultural land'** shall mean land as defined in Punjab Alienation of Land Act, 1900 (XIII of 1900) (as amended by act, 1 of 1907), but shall not include the rights of a mortgage, whether usufructuary or not in such land:

11 Punjab Alienation of Land Act, 1900

12 The General Clauses Act, 1897

(2) **'village immovable property'** shall mean immovable property within the limits of a village, other than agricultural land:

(3) **'urban immovable property'** shall mean immovable property within the limits of town, other than agricultural land. For the purposes of this Act a specified place shall be deemed to be a town (a) If so declared by the State Government by notification in the Official Gazette or (b) if so found by the Courts:

xx xx xx

8. **State Government may exclude areas from pre-emption**- (1) Except as may otherwise be declared in the case of any agricultural land in a notification by the State Government, no right of pre-emption shall exist within any cantonment.

(2) The State Government may declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sale or class of sales, no right of pre-emption or only such limited right as that the State Government may specify, shall exist.

xx xx xx

15. Persons in whom right of pre-emption vests in respect of sales of agricultural land and village immovable property. (1) The right of pre-emption in respect of agricultural land and village immovable property shall vest-

(a) where the sale is by <u>sole owner</u>-

First, in the son or daughter or son's son or daughter's son of the vendor;

Secondly, in the brother or brother's son of the vendor;

Thirdly, in the father's brother or father's brother's son of the vendor;

Fourthly, in the tenant who holds under tenancy of vendor the land or property sold or apart thereof.

(b) Where the sale is of a share out of joint land or property made by all the co-sharers jointly-

First in the sons or daughters or sons' sons or daughters' sons of the vendor or vendors;

Secondly, in the brothers or bother's sons of the vendor or vendors;

Thirdly, in the father's brother or father's brother's sons of the vendor or vendors;

Fourthly, in the other co-sharer's;

Fifthly, in the tenants who hold under tenancy of the vendor or vendor the land or property sold or a part thereof;

(c) where the sale is of land or property owned jointly and is made by all the co-sharers jointly-

First, in the sons or daughters or son's sons or daughter's sons of the vendors;

Secondly, in the brothers or bother's sons of the vendors;

Thirdly, in the father's brother's or father's brother's sons of vendors;

Fourthly, in the tenants who hold under tenancy of the vendors or any one of them the land or property sold or a part thereof.

(2) Notwithstanding anything contained in subsection (1):-

(a) where the sale is by a female of land or property to which she has succeeded through her father or brother or the sale in respect of such land or property is by the son daughter of such female after inheritance, the right of pre-emption shall vest:-

(i) if the sale is by such female in her brother or brother's son:

(ii) if the sale is by the son or daughter of such female in the mother's brother or the mother's brother's son of the vendor or vendors;

b. where the sale is by a female of land or property to which she has succeeded through her husband, or through her son in case the son has inherited the land or property sold from his father, the right or pre-emption shall vest-

First, in the son or daughter of such husband of the female;

Secondly, in the husband's brother or husband's brother's son of such female.

16. **Person in whom right of pre-emption vests in an urban immovable property-** The right of pre-emption in respect of urban immovable property shall vest in the tenant who holds under tenancy of the vendor the property sold or apart thereof."

Section 2(3) of the 1900 of Punjab Alienation of Land Act, 1900

2. In this Act, unless there is anything repugnant in the subject or context, -

xx xx xx

(3) the expression "**land**" means land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes—

(a) the sites of buildings and other structures on such land;

(b) a share in the profits of an estate or holding;

(c) any dues or any fixed percentage of the land-revenue payable by an inferior landowner to a superior land-owner;

(d) a right to receive rent; and

(e) any right to water enjoyed by the owner or occupier of land as such:

12. The right of the respondents/tenants in the property flows from Section 16 of the 1913 Act. It is not a matter of dispute that the respondents were tenants in the property from the year 1949 onwards

where the rolling mill had been set up. The term 'urban immovable property' has been defined in Section 3(3) of the 1913 Act to mean immovable property within the limits of town, other than agricultural land. Section 3(1) defines any agricultural land to mean land as defined in 1900 Act. The term 'land' as defined in Section 2(3) of the 1900 Act excludes any site of any building in a town or village. Meaning thereby that the immovable property would be more than the land only or the land on which the construction has already been made. The fact that the property in dispute is located in a municipal area of Jagadhri is not in dispute.

13. After coming to the conclusion that the property in dispute on which right of pre-emption was sought to be exercised by the respondents was an urban immovable property, the only issue which requires consideration by this Court is as to whether the exemption of pre-emption as granted vide notification dated 08.10.1985 would be available to the property in dispute.

14. A perusal of the notification shows that it has been issued in exercise of powers conferred under Section 8(2) of the 1913 Act, which enables the State Government to declare by notification either no right of pre-emption or only limited right will exist in any local area or with respect to any land or property or class of land or property. The notification provides that right of pre-emption shall not exist in respect of sale of land falling in the areas of municipalities in Haryana.

15. As we have already noticed above, the term 'land' as such has not been defined in the 1913 Act as it is only the agricultural land which is defined. If the aforesaid notification is read with reference to the powers available with the State Government to grant exemption from pre-emption, it is evident that the same has been granted with reference to land only and not the immovable property. The fact that Section 8(2) of the 1913 Act uses two terms independently, clearly suggests that the land and the immovable property have different meanings. It is evident even from the language of Section 15 of the 1913 Act, which also provides right of pre-emption in respect of agricultural land and village immovable property. 'Village immovable property' has been defined to mean immovable property within the limits of a village other than the agricultural land.

16. From the aforesaid provisions of the 1913 Act, if read Scheme of the Act, it is abundantly clear that the land and the immovable property are two different terms. The immovable property is more than the land on which certain construction has been made. Guidance can also be taken from the definition of immovable property, as provided in Section 3(26) of the 1897 Act, which includes land, means something more than the land.

17. As the notification dated 08.10.1985 limits its application for taking away the right of pre-emption only with reference to sale of land falling in the areas of any municipality, the same will not come to the rescue of the appellants. In the case in hand, admittedly it is sale of immovable property, which is more than the land as a rolling mill had already been set up on the land, which was in occupation of the respondents as tenants.

18. The issue regarding limitation for filing of the suit is also misconceived if considered in the light of the facts of the case, the provisions of the 1961 Act and also that the same was not raised by the appellants before the lower Appellate Court or the High Court.

19. For the reasons mentioned above, we do not find any merit in the present appeal. The same is, accordingly, dismissed.

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

[2024] 2 S.C.R. 134 : 2024 INSC 92

Gurwinder Singh
v.
State of Punjab & Another

(Criminal Appeal Nos. 704 of 2024)

07 February 2024

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

Issue for Consideration

Whether the High Court was justified in upholding the order passed by the Special Judge, rejecting the application filed u/s. 439 CrPC by the appellant seeking regular bail in a case registered under the Unlawful Activities (Prevention) Act, 1967 alongwith other charges under the Penal Code and the Arms Act.

Headnotes

Unlawful Activities (Prevention) Act, 1967 – ss. 43D (5), 17, 18, 19 – Rejection of bail – On facts, charges u/ss. 17, 18, 19 of the UAP Act, u/ss. 124A, 153A, 153B, 120-B IPC and u/ss. 25 and 54 of Arms Act against the appellant along with other co-accused for raising funds for terrorist act, for conspiracy and for organising of terrorist camps – Bail application u/s. 439 CrPC by the appellant – Rejected by the Special Judge as also the High Court – Correctness:

Held: Material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered – In such a scenario if the appellant is released on bail there is every likelihood that he would influence the key witnesses of the case which might hamper the process of justice – Furthermore, mere delay in trial pertaining to grave offences cannot be used as a ground to grant bail – Also mere fact that the accused has not received any funds or nothing incriminating was recovered from his mobile phone does not absolve him of his role in the instant crime – Thus, the material on record prima facie indicates the complicity of the accused as a part of the conspiracy since he was knowingly facilitating the commission of a preparatory act

* Author

towards the commission of terrorist act u/s. 18 – Bail application of the appellant is rejected – Penal Code, 1860 – ss. 124A, 153A, 153B, 120-B – Arms Act, 1959 – ss. 25 and 54. [Paras 32-34]

Unlawful Activities (Prevention) Act, 1967 – s. 43D (5) – Scope and limitations of bail under :

Held: s. 43D(5) modifies the application of the general bail provisions in respect of offences punishable under Chapter IV and Chapter VI of the Act – Discretion of Courts must tilt in favour that bail is the rule, jail is the exception unless circumstances justify otherwise does not find any place while dealing with bail applications under UAP Act – Exercise of the general power to grant bail under the UAP Act is severely restrictive in scope – Words used in proviso to s. 43D (5) 'shall not be released' in contrast with the words as found in s. 437(1) CrPC 'may be released' suggests the intention of the Legislature to make bail, the exception and jail, the rule – Thus, the courts are burdened with a sensitive task on hand – In dealing with bail applications under UAP Act, the courts are merely examining if there is justification to reject bail – 'Justifications' must be searched from the case diary and the final report submitted before the Special Court – Bail must be rejected as a 'rule', if after hearing the public prosecutor and after perusing the final report or Case Diary, the court arrives at a conclusion that there are reasonable grounds for believing that the accusations are prima facie true – It is only if the test for rejection of bail is not satisfied, the courts would proceed to decide the bail application in accordance with the 'tripod test'-flight risk, influencing witnesses, tampering with evidence. [Paras 16, 18-20]

Unlawful Activities (Prevention) Act, 1967 – Bail applications – Test for rejection – Guidelines on the approach that Courts must partake in – Reiterated. [Para 23]

Case Law Cited

NIA v. Zahoor Ahmad Shah Watali, [2019] 5 SCR 1060**: (2019) 5 SCC 1 – relied on.**

Union of India v. KA Najeeb, [2021] 1 SCR 443 **: (2021) 3 SCC 713;** *Devender Gupta v. National Investigating Agency :* **2014 (2) ALD Cri. 251;** *Kekhriesatuo Tep and*

Ors. v. National Investigation Agency **[2023] 3 SCR 523: (2023) 6 SCC 58;** *Sudesh Kedia v. Union of India :* **(2021) 4 SCC 704- referred to.**

List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Unlawful Activities (Prevention)Act, 1967; Arms Act, 1959.

List of Keywords

Banned terrorist organization "Sikh for Justice"; Further investigation; National Investigation Agency; Hawala; Khalistan; Terror activities; Separatist movement; ISI handler; Disclosure statement; Bail application; Incriminating conversations; Communication Data Records; Funding Link with ISI; Voluntary disclosure statement; Proscribed Terrorist; Bail jurisprudence; Penal offences; Shall not be released; May be released; Standard of 'strong suspicion'; Application for 'discharge'; Final report or Case Diary; Tripod test; Flight risk; Influencing witnesses; Tampering with evidence; Rejection of the bail; Raising funds for terrorist organization; Scrutiny report; Procurement of weapons; Revenge of the Sacrilege of Guru Granth Sahib; Involvement of a terrorist gang; Delay in trial; Complicity of the accused; Conspiracy.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.704 of 2024

From the Judgment and Order dated 24.04.2023 of the High Court of Punjab & Haryana at Chandigarh in CRAD No.144 of 2022

Appearances for Parties

Colin Gonsalves, Sr. Adv., Satya Mitra, Ms. Mugdha, Kamran Khawaja, Advs. for the Appellant.

Suryaprakash V Raju, A.S.G., Vivek Jain, DAG, Ajay Pal, Kanu Agarwal, Annam Venkatesh, Mayank Pandey, Arvind Kumar Sharma, Dr. Reeta Vasishta, Karan Sharma, Rishabh Sharma, Advs. for the Respondents.

Gurwinder Singh v. State of Punjab & Another

Judgment / Order of the Supreme Court

Judgment

Aravind Kumar J.

1. Leave granted.

2. The present appeal impugns the order dated 24.04.2023 passed by the High Court of Punjab and Haryana at Chandigarh in CRA-D No. 144 of 2022 (O&M) whereby the High Court has upheld the order dated 16.12.2021 passed by the Special Judge, NIA Court, SAS Nagar, Mohali in an application filed under Section 439 of the Code of Criminal Procedure, 1973 (Cr.P.C) filed by the Appellant herein-Gurwinder Singh along with other co-accused seeking regular bail in NIA Case RC.19/2020/NIA/DLI, registered under Sections 124A, 153A, 153B, 120-B of the Indian Penal Code, 1860 (IPC), Section(s) 17, 18, 19 of the Unlawful Activities (Prevention) Act, 1967 (UAP Act) and Sections 25 and 54 of the Arms Act, 1959, which came to be rejected.

3. The factual matrix relevant to dispose the present petition are summarized as under:

3.1. On 19.10.2018, Sh. Varinder Kumar, Inspector, CIA Staff, received secret information that two persons are hanging cloth banners on which "*Khalistan Jindabad*" and "Khalistan Referendum 2020", was written, at Pillars Kot Mit Singh Flyover, Amritsar. The Police team apprehended one Sukhraj Singh @ Raju and Malkeet Singh @ Meetu on the spot and a case was registered vide FIR No.152 dated 19.10.2018 under section(s) 124A, 153A, 153B and 120B of IPC against both the arrested accused. During the course of Investigation, entire module of the banned terrorist organization named "Sikh for Justice" was busted and other accused persons involved in the said module namely, Bikramjit Singh @ Vicky, Manjit Singh @ Manga, Jatinder Singh @ Goldy, Harpreet Singh @ Happy, **Gurwinder Singh @ Gurpreet Singh @ Gopi-the present Appellant**, Harmeet Singh @ Raju, Roofel @ Raful @ Rahul Gill, Sukhmander Singh @ Gopi and Kuldeep Singh @ Kuldip Singh @ Keepa were arrested by Punjab Police.

3.2. The investigation was completed and final report was presented on 16.04.2019 before the Trial Court against eleven accused persons under Sections 117, 112, 124A, 153A, 153B, 120-B of IPC, Sections 17, 18, 19 of UAP Act and Section 25 of Arms Act. On further investigation, the police submitted supplementary reports.

3.3. Due to degree of severity in the charges involved, the investigation in the present matter was transferred to the National Investigation Agency (NIA), which took over the investigation of this case as per the directions of Government of India, Ministry of Home Affairs issued vide Order F.No.11011/30/2020/NIA dated 04.04.2020 and registered the original case as RC.19/2020/NIA/DLI dated 05.04.2020. 3rd supplementary chargesheet was filed by NIA dated 18.12.2020 and Charges were framed by the Learned Special Judge, NIA Punjab on 09.12.2021.

3.4. The investigation revealed that the accused persons received funds through illegal means sent by members of the banned terrorist organization "Sikhs For Justice", those funds were channeled through illegal means such as "Hawala" and were sent to be used for furthering separatist ideology of demanding a separate State for Sikhs popularly called "Khalistan", and to carry out terror activities and other preparatory acts i.e., attempts to procure weapons to spread terror in India in furtherance of such separatist movement. The investigation further revealed the hand of an ISI handler named Javed Khan, to be behind the operations of this module busted by Punjab Police and NIA.

3.5. The *prima facie* involvement of the present Appellant has cropped up in the disclosure statement of the co-accused Bikramjit Singh @ Vicky (Accused No. 3) recorded on 09.06.2020 while he was in the custody of NIA.

3.6. The said disclosure statement revealed that on 08.07.2018, the Appellant herein-Gurwinder Singh accompanied Bikramjit Singh (Accused No. 3) and Harpreet Singh @Happy (Accused No.7) to Srinagar in a car where they had planned to purchase a pistol. There they met Sandeep Singh @ Sana and further went to a JK-Li Camp in Srinagar. Sandeep Singh entered the Army camp and after half an hour he came out and stated that pistol was not available. Then they came back to Gurudwara

Sahib, where Sandeep offered them to purchase RDX instead, but they declined and all three returned back to Punjab, where Bikramjit Singh (Accused No. 3) was dropped off mid-way at Jandialaguru while both, the present Appellant and Harpreet Singh @ Happy, returned back to their village in Punjab.

3.7. The Appellant's disclosure statement recorded on 12.06.2020 revealed a similar story as that of Bikramjit Singh. The Appellant stated that he and Harpreet Singh were childhood friends. In the 1st week of July 2018, Harpreet proposed to visit Srinagar for Religious Service and asked the Appellant to accompany. The Appellant in his disclosure statement further stated that he initially denied to go with them however later agreed to accompany them when Harpreet Singh continuously insisted him.

3.8. The trial court vide its order dated 16.12.2023 in CIS No. BA/2445/2021 dismissed the Appellant's bail application under Section 439 CrPC on the ground that there were reasonable grounds to believe the accusation against the Appellant to be true. The said order was impugned by way of an appeal before the High Court of Punjab and Haryana and meanwhile on 10.04.2023, 4th supplementary charge sheet was filed by NIA along with the List of witnesses and list of documents.

3.9. Vide the Impugned order the High Court rejected the grant of bail to Appellant on the ground of seriousness of the nature of offence and that none of the protected witnesses had been examined.

SUBMISSION ON BEHALF OF THE PARTIES

4. The Learned Senior Counsel, Mr. Colin Gonsalves, appearing on behalf of the Appellant made the following submissions in support of the Appellant's bail application:

5. Mr. Gonsalves, learned Senior Counsel contended that the Appellant has been denied bail by the Hon'ble High Court and the Ld. Special Judge by relying upon the disclosure statement of Bikramjit Singh alias Vicky and argued that the said disclosure statement cannot be used to implicate the present Appellant.

6. Learned Senior Counsel further raised contentions about the lack of scrutiny of the Appellant's mobile phone, marked as M-4 to indicate that the phone number did not belong to the Appellant. He argued

that the absence of incriminating conversations in the Communication Data Records (CDR) related to the Appellant's phone supports the case for bail. He further contended that the Appellant has been in custody since the last Five years facing charges of UAP Act which is contrary to the law laid down in ***KA Najeeb v. Union of India***.[1]

7. He further submitted that only 19 out of 106 witnesses have been examined in the last five-year period. He also drew our attention to terror funding chart to demonstrate that the name of the Appellant does not find place in the same. Mr. Gonsalves also questioned the omission of the alleged main conspirator, Nihal Singh, as an accused, emphasizing that the Appellant did not procure any weapons.

8. He further sought our attention to the 4th supplementary chargesheet, aimed at establishing a funding link with ISI, to illustrate the Appellant's exclusion from relevant documentation. Lastly, he stated that out of Nine protected witnesses that have been examined, eight have not mentioned the name of Appellant. Hence, he prayed to set aside the impugned order and grant bail to the Appellant.

9. Per contra, Mr. Suryaprakash V. Raju, learned Additional Solicitor General, on behalf of the Respondent, submitted that there is sufficient evidence on record to prove the incriminating role of the Appellant and the same is revealed by the statements of Protected witnesses.

10. He further submitted that the Appellant-accused along with co-accused Bikarmjit Singh @ Vicky (Accused No. 3) were involved in the activities of "Sikhs for Justice", a banded terrorist organisation, whose chief proponent is Gurpatwant Singh Pannu (Accused No. 12) and Bikramjit Singh @ Vicky (Accused No. 3) had asked their known persons to arrange weapons from Kashmir. In furtherance of their activities to procure arms and ammunition, the Appellant-accused along with co-accused Bikarmjit Singh @ Vicky and Harpreet Singh @ Happy (Accused No. 7) had visited Srinagar.

11. He further submitted that Appellant in his voluntary disclosure statement admitted that on gaining knowledge of purpose of visit to Srinagar, he voluntarily continued the journey. In fact, the Appellant suggested an alternative to the co-accused and advised them to procure the weapon from Western Uttar Pradesh.

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

12. Further, he submitted that the provisions of section 43D(5) of Unlawful Activities (Prevention) Act, 1967 are completely applicable in this case and as such the High court has rightly denied bail to the Appellant-accused.

13. He also contended that the case is presently under trial and so far 22 witnesses have been examined. The accused is facing charges of grave nature pertaining to crimes that are not attributable to an individual but members of a terrorist gang operating at the behest of Gurpatwant Singh Pannu (Accused No. 12), a proscribed terrorist. If the Appellant is released on bail, there is every likelihood that he will influence the key witnesses of the case hampering the process of justice. Hence, he prayed that the bail petition should be rejected.

DISCUSSION AND CONCLUSION

14. We have heard the learned counsel on behalf of both the parties and have perused the records of the case. The present case involves the charges under the UAP Act along with other charges under the IPC and Arms Act therefore, it is apt to consider the bail provision envisaged under section 43D of the UAP Act before we delve to analyze the facts.

Bail under UAP Act: Section 43D (5)

15. **In the course of oral argument, both sides have laid great emphasis on the interpretation of section 43D(5) of the 1967 Act.** We will begin our analysis with a discussion on the scope and limitations of bail under Section 43D(5) UAP Act.

We shall extract Section 43D(5) for easy reference:

> *"Section 43D - Modified application of certain provisions of the Code*
>
> *(1)......*
>
> *................*
>
> ***(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:***

> ***Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.***
>
> *(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.*
>
> *(7) Notwithstanding anything contained in Sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorizedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."*

16. The source of the power to grant bail in respect of non-bailable offences punishable with death or life imprisonment emanates from Section 439 CrPC. It can be noticed that Section 43D(5) of the UAP Act modifies the application of the general bail provisions in respect of offences punishable under Chapter IV and Chapter VI of the UAP Act.

17. A bare reading of Sub-section (5) of Section 43D shows that apart from the fact that Sub-section (5) bars a Special Court from releasing an accused on bail without affording the Public Prosecutor an opportunity of being heard on the application seeking release of an accused on bail, the proviso to Sub-section (5) of Section 43D puts a complete embargo on the powers of the Special Court to release an accused on bail. It lays down that if the Court, '*on perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure*', is of the opinion that there are reasonable grounds for believing that the accusation, against such person, as regards commission of offence or offences under Chapter IV and/or Chapter VI of the UAP Act is prima facie true, such accused person ***shall not be*** released on bail or on his own bond. It is interesting to note that there is no analogous provision traceable in any other statute to the one found in Section 43D(5) of the UAP Act. In that sense, the language of bail limitation adopted therein remains unique to the UAP Act.

18. The conventional idea in bail jurisprudence vis-à-vis ordinary penal offences that the discretion of Courts must tilt in favour of the oft-quoted phrase - 'bail is the rule, jail is the exception' – unless circumstances justify otherwise - does not find any place while dealing with bail applications under UAP Act. The 'exercise' of the general power to grant bail under the UAP Act is severely restrictive in scope. The form of the words used in proviso to Section 43D (5)– '*shall not be released'* in contrast with the form of the words as found in Section 437(1) CrPC - '*may be released'* – suggests the intention of the Legislature to make bail, the exception and jail, the rule.

19. The courts are, therefore, burdened with a sensitive task on hand. In dealing with bail applications under UAP Act, the courts are merely examining if there is justification to reject bail. The 'justifications' must be searched from the case diary and the final report submitted before the Special Court. The legislature has prescribed a low, '*prima facie'* standard, as a measure of the degree of satisfaction, to be recorded by Court when scrutinising the justifications [materials on record]. This standard can be contrasted with the standard of '*strong suspicion',* which is used by Courts while hearing applications for 'discharge'. In fact, the Supreme Court in ***Zahoor Ali Watali***[2] has noticed this difference, where it said:

> "***In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act."***

20. In this background, the test for rejection of bail is quite plain. Bail must be rejected as a 'rule', if after hearing the public prosecutor and after perusing the final report or Case Diary, the Court arrives at a conclusion that there are reasonable grounds for believing that the accusations are prima facie true. It is only if the test for rejection of bail is not satisfied – that the Courts would proceed to decide the bail application in accordance with the 'tripod test' (flight risk, influencing witnesses, tampering with evidence). This position is made clear by

2 [2019] 5 SCR 1060 : (2019) 5 SCC 1

Sub-section (6) of Section 43D, which lays down that the restrictions, on granting of bail specified in Sub-section (5), are in addition to the restrictions under the Code of Criminal Procedure or any other law for the time being in force on grant of bail.

21. On a textual reading of Section 43 D(5) UAP Act, the inquiry that a bail court must undertake while deciding bail applications under the UAP Act can be summarised in the form of a twin-prong test :

1) Whether the test for rejection of the bail is satisfied?

   1.1 Examine if, prima facie, the alleged 'accusations' make out an offence under Chapter IV or VI of the UAP Act

   1.2 Such examination should be limited to case diary and final report submitted under Section 173 CrPC;

2) Whether the accused deserves to be enlarged on bail in light of the general principles relating to grant of bail under Section 439 CrPC ('tripod test')?

   On a consideration of various factors such as nature of offence, length of punishment (if convicted), age, character, status of accused etc., the Courts must ask itself :

   2.1 Whether the accused is a flight risk?

   2.2 Whether there is apprehension of the accused tampering with the evidence?

   2.3 Whether there is apprehension of accused influencing witnesses?

22. The question of entering the 'second test' of the inquiry will not arise if the 'first test' is satisfied. And merely because the first test is satisfied, that does not mean however that the accused is automatically entitled to bail. The accused will have to show that he successfully passes the 'tripod test'.

Test for Rejection of Bail: Guidelines as laid down by Supreme Court in Watali's Case

23. In the previous section, based on a textual reading, we have discussed the broad inquiry which Courts seized of bail applications under Section 43D(5) UAP Act r/w Section 439 CrPC must indulge in. Setting out the framework of the law seems rather easy, yet the application of it, presents its own complexities. For greater clarity in

the application of the test set out above, it would be helpful to seek guidance from binding precedents. In this regard, we need to look no further than Watali's case which has laid down elaborate guidelines on the approach that Courts must partake in, in their application of the bail limitations under the UAP Act. On a perusal of paragraphs 23 to 29 and 32, the following 8-point propositions emerge and they are summarised as follows:

- **Meaning of 'Prima facie true'** [para 23]: *On the face of it, the materials must show the complicity of the accused in commission of the offence. The materials/evidence must be good and sufficient to establish a given fact or chain of facts constituting the stated offence, unless rebutted or contradicted by other evidence*.

- **Degree of Satisfaction at Pre-Chargesheet, Post Chargesheet and Post-Charges – Compared** [para 23]: *Once charges are framed, it would be safe to assume that a very strong suspicion was founded upon the materials before the Court, which prompted the Court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged against the accused, to justify the framing of charge. In that situation, the accused may have to undertake an arduous task to satisfy the Court that despite the framing of charge, the materials presented along with the charge-sheet (report under Section 173 CrPC), do not make out reasonable grounds for believing that the accusation against him is prima facie true. Similar opinion is required to be formed by the Court whilst considering the prayer for bail, made after filing of the first report made under Section 173 of the Code, as in the present case*.

- **Reasoning, necessary but no detailed evaluation of evidence** [para 24]: *The exercise to be undertaken by the Court at this stage--of giving reasons for grant or non-grant of bail--is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage.*

- **Record a finding on broad probabilities, not based on proof beyond doubt** [para 24]: "*The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.*"

- **Duration of the limitation under Section 43D(5) [**para 26**]**: *The special provision, Section 43-D of the 1967 Act, applies right from the stage of registration of FIR for the offences under Chapters IV and VI of the 1967 Act until the conclusion of the trial thereof*.

- **Material on record must be analysed as a 'whole'; no piecemeal analysis [**para 27**]**: *The totality of the material gathered by the investigating agency and presented along with the report and including the case diary, is required to be reckoned and not by analysing individual pieces of evidence or circumstance.*

- **Contents of documents to be presumed as true** [para 27]: *The Court must look at the contents of the document and take such document into account as it is*.

- **Admissibility of documents relied upon by Prosecution cannot be questioned** [para 27]: *The materials/evidence collected by the investigation agency in support of the accusation against the accused in the first information report must prevail until contradicted and overcome or disproved by other evidence…….In any case, the question of discarding the document at this stage, on the ground of being inadmissible in evidence, is not permissible.*

24. It will also be apposite at this juncture to refer to the directions issued in ***Devender Gupta v. National Investigating Agency***[3] wherein a Division Bench of the High Court of Andhra Pradesh strove to strike a balance between the mandate under Section 43D on one hand and the rights of the accused on the other. It was held as follows:

> *"The following instances or circumstances, in our view, would provide adequate guidance for the Court to form an opinion, as to whether the accusation in such cases is "**prima facie true**":*
>
> *1) Whether the accused is/are associated with any organization, which is prohibited through an order passed under the provisions of the act;*

3 2014 (2) ALD Cri. 251

2) *Whether the accused was convicted of the offenses involving such crimes, or terrorist activities, or though acquitted on technical grounds; was held to be associated with terrorist activities;*

3) *Whether any explosive material, of the category used in the commission of the crime, which gave rise to the prosecution; was recovered from, or at the instance of the accused;*

4) ***Whether any eye witness or a mechanical device, such as CC camera, had indicated the involvement, or presence of the accused, at or around the scene of occurrence****; and*

5) *Whether the accused was/were arrested, soon after the occurrence, on the basis of the information, or clues available with the enforcement or investigating agencies."*

25. In the case of ***Kekhriesatuo Tep and Ors. v. National Investigation Agency***[4] the Two-Judge Bench (Justice B.R. Gavai & Justice Sanjay Karol) while dealing with the bail application for the offence of supporting and raising funds for terrorist organization under section 39 and 40 of the UAP Act relied upon ***NIA v. Zahoor Ahmad Shah Watali***[5] and observed that:

> *"while dealing with the bail petition filed by the accused against whom offences under chapter IV and VI of UAPA have been made, the court has to consider as to whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. The bench also observed that distinction between the words "not guilty" as used in TADA, MCOCA and NDPS Act as against the words "prima facie" in the UAPA as held in Watali's Case (supra) to state that a degree of satisfaction required in the case of "not guilty" is much stronger than the satisfaction required in a case where the words used are "prima facie"*

4 [2023] 3 SCR 523 : (2023) 6 SCC 58

5 [2019] 5 SCR 1060 : (2019) 5 SCC 1

26. In the case of ***Sudesh Kedia v. Union of India***[6] the Bench of Justice Nageswara Rao and Justice S. Ravindra Bhat while dealing with a bail application for the offence u/s. 17, 18 and 21 of the UAP Act relied upon the principle propounded in *Watali's case (supra)* and observed that:

> *"the expression "prima facie" would mean that the materials/ evidence collated by the investigating agency in reference to the accusation against the accused concerned must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows that complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted."*

27. In the light of these guiding principles, we shall now proceed to decide whether the additional limitations found in Section 43D(5) UAP Act are attracted in the facts of the present case. In other words, we shall inquire if the first test (as set out above), i.e., test for rejection of bail, is satisfied. For this purpose, it will, firstly, have to be examined whether the allegations/accusations against the Appellants contained in charge-sheet documents and case diary, *prima facie,* disclose the commission of an offence Section 17,18 and 19 of the UAP Act.

Section 17 of the UAP Act states:

> ***17. Punishment for raising funds for terrorist act.*** *—Whoever, in India or in a foreign country, directly or indirectly, raises or collects funds or provides funds to any person or persons or attempts to provide funds to any person or persons, knowing that such funds are likely to be used by such person or persons to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.*

6 (2021) 4 SCC 704

Section 18 of the UAP Act states:

> ***18. Punishment for conspiracy, etc.***—*Whoever conspires or attempts to commit, or advocates, abets, advises or [incites, directly or knowingly facilitates] the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.*

Section 19 of the UAP Act states:

> ***19. Punishment for harbouring, etc.***—*Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine: Provided that this section shall not apply to any case in which the harbour or concealment is by the spouse of the offender."*

28. Having examined the provisions of law, let us now consider the material available on record to ascertain whether the case of the Appellant satisfies the tests as mentioned herein above.

29. The Appellant's counsel contended that the Appellant's mobile phone has not undergone scrutiny, and therefore, no conclusive connection to the charged offenses could be established. However, the scrutiny report of Bikramjit Singh @ Vicky's (Accused No. 3) mobile phone, marked as M-5 reveals at serial no. 10, that the present Appellant was in communication with Accused No.3 multiple times. The Call Detail Records (CDRs) unveils a consistent pattern of communication between the Appellant and Bikramjit Singh (Accused No.3) even prior to their trip to Srinagar for procurement of weapons. Detailed scrutiny of the CDRs indicates that the Appellant had engaged in communication with Bikramjit Singh (Accused No.3) approximately 26 times, spanning from June 22, 2018 to October 19, 2018, the day of his arrest.

30. The Appellant's counsel has objected to the denial of bail by the High Court and Special Court upon relying on the disclosure statements of Bikarmjit Singh @ Vicky (Accused No.3) and the Appellant himself.

Accused No.3 in his disclosure statement (Annexure P3) has stated that on 08.07.2018, he along with Harpreet Singh @ Happy and Gurwinder Singh @ Gurpreet Singh Gopi (the present Appellant) went to Srinagar for the purchase of pistol which was sought to be used by them to take revenge of the Sacrilege of Guru Granth Sahib. Further, the disclosure Statement of the present Appellant (Annexure P4) corroborated the disclosure Statement of Accused No.3 wherein he stated that he went with Accused No.3 and Harpreet Singh @ Happy to Srinagar. Though the present Appellant has taken the stance of not knowing the purpose of the visit to Srinagar, in his disclosure statement, he has admitted to the fact that he suggested both Bikramjit Singh (Accused No.3) and Harpreet Singh (Accused No.7) to purchase the weapon from western Uttar Pradesh.

31. The Appellant's counsel has stated that in the terror funding chart the name of the Appellant does not find place. It is pertinent to mention that the charges in the present case reveals the involvement of a terrorist gang which includes different members recruited for multiple roles. Hence, the mere fact that the accused has not received any funds or nothing incriminating was recovered from his mobile phone does not absolve him of his role in the instant crime.

32. The Appellant's counsel has relied upon the case of *KA Najeeb (supra)* to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and substance. In KA Najeeb's case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court's decision to consider bail was grounded in the anticipation of the impending sentence that the respondent-accused might face upon conviction and since the respondent-accused had already served portion of the maximum imprisonment i.e., more than five years, this court took it as a factor influencing its assessment to grant bail. Further, in KA Najeeb's case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of trial in near future.

However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail. Hence, the aforesaid argument on the behalf the appellant cannot be accepted.

33. Hence, we are of the considered view that the material on record *prima facie* indicates the complicity of the accused as a part of the conspiracy since he was knowingly facilitating the commission of a preparatory act towards the commission of terrorist act under section 18 of the UAP Act.

34. For the aforementioned reasons the bail application of the Appellant is **rejected** and consequently the appeal fails. Needless to say, that any observation made hereinabove is only for the purpose of deciding the present bail application and the same shall not be construed as an expression on the merits of the matter before the trial court.

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

[2024] 2 S.C.R. 152 : 2024 INSC 96

Rajasekar
v.
The State Rep. by The Inspector of Police

(Criminal Appeal No. 756 of 2024)

5 February 2024

[Vikram Nath and Satish Chandra Sharma, JJ.]

Issue for Consideration

The appellant who was convicted for offence u/ss. 3(a) r/w s. 4 of the POCSO Act, and was awarded the sentence of ten years RI alongwith a fine, the quantum of sentence awarded, if justified.

Headnotes

Protection of Children from Sexual Offences Act, 2012 – ss. 3(a) r/w s. 4 – Quantum of sentence – Conviction of the appellant for offences u/ss. 3(a)/4 and sentenced to ten years RI alongwith a fine of Rs. 5,000/- with a default clause to undergo SI for three months alongwith the compensation of Rs One Lakh to the victim by the courts below – In appeal before this Court, the appellant's plea that at the time of conviction, the minimum sentence prescribed u/s. 4 was seven years and as on date, the appellant have already served more than seven years of his sentence; and that the appellant is providing for the day-to-day expenses of the victim and her child:

Held: Considering the totality of the circumstances of the case, to meet the ends of justice, the period of imprisonment awarded is reduced to the period already undergone by the appellant – However, the conviction u/s. 3(a) r/w s. 4 is upheld – Sentence/ sentencing. [Para 6]

List of Acts

Protection of Children from Sexual Offences Act, 2012.

List of Keywords

Protection of Children from Sexual Offences; Quantum of sentence; Compensation; Minimum sentence; Sentence modified; Sentence reduced.

Rajasekar v. The State Rep. by The Inspector of Police

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.756 of 2024

From the Judgment and Order dated 26.10.2021 of the High Court of Judicature at Madras in CRLA No.176 of 2017

Appearances for Parties

B Karunakaran, Mrs. K Balambihai, Ajith Williyam S, V M Eashwar, S. Gowthaman, Advs. for the Appellant.

Judgment / Order of the Supreme Court

Order

Leave granted.

2. The Appellant before us is aggrieved by the judgement dated 26.10.2021 passed by the High Court of Judicature at Madras in Criminal Appeal No. 176 of 2017 whereby the High Court dismissed the appeal preferred by the Appellant and confirmed the judgement dated 03.02.2017, passed by the Sessions Court--convicting the Appellant for offences u/S. 3(a) r/w Sec. 4 of the Protection of Children from Sexual Offences (‘**POCSO**’) Act, 2012.

3. At the outset, it must be noted that *vide* order dated 12.07.2022, this Court issued notice only on the quantum of sentence awarded to the Appellant. Therefore, only that limited question is required to be considered by this Court.

4. *Vide* the judgement of the Sessions Court, the Appellant was sentenced to undergo ten years RI along with a fine of INR 5,000 with a default clause to undergo SI for three months. The State Government was also directed to pay INR 1,00,000 to the victim as compensation under Rule 7(2) of the POCSO Rules, 2012. The sentence imposed by the Sessions Court was confirmed by the High Court without any modification.

5. Learned Counsel for the Appellant submits that at the time of conviction, the minimum sentence prescribed u/Sec. 4 of the POCSO Act was seven years and as on date, the Appellant has already served more than seven years of his sentence. It is also submitted

that the Appellant is providing for the day-to-day expenses of the victim and her child and therefore, further imprisonment will impact not only his family but also the victim's. On these grounds, Learned Counsel presses for leniency.

6. Having heard the Learned Counsel for the parties and considering the totality of the circumstances of the case, we are of the view that the ends of justice would be met if the period of imprisonment awarded against the Appellant is reduced to the period already undergone by him. Accordingly, the appeal is allowed in part. The conviction of the Appellant u/s. u/S. 3(a) r/w Sec. 4 of the POCSO Act, 2012 is hereby confirmed. However, the sentence imposed by the Sessions Court and confirmed by the High Court is hereby modified and reduced to the period already undergone by the Appellant.

7. The Appellant be set at liberty forthwith in case he is not required in any other case.

8. With the aforesaid, the appeal stands disposed of. Pending application(s), if any, shall also stand disposed of.

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

[2024] 2 S.C.R. 155 : 2024 INSC 100

Vinod Kanjibhai Bhagora
v.
State of Gujarat & Anr.

(Civil Appeal No. 1571 of 2024)

02 February 2024

[Vikram Nath and Satish Chandra Sharma, JJ.]

Issue for Consideration

Whether the Appellant's subsequent employment with the State Government could be construed to mean that the Appellant had been 'absorbed' by the State Government, such that the Appellants' prior service with the Central Government would be considered as a part of 'qualifying service' in terms of Rule 25(ix) of the Gujarat Civil Services (Pension) Rules, 2022.

Headnotes

Gujarat Civil Services (Pension) Rules, 2022 – r.25(ix) – Interpretation – Qualifying Service – Inclusion of the period of service rendered to the Central Government as a part of 'qualifying service' under the State Government's Pension Rules:

Held: Pension schemes floated by the State Government form a part of delegated beneficial legislation; and ought to be interpreted widely subject to such interpretation not running contrary to the express provisions of the Pension Rules – State Government is a model employer; and ought to uphold principles of fairness and clarity –The interpretation sought to be advanced is narrow and restrictive so as to limit the benefit of r.25(ix) only to such person(s) who may have explicitly been absorbed by the State Government as against persons such as the Appellant herein who had most certainly, implicitly been absorbed by the State Government i.e., the Appellants' participation in the selection process was prefaced by an NOC from the Central Government; and subsequently was followed by the tender of a technical resignation to the Central Government upon securing employment with the State Government – High Court erred in its interpretation of r.25(ix) and unfairly deprived the Appellant from seeking inclusion of the period of service rendered to the Central Government as a part of 'qualifying service' under the Pension Rules – Respondent No.1 to consider the service rendered by the Appellant to the Central Government in his capacity as Postal Assistant in the Gandhinagar Postal

Division to be considered as qualifying service and re-calculate the terminal benefits/pensionary benefits – Impugned order set aside. [Paras 17-20, 22]

Service Law – Pension – Grant of – *raison d'etre* – Discussed. [Para 10]

Case Law Cited

LIC v. Shree Lal Meena, [2019] 5 SCR 391 **: (2019) 4 SCC 479 – referred to.**

List of Acts

Gujarat Civil Services (Pension) Rules, 2022; Constitution of India.

List of Keywords

Pension; Subsequent employment; Absorbed; Prior service; Qualifying service; Technical resignation; Terminal benefits/ pensionary benefits.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1571 of 2024

From the Judgment and Order dated 08.03.2018 of the High Court of Gujarat at Ahmedabad in SCA No.22341 of 2017

Appearances for Parties

Rishabh Parikh, E. C. Agrawala, Advs. for the Appellant.

Ms. Aishwarya Bhati, A.S.G., Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Gurmeet Singh Makker, Ms. Ruchi Kohli, Ms. Archana Pathak Dave, Ms. Suhasini Sen, S S Rebello, Shyam Gopal, Raghav Sharma, Sughosh Subramanyam, Ms. Rekha Pandey, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Leave granted. The decision of the High Court of Gujarat (the "**High Court**") in Special Civil Application No. 22341 of 2017 whereunder, the High Court declined to exercise its jurisdiction under Article 226 of the Constitution of India, is assailed before us (the "**Impugned Order**").

2. The Appellant was engaged by the Central Government as a Postal Assistant in the Gandhinagar Postal Division on 12.08.1983 and thereafter continued to serve in the aforesaid role up until 16.07.1993.

3. In the *interregnum,* an invitation for application(s) for recruitment to the post of Senior Assistant in the Ministry of Health and Medical Services, Government of Gujarat (the "**State Government**") came to be issued. Accordingly, the Appellant herein obtained a No-Objection Certificate ("**NoC**") dated 18.06.1993 from the Superintendent of Post Office, Gandhinagar Division and thereafter participated in the aforesaid selection process.

4. On 16.07.1993, the Appellant having been selected as Senior Assistant in the State Government, tendered a technical resignation in qua his employment as a Postal Assistant in the Gandhinagar Postal Division.

5. On 18.08.1993, the Appellant joined as a Senior Assistant in the State Government; and thereafter went on to serve the State Government for a period extending to 23 (twenty-three) years up until his superannuation (the "**Subject Period**"). Thereafter, the State Government only paid the Appellant terminal benefits/pensionary benefits to the extent of the Subject Period (the "**Impugned Action**").

6. Aggrieved by Impugned Action of the State Government, the Appellant made a representation before the Chief Postmaster General, Gujarat Circle seeking the inclusion of the period of his service with the Central Government i.e., as a Postal Assistant in the Gandhinagar Postal Division between '1983 and '1993 to be considered in the grant of terminal benefits / pensionary benefits as per Rule 25 of the Gujarat Civil Services (Pension) Rules, 2022 (the "**Pension Rules**"). However, *vide* an order dated 30.06.2014, the aforesaid representation came to be rejected on the sole ground that the Appellant had tendered an unconditional resignation.

7. In the aforesaid circumstances, the Appellant was constrained to prefer a writ petition before the High Court. *Vide* the Impugned Order, the High Court dismissed the aforesaid writ petition and observed *inter alia* that the Appellants' case would not attract the benefit envisaged under Rule 25 of the Pension Rules. The operative paragraph(s) of the decision of the High Court are reproduced hereunder:

> *"6. The petitioner has claimed the pensionary benefits from the State Government for the period he worked as Central Government for the year 1983 to 1993. Reliance is placed upon Rule 25 of the above Rules. However, considering Rule 25 of the above Rules, we are of the opinion that the same shall not be applicable to the facts and circumstances of the case on the hand. Rule 25 of the said Rules is with respect to the qualifying service. The employee who has rendered his service with the Central Government is thereafter absorbed in the State Government. Thereafter, it was found that he has not completed the qualifying service while working with the State Government. In that case for the purpose of qualifying service, the service rendered by him as a Central Government employee is required to be counted and that too for the purpose of qualifying service.*
>
> *7. Therefore, in the facts and circumstances of the case, Rule 25 of the above Rules would not be applicable.*
>
> *8. Under the circumstances, as observed hereinabove, the petitioner has been paid the pension/pensionary/terminal benefits of the State Government where he last worked, considering the service rendered by him with the State Government."*

8. Mr. Rishabh Parikh, Ld. Counsel appearing on behalf of the Appellant has drawn the attention of the Court to Rule 25(ix) of the Pension Rules. In the aforesaid context, he has submitted that the Appellant has served as Postal Assistant in the Gandhinagar Postal Division between '1983 and '1993 i.e., service under the Central Government having a pension scheme, and thereafter served the State Government for the Subject Period. Accordingly, it was his principal contention that the Appellant was absorbed by the State Government and consequently, in terms of Rule 25(ix) of the Pension Rules, the Appellants' terminal benefits / pensionary benefits could not be limited to merely the Subject Period but must also include 10 (ten) years of service rendered by him to the Central Government.

9. On the other hand, Ms. Swati Ghildiyal, AOR appearing on behalf of Respondent No. 1 i.e., the State of Gujarat has vehemently opposed the aforesaid submission(s). The main thrust of her argument(s) before this Court is that that the Appellant was not entitled to seek

the benefit of Rule 25(ix) of the Pension Rules on account of the Appellants' appointment in the State Government emanating from a fresh recruitment i.e., pursuant to an invitation for application(s) to the post of Senior Assistant in the Ministry of Health and Medical Services issued by the State Government.

10. As a precursor, it would be relevant to consider the *raison d'etre* qua the grant of pension. Similarly, it would be equally important to clarify that pension is earned by a government servant in *lieu* of tireless service rendered by him / her (as the case may be) during the course of their employment; and often is an important consideration for person(s) seeking government employment. Accordingly, in our considered opinion, the *raison d'etre* qua the grant of pension by the State Government would inextricably be linked to a concentrated effort by the State Government to enable its former employee(s) to tide over the vagaries and vicissitudes associated with old age *vide* a pension scheme.

11. In this context, we must now examine Rule 25(ix) of the Pension Rules. For ease of reference the same is reproduced as under:

> *"Rule 25. Qualifying Service : Subject to the provisions of these rules, qualifying service of a Government employee, means and includes -*
>
> *xxx xxx xxx*
>
> *(ix) services rendered under Central Government/ Central Government Autonomous bodies having pension scheme, by a Government employee who is absorbed in Government"*

12. The fulcrum of the dispute before this Court pertains to whether the Appellants' subsequent employment with the State Government could be construed to mean that the Appellant had been 'absorbed' by the State Government, such that the Appellants' prior service with the Central Government would be considered as a part of 'qualifying service' in terms of Rule 25(ix) of the Pension Rules.

13. Admittedly, the Appellant served the Central Government as a Postal Assistant in the Gandhinagar Postal Division between '1983 – '1993 i.e., for a period spanning close to a decade. Subsequently, pursuant to an invitation of application(s) for recruitment to the post

of Senior Assistant in the Ministry of Health and Medical Services, Government of Gujarat, the Appellant *herein* after obtaining an NOC from the Central Government, applied for and subsequently came to be appointed to the aforesaid post. Thereafter, the Appellant volunteered a technical resignation in order to be able to serve the State Government.

14. On a perusal of Rule 25(ix) of the Pension Rules we note that, qualifying service for the purpose of calculating terminal benefits / pensionary benefits under the Pension Rules would include prior services rendered by such an person under *inter alia* the Central Government provided that (i) the employment of such person under the Central Government encompassed an underlying pension scheme; and (ii) such person came to be absorbed by the State Government.

15. In the present case, it is an admitted and undisputed fact that the prior employment of the Appellant under the Central Government contemplated an underlying pension and thus, the dispute before us is only limited to whether the Appellant came to be 'absorbed' by the State Government.

16. Respondent No. 1's stance is premised on the fact that that the Appellant joined the services of the State Government pursuant to a fresh recruitment i.e., pursuant to an invitation for applications issued by the State Government; and, merely because the Appellant was a Central Government employee in his previous avatar, he could not be considered to have been absorbed by the State Government.

17. It is well settled that pension scheme(s) floated by the State Government form a part of delegated beneficial legislation; and ought to be interpreted widely subject to such interpretation not running contrary to the express provisions of the Pension Rules[1]. Furthermore, it would be relevant to underscore that the State Government is a model employer; and ought to uphold principles of fairness and clarity.

18. In the aforesaid context, we have carefully considered the Pension Rules, and we find that the interpretation sought to be advanced by Ms. Ghildiyal is narrow and restrictive so as to limit the benefit of Rule 25(ix) of the Pension Rules only to such person(s) who may have explicitly been absorbed by the State Government as against persons

1 ***Senior Divisional Manager, LIC v. Shree Lal Meena***, [2019] 5 SCR 391 : (2019) 4 SCC 479

such as the Appellant herein who has most certainly, implicitly been absorbed by the State Government i.e., the Appellants' participation in the selection process was prefaced by an NOC from the Central Government; and subsequently was followed by the tender of a technical resignation to the Central Government upon securing employment with the State Government. Pertinently, neither can the aforementioned interpretation sought to be advance on behalf of Respondent No. 1 be said to be echoed by any express provision of the Pension Rules nor has any convincing rationale to adopt such an interpretation, been placed before us.

19. We thus find that the High Court erred in its interpretation of Rule 25(ix) of the Pension Rules; and consequently, unfairly deprived the Appellant from seeking inclusion of the period of service rendered to the Central Government as a part of 'qualifying service' under the Pension Rules.

20. Accordingly, we direct Respondent No. 1 to consider the service rendered by the Appellant to the Central Government in his capacity as Postal Assistant in the Gandhinagar Postal Division to be considered as qualifying service; and thereafter (i) re-calculate the terminal benefits / pensionary benefits accruing in favour of the Appellant; and (ii) transmit the arrears (if any) of such terminal benefits / pensionary benefits to the Appellant within 6 (six) weeks from today i.e., 02.02.2024.

21. Upon making the aforementioned payment, Respondent No. 1 shall be free to seek *pro-rata* re-imbursement / contribution from Respondent No. 2 in respect of terminal benefits / pensionary benefits paid by Respondent No. 1 for the period pertaining to service rendered by the Appellant for the Central Government.

22. The Impugned Order is set aside; and the appeal stands allowed in the aforesaid terms. Pending application(s), if any, stand disposed of. No order as to costs.

Headnotes prepared by: Divya Pandey

Result of the case: Appeal allowed.

[2024] 2 S.C.R. 162 : 2024 INSC 99

Abdul Jabbar
v.
The State of Haryana & Ors.

(Criminal Appeal No. 748 of 2024)

5 February 2024

[Vikram Nath and Satish Chandra Sharma, JJ.]

Issue for Consideration

Matter pertains to conviction of the appellant for offences punishable u/s. 323/34 IPC and imposition of three months imprisonment, as also conviction u/s. 325/34 IPC and imposition of one year imprisonment with Rs 500/- fine which was modified to three months imprisonment with Rs 5000/- fine by the High Court.

Headnotes

Sentence/Sentencing – Reduction of sentence – Conviction of the appellant for offences punishable u/s. 323/34 and u/s. 325/34 – Imposition of three months imprisonment and one year imprisonment with Rs 500/- fine respectively – High Court modified the sentence of one year imprisonment with Rs 500/- fine to three months imprisonment with Rs 5000/- fine – Correctness:

Held: Considering the totality of circumstances, that the appellant has undergone almost 1/3rd of his sentence and that the underlying incident occurred in 2010, the period of almost 13 years gone in the trial, the appellants' sentence is reduced to the period already undergone, one month and three days – Impugned order modified – Penal Code, 1860 – s. 323/34 and s. 325/34. [Para 5, 6]

List of Acts

Penal Code, 1860.

List of Keywords

Reduction of sentence; Modification of sentence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.748 of 2024

From the Judgment and Order dated 01.05.2023 of the High Court of Punjab & Haryana at Chandigarh in CRR No.3005 of 2013

Appearances for Parties

Deepkaran Dalal, Karan Singh Dalal, Raunaq Dalal, Advs. for the Appellant.

Raj Singh Rana, AAG, Samar Vijay Singh, Keshav Mittal, Ms. Sabarni Som, Fateh Singh, Ms. Nilakashi Choudhury, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Leave granted.

2. The decision of the High Court of Punjab & Haryana (the “**High Court**”) in Criminal Revision Petition bearing number CRR No. 3005 of 2013 is assailed before us.

3. The Appellant was prosecuted along with 3 (three) other persons for offences punishable under Section 452, Section 323 and Section 325 of the Indian Penal Code (the “**IPC**”). Thereafter, *vide* an order dated 22.04.2013, the Appellant came to be convicted by the Chief Judicial Magistrate, Nuh, Haryana (the “**Trial Court**”) in relation to offences punishable under (i) Section 323 read with Section 34; and (ii) Section 325 read with Section 34 of the IPC. Accordingly, the Trial Court sentenced the Appellant as under:

Offence(s)	Period of Sentence	Fine Imposed
323/34 IPC	03 Months	-
325/34 IPC	01 Year	INR 500

(the “**Trial Court Order**”).

4. The Trial Court Order was assailed before the Additional Session Judge, Nuh unsuccessfully, and thereafter challenged before the High Court. *Vide* an order dated 01.05.2023, the High Court partly allowed the Criminal Revision Petition i.e., upheld the conviction recorded by the Trial Court, however, on account of substantial delay i.e., extending to a period of almost 13 (thirteen) years in the underlying trial, modified the sentence imposed by Trial Court on the Appellant, as under:

Offence(s)	Period of Sentence	Fine Imposed
323/34 IPC	03 Months	-
325/34 IPC	03 Months	INR 5000

(the "**Impugned Order**").

5. Mr. Deepkaran Dayal, learned counsel appearing on behalf of the Appellant has drawn the attention of this Court to the fact that the Appellant has undergone almost 1/3rd of his sentence i.e., a period extending to 1 (one) month; and 3 (three) days. Furthermore, he has submitted that the underlying offence pertains to 2010 and that the Appellant was made to suffer the agony of a protracted trial spanning over 13 (thirteen) years. Accordingly, it was urged before us that the sentence awarded to the Appellant be reduced to the period already undergone.

6. Taking into consideration the totality of circumstances, coupled with the fact that underlying incident occurred in 2010, the appeal is allowed in part and the Impugned Order is modified to the extent that the Appellants' sentence is reduced to the period already undergone i.e., 1 (one) month; and 3 (three) days.

7. In view of the aforesaid, I.A. No. 126067 of 2023 i.e., an application seeking declaration of the Appellant as a juvenile at the time of the underlying offence, does not require any consideration by this Court.

8. Pending application(s), if any, shall stand disposed of. No order as to costs.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal partly allowed.

[2024] 2 S.C.R. 165 : 2024 INSC 90

Sudhir Vilas Kalel & Ors.
v.
Bapu Rajaram Kalel & Ors.

(Civil Appeal Nos. 1776 of 2024)

07 February 2024

[Vikram Nath and K.V. Viswanathan,* JJ.]

Issue for Consideration

Whether Appellant No.1 was entitled to the protection of ss.3 and 4, Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Act, 2023; whether the proceedings of 19.06.2023 holding the No Confidence Motion against Appellant No.2 as not carried for want of the requisite votes is tenable.

Headnotes

Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Act, 2023 – ss.3, 4 – Maharashtra Village Panchayats Act, 1959 – ss.35, 10(1A), 30(1A) – Maharashtra Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 – ss.3, 4 of the 2023 Act – Protection under – When not available – No Confidence Motion against Appellant No.2-Sarpanch of the Gram Panchayat – Validity – Appellant No.1 if was a member of the Panchayat entitled to vote and covered by the protective umbrella u/ss.3 and 4:

Held: Temporary Extension Act was enacted since the Scrutiny Committees were overburdened with the work of verification of Caste Certificates and the elected members were facing difficulties in obtaining the Validity Certificates within the prescribed time – It aimed to protect the applicants whose applications were still pending before the Scrutiny Committee – The idea was that such elected candidates ought not to be deprived merely because of

* Author

non-issuance of Validity Certificates when the applications are still pending – Appellant No.1 stood automatically disqualified as a Member since he failed to produce the Validity Certificate within 12 months from the date of his election – The protective umbrella of s.3 of the Temporary Extension Act, 2023 will not be available to Appellant No.1 since he is hit by s.3(2)(b), as there was no valid application pending on the date of the commencement of the said Act – Appellant No.1 ceased to be a member because of the automatic disqualification – The contention that there was no rejection and that it was only a "filing" or "lodgment" of the application by the Scrutiny Committee, not accepted – The rejection in s.3(2)(b) will also include those cases where applications came to be rejected on account of defaults committed at the end of the applicants themselves – Proceedings of the Tahsildar dtd.19.06.2023 rejecting the No Confidence Motion on the ground that the voting requirement of three-fourth of the members "entitled to sit and vote", was not fulfilled, cannot be sustained and was rightly set aside by the High Court – High Court also rightly set aside the rejection of the No Confidence Motion holding that the No Confidence Motion against Appellant No. 2-Sarpanch, was duly carried – Order of the High Court affirmed. [Paras 31, 39, 40, 42-44]

Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Act, 2023 – s.3(1)(b), (2)(b):

Held: s.3 covers the cases of persons who had applied to the Scrutiny Committee for verification of their Caste Certificate before the date of filing of the nomination papers and who were elected on the reserved seat; and whose applications were pending before the Scrutiny Committee on the date of commencement of the Act– It is mandated that they can produce the certificate within twelve months from the date of commencement of the Temporary Extension Act, 2023 i.e. till 09.07.2024 – Under s.3(1), the further period of twelve months from 10.07.2023 was for those whose applications were validly filed and pending and where their applications have been submitted before the date of nomination – Sub-section (2)(b) clearly states that the provisions of sub-section (1) shall not apply where the member whose application of Validity Certificate had been rejected by the Scrutiny Committee. [Paras 31, 38]

Sudhir Vilas Kalel & Ors. v. Bapu Rajaram Kalel & Ors.

Case Law Cited

Shankar S/o Raghunath Devre (Patil) Vs. State of Maharashtra & Others. **(2019) 3 SCC 220 – referred to.**

Anant H. Ulahalkar & Anr. Vs. Chief Election Commissioner & Ors. **2017 (1) Mh.L.J. 431;** *Mandakani Kachru Kokane alias Mandakani Vishnu Godse Vs State of Maharashtra & Ors.* **2021 (3) Mh.L.J. 221 – referred to.**

List of Acts

Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Act, 2023; Maharashtra Village Panchayats Act, 1959; Maharashtra Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000; Maharashtra Scheduled Castes, Denotified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Rules, 2012; Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965.

List of Keywords

Caste Certificate; Verification of Caste Certificates; Validity Certificate; Scrutiny Committees; No Confidence Motion; Automatic disqualification; Sarpanch.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1776 of 2024

From the Judgment and Order dated 20.09.2023 of the High Court of Judicature at Bombay in WP No.7924 of 2023

Appearances for Parties

Gaurav Agrawal, Manav, Mr./Ms. Suman Sharma, Muesh Kumar Tripathy, Ms. Swati Vaibhav, Advs. for the Appellants.

Vinay Navare, Sr. Adv., Anand Dilip Landge, Siddheshwar Kalel, Vivek Salunkhe, Aniruddha Joshi, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Raavi Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave Granted.

2. The 'war' in this case is over the validity of a No Confidence Motion against Appellant No. 2 – Sushila Sitaram Kalel, the Sarpanch (Village head) of Jambulani Gram Panchayat. However, there is a 'battle' within, which entirely determines the result of the war. It is on the validity of the membership of Appellant No. 1 – Sudhir Vilas Kalel in the Panchayat. A Motion of No Confidence is to be carried by not less than three-fourth of the total number of members who are entitled, to 'sit' and 'vote'. If the Appellant No. 1 was entitled to 'Sit' as a member on 19.06.2023, then the No Confidence Motion against Appellant No.2 cannot 'Stand', to deploy a Denning-esque phrase. The High Court has found against the appellants. Aggrieved, they are before us in appeal.

3. Was the Appellant No.1, in law, a member of the Panchayat, entitling him to vote, is the question that arises for consideration in this case. Is the Appellant No. 1 covered by the protective umbrella under Sections 3 and 4 of the Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Act, 2023 [hereinafter referred to as the "**Temporary Extension Act, 2023**"]? If the answer is in the affirmative, the election of the Appellant No. 1 as a reserved Member in the election of the Gram Panchayat of Village Jambulani would stand validated. Consequently, the No Confidence Motion expressing No Confidence in the Appellant No. 2 – Sushila Sitaram Kalel (the Sarpanch) would also stand nullified. If Appellant No. 1 is held not to be entitled to the benefit of Section 3 of the Temporary Extension Act, 2023, then he would be deemed to have vacated his seat and consequently, the No Confidence Motion would stand carried. For a fuller understanding, the background facts and the statutory regime need to be set out in some detail.

Brief facts and the Legislative Regime:

4. On 30.12.2020, the Appellant No. 1 filed his nomination papers for contesting elections as a Member of the Panchayat of Village Jambulani, District Satara on a seat reserved for the OBC category.

As early as on 03.02.2013 itself, the Appellant No. 1 was issued a Caste Certificate by the Sub Divisional Officer, District Satara certifying that he belongs to '*Lonari*' Caste which is an Other Backward Class. He had on the same day of filing his nomination papers i.e. on 30.12.2020 applied for a Validity Certificate. This Validity Certificate is an essential requirement under the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 [hereinafter referred to as the "**Caste Certificate Act, 2000**"]. There are elaborate rules framed under this Act which will be discussed later in the judgment.

5. Under Section 3 of this Act, any person belonging to Other Backward Class for the purpose of contesting for any elective post in any local authority, should apply in such form and in such manner as may be prescribed, to the Competent Authority for the issuance of a Caste Certificate. Under Section 4 of this Act, the Competent Authority is entitled to issue a Caste Certificate. This is a Certificate which the Appellant No. 1 possessed on 03.02.2013. However, this alone is not conclusive. Under Section 4(2), the Caste Certificate issued by the Competent Authority would be valid subject to the verification and grant of Validity Certificate by the Scrutiny Committee. Under Section 6 of this Act, the Government is authorized to constitute a Scrutiny Committee and prescribe the area of its jurisdiction. Under Section 6(2) of this Act, after obtaining the Caste Certificate from the Competent Authority, any person, desirous of availing of the benefits or concessions provided to the said caste, is authorized to make an application, well in time, in such form and in such manner as may be prescribed to the concerned Scrutiny Committee for the verification of such Caste Certificate and issue of a Validity Certificate. Under Section 6(4) of this Act, the Scrutiny Committee was to follow such procedure for verification of the Caste Certificate and adhere to the time limit for verification and grant of Validity Certificate as prescribed.

6. The Rules called the Maharashtra Scheduled Castes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Rules, 2012 [hereinafter referred to as the "**2012 Rules"**] have been framed. Rule 11 prescribes the constitution of the Scrutiny Committee. Rule 14 sets out that any person desirous

of availing of the benefits and concessions provided to the reserved category shall submit an application in the prescribed form with an affidavit to the concerned Scrutiny Committee for verification of his caste claim and issuance of Caste Validity Certificate well in time. Rule 15 mandates that the application for verification of Caste Certificate under Rule 14 shall be filed or submitted well in time in such form and in such manner as may be prescribed in Rule 17. Further Rule 16 provides for the information to be supplied by the applicant. It states that to enable the Scrutiny Committee to decide the application expeditiously, the documents/information set out therein, was to be produced. Apart from setting out certain documents, sub-clause (f) provides for the furnishing of other relevant evidence, if any, subject to admissibility. Explanation 2 of Rule 16 speaks of the applicant undertaking the production of original documents as and when required by the Scrutiny Committee.

7. Rule 17, which prescribes the procedure of Scrutiny Committee, is significant for this case. Sub-Rules 1 to Sub- Rules 3 of Rule 17 are extracted herein below:

> "17 (1) On receipt of application, the Scrutiny Committee shall ensure that the application and the information supplied therewith is complete in all respects and to carry out scrutiny of the application.
>
> (2) Notwithstanding anything contained in these rules, the claimant or applicant or complainant shall be personally responsible for removal of objections raised by Scrutiny Committee, if any, within two weeks or within such extended period, which shall not be more than six weeks, failing which the claim or application or complaint shall be disposed of, by appreciating available records and such decision may be communicated to the applicant by the Scrutiny Committee.
>
> (3) The incomplete application may be rejected by recording reasons."

8. As is clear from the above, Rule 17 (2) states that applicant was personally responsible for removal of objections raised by the Scrutiny Committee within the time prescribed. Sub-Rule 3 of Rule 17 categorically states that incomplete application may be rejected by recording reasons.

9. For the purpose of adjudicating this case, alongside the above statutes, certain provisions of the Maharashtra Village Panchayats Act, 1959 [hereinafter referred to as the "**Panchayats Act**"] which come into play, need to be set out and analyzed. Section 10-1A, reads as follows:

> "**10-1A. Person contesting election for reserved seat to submit Caste Certificate and Validity Certificate. -** Every person desirous of contesting election to a seat reserved for Scheduled Castes, Scheduled Tribes or, as the case may be, Backward Class of Citizens, shall be required to submit, alongwith the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificate issued by the Scrutiny Committee in accordance with the provisions of the Maharashtra Scheduled Castes, Scheduled Tribes, De-notified Tribes (Vimukta Jatis), Nomadic Tribes, other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000:
>
> Provided that, for the General or by-elections for which the last date of filing of nomination falls on or before the 31st December 2023[1], in accordance with the election programme declared by the State Election Commission, a person who has applied to the Scrutiny Committee for verification of his Caste Certificate before the date of filing of the nomination papers but who has not received the Validity Certificate on the date of filing of the nomination papers shall submit, along with the nomination papers, -
>
> (i) a true copy of the application preferred by him to the Scrutiny Committee for issuance of the Validity Certificate or any other proof of having made such application to the Scrutiny Committee; and
>
> (ii) an undertaking that he shall submit, within a period of twelve months from the date on which he is declared elected, the Validity Certificate issued by the Scrutiny Committee:

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1 (This date was originally 28.02.2021, at the time of the election in question)

> Provided further that, if such person fails to produce the Validity Certificate within a period of twelve months from the date on which he is declared elected, his election shall be deemed to have been terminated retrospectively and he shall be disqualified for being a member."

A similar provision in the form of Section 30(1A) exists for persons contesting for the reserved office of Sarpanch.

10. In view of the above provision, every person desirous of contesting election to a membership in the reserved category, shall submit alongwith the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificate issued by the Scrutiny Committee in accordance with Caste Certificate Act, 2000. The proviso sets out that for elections for which the last date of filing of nomination fell on or before the date prescribed in the proviso, a person who has applied to the Scrutiny Committee for verification of his Caste Certificate before the date of filing of the nomination papers but who has not yet received the Validity Certificate shall submit, along with the nomination papers, an undertaking that he shall submit the same, within a period of twelve months from the date on which he is declared elected. The further proviso sets out that if such person fails to produce the Validity Certificate within a period of twelve months from the date on which he is declared elected, his election shall be deemed to have been terminated retrospectively and the person was to be disqualified for being a member.

11. *In pari materia* provision exists in the Maharashtra Municipal Councils, Nagar Panchayats and Industrial Townships Act, 1965 in the form of Section 9A therein.

12. A raging legal debate arose in Maharashtra about the nature of these provisions – are they mandatory or are they directory? The issue was settled by a Full Bench of the Bombay High Court in the case of ***Anant H. Ulahalkar & Anr. Vs. Chief Election Commissioner & Ors.*** **[2017 (1) Mh.L.J. 431]*.*** This judgment of the Full Bench was affirmed by this Court in the case of ***Shankar S/o Raghunath Devre (Patil) Vs. State of Maharashtra & Others.*****[(2019) 3 SCC 220]**.

13. There were earlier divergent views in the High Court. The parties contending that the provisions were "directory", primarily argued that the time taken for disposal by the Scrutiny Committee was not in

their control. According to them, as long as the Validity Certificate was produced within a reasonable time, the strict time limit provided in the statute should be construed as directory and that elections should not be invalidated for the said reason. On the other hand, the proponents of the theory that the provision was mandatory contended that the statute is couched in mandatory terms, with the use of the word 'shall' and that consequences had been provided for non-compliance. The Full Bench, after considering the statutory provision and the decided cases, in para 45 and 46 of the judgment first held the following:

> **"45.** In case of *Sujit Vasant Patil* (supra), the Full Bench of this Court, in the context of inter play between similar Municipal Legislations and the Caste Act, 2000, has held that the legislature expects a person to claim benefit of contesting to a reserved post only after obtaining Validity Certificate from the Scrutiny Committee, though it also permits a person to claim such benefit on the basis of a tentative caste certificate issued by the Competent Authority, if such a person is willing to take the risk. Such reasoning is reflected in paragraphs 12A, 12B and 12C. Since paragraph 12B is most relevant, it is transcribed below for reference of convenience:—
>
> "*12B. Thus the scheme is that a person who obtains a caste certificate has to himself apply to the Scrutiny Committee for scrutiny of his caste certificate, so that he can secure a valid certificate from the Scrutiny Committee, and it is only after the Scrutiny Committee issuing a valid certificate that the caste certificate issued in favour of the person by the Competent Authority becomes final. In our opinion, the scheme of subsection (2) of section 6 is that any candidate who desires to avail of any benefit available to backward class has to get a caste certificate as also the validity certificate before he makes a claim for the benefits. But if a candidate chooses to make claim to the benefits on the basis of a tentative certificate namely a certificate issued by the Competent Authority, he takes the risk of his losing the benefits that he has claimed and obtained and also being visited with penal consequences on the refusal of the Scrutiny Committee to validate his caste claim. The Act*

> *contemplates conscious decision being made by a person at the time of claiming benefits.* ***The Legislature expects a person to claim the benefits only after obtaining the validity certificate, but the Legislature also permits a person to claim the benefits on the basis of a tentative certificate issued by the Competent Authority, if he is willing to take the risk mentioned above. In our opinion, therefore, the validity certificate is one of the essential ingredient of the candidate being qualified to contest for the reserved seat….***"
>
> *(emphasis supplied)*
>
> **46.** According to *Sujit Vasant Patil* (supra), therefore, a person who seeks to contest election to reserved posts without compliance with the general rule of producing Validity Certificate along with nomination papers, '*takes a risk*'. The first proviso to section 9-A, in such a case, makes this position quite clear by requiring such person to furnish a statutory undertaking to produce Validity Certificate within six months from the date of election. The second proviso, in terms, provides for consequence in case of breach. Such person, having taken the risk, cannot, in the absence of any ambiguity in the provision, be permitted to wriggle out from the consequences of breach so clearly and statutorily provided in the provision itself. Otherwise, such person, will avail of a conditional concession, without, fulfilling the condition subject to which such concession came to be granted in the first place by the provision."

The Legislature expects a person claiming the benefit of contesting in a reserved post to be in possession of both the Caste Certificate and the Validity Certificate at the time of filing the nomination. The allowance to contest by submitting the Caste Certificate alone was with the undertaking that he would produce the Validity Certificate within the stipulated time, and this was the risk that the candidate was taking. It was a 'risk' because a Validity Certificate which he ought to have ordinarily possessed on the date of nomination being unavailable, he or she is granted the concession of contesting, subject to the undertaking. In the event of non-production within the stipulated time, even an elected candidate would automatically stand disqualified.

14. Thereafter, the Full Bench went on to hold as follows in para 80 and 81, while construing the nature of the time limit for production of the Validity Certificate, as it then stood.

> "80. ...If the legislature, for a limited period of time, taking into consideration pendency of applications for issuance of Validity Certificate before the Scrutiny Committee grants some exemptions or concession to persons who have applied for issue of Validity Certificate before the date of filing nomination papers, but who have not received such Validity Certificate on the date of filing of nomination papers, subject to such persons producing the Validity Certificate "*within period of six months from the date of election*", there is no reason to treat the stipulation as to time has (sic.) merely *directory* and thereby enlarge or extend the exemption or the concession granted by the legislature.
>
> 81. If, the intention of the legislature was to grant exemption from the requirement of producing Validity Certificate, until, the elected candidate's application is disposed of by the Scrutiny Committee, nothing prevented the legislature from saying so expressly or at least by necessary implication. Instead, in this case, and perhaps, for good reason, the legislature has consciously deemed it appropriate to insist that the person submits an undertaking that he shall produce the Validity Certificate within six months and further, the legislature, in clear, unambiguous and express terms has provided that upon the failure of such person to produce the Validity Certificate within six months from the date of election, his election shall be deemed to have been retrospectively terminated and he shall be disqualified for being a Councillor. If, the stipulation as to time is construed as directory, then, the legislative intent, so clearly expressed, will be defeated. The significant portions of the provision will be rendered a mere surplusage. In essence, this Court would be rewriting the statute on the basis of its own value judgments or notions of equity and inequity."

After holding that the provision is mandatory, the Full Bench held that failure to produce the Validity Certificate from the Scrutiny Committee within the stipulated time would mean that the election was deemed to have been terminated retrospectively and the person was to be disqualified. It also held that retrospective termination of the election and disqualification were automatic in the following words:-

> "98. In the present case also the legislature in enacting section 9-A has provided for a statutory fiction, which is evident from the use of expression "*his election shall be deemed to have been terminated retrospectively and he shall be disqualified being a Councillor*". The statutory fiction must be allowed to have its full play. No other provision or reason has been pointed out to take the view that consequences prescribed under second proviso to section 9-A are not automatic or would require any further adjudication once it is established that the person elected has failed to produce the Validity Certificate within a stipulated period of six months from the date of his election.
>
> 99. The validation of caste claim of the elected Councillor by the Scrutiny Committee beyond the prescribed period would have no effect upon the statutory consequences prescribed under the second proviso to section 9-A i.e. deemed retrospective termination of the election of such Councillor and his disqualification for being a Councillor. The subsequent validation or issue of the Validity Certificate will therefore be irrelevant for the purpose of restoration of the Councillor's election but, such validation will obviously entitle him to contest the election to be held on account of termination of his election and the consequent vacancy caused thereby.
>
> 100. In the result, we hold that the time limit of six months prescribed in the two provisos to section 9-A of the said Act, within which an elected person is required to produce the Validity Certificate from the Scrutiny Committee is *mandatory*."
>
> Further, in terms of second proviso to section 9-A if a person fails to produce Validity Certificate within a period of six months from the date on which he is elected, his election shall be deemed to have been terminated retrospectively and he shall be disqualified for being a Councillor.

> Such retrospective termination of his election and disqualification for being a Councillor would be automatic and validation of his caste claim after the stipulated period would not result in restoration of his election.
>
> The questions raised, stand answered accordingly."

15. This statutory background is essential to interpret the Temporary Extension Act, 2023. To consider whether the Appellant No. 1 is entitled to the protection of the Temporary Extension Act, 2023, it is necessary to recapitulate the facts of the present case. The Appellant No. 1 obtained his Caste Certificate on 03.02.2013. Only on 30.12.2020 (the date of his nomination) he submitted an application for the Validity Certificate to the Caste Scrutiny Committee. At the time of filing of his nomination, he also filed an undertaking that he will produce the Caste Validity Certificate within twelve months from the date of his election. On 18.01.2021, the elections were held and on 21.01.2021, the results were declared and the Appellant No. 1 was declared elected. The twelve months period expired on 20.01.2022.

16. On 30.12.2020, when he filed the application online to the Scrutiny Committee for obtaining the Validity Certificate, a receipt was issued to him. In the receipt, the following endorsement appears:-

> "I have been informed that, within seven days will file declaration otherwise the matter should be closed."

Thereafter, it is undisputed that on 01-03/04/2021, the District Caste Certificate Verification Committee, Satara made the following order. This order also covered the case of the Appellant No. 1 along with 3013 other applicants. The order reads as under:

> "As per above read No 1 the intended contestants of the elections of Local Bodies. Municipal Councils, Municipal Corporations have submitted their application for their cast certificates with the office of the Committee. As per the read No 2 and 3 above the elected candidates in local bodies, municipal councils and corporations from reserved seats, have to submit their cast verification certificate within one year from the election.
>
> As per read No. 4 above notification regarding decision of the election dtd 23.03.2021 of Collector (Election Branch) and as per the notification submitted by the elected

> candidates the committee scrutinized that, whether these applicants are elected in such elections or not? After scrutiny it found that, these applicant candidates have not been elected in the elections from the reserve seats. As such elected candidates have not filed the notification of elected candidates in time, this office cannot take decision in this regard. Hence this proposal has been filed as per the provisions of Rules 17(2)(3) of Maharashtra Rules of verification of caste certificate SC, ST, OBC, Spl BC 2012."

It is clear from the operative portion of the order that since the elected candidates have not submitted the notification of being elected, in time, the office was not able to take any decision in that regard. In view of that, the proposal was 'filed' as per the provisions of Rule 17 (2)(3) of the 2012 Rules.

17. Before we take up for consideration the interpretation of Sections 3 and 4 of the Temporary Extension Act, 2023, one judgment of the High Court of Judicature at Bombay in the case of ***Mandakani Kachru Kokane alias Mandakani Vishnu Godse Vs State of Maharashtra & Ors.*** **[2021 (3) Mh.L.J. 221]** needs to be referred to. In the said judgment, in para 48, 49, 50(ii) and 50(iii), the following significant directions were issued:

> "48. Shri Satyajit Dighe, learned counsel for the Petitioner rightly submitted that impugned order of the Caste Scrutiny Committee was passed almost on the last day of twelve months mandatory period and therefore, no time was left for approaching this Court which is the only remedy available i.e. the constitutional remedy. Thus Petitioner's right to approach this Court under Article 226 of the Constitution of India is violated….
>
> 49. However, in view of the law laid down by the Full Bench of this Court in the case of Anant H. Ulharkar (supra) Section 30(1A) of the Maharashtra Village Panchayat Act, 1958 is mandatory and therefore time limit provided therein cannot be extended. However, we are constrained to issue directions to all the Caste Scrutiny Committees to decide the matters much before the mandatory period of twelve months if the aforesaid provisions are applicable. However, this will be subject to the condition

that the applicant completely co-operates in disposal of the proceedings in time bound manner and do not seek unnecessary adjournments.

50. (ii) All the District Caste Scrutiny Committees are directed to dispose of the matters which are covered by the mandatory period of twelve months as provided in Section 10-1A and Section 30(1A) of the Maharashtra Village Panchayat Act, 1959, Section 9A of the Maharashtra Municipal Councils, Nagar Panchayat and Industrial Townships Act, 1965, in Section 5-B of the Mumbai Municipal Corporation Act, 1888 and Section 5-B of the Maharashtra Municipal Corporation Act, 1949 as expeditiously as possible and in any case within a period of eight months subject to following conditions:

(a) The concerned successful candidate who has applied for getting caste certificate validated to convey his election result and this order to the relevant District Caste Scrutiny Committee personally or through his Advocate within a period of two weeks from the date of declaration of the result of his election and pointing out to the Committee the aforesaid time period of twelve months as provided in the aforesaid provisions with a request to expedite the hearing and to complete the proceedings within the time prescribed in this judgment.

(b) The relevant District Caste Scrutiny Committee to fix tentative time table for disposal of the said case in maximum period of eight months from the above referred communication of the successful candidate to the Committee. However while fixing the time table the Committee shall also have regard to the provisions of said Act and said Rules.

(c) The concerned successful candidate to completely cooperate in expeditious disposal of the respective proceedings before the committee and shall not take any adjournment without valid reason.

(d) It is specifically directed that in case such successful candidate fails to comply with the above directions then the time limit as fixed herein will not apply to such proceedings.

> (iii) The Chief Secretary of the State of Maharashtra is directed to circulate to all the District Caste Scrutiny Committees copy of this judgment within a period of 30 days from today."

It is obvious from the above directions issued on 27th October, 2020 (well before the Appellant No. 1 filed the application for the Validity Certificate on 30.12.2020) that within two weeks from the declaration of the result the successful candidate from the reserved seats was obligated to convey his election result and the order and the judgment of the High Court to the relevant Caste Scrutiny Committee. The candidate was also to point out the aforesaid time limit and request for an expeditious hearing and completion of proceeding within the said period. It is further clear that the Scrutiny Committee was to fix a tentative time table and dispose of the said application within a maximum period of eight months from the date of the aforesaid communication. The successful candidate was to co-operate in the expeditious disposal of the respective proceedings. Most importantly, it was specifically directed that in case the successful candidate failed to comply with the directions, then the time limit fixed therein will not apply to such proceedings.

18. It is also the understanding of the Appellant No. 1, as evident from the undertaking furnished along with his second application on 14.06.2023, which is in the following terms:

> "I, Applicant – Sudhir Vilas Kalel respectfully submitting this
>
> I applicant Sudhir Vilas Kalel submitting my request application that, I contested the election of Grampanchayat Jambhulni, Tal Man in the year 2020 and I am elected in the said election. <u>In that respect Ld. Election Officer, Tal Man has given me declaration/letter to me. Due to some reasons, I could not submit the same within time and therefore my proposal has been rejected by the Committee.</u>
>
> That today on 14.07.2023, I am again submitting my fresh proposal and accepting the responsibilities for delay. I am solely responsible for the delay caused. You are kindly requested to accept my proposal and please issue me the Caste Validity Certificate at your earliest."
>
> (Emphasis Supplied)

19. No doubt, on this application which is filed on 14.06.2023 (filed long after the submission of his nomination on 30.12.2020), he obtained the Validity Certificate on 12.07.2023.

20. In this background we need to examine whether the validation under Section 3 of the Temporary Extension Act, 2023 applies to the case of the Appellant No. 1. The provisions of Sections 3 and 4 of the Temporary Extension Act, 2023, along with its Statement of Objects and Reasons, are set out and analyzed in the later part of the judgment.

21. A factual aspect that needs to be noticed is that on 26.05.2023, the Tehsildar forwarded a report to the Respondent No.11 - District Collector, Satara informing that the Appellant No. 1 Sudhir Vilas Kalel has failed to produce his Caste Validity Certificate within the prescribed time as per Section 10(1A) of the Panchayats Act.

Proceedings arising from the No Confidence Motion

22. On 13.06.2023, eight *Members* moved a No Confidence Motion against Appellant No. 2-Sushila Sitaram Kalel, expressing No Confidence in her being the Sarpanch. The eight Respondents herein voted in favour of the No Confidence Motion. If Appellant No.1 was entitled to sit, the total number of members would be eleven and eight members voting would only constitute 72.73%. If the Appellant No.1 was not entitled to sit, then the total number of members would be ten and eight members voting would constitute 80%. On 19.06.2023, on the ground that there was absence of minimum three-fourth of the Members voting in favour of the motion, the No Confidence Motion was ordered as rejected. The relevant part of Section 35 of the Panchayats Act which deals with the process of No Confidence Motion is extracted below:

> **"35. Motion of no confidence. –**
>
> (1) A motion of no confidence may be moved by not less than two third of the total number of the members who are for the time being entitled to sit and vote at any meeting of the panchayat against the Sarpanch or the Upa-Sarpanch after giving such notice thereof to the Tahsildar as may be prescribed. Such notice once given shall not be withdrawn.

(2) Within seven days from the date of receipt by him of the notice under sub-section (1), the Tahasildar, shall convene a special meeting of the panchayat at a time to be appointed by him and he shall preside over such meeting. At such special meeting, the Sarpanch or the Upa- Sarpanch against whom the motion of no confidence is moved shall have a right to speak or otherwise to take part in the proceedings at the meeting including the right to vote.

(3) If the motion is carried by a majority of not less than three-fourth of the total number of the members who are for the time being entitled to sit and vote at any meeting of the panchayat or the Upa-Sarpanch, as the case may be, shall forthwith stop exercising all the powers and perform all the functions and duties of the office and thereupon such powers, functions and duties shall vest in the Upa-Sarpanch in case the motion is carried out against the Sarpanch; and in case the motion is carried out against both the Sarpanch and Upa-Sarpanch, in such officer, not below the rank of Extension Officer, as may be authorised by the Block Development Officer, till the dispute, if any, referred to under sub-section (3B) is decided: …"

23. On 23.06.2023, respondents no. 1 to 8 filed a Writ Petition before the High Court praying that the No Confidence Motion against Appellant No. 2 be declared to be duly and validly carried, and for consequential directions directing the Appellant No. 2 to forthwith stop exercising all the powers, functions and duties as the Sarpanch. Further directions for declaring election to the post of Sarpanch were also prayed.

24. On 12.07.2023, the District Caste Certificate Scrutiny Committee, Satara granted the Caste Validity Certificate to the Appellant No. 1.

25. By its judgment of 20.09.2023, which is impugned herein, the Division Bench of the High Court made rule absolute in terms of prayer (a) and (b) of the Writ. Prayer (a) and (b) of the Writ is as under:

(a) By suitable writ, order or direction this Hon'ble Court may be pleased to hold and declare that the no confidence motion against the present Respondent No. 3 moved by the Petitioners

on 13/06/2023 has been duly and validly carried with the requisite majority in the special meeting conveyed by the Respondent No. 2 and held on 19/06/2023 and consequently the direction be issued to the Respondents that the Respondent No. 3 shall forthwith stop exercising all the powers, functions and duties as the Sarpanch in the village Panchayat Jambulani Taluka Man, District Satara and thereafter, further direction be issued to the Respondent No. 2 and Respondent No. 6 – the Collector to declare the election for the post of the village Sarpanch for electing the new Sarpanch in the said Village Panchayat.

(b) By suitable writ, order or direction the declaration made by the Respondent No. 2 in the special meeting held on 19/06/2023 and as recorded in the minutes of the said meeting declaring that the no confidence motion against the Respondent No. 3 has failed be quashed and set aside.

Questions for Consideration:

26. In this scenario, the questions that arise for consideration are as follows:

a. Whether Appellant No. 1 is entitled to the protection of Sections 3 and 4 of the Temporary Extension Act, 2023?

b. Whether the proceedings of 19.06.2023 holding the No Confidence Motion against Appellant No. 2 as not carried for want of the requisite votes is tenable?

Contentions

27. We have heard Mr. Gaurav Agrawal, learned advocate (since designated as a senior counsel) for the appellants and Mr. Vinay Navare, learned senior counsel for the Respondent nos. 1 to 8 as well as Mr. Aniruddha Joshi, learned counsel for the official respondents. Mr. Gaurav Agrawal, learned advocate vehemently contends that the application filed before the Scrutiny Committee on 30.12.2020 has not been rejected. According to the learned counsel, the order dated 01-03/04.2021 cannot be construed as a rejection; that his application was pending and the filing done on 14.06.2023 was only a re-filing after curing the defects. In view of the same, according to the learned counsel, the Appellant No.1 is entitled to the benefit of the validation provision under Section 3 of the Temporary Extension

Act, 2023. Learned counsel contends that under Section 35(3) of the Maharashtra Village Panchayats Act, a No Confidence Motion has to be carried by a majority of not less than three-fourth of total number of Members who are for the time being entitled to sit and vote. Hence, submits the learned counsel, that the requisite majority of nine votes was not obtained.

28. In response, Mr. Vinay Navare, learned senior counsel and Mr. Aniruddha Joshi, learned counsel for the Respondent authorities, have contended that the Appellant No. 1 is not entitled to the benefit of Section 3 of the Temporary Extension Act, 2023 as that Section will apply only to a person who has applied to the Scrutiny Committee for verification of his Caste Certificate before the date of filing the nomination papers and who is elected on the reserved seat but whose application is pending before the Scrutiny Committee on 10.07.2023, the date of commencement of the Temporary Extension Act, 2023. It is only to those persons the benefit of submission of the Validity Certificate within twelve months from 10.07.2023 is made available. According to them, it is only that person's election which may have been terminated or deemed to have been terminated for not submitting the Validity Certificate would be protected by the deeming provisions which enabled the individual to continue to be a Member or Sarpanch. They further contended that the impugned order warrants no interference as it has been rightly held that on account of the conduct of the Appellant No. 1 in not furnishing the declaration as undertaken and as required, he is deemed to be automatically disqualified with retrospective effect from the date of his election. Since the No Confidence Motion was carried with eight Members out of ten, who were entitled to sit and vote, the rejection of No Confidence Motion was illegal.

Discussion and findings:

29. Sections 3 and 4 of the Temporary Extension Act, 2023 read as under:-

> "**3.** (*1*) Notwithstanding anything contained in sections 10-1A and 30-1A of the Maharashtra Village Panchayats Act and sections 12A, 42 and 67 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, for contesting General or bye-elections to the Village Panchayats, *Zilla Parishads* and *Panchayat Samitis* which were held on or after 1st January 2021 and till the date of commencement of this Act,—

(a) a person, who has applied to the Scrutiny Committee for verification of his Caste Certificate before the date of filing of the nomination papers and who is elected on the reserved seat of a member or *Sarpanch* of Village *Panchayat,* Councillor or President of *Zilla Parishad* or member or Chairman of *Panchayat Samiti*, but whose application is pending before the Scrutiny Committee on the date of commencement of this Act, shall submit his Validity Certificate within a period of twelve months from the date of commencement of this Act ;

And

(b) a person, whose election has been terminated or deemed to have been terminated or a person who is disqualified for being a member or *Sarpanch* of Village *Panchayat,* Councillor or President of *Zilla Parishad* or member or Chairman of *Panchayat Samiti* for not submitting the Validity Certificate within the period specified in sections mentioned above, shall be deemed to be and shall continue to be a member or *Sarpanch* of Village *Panchayat,* Councillor or President of *Zilla Parishad* or member or Chairman of *Panchayat Samiti*, as the case may be, and shall not be disqualified till the period of twelve months from the date of commencement of this Act for not submitting the Validity Certificate:

Provided that, if such person fails to produce the Validity Certificate within a period of twelve months from the date of commencement of this Act, his election shall be deemed to have been terminated retrospectively and he shall be disqualified for being a member or *Sarpanch* of Village *Panchayat,* Councillor or President of *Zilla Parishad* or member or Chairman of *Panchayat Samiti*.

(*2*) The provisions of sub-section (*1)* shall not be applicable,—

(a) where bye-elections have been held on the seats specified in sub-section (*1)* before the date of commencement of this Act ; or

(b) where a member whose application of Validity Certificate has been rejected by the Scrutiny Committee.

4. All legal proceedings pending immediately before the date of commencement of this Act, before any court or authority relating to disqualification of a member or *Sarpanch* of Village *Panchayat,* Councillor or President of Zilla *Parishad* or member or Chairman of *Panchayat Samiti*, for not submitting the Validity Certificate by them in cases where extension of period for submission of Validity Certificate is granted under this Act, shall abate."

30. The statement of objects and reasons leading to the passing of the Temporary Extension Act, 2023 w.e.f. 10.07.2023 are important. They are extracted hereinbelow:-

"Sections 10-1A and 30-1A of the Maharashtra Village Panchayats Act (III of 1959) and sections 12A, 42 and 67 of the Maharashtra Zilla Parishads and Panchayats Samitis Act, 1961 (Mah. V of 1962) provides that, every person desirous of contesting elections to a seat of a member or Sarpanch of the Village Panchayat, Councillor or President of the Zilla Parishad or member or Chairman of Panchayat Samiti reserved for persons belonging to Scheduled Castes, Scheduled Tribes or, as the case may be, Backward Classes of Citizens, shall submit alongwith the nomination paper, Caste Certificate issued by the Competent Authority and the Validity Certificate issued by the Scrutiny Committee.

2. The abovementioned sections of the said Acts are amended with a view to allow the persons, desirous of contesting for such reserved seats in certain general or bye-elections and have applied to the Scrutiny Committee for obtaining Validity Certificate, to submit the Validity Certificate within twelve months from the date on which they were declared elected.

3. **As the Scrutiny Committees are overburdened with the work of verification of Caste Certificates, the elected members were facing difficulties in obtaining the Validity Certificates from the Scrutiny Committees**

> **within the period specified in the said Acts. The applications of such elected members are still pending before the Scrutiny Committees.** However, due to pending applications of such members before Scrutiny Committees more than seven thousand duly elected members were disqualified or might be disqualified for not submitting Validity Certificates for no fault of their own. Also it had caused hindrance in the local self-governing process. **It was, therefore, necessary to ensure that such elected candidates shall not be deprived to hold such offices merely because of non-issuance of validity certificates in time by the Scrutiny Committees when their applications are still pending with the Scrutiny Committees.**
>
> 4. It was, therefore, considered expedient to make a law to provide for extension of a period of twelve months for submitting Validity Certificates by persons elected on reserved seats of member, Sarpanch, Councillor, President and member and Chairman in certain general or bye-elections to Village Panchayats, Zilla Parishads and Panchayat Samitis and for the matters connected therewith or incidental thereto.
>
> 5. As both Houses of the State Legislature were not in session and the Governor of Maharashtra was satisfied that circumstances existed which rendered it necessary for him to take immediate action to make a law, for the purposes aforesaid, the Maharashtra Temporary Extension of Period for Submitting Validity Certificate (for certain elections to Village Panchayats, Zilla Parishads and Panchayat Samitis) Ordinance, 2023 (Mah. Ord. VI of 2023), was promulgated by the Governor of Maharashtra on the 10th July 2023.
>
> 6. The Bill is intended to replace the said Ordinance by an Act of the State Legislature."
>
> (emphasis supplied)

31. As would be evident, this Temporary Extension Act was enacted since the Scrutiny Committees were overburdened with the work of verification of Caste Certificates and the elected members were facing

difficulties in obtaining the Validity Certificates within the prescribed time. It is aimed to protect the applicants whose applications are still pending before the Scrutiny Committee. The idea was that such elected candidates ought not to be deprived merely because of non-issuance of Validity Certificates when the applications are still pending. Section 3 begins with a non obstante clause. It applies to elections held on or after the 1st January, 2021 and till 10.07.2023, the date of commencement of the Temporary Extension Act, 2023. It clearly provides that it covers the cases of persons who have applied to the Scrutiny Committee for verification of his Caste Certificate before the date of filing of the nomination papers and who are elected on the reserved seat; and whose applications are pending before the Scrutiny Committee on the date of commencement of the Act. It is mandated that they can produce the certificate within twelve months from the date of commencement of the Temporary Extension Act, 2023 i.e. till 09.07.2024. Sub-clause (b) states that a person whose election has been terminated or deemed to have been terminated or a person who is disqualified for being a *Member* or *Sarpanch* for not submitting the Validity Certificate within the period specified in the sections mentioned above (10-1A and 30-1A), shall be deemed to be and shall be continued to be a member or *Sarpanch* and shall not be disqualified till the period of twelve months. Sub-section (2) further clearly states that the provisions of sub-section (1) shall not apply where the member whose application of Validity Certificate had been rejected by the Scrutiny Committee. Section 4 states that all legal proceedings pending immediately before the date of commencement of the Act, before any court or authority relating to disqualification of a member, for not submitting the Validity Certificate where extension of period for submission is granted under the present Act was to abate.

32. The High Court, in the impugned order, has recorded the following findings in its operative portion:

> "32. In this particular case, Sudhir's application for a Validity Certificate was rejected on 1st April 2021. The argument that this rejection is technical is totally irrelevant. In fact, the order seems to us to expose precisely the mischief that is sought to be cured and addressed by Section 10-1A and the amended proviso. It is not permissible for a candidate to simply file an application and do nothing

> further. That application for a Validity Certificate must be properly filed and followed through. The mere filing of the application is not in sufficient compliance with the statute. The Validity Certificate has to be obtained within the time provided, whether by the original statute or by the Temporary Extension Act. Simply filing some sort of defective application with incomplete documents does not meet the statutory purpose.
>
> 33. Thus, if even the mischief rule of interpretation, the oldest interpretation doctrine by far, [*Heydon's case*, 1584, 76 ER 637] is adopted for the purposes of the Maharashtra Village Panchayats Act, 1959 and the Temporary Extension Act, it is clear that defective or incomplete applications that result in a rejection are no different from a rejection on merits. Yet, Section 3(2)(b) of the Temporary Extension Act is thus an essential safeguard.
>
> 34. Viewed from either perspective, the Temporary Extension Act cannot come to Sudhir's rescue. We note from the Ordinance, a copy of which is at pages 93 and 96, that it was necessitated because of the huge backlog of applications pending before the scrutiny committee."

33. As was set out earlier, after obtaining his caste certificate on 03.02.2013, it was only on 30.12.2020 that is on the same day of the nomination that the Appellant No. 1 moved the Scrutiny Committee for obtaining the Validity Certificate. The elections were held on 18.01.2021 and the results were declared on 21.01.2021. He ought to have furnished the Validity Certificate by 20.01.2022.

34. After filing his application for the Validity Certificate on 30.12.2020, he undertook that he would file the declaration of the results within a week. Besides, this undertaking is legally backed by the judgment in ***Mandakani Kachru Kokane (supra)***, which no doubt gave two weeks from the date of declaration of the result for communication of the declaration to the Scrutiny Committee. Admittedly, the appellant No. 1 did not submit the declaration either within one week as undertaken or within two weeks as provided in ***Mandakani Kachru Kokane (supra)***. In cases where there is due communication from the applicants, the Division Bench in ***Mandakani Kachru Kokane (supra)*** had obligated the Scrutiny Committee to decide

the case within a maximum period of eight months from the date of communication. The Scrutiny Committee which is faced with a large number of applications can legitimately expect that the applicants who require disposal on priority basis should comply with the formalities required to enable the applicant to get priority in decision making. The Committee under Rule 17(3) is also entitled to reject incomplete applications by recording reasons. Under Section 17(2) it is also the obligation of the applicant to comply with removal of objections raised.

35. It is in this background that the order of 01-03/04/2021 came to be passed whereby the applications (including those of the Appellant No.1), were 'filed'. On the facts of the case, the question is, would the order of 01-03.04.2021 tantamount to a rejection under Section 3(2)(b) of the Temporary Extension Act, 2023 so as to dis-entitle Appellant No.1 from the benefit of Section 3.

36. To answer this question, the object of Section 10-1A and 30-1A of the Panchayats Act along with Sections 3 and 4 of the Temporary Extension Act, 2023 ought to be borne in mind. As has been correctly held in ***Anant H. Ulahalkar (supra)*** while reiterating the holding in ***Sujit Vasant Patil (supra)***, ordinarily, the rule is for an aspiring candidate in an election to submit the Caste Certificate and the Validity Certificate along with the nomination. However, a window of twelve months was given for those who have not obtained the Validity Certificate to furnish the same and this was held to be a "risk" that the applicants were taking. Under the Caste Certificate Act, 2000, the certificate attains finality only if it is authenticated with a Validity Certificate. That statute and scheme have been discussed herein above. From those who aspire to contest for a reserved seat and who take a risk of applying for the validity certificate by filing an application before the date of nomination, it is prudent to expect that they will show utmost due diligence in the prosecution of their application. This would mean that they are expected to do all that is within their control to do and submit with the Scrutiny Committee a valid application for their consideration. In fact, it was on the basis that applicants aspiring to contest election who do not possess a Validity Certificate, were taking a risk, that the provisions were held to be mandatory. Further and independent of the above, ***Mandakani Kachru Kokane (supra)*** which came on 27.10.2020 well before the Appellant No.1 filed his nomination clearly mandated that there was an obligation on the applicants before the Scrutiny

Committee to furnish the declaration of the results within two weeks of the declaration of the results for expeditious disposal. In this case, results were announced on 21.01.2021. Under the law, as it obtained in Maharashtra, as laid down in the statute and in the judgments of the Court, there was an obligation to furnish the validity certificate on or before 20.01.2022. The Appellant No. 1 admitted in the second application filed on 14.06.2023 that inspite of possessing the declaration of the result, for some reason, he could not file the same with the Scrutiny Committee. The consequence was that on 20.01.2022, the Appellant No.1 stood automatically disqualified as a *Member* with retrospective effect from the date of his election, under Section 10-1A of the Panchayats Act. On 01-03/4/2021, under Rule 17(2) and 17(3) of the Caste Certificate Rules, the applications were 'filed' for not submitting of the notification of his election. It is pertinent to note that the said order was never challenged by the Appellant No.1 and so it has attained finality.

37. To hold that – in spite of the Appellant No.1 not doing everything required to be done, and which were under his control to do – his application before the Caste Certificate Scrutiny Committee was still pending on 10.07.2023 for the purposes of Section 3 of the Temporary Extension Act, 2023, would be letting the Appellant No.1 take advantage of his own wrong. It will also go against the object and purpose of extending the time for production of the Validity Certificate by further period of twelve months from 10.07.2023.

38. As is clear from Section 3(1), the further period of twelve months from 10.07.2023 was for those whose applications were validly filed and pending and where their applications have been submitted before the date of nomination. Sub-section (1)(b) of Section 3 of the Temporary Extension Act, 2023 only revives the membership of those, whose applications are pending by enacting a deeming provision, since they are now given a further period of twelve months from 10.07.2023 to furnish the Validity Certificate. Sub-section (2) (b) clearly states that Section 3(1) was not to apply to members whose applications for Validity Certificate has been rejected by the Scrutiny Committee.

39. The contention of learned counsel for the Appellant No.1 that there was no rejection and that it was only a "filing" or "lodgment" of the application on 01-03/04/2021 by the Scrutiny Committee, does not commend itself to us for acceptance. The rejection in Section 3(2) (b) will also include those cases where applications came to be

rejected on account of defaults committed at the end of the applicants themselves. An applicant who has certain things under his control ought to have done everything that is under his control for the purpose of Section 3 of the Temporary Extension Act, 2023. This would also mean that Section 3(1) of the Temporary Extension Act, 2023 would not apply since there was no valid application filed before the nomination to the Scrutiny Committee and which was pending. That his application was not pending, was also the undertaking of the Appellant No.1, as explained hereinabove. Accepting the contention of the Appellant No.1 would also amount to putting a premium on the concession given to a party who was taking the 'risk' of contesting the election by not having a Validity Certificate on the date of the nomination.

40. For the above reasons, we hold that the Appellant No.1 stood automatically disqualified as a *Member* since he failed to produce the Validity Certificate within 12 months from the date of his election. The protective umbrella of Section 3 of the Temporary Extension Act, 2023 will not be available to Appellant No.1 since he is hit by Section 3(2)(b), for the reason that there was no valid application pending on the date of the commencement of the said Act.

41. Additionally, the application was rejected under Rule 17. No doubt this cannot be a rejection which will result in the cancellation of his caste certificate. This is also reinforced by the fact that the District Caste Certificate Scrutiny Committee, by its letter dated 14.09.2023, stated that the Appellant No.1's application dated 30.12.2020 was "disposed for non-compliance" and clarifies that his Caste Certificate dated 03.02.2013 is not invalidated. The Appellant No.1 may take the benefit of the validity certificate issued to him on 12.07.2023, pursuant to his second application of 14.06.2023, for sustaining his Caste Certificate issued by the Competent Authority on 03.02.2013, for contesting in future elections and for claiming other concessions as may be available in law.

42. Appellant No.1 has ceased to be a member because of the automatic disqualification. In view of this, the proceedings of the Tahsildar dated 19.06.2023 rejecting the No Confidence Motion on the ground that the voting requirement of three-fourth of the members "entitled to sit and vote", was not fulfilled, cannot be sustained and has rightly been set aside by the High Court.

43. The net result is that the High Court was right in setting aside the rejection of the No Confidence Motion and in holding that the No Confidence Motion against Appellant No. 2-*Sarpanch*, was duly carried. The High Court was also justified in directing that the Appellant No.2 should stop exercising the powers as a sarpanch and in further directing that the election for the post of village *Sarpanch* be notified afresh. The High Court was justified in quashing the declaration dated 19.06.2023 declaring that the No Confidence Motion had failed.

44. We affirm the judgement and order of the High Court dated 20.09.2023 in Writ Petition No. 7924 of 2023. In view of the above discussion, the Appeal is dismissed. Interim orders will stand vacated. No order as to costs.

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

[2024] 2 S.C.R. 194 : 2024 INSC 94

Naresh Chandra Agrawal
v.
The Institute of Chartered Accountants of India and Others

(Civil Appeal No. 4672 of 2012)

08 February 2024

[Pamidighantam Sri Narasimha and Aravind Kumar,* JJ.]

Issue for Consideration

Whether Rule 9(3)(b) of the Chartered Accountants' (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 is inconsistent with and beyond the rule-making power of the Central Government.

Headnotes

Chartered Accountants' (Amendment) Act, 2006 – Chartered Accountants' (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 – Writ petition was filed with a prayer to declare Rule 9(3)(b) of the Rules, 2007 as invalid on the ground that the said rule was *ultra vires* section 21 A (4) of the Act – Challenge was repelled by the High Court:

Held: The rule-making power has been conferred u/s. 29A, which is titled as 'Power of the Central Government to make Rules' – While sub-clause (1) of s. 29A sets out the general power of delegation, sub-clause (2) provides for enumerated heads – The power to make rules under the latter clause is without prejudice to the general power under the former clause – In exercise of the enabling power (s.29A(2)(c)) to make rules relating to procedure of investigation u/s. 21(4), the Rules 2007 have been made – Admittedly, Rule 9(3) goes beyond what is provided for u/s. 21A(4) in terms of the options available to the Board of Discipline in case it disagrees with the opinion of the Director (Discipline) – Other than the option of advising the director to further investigate, Rule 9(3) provides the additional option to the Board for proceeding to deal with the complaint by itself or referring it to the Disciplinary Committee, depending on whether the alleged misconduct falls under the First Schedule or the Second Schedule – Since the general delegation of power is without any specific guideline, it

* Author

may be necessary to understand the object of the Act vis-à-vis the chapter on Misconduct – This Chapter defines and prohibits professional misconduct, while aiming to uphold honesty, integrity, and professionalism in the practice of chartered accountancy – By addressing instances of misconduct, it establishes a framework for accountability, reinforcing the credibility of individual professionals and the reputation of the entire profession – To achieve these goals, the Act includes a disciplinary mechanism, ensuring a fair and transparent process for investigating and adjudicating alleged cases of misconduct – In this background, there is not the slightest hesitation to conclude that the impugned rule is completely in sync with the object and purpose of framing the Chapter on 'Misconduct' under the Act. [Paras 34, 35, 36]

Administrative Law – Subordinate Legislation – Summarization of the legal principles that may be relevant in adjudicating cases where subordinate legislation are challenged on the ground of being 'ultra vires' the parent Act:

Held: (a) The doctrine of ultra vires envisages that a Rule making body must function within the purview of the Rule making authority, conferred on it by the parent Act – As the body making Rules or Regulations has no inherent power of its own to make rules, but derives such power only from the statute, it must necessarily function within the purview of the statute – Delegated legislation should not travel beyond the purview of the parent Act; (b) Ultra vires may arise in several ways; there may be simple excess of power over what is conferred by the parent Act; delegated legislation may be inconsistent with the provisions of the parent Act; there may be non-compliance with the procedural requirement as laid down in the parent Act – It is the function of the courts to keep all authorities within the confines of the law by supplying the doctrine of ultra vires; (c) If a rule is challenged as being ultra vires, on the ground that it exceeds the power conferred by the parent Act, the Court must, firstly, determine and consider the source of power which is relatable to the rule – Secondly, it must determine the meaning of the subordinate legislation itself and finally, it must decide whether the subordinate legislation is consistent with and within the scope of the power delegated; (d) Delegated rule-making power in statutes generally follows a standardized pattern – A broad section grants authority with phrases like 'to carry out the provisions' or 'to carry out the purposes' – Another sub-section specifies areas for delegation, often using language

like 'without prejudice to the generality of the foregoing power' – In determining if the impugned rule is intra vires/ultra vires the scope of delegated power, Courts have applied the 'generality vs enumeration' principle; (e) The "generality vs enumeration" principle lays down that, where a statute confers particular powers without prejudice to the generality of a general power already conferred, the particular powers are only illustrative of the general power, and do not in any way restrict the general power – In that sense, even if the impugned rule does not fall within the enumerated heads, that by itself will not determine if the rule is ultra vires/intra vires – It must be further examined if the impugned rule can be upheld by reference to the scope of the general power; (f) The delegated power to legislate by making rules 'for carrying out the purposes of the Act' is a general delegation, without laying down any guidelines as such – When such a power is given, it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the Act of having been so framed as to fall within the scope of such general power confirmed; (g) However, it must be remembered that such power delegated by an enactment does not enable the authority, by rules/regulations, to extend the scope or general operation of the enactment but is strictly ancillary – It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision – In that sense, the general power cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself; (h) If the rule making power is not expressed in such a usual general form but are specifically enumerated, then it shall have to be seen if the rules made are protected by the limits prescribed by the parent Act. [Para 32]

Case Law Cited

Tamil Nadu and Anr. v. P. Krishnamurthy and Ors., **[2006] 3 SCR 396 : (2006) 4 SCC 517;** *Academy of Nutrition Improvement v. Union of India,* **[2011] 8 SCR 680 : (2011) 8 SCC 274;** *Afzal Ullah vs. The State of Uttar Pradesh,* **1963 SCC Online SC 76 – relied on.**

BSNL v. TRAI, **[2013] 12 SCR 999 : (2014) 3 SCC 222;** *Afzal Ullah v. State of U.P*, **[1964] 4 SCR 991 : AIR 1964 SC 264;** *Rohtak and Hissar Districts Electric*

Supply Co. Ltd. v. State of U.P., [1966] 2 SCR 863 : **AIR 1966 SC 1471;** *K. Ramanathan v. State of T.N.*, [1985] 2 SCR 1028 : **(1985) 2 SCC 116;** *D.K. Trivedi and Sons v. State of Gujarat*, **1986 Supp SCC 20;** *State of Jammu and Kashmir v Lakhwinder Kumar and Ors.*, [2013] 2 SCR 1070 : **(2013) 6 SCC 333;** *PTC India Ltd. v. Central Electricity Regulatory Commission*, [2010] 3 SCR 609 : **(2010) 4 SCC 603;** *Hindustan Zinc Ltd. vs Andhra Pradesh State Electricity Board*, [1991] 2 SCR 643 : **(1991) 3 SCC 299;** *Shri Sitaram Sugar Co. Ltd. vs Union of India*, [1990] 1 SCR 909 : **(1990) 3 SCC 223 – referred to.**

King Emperor v. Sibnath Banerji, **AIR 1945 PC 156;** *State of Kerala v. Shri M. Appukutty*, **(1963) 14 STC 242 – referred to.**

List of Acts

Chartered Accountants' (Amendment) Act, 2006 – Chartered Accountants' (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007.

List of Keywords

Administrative Law; Subordinate Legislation; Doctrine of ultra vires; Rule making body; Rule making authority; Delegated legislation; Rule exceeds the power conferred by the parent Act; Delegated rule-making power in statutes; Generality vs enumeration.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.4672 of 2012

From the Judgment and Order dated 05.09.2011 of the High Court of Delhi at New Delhi in WP No.6488 of 2011

Appearances for Parties

Dr. Anurag Kr. Agarwal, Umesh Mishra, Sanjay Jain, Advs. for the Appellant.

K. M. Nataraj, ASG, Pramod Dayal, Nikunj Dayal, Ms. Sushma Suri, Sharath Nambiar, Chinmayee Chandra, Digvijay Dam, Yogya Rajpurohit, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Aravind Kumar, J.

1. The facts in brief are set out herein below:

The Bank of Rajasthan Limited, (hereinafter referred to as **'Complainant-bank'**) had engaged the services of M/s Ramesh C. Agrawal & Co. (hereinafter referred to interchangeably as **'the firm'/ 'service provider'**) for the purpose of conducting audit work. The audit work was to be carried out in respect of Sahara India, Aliganj, Lucknow Branch for a period of 3 years commencing from 01.01.2007. According to this arrangement, the service provider was required to submit monthly audit reports in respect of daily transactions/banking affairs of the concerned branch. This report had to be submitted within a particular time frame, i.e., by the 7th of the succeeding month. The service provider was also required to report any suspicious activity or foul play pertaining to the transactions under review, to the Chief Executive Officer of the Complainant bank.

On 27.09.2009, a series of circuitous transactions (hereinafter referred to as *'subject transaction'*) involving large sums of money are said to have taken place in certain accounts of the branch, which were neither regular nor normal in nature. However, in the audit report submitted to the Complainant bank, these transactions were not flagged.

2. According to the Complainant, the main purpose of engaging the firm for audit related work was to assist it in timely detection of irregularities/ lapses, besides observing as to whether the transactions were within the policy parameters as laid down by the Reserve Bank of India. In having failed to point out the suspicious transactions that took place on 27.09.2009, the Complainant alleges that the firm had utterly failed to discharge its professional obligation under the terms, as agreed.

3. It is in this background that the Complainant wrote to the firm, vide letter dated 05.03.2009 and called for its explanation. No satisfactory response was received. On 05.09.2009, yet another letter was issued to the firm, but no reply was received in that regard.

4. Accordingly, the Complainant proceeded to register its complaint against the audit firm before the Director (Discipline) on 21.12.2009. The Director (Discipline) forwarded a copy of the complaint to the firm

and called upon it to disclose the name(s) of the member/person(s) who was/were responsible for conducting the audit and preparing the report pertaining to the subject transaction.

5. On 15.02.2010, there was a letter communication received by the Director (Discipline) from the audit firm, in which it was stated that the Appellant was given the responsibility for reviewing the subject transactions. The Appellant filed his written statement on 02.04.2010. The Complainant bank submitted its rejoinder on 02.06.2010. Certain additional documents were sought by the Director (Discipline) from the Complainant on 10.12.2010.

6. On consideration of the complaint, the written statement and the other matters on record, the Director (Discipline) arrived at a *prima facie* conclusion that the Appellant was not guilty of any professional or other misconduct within the meaning of clause (7), (8) and (9) of Part 1 of the Second Schedule of the Chartered Accountants' (Amendment) Act, 2006.

7. On such opinion of the Director being placed before the Board of Discipline, Respondent No.1 informed the Appellant that the Board of Discipline had disagreed with the *prima facie* opinion of the Director (Discipline) and the Board had decided to refer the matter to the Disciplinary Committee for further action under Chapter V of the Chartered Accountants' (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007 (for short 'Rules, 2007').

8. The action of the Board in disagreeing with the *prima facie* opinion of the Director (Discipline) and referring the matter for further action before the Disciplinary Committee was impugned before the High Court of Delhi in W.P.(C) No.6488 of 2011. The prayer in the said writ petition was to declare Rule 9(3)(b) of the Rules, 2007 as invalid on the ground that the said rule was *ultra vires* section 21 A (4) of the Act. The Ld. Division Bench having repelled the said challenge, the Appellants are now before us.

9. According to the Ld. Counsel for the Appellant, when the Director (Discipline) was of the *prima facie* opinion that the Appellant was not guilty of the alleged misconduct, the Board had two options available to it according to Section 21 A (4) of the Act. It could either close the

matter at that very stage or direct the Director (Discipline) to further investigate and it could not have assumed the role of the Director and acted as the investigating agency by referring the matter to the Disciplinary Committee. It is submitted that there is no substantive basis in the parent Act for the action impugned in this appeal. The Ld. Counsel argued that the impugned Rule, being a delegated legislation, cannot provide for any action which is not contemplated under the parent Act.

10. Per contra, Ld. Counsel for the Respondent has sought to justify the correctness of the view taken in the impugned order. According to him, if the argument of the Appellant is accepted, the result would be that the Director (Discipline), who is merely a Secretary to the Board of Discipline, would have greater powers than the Board itself. This is because the Board would not be able to overrule the *prima facie* view taken by the Director (Discipline). The Board could, at best, direct the Director (Discipline) to conduct further investigation and nothing more. It is submitted that the legislature would not have intended such a consequence. There is nothing in the scheme of the Act to suggest that the Board cannot refer the matter to the Disciplinary Committee for further action.

11. Therefore, considering the arguments canvassed on behalf of both sides, the following question falls for our consideration:

> *"Whether Rule 9(3)(b) of the Rules, 2007 is inconsistent with and beyond the rule-making power of the Central Government?"*

Relevant provisions in the Act and Rules:

12. It may be necessary to refer to certain provisions of the Act in order to better understand the scheme of the applicable law pertaining to investigation of complaints alleging misconduct. The relevant provisions are extracted hereinbelow:

> ***"21. Disciplinary Directorate. -***
>
> *(1) The Council shall, by notification, establish a Disciplinary Directorate headed by an officer of the Institute designated as Director (Discipline) and such other employees for making investigations in respect of any information or complaint received by it.*

(2) On receipt of any information or complaint along with the prescribed fee, the Director (Discipline) shall arrive at a prima facie opinion on the occurrence of the alleged misconduct.

(3) Where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the First Schedule, he shall place the matter before the Board of Discipline and where the Director (Discipline) is of the opinion that a member is guilty of any professional or other misconduct mentioned in the Second Schedule or in both the Schedules, he shall place the matter before the Disciplinary Committee.

(4) In order to make investigations under the provisions of this Act, the Disciplinary Directorate shall follow such procedure as may be specified.

(5) Where a complainant withdraws the complaint, the Director (Discipline) shall place such withdrawal before the Board of Discipline or, as the case may be, the Disciplinary Committee, and the said Board or Committee may, if it is of the view that the circumstances so warrant, permit the withdrawal at any stage.

21A. Board of Discipline. —

(1) The Council shall constitute a Board of Discipline consisting of--

(a) a person with experience in law and having knowledge of disciplinary matters and the profession, to be its presiding officer.

(b) two members one of whom shall be a member of the Council elected by the Council and the other member shall be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy.

(c) the Director (Discipline) shall function as the Secretary of the Board.

(2) The Board of Discipline shall follow summary disposal procedure in dealing with all cases before it.

(3) Where the Board of Discipline is of the opinion that a member is guilty of a professional or other misconduct mentioned in the First Schedule, it shall afford to the member apportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely: --

(a) reprimand the member.

(b) remove the name of the member from the Register up to a period of three months.

(c) impose such fine as it may think fit, which may extend to rupees one lakh.

(4) The Director (Discipline) shall submit before the Board of Discipline all information and complaints where he is of the opinion that there is no prima facie case and the Board of Discipline may, if it agrees with the opinion of the Director (Discipline), close the matter or in case of disagreement, may advise the Director (Discipline) to further investigate the matter.]

21B. Disciplinary Committee. —

(1) The Council shall constitute a Disciplinary Committee consisting of the President or the Vice-President of the Council as the Presiding Officer and two members to be elected from amongst the members of the Council and two members to be nominated by the Central Government from amongst the persons of eminence having experience in the field of law, economics, business, finance or accountancy:

Provided that the Council may constitute more Disciplinary Committees as and when it considers necessary.

(2) The Disciplinary Committee, while considering the cases placed before it shall follow such procedure as may be specified.

(3) Where the Disciplinary Committee is of the opinion that a member is guilty of a professional or other misconduct mentioned in the Second Schedule or both the First Schedule and the Second Schedule, it shall afford to the member an opportunity of being heard before making any order against him and may thereafter take any one or more of the following actions, namely: --

(a) reprimand the member.

(b) remove the name of the member from the Register permanently or for such period, as it thinks fit.

(c) impose such fine as it may think fit, which may extend to rupees five lakhs.

(4) The allowances payable to the members nominated by the Central Government shall be such as may be specified.]

"**29A. Power of Central Government to make rules:**

(1) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely :–

(a) the manner of election and nomination in respect of members to the Council under sub-section (2) of Section 9;

(b) the terms and conditions of service of the Presiding Officer and Members of the Tribunal, place of meetings and allowances to be paid to them under sub-section (3) of Section 10B;

(c) the procedure of investigation under sub-section (4) of Section 21;

(d) the procedure while considering the cases by the Disciplinary Committee under sub-section (2), and the fixation of allowances of the nominated members under sub-section (4) of Section 21B;

(e) the allowances and terms and conditions of service of the Chairperson and members of the Authority and the manner of meeting expenditure by the Council under Section 22C;

(f) the procedure to be followed by the Board in its meetings under Section 28C ; and

(g) the terms and conditions of service of the Chairperson and members of the Board under sub-section (1) of Section 28D.]

(emphasis supplied)

Rule 9 of the Rules, 2007 is extracted hereinbelow:

Rule 9. Examination of the Complaint

(1) The Director shall examine the complaint, written statement, if any, rejoinder, if any, and other additional particulars or documents, if any, and form his prima facie opinion as to whether the member or the firm is guilty or not of any professional or other 10 misconduct or both under the First Schedule or the Second Schedule or both.

(2) (a) Where the Director is of the prima facie opinion that, –

(i) the member or the firm is guilty of any misconduct under the First Schedule, he shall place his opinion along with the complaint and all other relevant papers before the Board of Discipline.

(ii) the member or the firm is guilty of misconduct under the Second Schedule or both the First and Second Schedules, he shall place his opinion along with the complaint and all other relevant papers before the Committee.

(b) If the Board of Discipline or the Committee, as the case may be, agrees with the prima facie opinion of the Director under clause (a) above, then the Board of Discipline or the Committee may proceed further under Chapter IV or V respectively.

(c) If the Board of Discipline or the Committee, as the case may be, disagrees with the prima facie opinion of the Director under clause (a) above, it shall either close the matter or advise the Director to further investigate the matter

(3) Where the Director is of the prima facie opinion that the member or the firm is not guilty of any misconduct either under the First Schedule or the Second Schedule, he shall place the matter before the Board of Discipline, and the Board of Discipline, –

(a) if it agrees with such opinion of the Director, shall pass order, for closure.

(b) if it disagrees with such opinion of the Director, then it may either proceed under chapter IV of these rules, if the matter pertains to the First Schedule, or refer the matter to the Committee to proceed under Chapter V of these rules, if the matter pertains to the Second Schedule or both the Schedules and may advise the Director to further investigate the matter.

(4) The Director shall, after making further investigation as advised by the Board of Discipline under sub-rule (2) or (3) of this rule or by the Committee under sub-rule (2), shall further proceed under this rule."

(emphasis supplied)

13. Section 21(1) empowers the Council to establish a Disciplinary Directorate for making investigations into the complaints received by it. The head of this authority is designated as Director (Discipline). Section 21(2) provides that the Director (Discipline), on receipt of any information or complaint, shall arrive at a *prima facie* opinion on the occurrence of the alleged misconduct. Section 21(3) states that should the Director (Discipline) arrive at a *prima facie* opinion that the member is guilty of professional misconduct, he shall refer the matter to the Board of Discipline or the Disciplinary Committee, depending on whether the alleged misconduct falls within the First Schedule or the Second Schedule or both. If the alleged misconduct

falls within the First Schedule, the matter is placed before the Board of Discipline and if it falls within the Second Schedule or in both the Schedules, the matter is placed before the Disciplinary Committee. Section 21(4) provides that the procedure for investigation would be as prescribed under the relevant rules.[1] In the event where the Complainant wishes to withdraw his/her complaint, Section 21(5) provides that the Director (Discipline) shall place the request for withdrawal before the Board of Discipline or the Disciplinary Committee, as the case may be, and the Board or Committee would take a final call in this regard.

14. The Board of Discipline is constituted under Section 21A of the Act. The Director (Discipline) is to function as the Secretary of the Board, as per Section 21A(1)(c) of the Act. Section 21A (2) provides that the Board shall follow a summary procedure in dealing with cases referred to it. Where the Board finds that a member is guilty of professional or other misconduct mentioned in First Schedule, it may resort to imposing any of the three punishments enumerated in Section 21A (3).

15. Section 21A (4) requires the Director (Discipline) to submit all information and complaints to the Board, where he is of the opinion that there is no *prima facie* case in the complaint. It further provides that if the Board agrees with the opinion of the Director (Discipline), it may close the matter and if it disagrees with the opinion, it may advise the Director (Discipline) to further investigate into the complaint.

16. Similar scheme to deal with complaints relating to misconduct as prescribed in the Second Schedule is found in Section 21B (1) to (4).

17. Section 29A is titled 'Power of Central Government to make rules'. Section 29A (1) enables the Central Government *'to make rules to carry out the provisions of this Act'.* Section 29A (2) sets out enumerated heads under which rules may be made. Rule 9(3), which is part of Rules, 2007 appears to have been made under Section 29A(2)(c). It is relevant to note that the power to make rules under sub-section (2) of Section 29A is *'without prejudice to the generality of the foregoing power'* provided for in Section 29A(1).

1 Chartered Accountants' (Procedure of Investigation of Professional and Other Misconduct and Conduct of Cases) Rules, 2007

18. Having discussed the scheme of relevant provisions in the parent Act, we may now peruse the contents of Rule 9.

19. Rule 9 is titled ‘Examination of Complaint’. Sub-clause (1) provides for the procedure to be followed on receipt of complaint. The Director (Discipline) is required to form his *prima facie* opinion as to whether the member is guilty or not of the alleged misconduct. Sub-clause (2) sets out the procedure to be followed in the event where the Director (Discipline) reaches a *prima facie* opinion that the member is guilty of professional misconduct. What is of utmost significance for us is to see the procedure to be followed when the Director (Discipline) comes to a *prima facie* opinion that the member is not guilty of alleged misconduct, as has been examined in the instant case. This can be found in sub-clause (3) of Rule 9. It provides that the Board can accept the opinion of the Director (Discipline) and pass an order for closure (Rule 9(3)(a)). Where the Board disagrees with the opinion of the Director (Discipline), it may proceed under Chapter IV of the Rules, 2007 if the matter pertains to the First Schedule or it may advise the Director to further investigate the matter. Similarly, the Board could refer the matter to the Disciplinary Committee for action under Chapter V if the matter pertains to the Second Schedule or it could advise the Director (Discipline) to conduct further investigation.

Analysis and Findings:

20. Now, let us contrast Section 21A (4) with Rule 9(3) to examine if there is any substance in the argument that Rule 9(3) is ultra vires Section 21A (4). In the event the Board disagrees with the opinion of the Director (Discipline), Section 21A(4) provides that the Board *may* advise the Director to further investigate the matter. However, Rule 9(3) does not limit itself to just this option. It also enables the Board to straightaway proceed to act by itself or refer the matter to the Disciplinary Committee, depending on whether the alleged misconduct relates to the First Schedule or Second Schedule. It is in this background that the learned counsel for the Appellant has strenuously submitted that the Rule goes beyond the enabling power set out in the parent Act.

21. In *State of Tamil Nadu and Anr. v. P. Krishnamurthy and Ors.* **(2006) 4 SCC 517,** this Court recollected the following principles while adjudging the validity of subordinate legislation, including regulations:

> *15. There is a presumption in favour of constitutionality or validity of a subordinate legislation and the burden is upon him who attacks it to show that it is invalid. It is also well recognized that a subordinate legislation can be challenged under any of the following grounds:*
>
> *(a) Lack of legislative competence to make the subordinate legislation.*
>
> *(b) Violation of fundamental rights guaranteed under the Constitution of India.*
>
> *(c) Violation of any provision of the Constitution of India.*
>
> *(d) Failure to conform to the statute under which it is made or exceeding the limits of authority conferred by the enabling Act.*
>
> *(e) Repugnancy to the laws of the land, that is, any enactment.*
>
> *(f) Manifest arbitrariness/unreasonableness (to an extent where the court might well say that the legislature never intended to give authority to make such rules)*
>
> ***(emphasis supplied)***

22. Of the six available grounds for challenging subordinate legislation, it is quite clear that the scope of the challenge raised in this petition is restricted to one ground in the instant case; that the Rule exceeds the limits of authority conferred by the enabling Act. Therefore, it becomes important to examine the scope of power available under the Act before we can adjudge whether the Rules exceed the limits of authority conferred by the enabling Act.

23. As we have noted earlier, the Rules, 2007, have been framed purportedly in exercise of the power conferred under Section 29A(2)(c) of the Act, which enables the Central Government to make rules regarding *'the procedure of investigation under sub-section (4) of Section 21'*. However, the enumerated heads set out in Section 29A(2) cannot be read as exhaustive since the legislature has deployed the expression *'without prejudice to the generality of the foregoing provisions'* before enumerating the specific heads for exercising the rule-making power. In that sense, the power to make rules generally for carrying out the provisions of the Act is found in Section 29A(1).

Section 29A (2) is only an illustrative list of subjects with respect to which the Central Government may make rules. The illustrative list of subjects cannot limit the scope of general power available under the wider rule-making power found in Section 29A(1).

24. Experience of legislative drafting in India has shown that, generally, the delegation of power to formulate rules follows a standardized pattern within statutes. Typically, a section of the statute grants this authority in broad terms, using phrases like *'to carry out the provisions of this Act' or 'to carry out the purposes of this Act.'* Subsequently, another sub-section details specific matters or areas for which the delegated power can be exercised, often employing language such as *'in particular and without prejudice to the generality of the foregoing power.'* Judicial interpretation of such provisions underscores that the specific enumeration is illustrative and should not be construed as limiting the scope of the general power. This approach allows for flexibility in rulemaking, enabling the authorities to address unforeseen circumstances. A key principle emerges from this interpretation: even if specific topics are not explicitly listed in the statute, the formulation of rules can be justified if it falls within the general power conferred, provided it stays within the overall scope of the Act. This mode of interpretation has been categorised as the 'generality versus enumeration' principle in some precedents of this Court[2]. This delicate balance between specificity and generality in legal delegation is crucial for effective governance and adaptability to evolving legal landscapes.

25. For the sake of completeness, we may refer to some leading precedents of this Court which have discussed the *'generality versus enumeration' principle.*

26. In *State of Jammu and Kashmir v Lakhwinder Kumar and Ors.,* **(2013) 6 SCC 333**, this Court held that when a general power to make regulations is followed by a specific power to make regulations, the latter does not limit the former. This is the principle of 'generality vs enumeration': a residuary provision can always be given voice.

2 See, BSNL v. TRAI, (2014) 3 SCC 222; King Emperor v. Sibnath Banerji: AIR 1945 PC 156; Afzal Ullah v. State of U.P, AIR 1964 SC 264; Rohtak and Hissar Districts Electric Supply Co. Ltd. v. State of U.P.,AIR 1966 SC 1471; K. Ramanathan v. State of T.N. (1985) 2 SCC 116; D.K. Trivedi and Sons v. State of Gujarat, 1986 Supp SCC 20

27. In *Academy of Nutrition Improvement v. Union of India* **(2011) 8 SCC 274,** this Court had interpreted a pari materia expression *"in particular and without the generality of the foregoing power, such Rules may provide for all or any of the following matters"*. This Court held as follows :

> *"………where power is conferred to make subordinate legislation in general terms, the subsequent particularisation of the matters/topics has to be construed as merely illustrative and not limiting the scope of the general power. Consequently, even if the specific enumerated topics in section 23(1A) may not empower the Central Government to make the impugned rule (Rule 44-I), making of the Rule can be justified with reference to the general power conferred on the central government under section 23(1), provided the rule does not travel beyond the scope of the Act"*

28. In the case of *State of Kerala v. Shri M. Appukutty (1963) 14 STC 242,* the provisions of Section 19 (1) and (2) (f) of the Madras General Sales Tax Act of 1939 came up for consideration of this Court. It was unsuccessfully argued therein that Rule 17(1) was ultra vires the rule making power specifically enumerated in Section 19(2)(f).

29. The relevant provisions involved there were similar in form to the applicable provisions in the instant case.

Section 19 (1),(2),2(f) read as follows:

(1) The State Government may make rules to carry out the purposes of this Act.

*(2) In particular and without prejudice to the generality of foregoing power such rules may provide for-- ******

(f) the assessment to tax under this Act of any turnover which has escaped assessment and the period within which such assessment may be made, not exceeding three years;

Dealing with the objection raised, this Court observed:**--**

> *"..... Rule 17 (1) and (3A) ex facie properly fall under Section 19(2)(f). In any event as was said by the Privy Council in King Emperor v. Sibnath Banerji MANU/PR/0024/1945,*

> *the rule-making power is conferred by Sub-section (1) of that section and the function of Sub-section (2) is merely illustrative and the rules which are referred to in Sub-section (2) are authorised by and made under Sub-section (1).* ***The pro-visions of Sub-section (2) are not restrictive of Sub-section (1) as expressly stated in the words 'without prejudice to the generality of the foregoing power' with which Sub-section (2) begins and which words are similar to the words of Sub-section (2) of Section 2 of the Defence of India Act which the Privy Council was considering....."***
>
> ***(emphasis supplied)***

30. While examining the "generality versus enumeration" principle, this Court, in *PTC India Ltd. v. Central Electricity Regulatory Commission,* (2010) 4 SCC 603, referred with approval to its earlier Judgement in *Hindustan Zinc Ltd. vs Andhra Pradesh State Electricity Board* (1991) 3 SCC 299, wherein the scope of Sections 49(1) & (2) of the Electricity Supply Act, 1948 fell for consideration. Under Section 49(1), a general power was given to the Board to supply electricity to any person not being a licensee, upon such terms and conditions as the Board thinks fit and the Board may, for the purposes of such supply, frame uniform tariff under Section 49(2). The Board was required to fix uniform tariff after taking into account certain enumerated factors. In this context, this Court, in *Hindustan Zinc Ltd.,* held that the power of fixation of tariff in the Board ordinarily had to be done in the light of specified factors; however, such enumerated factors in Section 49(2) did not prevent the Board from fixing uniform tariff on factors other than those enumerated in Section 49(2), as long as they were relevant and in consonance with the Act. This Court then referred, with approval, to its judgment in *Shri Sitaram Sugar Co. Ltd. vs Union of India* (1990) 3 SCC 223, wherein it was held that the enumerated factors/topics in a provision did not mean that the authority cannot take any other matter into consideration which may be relevant; and the words in the enumerated provision are not a fetter; they are not words of limitation, but are words for general guidance.

31. In *Afzal Ullah vs. The State of Uttar Pradesh* reported in 1963 SCC Online SC 76, it was argued that the impugned bye-laws were invalid, because they were outside the authority conferred on the delegate to make bye-laws by Section 298(2) of the Act, and it was also

contended that the bye-laws were invalid for the additional reason that they were inconsistent with Section 241 of the Act. Rejecting the said contentions, this Court observed as follows:

> *"Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by s. 298(1). It is well-settled that the specific provisions such as are contained in the several clauses of s. 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by s. 298(1) vide Emperor v. Sibnath Banerji & Ors MANU/PR/0024/1945. If the powers specified by s. 298(1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under s. 298(2) control the general words used by s. 298(1).* ***These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by section 298(2) may well be protected by s. 298(1), provided, of course, the impugned bye-laws can be justified by reference to the requirements of s. 298(1).*** *There can be no doubt that the impugned bye-laws in regard to the markets framed by respondent No. 2 are for the furtherance of municipal administration under the Act, and so, would attract the provisions of s. 298(1). Therefore we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."*
>
> ***(emphasis supplied)***

32. From reference to the precedents discussed above and taking an overall view of the instant matter, we proceed to distil and summarise the following legal principles that may be relevant in adjudicating cases where subordinate legislation are challenged on the ground of being '*ultra vires*' the parent Act:

(a) The doctrine of ultra vires envisages that a Rule making body must function within the purview of the Rule making authority, conferred on it by the parent Act. As the body making Rules or Regulations has no inherent power of its own to make rules, but

derives such power only from the statute, it must necessarily function within the purview of the statute. Delegated legislation should not travel beyond the purview of the parent Act.

(b) Ultra vires may arise in several ways; there may be simple excess of power over what is conferred by the parent Act; delegated legislation may be inconsistent with the provisions of the parent Act; there may be non-compliance with the procedural requirement as laid down in the parent Act. It is the function of the courts to keep all authorities within the confines of the law by supplying the doctrine of ultra vires.

(c) If a rule is challenged as being ultra vires, on the ground that it exceeds the power conferred by the parent Act, the Court must, *firstly*, determine and consider the source of power which is relatable to the rule. Secondly, it must determine the meaning of the subordinate legislation itself and finally, it must decide whether the subordinate legislation is consistent with and within the scope of the power delegated.

(d) Delegated rule-making power in statutes generally follows a standardized pattern. A broad section grants authority with phrases like *'to carry out the provisions' or 'to carry out the purposes.'* Another sub-section specifies areas for delegation, often using language like *'without prejudice to the generality of the foregoing power.'* In determining if the impugned rule is intra vires/ultra vires the scope of delegated power, Courts have applied the '*generality vs enumeration'* principle.

(e) The *"generality vs enumeration"* principle lays down that, where a statute confers particular powers *without prejudice* to the generality of a general power already conferred, the particular powers are only illustrative of the general power, and do not in any way restrict the general power. In that sense, even if the impugned rule does not fall within the enumerated heads, that by itself will not determine if the rule is ultra vires/intra vires. It must be further examined if the impugned rule can be upheld by reference to the scope of the general power.

(f) The delegated power to legislate by making rules *'for carrying out the purposes of the Act'* is a general delegation, without laying down any guidelines as such. When such a power is given,

it may be permissible to find out the object of the enactment and then see if the rules framed satisfy the Act of having been so framed as to fall within the scope of such general power confirmed.

(g) However, it must be remembered that such power delegated by an enactment does not enable the authority, by rules/regulations, to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. In that sense, the general power cannot be so exercised as to bring into existence substantive rights or obligations or disabilities not contemplated by the provisions of the Act itself.

(h) If the rule making power is not expressed in such a usual general form but are specifically enumerated, then it shall have to be seen if the rules made are protected by the limits prescribed by the parent Act.

33. With this background in view, we may now apply the principles to the factual context obtained in the instant case.

34. In the instant case, the ultra vires challenge has been mounted on the ground that the impugned Rule exceeds the power conferred by the parent Act. If we look at the parent Act, the rule-making power has been conferred under Section 29A, which is titled as ‘Power of the Central Government to make Rules’. While sub-clause (1) of Section 29A sets out the general power of delegation, sub-clause (2) provides for enumerated heads. As noted earlier, the power to make rules under the latter clause is without prejudice to the general power under the former clause. In exercise of the enabling power (Section 29A(2)(c)) to make rules relating to procedure of investigation under Section 21(4), the Rules 2007 have been made. Admittedly, Rule 9(3) goes beyond what is provided for under Section 21A(4) in terms of the options available to the Board of Discipline in case it disagrees with the opinion of the Director (Discipline). Other than the option of advising the director to further investigate, Rule 9(3) provides the additional option to the Board for proceeding to deal with the complaint

by itself or referring it to the Disciplinary Committee, depending on whether the alleged misconduct falls under the First Schedule or the Second Schedule. But as we have seen from principles discussed above, the scrutiny cannot stop at examining if the impugned rule is relatable to any specific enumerated head. We must go further and examine if it can be related to the general delegation of power under Section 29A(1), which authorises the Central Government to make rules for carrying out the purposes of the Act.

35. Since the general delegation of power is without any specific guideline, it may be necessary to understand the object of the Act vis-à-vis the chapter on Misconduct. It is only then can we examine whether the impugned rule falls within the scope of such general power conferred.

Object of the CA Act vis a vis Chapter on Misconduct:

36. The Chartered Accountants Act, 1949, is a legislation that governs the regulation of the chartered accountancy profession in India. The chapter on "Misconduct" in the Chartered Accountants Act, 1949, plays a crucial role in maintaining the ethical standards of the profession in India. Its main objectives are to set ethical guidelines, prevent actions that may compromise public interests, ensure accountability among chartered accountants, and preserve the profession's reputation. This Chapter defines and prohibits professional misconduct, while aiming to uphold honesty, integrity, and professionalism in the practice of chartered accountancy. By addressing instances of misconduct, it establishes a framework for accountability, reinforcing the credibility of individual professionals and the reputation of the entire profession. To achieve these goals, the Act includes a disciplinary mechanism, ensuring a fair and transparent process for investigating and adjudicating alleged cases of misconduct.

37. Seen in this background, we have not the slightest hesitation to conclude that the impugned rule is completely in sync with the object and purpose of framing the Chapter on 'Misconduct' under the Act. As has been rightly argued by the learned counsel for the Respondent, accepting the contention of the Appellant will create an anomalous situation. The Director (Discipline) who functions as a secretary to the Board of Discipline as per Section 21A (2) will be having greater powers than the Board itself. The *'prima facie'* opinion

of the Director will become nothing but a final opinion if the Board will have no option except to direct the Director (Discipline) to further investigate the matter. The Section is silent as to what would happen in a situation where the Director (Discipline) on further investigation concludes in accordance with his preliminary assessment. Therefore, even if we accept, for the sake of argument, that Rule 9(3) cannot be saved under Section 29A(2)(c), as it directly relates to furthering the purposes of the Act in ensuring that a genuine complaint of professional misconduct against the member is not wrongly thrown out at the very threshold, it can be easily concluded that the impugned Rule falls within the scope of the general delegation of power under Section 29A(1).

38. Accordingly, we dismiss this appeal. No costs.

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

[2024] 2 S.C.R. 217 : 2024 INSC 97

Sushil Kumar Pandey & Ors.
v.
The High Court of Jharkhand & Anr.

(Writ Petition (Civil) No. 753 of 2023)

01 February 2024

[Aniruddha Bose and Sanjay Kumar, JJ.]

Issue for Consideration

High Court whether justified in altering the selection criteria after the performance of individual candidates was assessed for selection to the posts of District Judge Cadre in the State of Jharkhand.

Headnotes

Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 – rr.14, 18, 21 – Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Regulation, 2017 – Selection to the posts of District Judge Cadre in the State of Jharkhand – Alteration in selection criteria after the performance of individual candidates was assessed – Higher aggregate marks prescribed in deviation from the statutory rules – By way of Full Court Resolution, High Court introduced securing 50 per cent marks in aggregate (combination of marks obtained in main examination and viva-voce) as the qualifying criteria for being recommended to the posts of District Judge – Impermissibility:

Held: Under r.18, the task of setting cut-off marks was vested in the High Court but this was to be done before the start of the examination – Stipulations contained in r.21 for making the select list were breached by the High Court administration in adopting the impugned resolution – Plea that applying a higher aggregate mark was not barred under the Rules or Regulations, not accepted – The very expression "aggregate" means combination of two or more processes and in the event the procedure for arriving at the aggregate has been laid down in the applicable Rules, a separate criteria cannot be carved out to enable change in the manner of making the aggregate marks – If the High Court is permitted to alter the selection criteria after the performance of individual

candidates is assessed, that would constitute alteration of the laid down Rules – Plea of the High Court administration that r.14 permits them to alter the selection criteria after the selection process is concluded and marks are declared is not proper exposition of the said provision – r.14 empowers the High Court administration in specific cases to reassess the suitability and eligibility of a candidate in a special situation by calling for additional documents –High Court administration cannot take aid of this Rule to take a blanket decision for making departure from the selection criteria specified in the 2001 Rules – High Court to make recommendation for those candidates who were successful as per the merit or select list, for filing up the subsisting notified vacancies without applying the Full Court Resolution that requires each candidate to get 50 per cent aggregate marks – The part of the Full Court Resolution of the Jharkhand High Court by which it was decided that only those candidates who secured at least 50% marks in aggregate shall be qualified for appointment to the post of District Judge is quashed [Paras 20, 22-24]

Service jurisprudence – Change in the rule midway – Discussed.

Case Law Cited

Sivanandan C.T. & Ors. v. High Court of Kerala, [2023] 11 SCR 674 **: (2023) INSC 709 – followed.**

State of Haryana v. Subash Chander Marwaha & Ors., [1974] 1 SCR 165 **: (1974) 3 SCC 220;** *Ram Sharan Maurya and Ors. v. State of U.P. and Ors.*, [2020] 12 SCR 466 **: (2021) 15 SCC 401 – distinguished.**

K.Manjusree v. State of Andhra Pradesh and Anr., [2008] 2 SCR 1025 **: (2008) 3 SCC 512;** *Hemani Malhotra v. High Court of Delhi,* [2008] 5 SCR 1066 **: (2008) 7 SCC 11 – relied on.**

Tej Prakash Pathak & Ors. v. Rajasthan High Court and Others: **(2013) 4 SCC 540 – referred to.**

List of Acts

Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001; Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Regulation, 2017; Constitution of India.

Sushil Kumar Pandey & Ors. v. The High Court of Jharkhand & Anr.

List of Keywords

District Judge Cadre; Altering the selection criteria; Higher aggregate mark; Qualifying criteria; Cut-off marks; Departure from selection criteria.

Case Arising From

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No.753 of 2023

(Under Article 32 of The Constitution of India)

With

Writ Petition (Civil) No.921 of 2023

Appearances for Parties

Arunabh Chowdhury, Sr. Adv./A.A.G., Vinay Navare, K Karpagavinagagam, Dushyant Dave, Ms. Meenakshi Arora, Jayant K. Sud, Jaideep Gupta, Sr. Advs., Mahesh Thakur, Ms. Neha Singh, Mrs. Geetanjali Bedi, Ranvijay Singh Chandel, Shivamm Sharrma, Ms. Shivani, Prithvi Pal, Sanjay Kumar Yadav, Manoj Jain, Ms. Kiran Bhardwaj, C Aravind, K V Mathu Kumar, Ms. Geeta Verma, Syed Imtiyaz, Usman Khan, Ms. Madhurima Sarangi, Naeem Ilyas, Towseef Ahmad Dar, Danish Zubair Khan, Dr. Lokendra Malik, Surya Nath Pandey, Durga Dutt, Rohit Priyadarshi, Upendra Narayan Mishra, Satyendra Kumar Mishra, Ms. Rashi Verma, Somesh Kumar Dubey, Kartik Jasra, Prannit Stefano, Shivam Nagpal, Ms. Susmita Lal, Ms. Racheeta Chawla, Kamakhya Srivastava, Rajiv Shanker Dvivedi, Ms. Tulika Mukherjee, Karma Dorjee, Dechen W. Lachungpa, Beenu Sharma, Venkat Narayan, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

In these two writ petitions, we are to address the legality of the selection process of District Judge Cadre in the State of Jharkhand initiated in the year 2022. An advertisement bearing No. 01/2022 was published on 24th March, 2022, inviting applications from the eligible candidates for the said posts. The vacancies specified in the advertisement itself were twenty-two. Appointment procedure to

the said posts is guided by the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Rules, 2001 ('the 2001 Rules'). In the year 2017, the Jharkhand Superior Judicial Service (Recruitment, Appointment and Conditions of Service) Regulation, 2017 ("the 2017 Regulation") was framed in terms of Rule 11 and Rule 30 of the 2001 Rules for this purpose.

2. On the basis of cut-off marks specified in the advertisement as also in the 2001 Rules, select list of sixty-six persons was published, applying the 1:3 ratio as there were twenty-two published vacancies.

3. The High Court on its administrative side, however, recommended only thirteen candidates for appointment though the vacancies declared were twenty-two. A resolution to that effect was taken in a Full Court meeting held on 23.03.2023. We shall quote relevant provisions from the 2001 Rules in subsequent paragraphs of this judgment along with the relevant extracts from the advertisement. In the advertisement, the relevant portions for adjudication of the subject dispute were contained under the heading 'Eligibility and Conditions'. The following criteria for selection was specified therein:-

"Preliminary Entrance Test

(1) The Preliminary Entrance Test shall consist. Of:-

i. General English

ii. General Knowledge(including Current Affairs).

iii. C.P.C.

iv. Cr.P.C.

v. Evidence Act

vi. Law of Contract.

vii. IPC

(2) The Preliminary Entrance Test shall be of 100 in aggregate

(3) Duration of Preliminary Entrance Test shall be of two hours.

(4) There shall be negative marking of -1 mark (minus one)for each wrong answer.

Main Examination

(1) The Main Examination shall consist of:-

Paper -I

Part- I Language (English) *50 Marks*

(Essay, Precis, Preposition and Comprehension etc,)

Part- II

(i) *Procedural Law (Cr.P.C. & C.P.C)*

(ii) *Law of Evidence*

(iii) *Law of Limitation* *50Marks*

Paper- II

Substantive Law *100 Marks*

(i) *Constitution of India*

(ii) *Indian Penal Code*

(iii) *Law of Contract*

(iv) *Sale of Goods Act*

(v) *Transfer of Property Act*

(vi) *Negotiable Instrument Act*

(vii) *Law relating to Motor Vehicle Accident Claim*

(viii) *Jurisprudence.*

(ix) *Santhal Pargana Tenancy Act*

(x) *Chhotanagpur Tenancy Act*

(xi) *Protection of Children from Sexual Offences Act (pocso)*

(xii) *Prevention Of Corruption Act (xiii) SC & ST Act*

(xiv) *Electricity Act*

(xv) *Narcotic Drugs and Psychotropic Substances Act (NDPS Act)*

(2) Examination shall be held in two sittings of three hours duration for each paper.

Viva-Voce Test

(1) There shall be Viva-Voce Test of 40 marks.

(2) The marks obtained in Viva-Voce Test shall be added to the marks obtained in Main Examination and the merit list shall be prepared accordingly.

(3) No candidate irrespective of the marks obtained by him in the Main Examination, shall be eligible for selection for appointment, if he obtains less than 20 marks out of aggregate of 40 in the Viva-Voce. Test.

Note:- Every differently abled candidate will be allowed "compensatory time" of 20 minutes for each hour of written examination."

4. So far as the selection process involved in these proceedings is concerned, no preliminary entrance test was held, but that question is not in controversy before us. The main examination comprising of Paper-I and Paper-II carried a total of 200 marks. As per the advertisement, the marks allocated for viva-voce test was 40 as would appear from the preceding paragraph. A candidate irrespective of the marks obtained by him in the main examination was required to get at least 20 marks out of the aggregate 40 in the viva-voce test.

5. As per the 2001 Rules, the provisions relevant are Rules 14, 18, 21 and 22. These Rules read:-

"14. Notwithstanding anything contained in the foregoing Rule, it shall be open to the High Court to require the candidate at any stage of the selection process or thereafter, to furnish any such additional proof or to produce any document with respect to any matter relating to his suitability and/or eligibility as the High Court may deem necessary.

18. Before the start of the examination, the High Court may fix the minimum qualifying marks in the Preliminary Written Entrance Test and thereafter minimum qualifying marks in the main examination. Based on such minimum qualifying marks, the High Court may decide to call for viva-voce such number of candidates, in order of merit in written examination, depending upon the number of vacancies available as it may appropriately decide:

Provided that in the case of candidates belonging to scheduled castes and scheduled tribes and candidates belonging to other reserved categories, such minimum qualifying marks may not be higher than 45% of the total aggregate marks :

Provided also that in determining the suitability of a particular candidate based on both the minimum qualifying marks as well as in order of merit, the total marks obtained in the examination as a whole and the marks obtained in any individual paper, both shall also be taken into consideration, depending upon any guidelines that the High Court may issue in this behalf in the Regulations to be framed for this purpose.

21. A candidate, irrespective of the marks obtained by him in the Preliminary Written Entrance Examination and/or the Main Written Examination shall not be qualified to be appointed unless he obtains a minimum of 30% marks in the viva-voce test. The marks obtained at the viva voce test shall then be added to the marks obtained by the candidate at the main written examination. The names of the candidates will then be tabulated and arranged in order of merit. If two or more candidates obtain equal marks in the aggregate, the order shall be determined in accordance with the marks secured at the main written examination. If the marks secured at the main written examination of the candidates also are found equal then the order shall be decided in accordance with the marks obtained in the Preliminary Written Entrance Test. From the list of candidates so arranged in order of merit the High Court shall prepare a select list and have it duly notified in a manner as prescribed in the regulations. Such select list shall be valid for a period of one year from the date of being notified.

22. From out of the aforesaid select list, depending upon the number of vacancies available or those required to be filled up, the High Court shall recommend to the Government the names for appointment as Additional District Judge."

6. There appears to be one inconsistency in relation to minimum marks prescribed between the content of Rule 21 of the said Rules and paragraph 12 of the 2017 Regulation. The said paragraph of the Regulation stipulates:-

"(12) No candidate irrespective of the marks obtained by him in the Main Examination, shall be eligible for selection for appointment, if he obtains less than 20 marks out of aggregate of 40 in the Viva-Voce Test."

7. We have already quoted Rule 21 of the 2001 Rules where minimum of 30% marks in the viva-voce has been prescribed as the qualification criteria. But that question also does not arise in the present two writ petitions as none of the parties before us has raised this point. We also find it to be a safer course to go by the provisions of paragraph 12 of the 2017 Regulation, as the advertisement also prescribed minimum 20 marks out of aggregate of 40 in the Viva Voce test.

8. Admitted position is that the 9 candidates who have been left out from being recommended for appointment, had found place in the select list in terms of Rule 21 of the 2001 Rules.

9. In Writ Petition (Civil) No. 753 of 2023, altogether seven petitioners have joined in questioning the exclusion of the 9 candidates by the Full Court Resolution. The said resolution introduces securing 50 per cent marks in aggregate (combination of marks obtained in main examination and viva-voce) as the qualifying criteria for being recommended to the said posts. This resolution against Agenda No. 1 of the Full Court Meeting held on 23rd March, 2023 records:-

SL.No.	*AGENDA*	*RESOLUTIONS*
1.	*To consider the matter over recruitment process of District Judge [U/r 4(a) directly from Bar] with regard to Final Result against advertisement no.01/2022/Apptt.*	*Considered.* *The Full Court resolves to approve the final result list of 63 Candidates who have appeared for viva voce (list enclosed with this resolution and marked at Flag "X")* *Further, Full Court observes that candidates at Sl.No.7 & 8 have got the same total marks, but on careful consideration it transpires that candidate at Sl.No.8 has got higher marks in written examination. Hence in view of Rule 21 of Jharkhand Superior Judicial (Recruitment, Appointment and Conditions of Service) Rules, 2001, candidate at Sl.No.8 is placed at higher place/ rank.*

		Further after due deliberation, keeping in view the responsibility that will be vested upon the candidates who qualify for appointment of District Judges and to maintain the high standard of Superior Judicial Services, the Full Court resolves that only those candidates who have secured at least 50% marks in aggregate, shall be qualified for appointment to post of District Judge. *It is hereby resolved to recommend the names of following 13 top (merit wise) candidates to the State Government for issuance of necessary notification/s for their appointment to the post of District Judge after completing/undertaking the investigation/enquiry relating to the candidates credentials as per Rule 23 & 24 of Jharkhand Superior Judicial (Recruitment, Appointment and Conditions of Service) Rules, 2001:*

S.No.	*Roll No.*	*Name*
1	*10369*	*NAMITA CHANDRA*
2	*10956*	*SHWETA DHINGRA*
3	*10343*	*PARAS KUMAR SINHA*
4	*10388*	*KUMAR SAKET*
5	*10519*	*SHIVNATH TRIPATHI*
6	*10218*	*BHUPESH KUMAR*
7	*11577*	*AISHA KHAN*
8	*10294*	*BHANU PRATAP SINGH*
9	*10592*	*NEETI KUMAR*
10	*10371*	*PRACHI MISHRA*
11	*10109*	*PAWAN KUMAR*

12	*11061*	*RAJESH KUMAR BAGGA*
13	*10587*	*NARANJAN SINGH*
Registrar General is directed to upload the names of above mentioned 13 successful candidates to the official website of this Court.		

10. This Resolution has been disclosed in the reply to the Rejoinder affidavit filed on behalf of the High Court of Jharkhand, affirmed by Registrar General of that Court.

11. There are two impleadment applications registered as I.A. No. 173928 of 2023 taken out by 'Purnendu Sharan' and I.A. No. 10383 of 2024 taken out by 'Ashutosh Kumar Pandey', both of them being aggrieved by the procedure adopted by the Full Court.

12. Another set of candidates have filed the second writ petition registered as Writ Petition (Civil) No. 921 of 2023. In this writ petition, altogether five candidates have sought substantially the same relief asked for in the Writ Petition (Civil) No. 753 of 2023.

13. The petitioners have been represented before us by Mr. Dushyant Dave, Mr. Vinay Navare and Mr. Jayant K. Sud, learned senior counsel whereas the High Court of Jharkhand has been represented by Mr. Jaideep Gupta, learned senior counsel. Mr. Rajiv Shanker Dvivedi, learned Standing Counsel for the State of Jharkhand has appeared for the State. State has taken a non-committal stand before us. Counter affidavit has been filed by the State in which also no definitive stand has been taken on the legality of the Resolution in the Full Court meeting of the High Court. It has however been submitted by the State that certain amendments need to be carried out in Rule 21 of the 2001 Rules. That plea does not come within the scope of the present proceedings.

14. The petitioners' main case rests on two planks. First one is that the decision of the Full Court on the administrative side goes contrary to the Recruitment Rules, Regulations and the Terms contained in the advertisement. The second plank of the submissions advanced by the petitioners is that in any event, after the performance of each of the candidate is known and the marks obtained by them in the two forms of the examination are disclosed, it was impermissible for the High Court Administration to introduce fresh cut-off marks. On this point, the authority relied upon by Mr. Dave is a judgment of a Constitution Bench comprising of five Hon'ble Judges of this

Court in the case of ***Sivanandan C.T. & Ors. Vs. High Court of*** **Kerala** [(2023) INSC 709)] decided on 12th July, 2023. This judgment narrates the factual background of that case in paragraph '7' thereof and the ratio of this decision would emerge from paragraphs '52' to '57' of the said judgment. These passages from the judgment are quoted below:-

> *"7. On 27 February 2017, after the viva-voce was conducted, the Administrative Committee of the High Court passed a resolution by which it decided to apply the same minimum cut-off marks which were prescribed for th e written examination as a qualifying criterion in the viva-voce. In coming to this conclusion, the Administrative Committee was of the view that since appointments were being made to the Higher Judicial Service, it was necessary to select candidates with a requisite personality and knowledge which could be ensured by prescribing a cut-off for the viva-voce in terms similar to the cut-off which was prescribed for the written examination. On 6 March 2017, the Full Court of the High Court of Kerala approved the resolution of the Administrative Committee. The final merit list of the successful candidates was also published on the same day.*
>
> *x x x*
>
> *52. The statutory rule coupled with the scheme of examination and the 2015 examination notification would have generated an expectation in the petitioners that the merit list of selected candidates will be drawn on the basis of the aggregate of total marks received in the written examination and the viva voce. Moreover, the petitioners would have expected no minimum cutoff for the viva voce in view of the express stipulation in the scheme of examination. Both the above expectations of the petitioners are legitimate as they are based on the sanction of statutory rules, scheme of examination, and the 2015 examination notification issued by the High Court. Thus, the High Court lawfully committed itself to preparing a merit list of successful candidates on the basis of the total marks obtained in the written examination and the viva voce.*

ii. Whether the High Court has acted unlawfully in relation to its commitment?

53. *The Administrative Committee of the High Court apprehended that a candidate who performed well in the written examination, even though they fared badly in the viva voce, would get selected to the post of District and Sessions Judge. The Administrative Committee observed that recruitment of such candidates would be a disservice to the public at large because they possessed only "bookish" knowledge and lacked practical wisdom. To avoid such a situation, the Administrative Committee of the High Court decided to apply a minimum cut-off to the viva voce examination. The decision of the Administrative Committee was approved by the Full Bench of the High Court.*

54. The Constitution vests the High Courts with the authority to select judicial officers in their jurisdictions. The High Court, being a constitutional and public authority, has to bear in the mind the principles of good administration while performing its administrative duties. The principles of good administration require that the public authorities should act in a fair, consistent, and predictable manner.

55. The High Court submitted that frustration of the petitioner's substantive legitimate expectation was in larger public interest – selecting suitable candidates with practical wisdom for the post of District Judges. Indeed, it is in the public interest that we have suitable candidates serving in the Indian judiciary. However, the criteria for selecting suitable candidates are laid down in the statutory rules. As noted above, the High Court did amend the 1961 Rules in 2017 to introduce a minimum cut-off mark for the viva voce. The amended Rule 2(c) is extracted below:

"2. Method of appointment – (1) Appointment to the service shall be made as follows:

[…]

(c) Twenty five percent of the posts in the service shall be filled up by direct recruitment from the members of the Bar. The recruitment shall be on the basis of a competitive

examination consisting of a written examination and a viva voce. […] Maximum marks for viva voce shall be 50. The General and Other Backward Classes candidates shall secure a minimum of 40% marks and Scheduled Caste/ Scheduled Tribe candidate shall secure a minimum of 35% marks for passing the viva voce. The merit list of the selected candidates shall be prepared on the basis of the aggregate marks secured by the candidate in the written examination and viva voce."

(emphasis supplied)

56. Under the unamended 1961 Rules, the High Court was expected to draw up the merit list of selected candidates based on the aggregate marks secured by the candidates in the written examination and the viva voce, without any requirement of a minimum cut-off for the viva voce. Thus, the decision of the Administrative Committee to depart from the expected course of preparing the merit list of the selected candidates is contrary to the unamended 1961 Rules. It is also important to highlight that the requirement of a minimum cutoff for the viva voce was introduced after the viva voce was conducted. It is manifest that the petitioners had no notice that such a requirement would be introduced for the viva voce examination. We are of the opinion that the decision of High Court is unfair to the petitioners and amounts to an arbitrary exercise of power.

57. The High Court's decision also fails to satisfy the test of consistency and predictability as it contravenes the established practice. The High Court did not impose the requirement of a minimum cut-off for the viva voce for the selections to the post of District and Sessions Judges for 2013 and 2014. Although the High Court's justification, when analyzed on its own terms, is compelling, it is not grounded in legality. The High Court's decision to apply a minimum cut-off for the viva voce frustrated the substantive legitimate expectation of the petitioners. Since the decision of the High Court is legally untenable and fails on the touchstone of fairness, consistency, and predictability, we hold that such a course of action is arbitrary and violative of Article 14."

15. There is an earlier judgment of this Court comprising of three Hon'ble Judges in the case of **K. Manjusree -vs- State of Andhra Pradesh and Anr.** [(2008) 3 SCC 512] in which the change of recruitment criteria mid-way through the selection process has been held to be impermissible. We quote below paragraphs '27' and '36' of that judgment from the said report:-

> *"27. But what could not have been done was the second change, by introduction of the criterion of minimum marks for the interview. The minimum marks for interview had never been adopted by the Andhra Pradesh High Court earlier for selection of District & Sessions Judges, (Grade II). In regard to the present selection, the Administrative Committee merely adopted the previous procedure in vogue. The previous procedure as stated above was to apply minimum marks only for written examination and not for the oral examination. We have referred to the proper interpretation of the earlier Resolutions dated 24.7.2001 and 21.2.2002 and held that what was adopted on 30.11.2004 was only minimum marks for written examination and not for the interviews. 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. We are fortified in this view by several decisions of this Court. It is sufficient to refer to three of them - P. K. Ramachandra Iyer v. Union of India[1], Umesh Chandra Shukla v. Union of India[2], and Durgacharan Misra v. State of Orissa[3].*
>
> *x x x*
>
> *36. The Full Court however, introduced a new requirement as to minimum marks in the interview by an interpretative process which is not warranted and which is at variance with the interpretation adopted while implementing the*

1 *(1984) 2 SCC 141: 1984 SCC (L &S) 214*

2 *(1985) 3 SCC 721: 1985 SCC (L&S) 919*

3 *(1987) 4 SCC 646: 1988 SCC (L & S) 36: (1987) 5 ATC 148*

> *current selection process and the earlier selections. As the Full Court approved the Resolution dated 30.11.2004 of the Administrative Committee and also decided to retain the entire process of selection consisting of written examination and interviews it could not have introduced a new requirement of minimum marks in interviews, which had the effect of eliminating candidates, who would otherwise be eligible and suitable for selection. Therefore, we hold that the action of Full Court in revising the merit list by adopting a minimum percentage of marks for interviews was impermissible."*

16. The same view has later been taken by a Coordinate Bench of this Court in the case of **Hemani Malhotra -vs- High Court of Delhi** [(2008) 7 SCC 11]. In a later decision, **Tej Prakash Pathak & Ors. -vs- Rajasthan High Court and Others** [(2013) 4 SCC 540], a three Judge Bench of this Court expressed a view which is different from that taken in the case of **K. Manjusree** (supra) and referred the matter to the Hon'ble the Chief Justice of India for being considered by a larger Bench. There is no decision yet from a larger Bench and until the principle laid down in the case of **K. Manjusree** (supra) is overruled by a larger Bench, we shall continue to be guided by the same as "no change in the rule midway" dictum has become an integral part of the service jurisprudence.

17. The next point urged by Mr. Gupta is that the ratio of the three judgments on which reliance has been placed by Mr. Dave would not apply in the facts of the present case. His argument is that in those three authorities, the marking in viva-voce was the subject of dispute whereas in the present writ petitions, it is on aggregate marking that the High Court administration has raised the bar. One of the authorities on which Mr. Gupta has relied on is **State of Haryana -vs- Subash Chander Marwaha & Ors.** [(1974) 3 SCC 220]. In paragraphs 7 and 12 of the said report, it has been held and observed by a Bench of two Hon'ble Judges of this Court:-

> *"7. In the present case it appears that about 40 candidates had passed the examination with the minimum score of 45%. Their names were published in the Government Gazette as required by Rule 10(1) already referred to. It is not disputed that the mere entry in this list of the name*

of candidate does not give him the right to be appointed The advertisement that there are 15 vacancies to be filled does not also give him a right to be appointed. It may happen that the Government for financial or other administrative reasons may not fill up any vacancies. In such a case the candidates, even the first in the list, will not have a right to be appointed. The list is merely to help the State Government in making the appointments showing which candidates have the minimum qualifications under the Rules. The stage for selection for appointment comes thereafter, and it is not disputed that under the Constitution it is the State Government alone which can make the appointments. The High Court does not come into the picture for recommending any particular candidate. After the State Government have taken a decision as to which of the candidates in accordance with the list should be appointed, the list of selected candidates for appointment is forwarded to the High Court then will have to enter such candidates on a Register maintained by it. When vacancies are to be filled the High Court will send in the names of the candidates in accordance with the select list and in the order they have been placed in that list for appointment in the vacancies. The High Court, therefore, plays no part except to suggest to the Government who in accordance with the select list is to be appointed and in a particular vacancy. It appears that in the present case the Public Service Commission had sent up the rolls of the first 15 candidates because the Commission had been informed that there are 15 vacancies. The High Court also in its routine course had sent up the first 15 names to the Government for appointment. Thereupon the Chief Secretary to Government, Haryana wrote to the Registrar of the High Court on May 4, 1971 as follows:

"I am directed to refer to Haryana Government endst No. 1678-1 GS, II—71/3802, dated April 22, 1971, on the subject noted above, and to say that after careful consideration of the recommendations of the Punjab and Haryana High Court for appointment of first fifteen candidates to the Haryana Civil Service (Judicial Branch),

the State Government have taken the view that it would be appropriate that only the first seven candidates should be appointed to the Haryana Civil Service (Judicial Branch) and a notification has been issued accordingly. The reason is that in the opinion of the State Government, only those candidates who obtained 55% or more marks in the Haryana Civil Service (Judicial Branch) Examination, should be appointed as that will serve to maintain a minimum standard in the appointments to the Service. It may be mentioned that the last candidate appointed against un-reserved vacancies out of the merit list prepared on the basis of the Haryana Civil Service (Judicial Branch) Examination held in May 1969, secured 55.67% marks.

The State Government have also received information that the Punjab and Haryana High Court themselves recommended to the Punjab Government that in respect of P.C.S. (Judicial Branch) Examination held in 1970, candidates securing 55% marks or more should be appointed against un-reserved vacancies. Thus, the decision taken by Haryana Government is in line with the recommendations which the High Court made to the Punjab Government regarding recruitment to the P.C.S. (Judicial Branch) on the basis of the Examination held in 1970, and a similar policy in both the cases would be desirable for obvious reasons."

12. It was, however, contended by Dr Singhvi on behalf of the respondents that since Rule 8 of Part C 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), Part C 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 more 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 Part C."

18. Mr. Gupta has also cited the case of **Ram Sharan Maurya and Ors. Vs. State of U.P. and Ors.** [(2021) 15 SCC 401]. It has been held in this judgment:-

"72. In terms of Rule 2(1)(x) of the 1981 Rules, qualifying marks of ATRE are such minimum marks as may be determined "from time to time" by the Government.

Clause (c) of Rule 14 of the 1981 Rules lays down that a candidate must have "passed Assistant Teacher Recruitment Examination conducted by the Government". Thus, one of the basic requirements for being considered to be appointed as an Assistant Teacher under the 1981 Rules is passing of ATRE with such minimum marks as may be determined by the Government. Unlike para 7 of the Guidelines for ATRE 2018 which had spelt out that a candidate must secure minimum of 45% or 40% marks (for "General" and "Reserved" categories respectively) for passing ATRE 2018, no such stipulation was available in G.O. dated 1-12-2018 notifying ATRE 2019. Though, the minimum qualifying marks were set out in the Guidelines for ATRE 2018, it is not the requirement of the 1981 Rules that such stipulation must be part of the instrument notifying ATRE. By very nature of entrustment, the Government is empowered to lay down minimum marks "from time to time". If this power is taken to be conditioned with the requirement that the stipulation must be part of the instrument notifying the examination, then there was no such stipulation for ATRE 2019. Such reading of the rules will lead to somewhat illogical consequences. On one hand, the relevant Rule requires passing of ATRE while, on the other hand, there would be no minimum qualifying marks prescribed. A reasonable construction on the relevant rules would therefore imply that the Government must be said to be having power to lay down such minimum qualifying marks not exactly alongside instrument notifying the examination but at such other reasonable time as well. In that case, the further question would be at what stage can such minimum qualifying marks be determined and whether by necessity such minimum qualifying marks must be declared well before the examination.

73.K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] and Hemani Malhotra [Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] were the cases which pertained to selections undertaken to fill up posts in judicial service. In these cases, no minimum qualifying marks in interview

were required and the merit list was to be determined going by the aggregate of marks secured by a candidate in the written examination and the oral examination. By virtue of stipulation of minimum qualifying marks for interview, certain candidates, who otherwise, going by their aggregate would have been in zone of selection, found themselves to be disqualified. The stipulation of minimum qualifying marks having come for the first time and after the selection process was underway or through, this Court found such exercise to be impermissible.

74. These were cases where, to begin with, there was no stipulation of any minimum qualifying marks for interview. On the other hand, in the present case, the requirement in terms of Rule 2(1)(x) read with Rule 14 is that the minimum qualifying marks as stipulated by the Government must be obtained by a candidate to be considered eligible for selection as Assistant Teacher. It was thus always contemplated that there would be some minimum qualifying marks. What was done by the Government by virtue of its orders dated 7-1-2019 was to fix the quantum or number of such minimum qualifying marks. Therefore, unlike the cases covered by the decision of this Court in K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841], where a candidate could reasonably assume that there was no stipulation regarding minimum qualifying marks for interview, and that the aggregate of marks in written and oral examination must constitute the basis on which merit would be determined, no such situation was present in the instant case. The candidate had to pass ATRE 2019 and he must be taken to have known that there would be fixation of some minimum qualifying marks for clearing ATRE 2019.

75. Therefore, there is fundamental distinction between the principle laid down in K. Manjusree [K. Manjusree v. State of A.P., (2008) 3 SCC 512 : (2008) 1 SCC (L&S) 841] and followed in Hemani Malhotra [Hemani Malhotra v. High Court of Delhi, (2008) 7 SCC 11 : (2008) 2 SCC (L&S) 203] on one hand and the situation in the present case on the other.

76. We are then left with the question whether prescription of such minimum qualifying marks by order dated 7-1-2019 must be set aside merely because such prescription was done after the examination was conducted. At this juncture, it may be relevant to note that the basic prayer made in the leading writ petition before the Single Judge was to set aside the order dated 7-1-2019. What could then entail as a consequence is that there would be no minimum qualifying marks for ATRE 2019, which would run counter to the mandate of Rule 2(1)(x) read with clause (c) of Rule 14. It is precisely for this reason that what was submitted was that the same norm as was available for ATRE 2018 must be adopted for ATRE 2019. In order to lend force to this submission, it was argued that Shiksha Mitras who appeared in ATRE 2018 and ATRE 2019 formed a homogeneous class and, therefore, the norm that was available in ATRE 2018 must be applied. This argument, on the basis of homogeneity, has already been dealt with and rejected.

77. If the Government has the power to fix minimum qualifying marks "from time to time", there is nothing in the Rules which can detract from the exercise of such power even after the examination is over, provided the exercise of such power is not actuated by any malice or ill will and is in furtherance of the object of finding the best available talent. In that respect, the instant matter is fully covered by the decisions of this Court in MCD v. Surender Singh [MCD v. Surender Singh, (2019) 8 SCC 67 : (2019) 2 SCC (L&S) 464] and Jharkhand Public Service Commission v. Manoj Kumar Gupta [Jharkhand Public Service Commission v. Manoj Kumar Gupta, (2019) 20 SCC 178] . In the first case, the power entrusted under Clause 25 of the advertisement also provided similar discretion to the Selection Board to fix minimum qualifying marks for each category of vacancies. While construing the exercise of such power, it was found by this Court that it was done "to ensure the minimum standard of the teachers that would be recruited". Similarly, in Jharkhand Public Service Commission [Jharkhand Public Service

Commission v. Manoj Kumar Gupta, (2019) 20 SCC 178], the exercise of power after the examination in Paper III was over, was found to be correct and justified.

78. If the ultimate object is to select the best available talent and there is a power to fix the minimum qualifying marks, in keeping with the law laid down by this Court in State of Haryana v. Subash Chander Marwaha [State of Haryana v. Subash Chander Marwaha, (1974) 3 SCC 220 : 1973 SCC (L&S) 488], State of U.P. v. Rafiquddin [State of U.P. v. Rafiquddin, 1987 Supp SCC 401 : 1988 SCC (L&S) 183], MCD v. Surender Singh [MCD v. Surender Singh, (2019) 8 SCC 67 : (2019) 2 SCC (L&S) 464] and Jharkhand Public Service Commission v. Manoj Kumar Gupta [Jharkhand Public Service Commission v. Manoj Kumar Gupta, (2019) 20 SCC 178], we do not find any illegality or impropriety in fixation of cut-off at 65-60% vide order dated 7-1-2019. The facts on record indicate that even with this cut-off the number of qualified candidates is more than twice the number of vacancies available. It must be accepted that after considering the nature and difficulty level of examination, the number of candidates who appeared, the authorities concerned have the requisite power to select a criteria which may enable getting the best available teachers. Such endeavour will certainly be consistent with the objectives under the RTE Act.

79. In the circumstances, we affirm the view taken by the Division Bench of the High Court and conclude that in the present case, the fixation of cut-off at 65-60%, even after the examination was over, cannot be said to be impermissible. In our considered view, the Government was well within its rights to fix such cut-off."

19. In these two writ petitions, we are not, however, only concerned with the "midway change of the Rule" Principle. But on that count also, the ratio of the decisions cited by Mr. Gupta are distinguishable. The three Judge Bench in **Tej Prakash Pathak** (supra) had referred to the judgment in the case of **Subhas Chandra Marwaha** (supra) to express doubt over correctness of the judgment in the case of **K. Manjusree** (supra). As we have already observed, the ratio of **K.**

Manjusree (supra) still holds the field. In the case of **Ram Sharan Maurya** (supra), the Rules guiding recruitment empowered the Government to stipulate qualifying marks of the particular selection process to be such minimum marks as may be determined from time to time by the Government. In this decision, the judgment itself takes note of the decisions of this Court in **K. Manjusree** (supra) and **Hemani Malhotra** (supra) and finds that the course for selection to the posts involved in that case was different from that which was found to be impermissible in **K. Manjusree** (supra) and **Hemani Malhotra** (supra).

20. We find from Rule 18 of the 2001 Rules, the task of setting cut-off marks has been vested in the High Court but this has to be done before the start of the examination. Thus, we are also dealing with a situation in which the High Court administration is seeking to deviate from the Rules guiding the selection process itself. We have considered the High Court's reasoning for such deviation, but such departure from Statutory Rules is impermissible. We accept the High Court administration's argument that a candidate being on the select list acquired no vested legal right for being appointed to the post in question. But if precluding a candidate from appointment is in violation of the recruitment rules without there being a finding on such candidate's unsuitability, such an action would fail the Article 14 test and shall be held to be arbitrary. The reason behind the Full Court Resolution is that better candidates ought to be found. That is different from a candidate excluded from the appointment process being found to be unsuitable.

21. Stipulations contained in Rule 21 of the 2001 Rules for making the select list were breached by the High Court administration in adopting the impugned resolution. The ratio of the decision in the case of **Ram Sharan Maurya** (supra) would not apply in the facts of this case and we have already discussed why we hold so.

22. Mr. Gupta's stand is that applying a higher aggregate mark is not barred under the said Rules or Regulations. We are, however, unable to accept this submission. The very expression "aggregate" means combination of two or more processes and in the event the procedure for arriving at the aggregate has been laid down in the applicable Rules, a separate criteria cannot be carved out to enable change in the manner of making the aggregate marks.

23. So far as the ratio of the decision in the case of **K. Manjusree** (supra) is concerned, that authority deals with change of the Rules mid-way. In the case before us, in our opinion, if the High Court is permitted to alter the selection criteria after the performance of individual candidates is assessed, that would constitute alteration of the laid down Rules. We refer to paragraphs Nos. 14 and 15 of the judgment of the Constitution Bench in the case of **Sivanandan C.T.** (supra), which lays down the principle of law on this point. We reproduce below the said passages from this authority:-

> *"14. The decision of the High Court to prescribe a cut-off for the viva-voce examination was taken by the Administrative Committee on 27 February 2017 after the viva-voce was conducted between 16 and 24 January 2017. The process which has been adopted by the High Court suffers from several infirmities. Firstly, the decision of the High Court was contrary to Rule 2(c)(iii) which stipulated that the merit list would be drawn up on the basis of the marks obtained in the aggregate in the written examination and the viva-voce; secondly, the scheme which was notified by the High Court on 13 December 2012 clearly specified that there would be no cut off marks in respect of the viva-voce; thirdly, the notification of the High Court dated 30 September 2015 clarified that the process of short listing which would be carried out would be only on the basis of the length of practice of the members of the Bar, should the number of candidates be unduly large; and fourthly, the decision to prescribe cut off marks for the viva-voce was taken much after the viva-voce tests were conducted in the month of January 2017.*
>
> *15. For the above reasons, we have come to the conclusion that the broader constitutional issue which has been referred in Tej Prakash Pathak (supra) would not merit decision on the facts of the present case. Clearly, the decision which was taken by the High Court was ultra vires Rule 2(c)(iii) as it stands. As a matter of fact, during the course of the hearing we have been apprised of the fact that the Rules have been subsequently amended in 2017 so as to prescribe a cut off of 35% marks in the viva-voce examination which however was not the prevailing legal position when the present process of selection was initiated on 30 September 2015. 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 or 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."*

24. The ratio of this authority is squarely applicable in the facts of this case. Submission on behalf of the High Court administration that Rule 14 permits them to alter the selection criteria after the selection process is concluded and marks are declared is not proper exposition of the said provision. The said Rule, in our opinion, empowers the High Court administration in specific cases to reassess the suitability and eligibility of a candidate in a special situation by calling for additional documents. The High Court administration cannot take aid of this Rule to take a blanket decision for making departure from the selection criteria specified in the 2001 Rules. The content of Rule 14 has the tenor of a verification process of an individual candidate in assessing the suitability or eligibility.

25. We, accordingly, allow both the writ petitions by directing the High Court to make recommendation for those candidates who have been successful as per the merit or select list, for filing up the subsisting notified vacancies without applying the Full Court Resolution that requires each candidate to get 50 per cent aggregate marks. The part of the Full Court Resolution of the Jharkhand High Court dated 23.03.2023 by which it was decided that only those candidates who have secured at least 50% marks in aggregate shall be qualified for appointment to the post of District Judge is quashed.

26. We expect the exercise of recommendation in terms of this judgment to be completed as expeditiously as possible.

27. We do not find any reason to address the impleadment applications as this judgment will cover the entire recommendation process.

Headnotes prepared by: Divya Pandey

Result of the case: Writ petitions allowed.

[2024] 2 S.C.R. 242 : 2024 INSC 95

No.2809759H Ex-Recruit Babanna Machched
v.
Union of India and Ors.

(Civil Appeal No. 644-645 of 2017)

09 February 2024

[Bela M. Trivedi and Pankaj Mithal,* JJ.]

Issue for Consideration

The appellants were dismissed/discharged from service on the ground that at the time of their enrollment in the Army through Maratha Light Infantry Regimental Centre under the Unit Headquarters Quota in December, 2009 they had produced false relationship certificates which upon verification were found to be manipulated and false. The points which arise for consideration are: (i) Whether the appellants were enrolled/recruited by giving benefit of relationship with the servicemen/ex-servicemen; (ii) Whether the appellants have produced any relationship certificate(s); (iii) Whether their discharge/dismissal from service is bad in law for non-consideration of their explanation.

Headnotes

Service Law – Dismissal from service – Allegation of producing false relationship certificate – The appellants contended that they were recruited under the general category and not on priority basis as relatives of any servicemen or ex-servicemen; and they have not produced any relationship certificate and, therefore, they cannot be charged for obtaining enrollment/recruitment on the basis of fake relationship certificates:

Held: The appellants have brought on record zerox copies of their applications submitted for the purposes of enrollment/recruitment – The application(s) nowhere mentions that they have produced any relationship certificate(s) – The application(s) thus clearly establishes that the appellants appear to have applied as a general category candidate(s) against the surplus seats/vacancies remaining unfilled after considering the priority/reserved quota for relatives of servicemen/ex-servicemen, etc – In such a situation, when they have not claimed any enrollment/recruitment on the basis of relationship with servicemen/ex-servicemen, obviously there was no occasion for them to submit any relationship certificate – In the discharge certificate, there is no mention of any inquiry being

* Author

conducted or find out as to whether the appellants had actually produced relationship certificates for the purpose of enrollment/recruitment – Tribunal had affirmed the discharge/dismissal order in a casual manner without taking note of the crucial point that appellants had applied under general category and not as relatives of servicemen/ex-servicemen – Thus, the orders of discharge/dismissal of the appellants stand vitiated for non-consideration of the material aspect – Thus, the discharge/dismissal orders of the appellants set aside. [Paras 17, 19, 20, 24, 27]

Case Law Cited

S.N. Mukherjee vs. Union of India, [1990] 1 Suppl. SCR 44 **: (1990) 4 SCC 594;** *Mohinder Singh Gill vs. Chief Election Commissioner,* [1978] 2 SCR 272 **: (1978) 1 SCC 405 – referred to.**

Ex Sig. Man Kanhaiya Kumar vs. Union of India and Ors., [2018] 1 SCR 679 **: (2018) 14 SCC 279;** *S. Muthu Kumaran vs. Union of India and Ors.,* [2017] 1 SCR 550 **: (2017) 4 SCC 609 – held inapplicable.**

List of Acts

Armed Forces Tribunal Act, 2007.

List of Keywords

Service Law; Dismissal from service; False relationship certificate; Relatives of servicemen/ex-servicemen; General category; Material evidence; Non-consideration of relevant material; Principles of Natural Justice.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.644-645 of 2017

From the Judgment and Order dated 06.03.2014 in O.A. No.159 of 2013/05.06.2014 in M.A. No.247 of 2014 in O.A. No.159 of 2013 of the Armed Forces Tribunal, Regional Bench, Kochi, Circuit Bench at Para Regimental Training Centre, Bangalore and order dated 18.11.2015 in M.A. No.373 of 2015 in R.A. No.15 of 2015 in O.A. No.159 of 2013, S.R.A. No.15 of 2015

With

Civil Appeal Nos.652-653, 642-643 And 654-655 of 2017

Appearances for Parties

Vinay Navare, Suhaskumar Kadam for M/s. Black & White Solicitors, Advs. for the Appellant.

Ms. Aishwarya Bhati, ASG, R. Bala, Sr. Adv., V. V. V. Pattabhi Ram, Anmol Chandan, Prahlad Singh, Ms. Nidhi Khanna, Ms. Poornima Singh, Ashwin Joseph, Dr. N. Visakamurthy, Mukesh Kumar Maroria, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pankaj Mithal, J.

1. Learned counsel for the parties were heard.

2. Instructions were issued from time to time with regard to enrollment into Army under the Unit Headquarters Quota (UHQ). The instructions as revised upto the year 1978, provided that Regiments/Corps have sanction to enroll 15 per cent of the total yearly demand released by the Additional Directorate of Recruiting to Zonal Recruiting Offices. This percentage was increased to 25 during the year 1981-82 and in March, 1983 this quota was further increased to 50 per cent. Since the Regiments/Corps could not fill up such large number of vacancies, to facilitate the enrollment, priority was provided to certain categories of personnel which included sons and grandsons of servicemen and ex-servicemen; brothers and other near relatives of those killed in battle or died in service; wards who were fully dependent upon servicemen or ex-servicemen; sportsmen of merit, and those for whom there was a special recruitment, e.g., Ladakh Scouts, Cavalry, Gorkha, Para, President Body Guard Regiments etc. It was further provided that Unit Headquarters Quota Enrollment shall give priority to the above categories and in case vacancies for recruitment remain available with Regimental Centre, personnel from open category based on merit may be taken.

3. In the light of the above instructions for recruitment under the Unit Headquarters, a news item was published for the purposes of recruitment inviting applications under the Unit Headquarters Quota. It appears that a large number of candidates including the appellants applied. The appellants were selected and were enrolled in the Army by the Maratha Light Infantry Regimental Centre (‘MLIRC’). After they

had put in nearly three years of service, a show cause notice was issued to several of them alleging that they had obtained enrollment in the Army either on the basis of the fake sports person certificate or on the basis of false relationship certificate. On consideration of the reply of those persons, the services of about 52 of them were terminated. However, after some litigation, candidates belonging to the category of sportsmen of merit, were all reinstated. In regard to the fake relationship certificate, services of about 20 persons including the appellants were terminated out of which 4 persons are before this Court.

4. The case of all the four appellants is identical and is based upon similar facts and as such the appeals of all four of them were taken up together for consideration and are being disposed of by this common judgment.

5. In these appeals the challenge is to the common judgment and order of the Armed Forces Tribunal[1], Kochi, dated 6.03.2014, whereby the Tribunal has refused to interfere with the discharge certificate, dismissing the appellants from service for adopting fraudulent means. Consequently, refusing the prayer of the appellants to reinstate them.

6. Notice in these appeals were issued only because the appellants before this Court wished to press that the appellants had never applied for enrollment in any reserved category. This was done on the statement of the counsel for the appellants which stands recorded in the order dated 08.03.2016.

7. In view of the above factual position, the only question for our consideration in these appeals is whether the appellants had applied and were selected as general category candidates or were placed in any of the reserved category.

8. Briefly stated, after the appellants were enrolled/recruited in the Army, they were served with identical show cause notices contending that they have been enrolled in the Army by producing false relationship certificates and the documents produced by them on verification have been found to be fake/forged. Thus, calling upon them as to why they should not be dismissed from service. In response to the show cause notice, all the appellants submitted their response on identical lines

1 Hereinafter referred to as ‘the Tribunal’

that they were recruited in the Army after they have passed all exams and standards; they were not recruited on the basis of the claim that they were relatives of any serving or ex-servicemen personnel rather they had applied under the general category and as such there was no occasion for them to have produced any relationship certificate. In other words, they clearly denied having produced any certificate of relationship for the purposes of recruitment and as such contended that they cannot be charged of producing fake certificates.

9. The Maratha Light Infantry Regimental Centre by similar orders dismissed all the appellants from service with effect from 9.05.2013. The discharge certificate issued to each of the appellant in unequivocal terms stated that they are being dismissed from service for the reason that they got themselves enrolled by adopting fraudulent means, referring to the fake relationship certificates as mentioned in the show cause notices.

10. In other words, the appellants were dismissed/discharged from service on the ground that at the time of their enrollment in the Army through Maratha Light Infantry Regimental Centre under the Unit Headquarters Quota in December, 2009 they had produced false relationship certificates which upon verification were found to be manipulated and false.

11. The departmental appeal(s) against the aforesaid discharge/dismissal also failed whereupon the appellants preferred Original Applications before the Armed Forces Tribunal. The Original Applications were dismissed by the Tribunal and so were the review petitions.

12. The appellants have thus preferred these appeals under Section 31 of the Armed Forces Tribunal Act, 2007 before this Court inter alia contending that the appellants were recruited under the general category and not on priority basis as relatives of any servicemen or ex-servicemen; and they have not produced any relationship certificate and, therefore, they cannot be charged for obtaining enrollment/recruitment on the basis of fake relationship certificates. The authorities as well as the Tribunal have not considered the above explanation of the appellants and only on the basis that the certificates alleged to have been produced by the appellants on verification have been found to be fake/forged, without recording any finding that the appellants had in effect produced any such certificate, upheld the order of discharge/dismissal.

13. The defence of the respondents is that the enrollment/recruitment under the Army Headquarters Quota is only for the relatives of the servicemen/ ex-servicemen and that there is no general category in which the appellants could have been recruited. It is also contended that the appellants are taking the above grounds of enrollment/ recruitment under general category and of non-production of relationship certificate as an afterthought as on identical plea the sports persons were directed to be reinstated.

14. After hearing Shri Vinay Navare, learned senior counsel, appearing as a lead lawyer for the appellants and Ms. Aishwarya Bhati, learned Additional Solicitor General, appearing for the respondents, in the facts and circumstances of the case, as narrated above, the following points arise for our consideration:

    (i) Whether the appellants were enrolled/recruited by giving benefit of relationship with the servicemen/ex-servicemen;

    (ii) Whether the appellants have produced any relationship certificate(s);

    (iii) Whether their discharge/dismissal from service is bad in law for non-consideration of their explanation.

15. The respondents have relied upon a newspaper clipping which was neither part of the record before the Tribunal or of these appeals but was passed over to this Court for the purposes of its perusal. The newspaper clipping dated 27.9.2009 as appearing in Deccan Herald as shown to this Court during the course of hearing is not part of the record. The respondents made no efforts to bring it on record at any stage, not even before this Court except for placing it across the Bar for our perusal. In such a scenario, it is not at all appropriate for this Court to consider and rely upon it. Nonetheless, a plain reading of it would reveal that it is not an advertisement inviting applications for enrollment/recruitment under the Unit Headquarters Quota. It is simply a news item published in the newspaper informing that such an exercise for enrollment/recruitment under the Unit Headquarters Quota is going to take place without specifically stating that general category candidates who do not have any relationship with servicemen/ex-servicemen are prohibited or barred from applying. On the contrary, the guidelines/instructions for recruitments under the enrollment/recruitment in Paragraph 7 clearly mentions about open category recruitment. It reads thus:

> "**7.** Open Category: In case of Additional vacancies for recruitment available with Regimental Centre open category of personnel based on merit may be taken provided they meet the ___________."

16. A simple reading of the above Paragraph 7 clearly belies the stand taken by the defence that the above enrollment/recruitment was only meant for the relatives of the servicemen/ex-servicemen and was not open for the general category.

17. The appellants have brought on record zerox copies of their applications submitted for the purposes of enrollment/recruitment. In Part-II of the application(s) under the heading 'Documentation' they have not claimed status of a relative of servicemen/ex-servicemen, NCC, Sports persons rather they have clearly stated to be of general category. The application(s) nowhere mentions that they have produced any relationship certificate(s). The application(s) thus clearly establishes that the appellants appear to have applied as a general category candidate(s) against the surplus seats/vacancies remaining unfilled after considering the priority/reserved quota for relatives of servicemen/ex-servicemen, etc. In such a situation, when they have not claimed any enrollment/recruitment on the basis of relationship with servicemen/ex-servicemen, obviously there was no occasion for them to submit any relationship certificate.

18. In response to the show cause notice which stated that the appellants have obtained enrollment/recruitment on false relationship certificates which on verification have been confirmed to be fake, the appellants have denied producing any such certificates as they never applied under any priority category as a relative of servicemen/ex-servicemen but in the general category. The discharge certificate simply states that the appellants are dismissed from service under the orders of Commandant for the reason of obtaining enrollment/recruitment by fraudulent means referring to submission of fake relationship certificates. The order of the Commandant states that at the time of enrollment/recruitment in December, 2009 under the Unit Headquarters Quota at the Maratha Light Infantry Regimental Centre, the relationship certificates of the appellants upon verification from records have been found to be manipulated and false. Therefore, the appellants had obtained enrollment/recruitment by fraudulent means and their services are liable to be terminated. Accordingly, the appellants were dismissed.

19. In the above discharge certificate or the order of the Commandant, there is no whisper that any inquiry was conducted to ascertain or find out as to whether the appellants had actually produced relationship certificates for the purposes of enrollment/recruitment in the Army. No finding has been recorded by the respondents that the appellants had as of fact, produced such certificates or that their explanation claiming that no such certificates were furnished by them is completely false. In effect, the authorities have not dealt with the above explanations/claims of the appellants.

20. A reading of the order of the Tribunal also shows that the above aspect or the contention of the appellants was not dealt with by the Tribunal. The Tribunal in a casual and routine manner affirmed the discharge/dismissal order simply holding that the relationship certificates produced by the appellants have been found to be fake even upon verification. The Tribunal also seems to have lost sight of the crucial point of the appellants that they have applied under the general category and not as relatives of servicemen/ex-servicemen. They have not produced the alleged certificate(s) which could be held to be fake. Accordingly, the core issue arising in the matter was missed not only by the authorities concerned but by the Tribunal as well. Thus, the order(s) of discharge/dismissal of the appellants and that of Tribunal stand vitiated for non-consideration of the material aspect.

21. In ***S.N. Mukherjee vs. Union of India***[2], it has been categorically laid down by this Court that an order passed without consideration of the material evidence or the plea would be violative of Principles of Natural Justice and would stand vitiated for non-consideration of the relevant material, plea or the evidence.

22. At the same time in ***Mohinder Singh Gill vs. Chief Election Commissioner, New Delhi***[3], it has been provided that the validity of the order impugned has to be tested on the basis of the reasoning contained therein and that the authorities are not supposed to supplement the same by means of extraneous material or affidavit before the courts.

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2 [1990] 1 Suppl. SCR 44 : (1990) 4 SCC 594

3 [1978] 2 SCR 272 : (1978) 1 SCC 405

23. In the case at hand, it was not the case of the respondents ever that the vacancies on which the appellants have been enrolled/recruited were only supposed to be filled up by the relatives of the servicemen/ex-servicemen and not by a general category person or that the posts advertised were only for the alleged reserved category. They never even took any defence based upon the newspaper clipping as referred to earlier. This is a subsequent improvement in their defence which as discussed earlier do not stand established. It is nothing but supplementing the reasoning of discharge/dismissal which is not contained in the order impugned. It is thus not permissible in law in view of Mohinder Singh Gill (supra).

24. In the end, we sum up our conclusions as under: -

    (i) The recruitment under the Headquarter Quota was not confined to the priority/reserved class rather it was open for general category also to a limited extent;

    (ii) There is no material on record to establish that the appellants had produced any relationship certificate to obtain enrollment; and

    (iii) The discharge/dismissal of the appellants from service is vitiated for non-consideration of their specific case that they have actually not produced any relationship certificate for selection/recruitment as they never applied in the reserved category.

25. The decision in ***Ex Sig. Man Kanhaiya Kumar vs. Union of India and Ors.***[4] as cited from the side of the respondents has no application in the present case in as much as in the said case the fraudulent enrollment in the Army was admitted to the appellants to be on the basis of fake relationship certificate. There is no dispute to the ratio laid down in the above case that the authorities had the power of punishment/dismissal/removal of the candidate in the event the enrollment/recruitment had been obtained by fraudulent means or on the basis of fake relationship certificate.

26. Similarly, the case of ***S. Muthu Kumaran vs. Union of India and Ors.***[5] is of no help to the respondents as the dismissal therein under the Army Act was on the ground of fraudulent recruitment which was

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4 [2018] 1 SCR 679 : (2018) 14 SCC 279

5 [2017] 1 SCR 550 : (2017) 4 SCC 609

No.2809759H Ex-Recruit Babanna Machched v.
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found to be proved and no perversity was found in the order of the Tribunal affirming the dismissal order which was modified/substituted to that of discharge.

27. In view of what have been said above and the legal position, as referred, the discharge/dismissal order of the appellants is certainly invalid for want of non-consideration of the plea taken by the appellants. Accordingly, we have no option but to set aside the impugned orders of discharge/dismissal dated 9.5.2013 and the judgment(s) and order(s) dated 06.03.2014 and 18.11.2015 passed by the Armed Forces Tribunal. The appellants shall be reinstated with all consequential benefits.

28. The appeals are allowed as aforesaid with no order as to costs.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals allowed.

[2024] 2 S.C.R. 252 : 2024 INSC 101

Mamidi Anil Kumar Reddy
v.
The State of Andhra Pradesh & Anr.

(Criminal Appeal No. 758 of 2024)

05 February 2024

[Vikram Nath and Satish Chandra Sharma, JJ.]

Issue for Consideration

The High Court, if justified in refusing to quash the docket order which re-initiated criminal proceedings against the appellants for offences u/s. 420, 498A, 506 IPC and u/s. 3, 4 of the Dowry Prohibition Act, 1961.

Headnotes

Code of Criminal Procedure, 1973 – s. 482 – Quashing of the docket order – Matter pertaining to matrimonial disputes, wherein the High Court refused to quash the docket order which re-initiated criminal proceedings against the husband and in-laws for offences u/s. 420, 498A, 506 IPC and u/s. 3, 4 of the Dowry Prohibition Act, 1961 – Correctness:

Held: A bare perusal of the complaint, statement of witnesses' and the charge-sheet shows that the allegations against the husband and in-laws are wholly general and omnibus in nature; even if taken in their entirety, they do not prima facie make out a case against the husband and in-laws – Material on record neither discloses any particulars of the offences alleged nor discloses the specific role/allegations assigned to any of the husband and in-laws in the commission of the offences – Husband and in-laws approached the High Court on inter alia grounds that the proceedings were re-initiated on vexatious grounds and even highlighted the commencement of divorce proceedings by the wife, as such the High Court had a duty to consider the allegations with great care and circumspection so as to protect against the danger of unjust prosecution – Thus, the material on record being wholly insufficient to proceed against the husband and in-laws, the impugned orders and the docket order set aside and the criminal proceedings against the husband and in-laws quashed. [Paras 14, 17, 18]

Mamidi Anil Kumar Reddy v. The State of Andhra Pradesh & Anr.

Case Law Cited

Kahkashan Kausar alias Sonam v. State of Bihar **[2022] 1 SCR 558 : (2022) 6 SCC 599;** *Mahmood Ali v. State of U.P.,* **Criminal Appeal No. 2341 of 2023 – referred to.**

List of Acts

Code of Criminal Procedure, 1973; Penal Code, 1860; Dowry Prohibition Act, 1961.

List of Keywords

Docket Order; Reopening/re-initiating criminal proceedings; Matrimonial disputes; False implication; Statement of witnesses; Compromise; Lok Adalat; Divorce; Vexatious grounds; Unjust prosecution.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.758 of 2024

From the Judgment and Order dated 23.11.2022 of the High Court of Andhra Pradesh at Amravati in CRLP No.2768 of 2022

With

Criminal Appeal No.759 of 2024

Appearances for Parties

D. Mahesh Babu, Adv. for the Appellant.

Mahfooz Ahsan Nazki, Polanki Gowtham, K V Girish Chowdary, T Vijaya Bhaskar Reddy, Ms. Rajeswari Mukherjee, Meeran Maqbool, Ms. Archita Nigam, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Leave granted.

2. Both the appeals are being disposed of by the present common order.

3. The present appeals arise out of orders dated (i) 11.11.2022 in Criminal Petition No. 5710 of 2021 (the '**Impugned Order I**') and (ii) 23.11.2022 in Criminal Petition No. 2768 of 2022 (the '**Impugned Order II**'), passed by the High Court of Andhra Pradesh (collectively referred to as the '**Impugned Orders**').

4. *Vide* the Impugned Orders, the High Court refused to quash the Docket Order dated 20.07.2021 which reinitiated criminal proceedings against the Appellants for offences u/s. 420, 498A, 506 of the IPC & u/s. 3, 4 of the Dowry Prohibition Act, 1961.

Brief Facts

5. The Appellants before us are the husband and the in-laws of Respondent No. 2 i.e., the de-facto complainant. After the case against the Appellants for the aforementioned offences was instituted, the parties were referred to the Lok Adalat by the Trial Court.

6. As per the Docket Order dated 26.06.2021, the parties entered into a compromise before the Lok Adalat and in consideration of the same, a petition for compounding of the offences was allowed by the Trial Court. Accordingly, the Appellants were acquitted by the Trial Court.

7. Thereafter, Respondent No. 2 altered her position and filed a memo before the Trial Court withdrawing her consent from the compromise. Consequently, *vide* Docket Order dated 20.07.2021, the Trial Court reopened the proceedings against the Appellants.

8. Aggrieved by this development, the Appellants approached the High Court u/s. 482 CrPC seeking to quash the Docket Order dated 20.07.2021 on *inter alia* grounds that Respondent No. 2 sought to reopen the criminal proceedings only to wreak vengeance upon the Appellants.

9. In case of the Appellant-husband, *vide* Impugned Order II, the High Court upheld the Docket Order dated 20.07.2021 and the set aside the compromise between the parties in view of the amendment[1] to Sec. 320(2) CrPC, applicable to the State of Andhra Pradesh. As per the amendment, compounding of an offence u/s. 498A *is only permissible after a lapse of three months* from the date of request for compounding.

10. In case of the in-laws*, vide* Impugned Order I, the High Court refused to grant the relief sought, noting the existence of *prima facie* allegations against the Appellants. However, in recognition of the fact that the allegations were general and omnibus in nature, the High Court dispensed with the presence of the Appellants during the trial and furthermore, left it open for the Trial Court to conduct trial.

1 Andhra Pradesh Act 11 of 2003, sec. 2 (w.e.f. 01.08.2003)

Submissions & Analysis:

11. Learned Counsel for the Appellants vehemently submits that a bare perusal of the complaint filed by Respondent No.2 and the charge-sheet plainly discloses the absence of any necessary ingredients of the charged offences. It is submitted that the allegations are wholly general and omnibus in nature, made only with the intention to harass the Appellants, amounting to an abuse of the process of the law.

12. To buttress his contention, Learned Counsel for the Appellants has drawn the attention of this Court to the fact that Respondent No. 2 filed a petition seeking divorce and only thereafter, the memo seeking reopening of the criminal proceedings against the Appellants was filed before the Trial Court.

13. This Court has heard the Learned Counsel for the parties and perused the record.

14. In the considered opinion of this Court, there is significant merit in the submissions of the Learned Counsel for the Appellants. A bare perusal of the complaint, statement of witnesses' and the charge-sheet shows that the allegations against the Appellants are wholly general and omnibus in nature; even if they are taken in their entirety, they do not *prima facie* make out a case against the Appellants. The material on record neither discloses *any* particulars of the offences alleged nor discloses the specific role/allegations assigned to *any* of the Appellants in the commission of the offences.

15. The phenomenon of false implication by way of general omnibus allegations in the course of matrimonial disputes is not unknown to this Court. In *Kahkashan Kausar alias Sonam v. State of Bihar*[2], this Court dealt with a similar case wherein the allegations made by the complainant-wife against her in-laws u/s. 498A and others were vague and general, lacking any specific role and particulars. The court proceeded to quash the FIR against the accused persons and noted that such a situation, if left unchecked, would result in the abuse of the process of law.

2 [2022] 1 SCR 558 : [(2022) 6 SCC 599]

16. More recently, this Court in *Mahmood Ali v. State of U.P.*[3], while considering the principles applicable to the exercise of jurisdiction u/s. 482 CrPC, observed as follows:

> *"12. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case*

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3 (Criminal Appeal No. 2341 of 2023)

on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRs assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged."

17. Considering the dicta in *Mahmood Ali* (supra), we find that the High Court in this case has failed to exercise due care and has mechanically permitted the criminal proceedings to continue despite specifically finding that the allegations are general and omnibus in nature. The Appellants herein approached the High Court on *inter alia* grounds that the proceedings were re-initiated on vexatious grounds and even highlighted the commencement of divorce proceedings by Respondent No. 2. In these peculiar circumstances, the High Court had a duty to consider the allegations with great care and circumspection so as to protect against the danger of unjust prosecution.

18. As stated above, given the facts and circumstances of the case, we find that the material on record is wholly insufficient to proceed against the Appellants. Accordingly, the Impugned Orders and the Docket Order dated 20.07.2021 are set aside and the criminal proceedings against the Appellants are consequently quashed.

19. Resultantly, the appeals stand allowed.

20. Pending applications, if any, shall also stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeals allowed.

[2024] 2 S.C.R. 258 : 2024 INSC 102

Greater Noida Industrial Development Authority
v.
Prabhjit Singh Soni & Anr.

(Civil Appeal Nos. 7590-7591 of 2023)

12 February 2024

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

Issue for Consideration

Whether in exercise of powers under s.60(5), Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority-NCLT can recall an order of approval passed under s.31(1) of the IBC; whether the application for recall of the order was barred by time; whether the resolution plan put forth by the resolution applicant did not meet the requirements of s.30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 and; what relief, if any, the appellant is entitled to.

Headnotes

Insolvency and Bankruptcy Code, 2016 – ss.30(2), 31(1), 60(5) – The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – National Company Law Tribunal Rules, 2016 – r.11 – Inherent power of the Tribunal – Recall of the order of approval passed u/s.31(1) – Maintainability of application for recall – Resolution plan put forth by the resolution applicant, if met the requirements of s.30(2) r/w Regulations 37 and 38 of the CIRP Regulations, 2016:

Held: A Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court – Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power – Rather, s.60(5)(c) which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC – Further,

* Author

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r.11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal – In the present case, the grounds taken in the recall application qualified as valid grounds on which a recall of the order of approval could be sought– Thus, the recall application was maintainable notwithstanding that an appeal lay before the NCLAT against the order of approval passed by the Adjudicating Authority – Neither NCLT nor NCLAT while deciding the application/ appeal of the appellant took note of the fact that the appellant was not served notice of the meeting of the Committee of Creditors (COC); the entire proceedings up to the stage of approval of the resolution plan were ex-parte to the appellant; the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and the resolution plan did not meet all the parameters laid down in s.30(2) read with Regulations 37 and 38 of the CIRP Regulations, 2016 – Also, the Recall Application was not barred by time – Impugned order set aside – Resolution plan be sent back to the COC for re-submission after satisfying the parameters set out by the Code. [Para 50, 52 and 55]

Insolvency and Bankruptcy Code, 2016 – The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Claim submitted with proof could not be overlooked merely because it is in a different Form:

Held: Even if a claim submitted by a creditor against the Corporate Debtor (CD) is in a Form not as specified in the CIRP Regulations, 2016, the same has to be given due consideration by the IRP or the RP, as the case may be, if it is otherwise verifiable, either from the proof submitted by the creditor or from the records maintained by the CD – *A fortiori*, if a claim is submitted by an operational creditor claiming itself as a financial creditor, the claim would have to be accorded due consideration in the category to which it belongs provided it is verifiable – The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant was that it had submitted its claim with proof – Though, the record indicates that the appellant was advised to submit its claim in Form B (meant for operational creditor) in place of Form C (meant of financial creditor) – But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form – The Form in which a claim is to be submitted is directory and not mandatory – What is necessary is that the

claim must have support from proof – The resolution plan failed not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. [Paras 30, 54]

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulation 7, 8, 8-A, 9, 9-A, 12-14, 12A – Corporate insolvency resolution process under – Discussed.

National Company Law Tribunal Rules, 2016 – r.11 – Inherent power of the Tribunal – Exercise of – Application for recall, maintainable on limited grounds:

Held: r.11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal – Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order – However, such power is to be exercised sparingly, and not as a tool to re-hear the matter – A Tribunal or a Court is invested with such ancillary or incidental powers as may be necessary to discharge its functions effectively for the purpose of doing justice between the parties and, in absence of a statutory prohibition, in an appropriate case, it can recall its order in exercise of such ancillary or incidental powers – Ordinarily, an application for recall of an order is maintainable on limited grounds, *inter alia*, where the order is without jurisdiction; the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice. [Paras 48, 50]

Insolvency and Bankruptcy Code, 2016 – s.30(2) – The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Regulations 37 and 38 – Resolution plan put forth by the resolution applicant did not meet the requirements of s.30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 – Reasons stated. [Para 54]

Insolvency and Bankruptcy Code, 2016 – s.60 – Companies Act, 2013 – ss.408, 409 – National Company Law Tribunal Rules, 2016 – r.11 – Code of Civil Procedure, 1908 – s.151:

Held: s.60 specifies that the Adjudicating Authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall

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be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located – s.60(5) provides that notwithstanding anything to the contrary contained in any other law for the time being in force, the NCLT shall have jurisdiction to entertain or dispose of any application or proceeding by or against the corporate debtor or corporate person; any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC – r.11 of the 2016 Rules, framed u/s.469 of the Companies Act 2013, which is in pari materia with s.151 of CPC, 1908, preserves the inherent powers of the Tribunal. [Paras 40-42]

Insolvency and Bankruptcy Code, 2016 – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – Duties performed by Resolution Professional – Discussed.

Words and Phrases – Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 – "a person claiming to be an operational creditor" in Regulation 7; "a person claiming to be a financial creditor" in Regulation 8:

Held: Indicate that the category in which the claim is submitted is based on the own understanding of the claimant – There could be a situation where the claimant, in good faith, may place itself in a category to which it does not belong – However, what is important is, the claim so submitted must be with proof – As to what could form proof of the debt/ claim is delineated in sub-regulation (2) of Regulations 7 and 8 of the CIRP Regulations, 2016. [Para 20].

Case Law Cited

Ghanashyam Mishra & Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd., [2021] 13 S.C.R. 737: **(2021) 9 SCC 657;** *Jaypee Kensington Boulevard Apartments Welfare Association vs. NBCC (India) Ltd.*, [2021] 12 SCR 603 **: (2022) 1 SCC 401;** *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal*, [1962] Suppl. SCR 450 **: AIR 1962 SC 527;** *Grindlays Bank Ltd. vs. Central Govt. Industrial Tribunal*, [1981] 2 S.C.R. 341**: 1980 Supp SCC 420;** *State of Punjab vs. Davinder Pal*

Singh Bhullar, [2011] 15 SCR 540 **: (2011) 14 SCC 770;** *New India Assurance Co. Ltd. vs. Krishna Kumar Pandey*, **(2021) 14 SCC 683;** *Budhia Swain vs. Gopinath Deb*, [1999] 2 SCR 1189 **: (1999) 4 SCC 396;** *Union Bank of India vs. Financial Creditors of M/s Amtek Auto Ltd. & Ors.*, **Civil Appeal No.4620 of 2023 – relied on.**

New Okhla Development Authority vs. Anand Sonbhadra, [2022] 5 SCR 319 **: (2023) 1 SCC 724;** *RE: Cognizance For Extension of Limitation*, [2021] 2 SCR 640 **: (2021) 5 SCC 452 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016; The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; U.P. Industrial Area Development Act, 1976; Companies Act, 2013; National Company Law Tribunal Rules, 2016; Code of Civil Procedure, 1908.

List of Keywords

Inherent power of the Tribunal; Recall application; Claim submitted with proof; Form not as specified in CIRP Regulations; Form directory not mandatory; Ancillary or incidental powers; *pari materia*.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.7590-7591 of 2023

From the Judgment and Order dated 24.11.2022 of the National Company Law Appellate Tribunal in CAAT (I) No. 867 of 2021 and IA No. 2315 of 2021

Appearances for Parties

Ravindra Kumar, Sr. Adv, Binay Kumar Das, Vipin Saxena, Ms. Neha Das, Ms. Priyanka Das Advs. for the Appellant.

Dr. Abhishek Manu Singhvi, Siddharth Bhatnagar, Sr. Advs., Vardhman Kaushik, Nishant Gautam, Dhruv Joshi, Abhinav Singh, Mayank Sharma, Ms. Sanjana Mehrotra, Pracheta Kar, Aditya Sidhra, Nadeem Afroz, Ajay Kanojia, Ayush Sharma, V M Kannan, G.P. Madaan, Aditya Madaan, Mrs. Harimohana N, Naresh Kaushik, Mrs. Lalita Kaushik, Advs. for the Respondents.

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Judgment / Order of the Supreme Court

Judgment

Manoj Misra, J.

1. These appeals under Section 62 of the Insolvency and Bankruptcy Code, 2016[1] are directed against the judgment and order[2] of the National Company Law Appellate Tribunal, Principal Bench, New Delhi[3] passed in Company Appeal (AT) (Ins.) No. 867 of 2021 and I.A. No. 2315 of 2021, whereby the appellant's appeal against the order of the National Company Law Tribunal, New Delhi[4] dated 05.04.2021 has been dismissed.

2. By the order dated 05.04.2021, NCLT had dismissed two applications filed by the appellant under Section 60(5) of the IBC, namely:

(a) I.A. No.1380/ 2021, *inter alia*, to recall the order dated 04.08.2020 passed by NCLT in I.A. No. 2201 (PB)/2020 in Company Petition No. (IB)-272 (ND)/ 2019; and

(b) I.A. No.344/ 2021, *inter alia*, questioning the decision of the Resolution Professional (hereinafter referred to as the RP) in treating the appellant as an operational creditor and not informing the appellant about the meetings of the Committee of Creditors[5].

Factual Background

3. The appellant being a statutory authority constituted under Section 3 of the U.P. Industrial Area Development Act, 1976[6] acquired land for setting up an urban and industrial township. On 28.10.2010, one of the plots of land acquired by it, namely, Plot No. 01-C, Sector 16C, Greater Noida, District Gautam Budh Nagar, U.P., was allotted, by way of lease for 90 years, to M/s. JNC Construction (P) Ltd (the

1 IBC

2 Order dated 24.11.2022

3 NCLAT

4 NCLT

5 COC

6 1976 Act

Corporate Debtor[7]) for a residential project, by charging premium, payable in instalments starting from 29.10.2012 up to 29.04.2020, after initial moratorium of 24 months, albeit subject to payment of interest as well as penal interest, while reserving right to cancel the lease and resume the demised land, subject to certain conditions. The CD committed default in payment of instalments and was served with demand cum pre-cancellation notice.

4. A Company Petition No. (IB) 272 (PB)/ 2019 was filed against the CD for initiating Corporate Insolvency Resolution Process[8], which was admitted on 30.05.2019. Consequent thereto, claims were invited through a public announcement.

5. Pursuant to the public notice, in the month of January 2020, appellant submitted a claim of Rs. 43,40,31,951, being unpaid instalments payable towards premium for the lease. The claim was set up by the appellant as a financial creditor of the CD.

6. However, the RP treated the appellant as an operational creditor and, vide e-mail dated 04.02.2020, requested the appellant to submit its claim in Form B, as an operational creditor of the CD.

7. The appellant did not submit its claim afresh as an operational creditor. In the meantime, the COC approved a plan which was presented to the Adjudicating Authority (NCLT) for approval. The NCLT *vide* order dated 04.08.2020 approved the same.

8. On getting information through letter dated 24.09.2020 that the plan has been finalised and approved, on 06.10.2020 the appellant filed I.A. No.344 of 2021 questioning, *inter alia,* the resolution plan, the decision of the RP to treat the appellant as an operational creditor, and all actions in pursuance thereof. Another I.A. No.1380/2021 was filed on 15.03.2021 seeking, *inter alia,* recall of the order dated 04.08.2020.

9. In the two applications referred to above, the appellant pleaded, *inter alia,* that, --

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7 CD

8 CIRP

(a) there was gross error on part of the RP in treating the appellant as an operational creditor, particularly, when it had no adjudicatory power under Regulation 13 of The Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016[9];

(b) the resolution plan erroneously states that appellant did not submit a claim when, in fact, it was submitted;

(c) appellant being owner of the land with statutory charge over assets of the CD ought to have been given top priority for its dues as a secured creditor;

(d) no opportunity of hearing was given to the appellant by the COC, and the entire process right up to the approval of the plan by the Adjudicating Authority was *ex parte*.

NCLT's Order

10. The NCLT, *vide* order dated 5.4.2021, rejected the aforesaid applications, *inter alia*, on the ground that, despite lapse of seven months between the date of filing its claim in January, 2020 and the date of approval of the plan in August 2020, the appellant took no steps against the RP for not taking a decision on its claim, even though it was aware about initiation of the CIRP, and now it is not permissible to take a decision on the claim application of the appellant as the CIRP is complete consequent to approval of the plan.

Appeal before NCLAT

11. Aggrieved with the order of the NCLT, the appellant filed an appeal before the NCLAT, *inter alia,* on the following grounds:

(i) The appellant was a financial creditor and, therefore, ought to have been a member of the COC. On account of absence of the appellant in the COC, the approval of the resolution plan by the COC and, thereafter, by the NCLT is rendered invalid;

9 CIRP Regulations 2016

(ii) By virtue of Sections 13[10], 13A[11]and 14[12]of the 1976 Act, the appellant had a charge over the assets of the CD and was therefore a secured creditor within the meaning of Section 3(30)[13] read with Section 3(31)[14] of the IBC, yet the resolution plan does not treat the appellant as a secured creditor;

(iii) The appellant had submitted its claim with proof, yet the appellant was shown as one who submitted no claim. Additionally, the appellant was neither informed of the meetings of the COC nor adequate amount, commensurate to its status as a secured creditor and owner of the land with statutory rights, was allocated to it in the resolution plan, which is violative of the provisions of Section 30(2)[15] of the IBC; and

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10 **Section 13.-** Imposition of penalty and mode of recovery of arrears.- Where any transferee makes any default in the payment of any consideration money or instalment thereof or any other amount due on account of the transfer of any site or building by the Authority or any rent due to the Authority in respect of any lease, or where any transfer or occupier makes any default in payment of any amount of fee or tax levied under this Act the Chief Executive Officer may direct that in addition to the amount of arrears, a further sum not exceeding that amount shall be recovered from the transferee or occupier, as the case may be, by way of penalty.

11 **Section 13.A-** Any amount payable to the Authority under Section 13 shall constitute a charge over the property and may be recovered as arrears of land revenue or by attachment and sale of property in the manner provided under Sections 503, 504, 505, 506, 507, 508, 509, 510, 512, 513, and 514 of the Uttar Pradesh Municipal Corporations Act, 1959 [Act 2 of 1959] and such provisions of the said Act shall mutatis mutandis apply to the recovery of dues of an authority as they apply to the recovery of a tax due to a Municipal Corporation, so however, that references in the aforesaid Sections of the said Act to "Municipal Commissioner", "Corporation Officer" and "Corporation" shall be construed as references to "Chief Executive Officer" and "Authority" respectively:
provided that more than one modes of recovery shall not be commenced or continued simultaneously

12 **Section 14.-** Forfeiture for breach of conditions of transfer.- (1) in the case of non-payment of consideration money or any installment thereof on account of the transfer by the Authority of any site or building or in case of breach of any condition of such transfer or breach of any rules or regulations made under this Act, the Chief Executive Officer may resume the site or building so transferred and may further forfeit the whole or any part of the money, if any, paid in respect thereof.
(2) Where the Chief Executive Officer orders resumption of any site or building under sub-section (1) the Collector may, on his own requisition, cause possession thereof to be delivered to him and may for that purpose use or causes to be used such force as may be necessary

13 **Section 3 (30).-** "secured creditor" means a creditor in favour of whom a security interest is created.

14 **Section 3(31).-** "security interest" means right, title or interest or a claim to a property, created in favour of, or provided for a secured creditor by a transaction which secures payment or performance of an obligation and includes mortgage, charge, hypothecation, assignment and encumbrance or any other agreement or arrangement securing payment or performance of any obligation of any person:
Provided that security interest shall not include a performance guarantee.

15 **Section 30. Submission of Resolution Plan.** – (1)…………………
(2) The resolution professional shall examine each resolution plan received by him to confirm that each resolution plan—
(a) provides for the payment of insolvency resolution process costs in a manner specified by the Board in priority to the payment of other debts of the corporate debtor;
(b) provides for the payment of debts of operational creditors in such manner as may be specified by the Board which shall not be less than—
(i) the amount to be paid to search creditors in the event of a liquidation of the corporate debtor

(iv) The NCLT failed to address and appreciate the grounds taken in the correct perspective.

Findings of NCLAT

12. The appeal preferred by the appellant was dismissed by observing, *inter alia,*

(i) the materials on record reflect that the RP had informed the appellant *vide* e-mail dated 04.02.2020 about its status as an Operational Creditor and to submit its claim in Form 'B', yet the appellant chose not to file its claim;

(ii) in ***New Okhla Development Authority vs. Anand Sonbhadra***[16], it was held that disbursement is an indispensable requirement to constitute a financial debt within the meaning of Section 5(8)[17] of the IBC and, that too, the disbursement must be from a

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under section 53;

(ii) the amount that would have been paid to such creditors, if the amount to be distributed under the resolution plan had been distributed in accordance with the order of priority in sub-section (1) of section 53;

whichever is higher, and provides for the payment of debts of financial creditors, who do not vote in favour of the resolution plan, in such manner as may be specified by the Board, which shall not be less than the amount to be paid to such creditors in accordance with sub-section (1) of section 53 in the event of a liquidation of the corporate debtor.

Explanation 1.-- For the removal of doubts, it is hereby clarified that a distribution in accordance with the provisions of this clause shall be fair and equitable to such creditors.

Explanation 2.-- For the purposes of this clause it is hereby declared that on and from the date of commencement of the Insolvency and Bankruptcy Code [Amendment] Act, 2019, the provisions of this clause shall also apply to the corporate insolvency resolution process of a corporate debtor----

(i) where the resolution plan has not been approved or rejected by the adjudicating authority;

(ii) where an appeal has been preferred under section 61 or section 62 or such an appeal is not time barred under any provision of law for the time being in force; or

(iii) where a legal proceeding has been initiated in any court against the decision of the adjudicating authority in respect of a resolution plan;

(c) provides for the management of the affairs of the corporate debtor after approval of the resolution plan;

(d) the implementation and supervision of the resolution plan;

(e) does not contravene any of the provisions of the law for the time being in force;

(f) conforms to such other requirements as may be specified by the Board.

16 [2022] 5 SCR 319 : (2023) 1 SCC 724

17 **Section 5(8).**—"financial debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes –

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;

(c) any amount raised pursuant to any note, purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or higher purchase contract which is deemed as a financial or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) receivables sold or discounted other than any receivables sold on non-recourse basis;

creditor to a debtor, and as the lease executed by the appellant was not a financial lease or capital lease, the appellant does not qualify as a financial creditor;

(iii) the resolution plan was approved by the Adjudicating Authority on 04.08.2020, and the successful resolution applicant (SRA) seeking implementation of the plan informed the appellant *vide* letter dated 24.09.2020 about the plan, yet I.A. No.344/2021 was not filed before 06.10.2020 and I.A. No. 1380/2021, seeking recall, was filed only on 15.03.2021, which shows that the appellant had not been diligent in pursuing its right, if any, therefore the challenge, post approval of the resolution plan, is liable to be rejected; and

(iv) there appears no material irregularity in the approval of the Resolution Plan, particularly, when the commercial wisdom of the COC is not justiciable.

13. We have heard Sri Ravindra Kumar, learned senior counsel, for the appellant; Dr. Abhishek Manu Singhvi, learned senior counsel, for respondent no.2 (Resolution Applicant); and Sri V.M. Kannan for respondent no.1 (Resolution Professional).

Submissions on behalf of the appellant

14. The learned counsel for the appellant, *inter alia*, submitted:

(a) There is no dispute that appellant had submitted its claim with proof on 30.01.2020 as a financial creditor having security interest over the assets of the CD. Even if the appellant was not a financial creditor, the resolution plan ought to have noticed

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(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;
Explanation.-- For the purposes of this sub clause,--
(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of Section 2 of the Real Estate (Regulation and Development Act, 2016 (16 of 2016);
(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;
(h) any counter indemnity obligation in respect of a guarantee, indemnity bond, documentary letter of credit or any other instrument issued by a bank or financial institution;
(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

its claim as a secured creditor whereas the order of approval dated 4.8.2020 describes the appellant as one who did not submit its claim.

(b) The meetings of the COC were not notified to the appellant to enable its participation. In absence thereof, the resolution plan stood vitiated.

(c) At the time of approving the resolution plan, the adjudicating authority failed to consider whether the plan had made provisions commensurate to appellant's claim, and the statutory charge which the appellant enjoyed over the assets of the CD. Not only that, it overlooked the ownership and statutory rights of the appellant over the land and thereby failed to consider whether the plan was feasible and viable. In absence of such consideration, the order of approval stood vitiated.

(d) The finding that there had been a delay on part of the appellant in pursuing its remedies is misconceived, particularly when it was established on record that I.A. No.344/ 2021 was filed promptly on 6.10.2020 upon getting information on 24.09.2020 from the monitoring agency regarding approval of the plan. Likewise, I.A. No.1380/ 2021 was filed immediately on 15.03.2021 when suspension of the period of limitation for any suit, appeal, application or proceeding, imposed between 15.03.2020 and 14.03.2021, was lifted in terms of this Court's order dated 8.03.2021 in ***RE: Cognizance For Extension of Limitation***[18].

Submissions on behalf of the respondents

15. Dr. Abhishek Manu Singhvi, leading the arguments on behalf of the respondents, submitted that the issue as to whether dues payable to an Industrial Area Development Authority, like the appellant, towards lease/ allotment premium / rental, would be a financial debt or not is no longer *res integra,* as it stands settled by a decision of this Court in ***Anand Sonbhadra*** ***(supra)***, wherein it has been held that it is not a financial debt. Therefore, the appellant had no voting right in the COC. And since the appellant pressed its case only on the ground that it is a financial creditor, its challenge to the order of approval had no basis. More so, when the commercial wisdom of the COC

18 [2021] 2 SCR 640 : (2021) 5 SCC 452

is not justiciable. Further, once the resolution plan, which makes a provision for the appellant, is approved by the Adjudicating Authority, it cannot be questioned through a recall application.

Analysis

16. Before we proceed to test the correctness of the impugned order against the weight of rival submissions, it would be useful to have a look at the statutory provisions of the IBC and the Regulations framed thereunder with reference to the corporate insolvency resolution process.

17. As per the provisions of the IBC, on admission of a petition, and declaration of a moratorium under Section 13, a public announcement is made inviting claims against the CD by a specified date. The manner in which a public announcement is to be made and claims are to be submitted, is described in the CIRP Regulations 2016.

18. Regulation 7[19] of CIRP Regulations, 2016 deals with submission of a claim by a person who claims himself to be an operational creditor. Such claim is to be submitted in Form B specified in the Schedule. Whereas Regulation 8[20] deals with submission of a claim by a person who claims himself to be a financial creditor. Such a claim is to be submitted in Form C. Regulations 8-A, 9 and 9-A deal with other classes of creditors with which we are not concerned here.

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19 **7. *Claims by operational creditors.*—**(1) A person claiming to be an operational creditor, other than workman or employee of the corporate debtor, shall submit claim with proof to the interim resolution professional in person, by post or by electronic means in Form B of the Schedule:
Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.
(2) The existence of debt due to the operational creditor under this regulation may be proved on the basis of—
(a) the records available with an information utility, if any; or
(b) other relevant documents, including—
(i) a contract for the supply of goods and services with corporate debtor;
(ii) an invoice demanding payment for the goods and services supplied to the corporate debtor;
(iii) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any; or
(iv) financial accounts.

20 **8. *Claims by financial creditors.*—**(1) A person claiming to be a financial creditor, other than a financial creditor belonging to a class of creditors, shall submit claim with proof to the interim resolution professional in electronic form in Form C of the Schedule:
Provided that such person may submit supplementary documents or clarifications in support of the claim before the constitution of the committee.
(2) The existence of debt due to the financial creditor may be proved on the basis of—
(a) the records available with an information utility, if any; or
(b) other relevant documents, including—
(i) a financial contract supported by financial statements as evidence of the debt;
(ii) a record evidencing that the amounts committed by the financial creditor to the corporate debtor under a facility has been drawn by the corporate debtor;
(iii) financial statements showing that the debt has not been paid; or
(iv) an order of a court or tribunal that has adjudicated upon the non-payment of a debt, if any.

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19. Regulation 12[21] mandates submission of proof of the claim by the date specified. Whereas, Regulation 13[22] speaks of verification of claims by the interim resolution professional (IRP) or the RP, as the case may be. Regulation 14[23] provides for determination of amount of claim where the amount claimed is not precise.

20. The use of the words *"a person claiming to be an operational creditor"* in the opening part of Regulation 7, and the words *"a person claiming to be a financial creditor"* in Regulation 8, indicate that the category in which the claim is submitted is based on the own understanding of the claimant. Thus, there could be a situation where the claimant, in good faith, may place itself in a category to which it does not belong. However, what is important is, the claim so submitted must be with proof. As to what could form proof of the debt/ claim is delineated in sub-regulation (2) of Regulations 7 and 8 of the CIRP Regulations, 2016.

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21 **12. *Submission of proof of claims.***—(1) Subject to sub-regulation (2), a creditor shall submit claim with proof on or before the last date mentioned in the public announcement.
(2) A creditor, who fails to submit claim with proof within the time stipulated in the public announcement, may submit the claim with proof to the interim resolution professional or the resolution professional, as the case may be, on or before the ninetieth day of the insolvency commencement date.
(3) Where the creditor in sub-regulation (2) is a financial creditor under Regulation 8, it shall be included in the committee from the date of admission of such claim:
Provided that such inclusion shall not affect the validity of any decision taken by the committee prior to such inclusion.

22 **13. *Verification of claims.***—(1) The interim resolution professional or the resolution professional, as the case may be, shall verify every claim, as on the insolvency commencement date, within seven days from the last date of the receipt of the claims, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it.
(2) The list of creditors shall be—
(a) available for inspection by the persons who submitted proofs of claim;
(b) available for inspection by members, partners, directors and guarantors of the corporate debtor or their authorised representatives;
(c) displayed on the website, if any, of the corporate debtor;
(ca) filed on the electronic platform of the Board for dissemination on its website:
Provided that this clause shall apply to every corporate insolvency resolution process ongoing and commencing on or after the date of commencement of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) (Fifth Amendment) Regulations, 2020;
(d) filed with the adjudicating authority; and
(e) presented at the first meeting of the committee.

23 **14. *Determination of amount of claim.***—(1) Where the amount claimed by a creditor is not precise due to any contingency or other reason, the interim resolution professional or the resolution professional, as the case may be, shall make the best estimate of the amount of the claim based on the information available with him.
(2) The interim resolution professional or the resolution professional, as the case may be, shall revise the amounts of claims admitted, including the estimates of claims made under sub-regulation (1), as soon as may be practicable, when he comes across additional information warranting such revision."

21. Once a claim is submitted with proof under any of the Regulations (i.e., Regulations 7, 8, 8-A, 9 and 9-A), the IRP or the RP, as the case may be, as per Regulation 13, has to verify the claim, as on the insolvency commencement date, and thereupon maintain a list of creditors containing names of creditors along with the amount claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims, and update it in terms of Regulation 12 A[24].

22. As it could be noticed from the CIRP Regulations, 2016, on submission of a claim with proof, the IRP or the RP, as the case may be, has to verify the claim and prepare a list of creditors containing names of creditors along with the amount claimed by them and security interest, if any, the logical conclusion derivable from the provisions analysed above would be that the Form in which a claim is to be submitted under the CIRP Regulations 2016 is directory and not mandatory. What is important is, the claim must be supported by proof.

23. On collation of claims received against the CD, the IRP has to constitute a COC. As per Section 21 (2) of the IBC, subject to other provisions of Section 21, the COC must comprise all financial creditors of a CD. Under Section 22 of the IBC, the COC appoints an RP in its first meeting. It may, however, resolve to appoint the IRP as the RP, subject to confirmation by the Board.

24. The RP has many important duties. Some of the duties which an RP has to perform, under Section 25 of the IBC, are to: (a) take immediate custody and control of all the assets of the CD, including the business records of the CD; (b) maintain an updated list of claims; (c) convene and attend all meetings of the COC; (d) prepare information memorandum in accordance with Section 29 read with Regulation 36 of the CIRP Regulations 2016[25]; (e) invite prospective

24 **!2 A. Updation of claim.** — A creditor shall update its claim as and when the claim is satisfied, partly or fully, from any source in any manner, after the insolvency commencement date.

25 **Regulation 36. Information memorandum.** – (1) Subject to sub regulation [4], the resolution professional shall submit the information memorandum in electronic form to each member of the committee within 2 weeks of his appointment, but not later than 54th day from the insolvency commencement date, whichever is earlier.

(2) the information memorandum shall contain the following details of the corporate debtor--

[a] assets and liabilities with such description, as on the insolvency commencement date, as are generally necessary for ascertaining their values.

Explanation.- Description includes the details such as date of acquisition cost of acquisition, remaining useful life identification number, depreciation charged, book value, and any other relevant details.

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resolution applicants to submit a resolution plan or plans; and (f) present all resolution plans at the meetings of the COC.

25. The meetings of the COC are to be conducted by the RP. Sub section (3) of Section 24[26], *inter alia*, provides that the RP shall give notice of each meeting of the COC to the operational creditors or their representative(s) if the amount of their aggregate dues is not less than ten percent of the debt. Regulation 19 of the CIRP Regulations, 2016 further mandates the RP to ensure that notice of the meeting is given to every participant. "Participant" is defined in Regulation 2 (l) of the CIRP Regulations 2016 as a person who is entitled to attend a meeting of the COC under Section 24 of the IBC or any other person authorised by the COC to attend the meeting.

26. Based on the information memorandum, when a resolution plan is submitted by a resolution applicant, eligible under Section 29-A of the IBC, the RP is under an obligation to examine whether the resolution

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(b) the latest annual financial statements;
(c) financial statements of the corporate debtor for the last 2 financial years and provisional financial statements for the current financial year made up to a date not earlier than 14 days from the date of the application;
(d) a list of creditors containing the names of creditors, the amounts claimed by them, the amount of their claims admitted and the security interest, if any, in respect of such claims;
(e) particulars of a debt due from or to the corporate debtor with respect to related parties;
(f) details of guarantees that have been given in relation to the debts of the corporate debtor by other persons, specifying which of the guarantors is a related party;
(g) the names and addresses of the members or partners holding at least 1% stake in the corporate debtor along with the size of stake;
(h) details of all material litigation and an ongoing investigation or proceeding initiated by Government and statutory authorities;
(i) the number of workers and employees and liabilities of the corporate debtor towards them;
(j) *******omitted
(k)*******omitted
(l) other information, which the resolution professional deems relevant to the committee.

(3) A member of the committee may request the resolution professional for further information of the nature described in this regulation and the resolution professional shall provide such information to all members within reasonable time if such information has a bearing on the resolution plan.
(4) The resolution professional shall share the information memorandum after receiving an undertaking from a member of the committee to the effect that such member or resolution applicant shall maintain confidentiality of the information and shall not use such information to cause an undue gain or undue loss to itself or any other person and comply with the requirements under subsection [2] of section 29.

26 **"Section 24. Meeting of committee of creditors.---** (1)………
(2)…………..
(3) The resolution professional shall give notice of each meeting of the committee of creditors to—
(a) members of committee of creditors, including the authorized representatives referred to in sub-sections (6) and (6A) of section 2 and sub-section (5);
(b) members of the suspended Board of Directors or the partners of the corporate persons, as the case may be;
(c). operational creditors or their representatives if the amount of their aggregate dues is not less than ten percent of the debt

plan(s) received by him conform(s) to the conditions referred to in sub-section (2) of Section 30 of the IBC as elaborated in Regulations 37[27] and 38[27A] of the CIRP Regulations 2016.

27. The resolution plan that conforms to the conditions referred to in sub-section (2) of Section 30 is to be presented by the RP to the COC for its approval. Thereafter, under sub-section (4) of Section 30[28], the COC may approve the plan after considering its feasibility

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27 **Regulation 37. Resolution Plan.--** A resolution plan shall provide for the measures as may be necessary, for insolvency resolution of the corporate debtor for maximization of value of its assets including but not limited to the following:-

[a] transfer of all or part of the assets of the corporate debtor to one or more persons;
(b) sale of all or part of the assets whether subject to any security interest or not;
[ba] restructuring of the corporate debtor, by way of merger, amalgamation and demerger;
[c] the substantial acquisition of shares of the corporate debtor or the merger or consolidation of the corporate debtor with one or more persons;
[ca] cancellation or delisting of any shares of the corporate debtor if applicable;
[d] satisfaction or modification of any security interest;
[e] curing or waving of any breach of the terms of any debt due from the corporate debtor;
[f] reduction in the amount payable to the creditors;
[g] extension of a maturity date or change in interest rate or other terms of a debt due from the corporate debtor;
[h] amendment of the constitutional documents of the corporate debtor;
[i] issuance of securities of the corporate debtor for cash, property, securities, or in exchange for claims or interest, or other appropriate purpose;
[j] change in portfolio of goods or services produced or rendered by the corporate debtors;
[k] change in technology used by the corporate debtor; and
[l] obtaining necessary approvals from the central and state governments and other authorities.

27A **Regulation 38. Mandatory contents of the resolution plan.---**(1) The amount payable under a resolution plan-----

(a) to the operational creditors shall be paid in priority over financial creditors; and
(b) to the financial creditors, who have a right to vote under sub- section (2) of Section 21 and did not vote in favour of the resolution plan, shall be paid in priority over financial creditors who voted in favour of the plan.

(1A) A resolution plan shall include a statement as to how it has dealt with the interests of all stakeholders including financial creditors and operational creditors, of the corporate debtor.
(1B) A resolution plan shall include a statement giving details if the resolution applicant or any of its related parties has failed to implement or contributed to the failure of implementation of any other resolution plan approved by the adjudicating authority at any time in the past.
(2) A resolution plan shall provide:
[a] the term of the plan and its implementation schedule;
[b] the management and control of the business of the corporate debtor during its term; and
[c] adequate means for supervising its implementation.
(3) A resolution plan shall demonstrate that----

[a] it addresses the cause of the fault;
[b] it is feasible and viable;
[c] it has provisions for its effective implementation;
(d) it has provisions for approvals required and the timeline for the same; and
[e] the resolution applicant has the capability to implement the resolution plan.

28 **Section 30 (4).** The committee of creditors may approve a resolution plan by a vote of not less than sixty six percent of voting share of financial creditors, after considering its feasibility and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of section 53, including the priority and value of the security interest of secured creditor and such other requirements as may be specified by the Board:
………………”

and viability, the manner of distribution proposed, which may take into account the order of priority amongst creditors as laid down in sub-section (1) of Section 53, including the priority and value of security interest of a secured creditor and such other requirements as may be specified by the Board.

28. Once the plan is approved by the COC, the RP has to submit it for approval of the Adjudicating Authority. As per sub-section (1) of Section 31[29] of the IBC, if the Adjudicating Authority is satisfied that the resolution plan as approved by the COC under sub-section (4) of Section 30 meets the requirements of sub-section (2) of Section 30, it has to approve the resolution plan. On its approval, the plan becomes binding on the CD and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan. But where the Adjudicating Authority is satisfied that the resolution plan does not conform to the requirements referred to in sub-section (1), it may, in exercise of power under sub-section (2) of Section 31, by an order, reject the resolution plan.

29. Explaining the scheme of the CIRP under the IBC, in ***Ghanashyam Mishra & Sons (P) Ltd. vs. Edelweiss Asset Reconstruction Co. Ltd.***[30]**,** a three-Judge Bench of this Court observed that one of the principal objects of the IBC is to provide for revival of the CD and to make it a going concern. The RP on commencement of CIRP is required to issue a publication inviting claims from all the stakeholders; thereafter, on basis of claims received, the RP is required to collate the information and submit necessary details in the information memorandum; the resolution applicant(s) submit their plan(s) on the basis of the details provided in the information memorandum; the resolution plan(s) undergo deep scrutiny by RP

29 **"Section 31. Approval of resolution plan.**- (1) If the Adjudicating Authority is satisfied that the resolution plan as approved by the committee of creditors under sub-section (4) of section 30 meets the requirements as referred to in sub-section (2) of section 30, it shall by order approve the resolution plan which shall be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority to whom a debt in respect of the payment of dues under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan:
…………".

30 [2021] 13 SCR 737 : (2021) 9 SCC 657 (paragraph 93)

as well as COC; in the negotiations that may be held between COC and the resolution applicant, various modifications may be made so as to ensure that while paying part of the dues of financial creditors as well as operational creditors and other stakeholders, the CD is revived and is made an on-going concern; after COC approves the plan, the adjudicating authority is required to arrive at a subjective satisfaction that the plan conforms to the requirements as are provided in sub-section (2) of Section 30 of IBC; and only thereafter, the adjudicating authority can grant its approval to the plan.

30. What is clear from the provisions of the IBC and the Regulations noticed above is, that the RP is under a statutory obligation to collate the data obtained from (a) the claim(s) made before it and (b) information gathered from the records including those maintained by the CD. The data so collated forms part of the information memorandum. Based on that information, the resolution applicant(s) submit(s) plan. In consequence, even if a claim submitted by a creditor against the CD is in a Form not as specified in the CIRP Regulations, 2016, the same has to be given due consideration by the IRP or the RP, as the case may be, if it is otherwise verifiable, either from the proof submitted by the creditor or from the records maintained by the CD. *A fortiori*, if a claim is submitted by an operational creditor claiming itself as a financial creditor, the claim would have to be accorded due consideration in the category to which it belongs provided it is verifiable.

31. On submission of the plan by a resolution applicant, the RP examines it to confirm whether it meets the requirements of sub-section (2) of Section 30 and, if it conforms to the conditions referred to therein, present the plan to the COC for its approval. After the plan is presented to the COC for its approval, the COC, under sub-section (4) of Section 30, has to consider its feasibility and viability, the manner of distribution proposed, including the priority and value of the security interest of a secured creditor and such other requirements as may be specified by the Board. Once that exercise is over, the plan is submitted for approval of the Adjudicating Authority, which must, under sub-section (1) of Section 31, satisfy itself as to whether the plan approved by COC under sub-section (4) of Section 30 meets the requirements as referred to in sub-section (2) of Section 30 of IBC.

32. In ***Jaypee Kensington Boulevard Apartments Welfare Association vs. NBCC (India) Ltd.,***[31] a three-Judge Bench of this Court had occasion to examine the scope of judicial review exercisable by: (a) the Adjudicating Authority, under Section 31 (1), over a resolution plan approved by the COC; and (b) the Appellate Authority exercising its power under Section 32 read with Section 61 (3) of the IBC. After examining the relevant provisions of the IBC and the Regulations framed thereunder, and upon a survey of various judicial pronouncements on the subject, the scope of judicial review was summarised as follows:

> "**108.** To put in a nutshell, the adjudicating authority has limited jurisdiction in the matter of approval of a resolution plan, which is well-defined and circumscribed by Sections 30(2) and 31 of the Code read with the parameters delineated by this Court in the decisions above-referred. The jurisdiction of the appellate authority is also circumscribed by the limited grounds of appeal provided in Section 61 of the Code. In the adjudicatory process concerning a resolution plan under IBC, there is no scope for interference with the commercial aspects of the decision of the CoC; and there is no scope for substituting any commercial term of the resolution plan approved by the CoC. Within its limited jurisdiction, if the adjudicating authority or the appellate authority, as the case may be, would find any shortcoming in the resolution plan vis-à-vis the specified parameters, it would only send the resolution plan back to the Committee of Creditors, for re-submission after satisfying the parameters delineated by the Code and exposited by this Court.
>
> (Emphasis supplied)

33. In light of the analysis of the provisions of the IBC and the Regulations framed thereunder, in our view, though commercial wisdom of the COC in approving a resolution plan may not be justiciable in exercise of the power of judicial review, the Adjudicating Authority can always take notice of any shortcoming in the resolution plan in terms of the parameters specified in sub-section (2) of Section 30 of the IBC

31 [2021] 12 SCR 603 : (2022) 1 SCC 401

coupled with Regulations 37 and 38 of the CIRP Regulations 2016. If any such shortcoming appears in the resolution plan, it may send the resolution plan back to the COC for re-submission after satisfying the parameters so laid down. Likewise, the appellate authority can also interfere upon noticing any shortcoming in the resolution plan while exercising its powers under Section 32[32] read with Section 61 (3)[33] of the IBC.

34. In the instant case, a perusal of the approval order dated 04.08.2020 would reveal that the resolution plan put forth by the resolution applicant refers to the appellant as a creditor who had not submitted its claim. Further, the dues shown payable to the appellant are Rs. 13,47,40,819/- when, according to the appellant, its claim was for Rs. 43,40,31,951/- Not only that, the amount proposed to be paid is just Rs.1,34,74,082/-, that too, payable by conversion of dues into square feet of area to be completed and payment to be made, on square feet basis, at the time of registration of each of the units.

35. However, what is important is that neither NCLT nor NCLAT rejected the assertion of the appellant that on 30.01.2020, in response to the public announcement, the appellant had submitted with proof a claim of Rs.43,40,31,951/- before the RP, being the amount payable to it by the CD towards unpaid premium including interest payable thereon for the lease/allotment of land owned by the appellant.

36. According to the appellant, the resolution plan fails to take into account the following: (a) the appellant had submitted its claim with proof for Rs. 43,40,31,951/-; (b) the appellant had a statutory charge over the assets of the CD; (c) the entire land over which the project has been conceived is owned by the appellant; (d) a notice to cancel the

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32 **Section 32. Appeal. -** Any appeal from an order approving the resolution plan shall be in the manner and on the grounds laid down in sub-section (3) of Section 61.

33 **Section 61. Appeals and Appellate Authority. –** (1)…………
(2)…………
(3) An appeal against an order approving resolution plan under Section 31 may be filed on the following grounds, namely:-
[i] the approved resolution plan is in contravention of the provisions of any law for the time being in force;
(ii) there has been material irregularity in exercise of the powers by the resolution professional during the corporate insolvency resolution period;
(iii) the debts owed to operational creditors of the corporate debtor have not been provided for in the resolution plan in the manner specified by the Board;
(iv) the insolvency resolution process costs have not been provided for repayment in priority to all other debts; or
(v) the resolution plan does not comply with any other criteria specified by the Board.

lease for non-payment of dues had already been served on the CD; and (e) without approval of the appellant, the plan was not feasible. Further, according to the appellant, the plan did not conform to the conditions referred to in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations 2016; and that the entire process of preparing the resolution plan and approving the same had been *ex parte,* thereby seriously prejudicing the interest of the appellant. It is the case of the appellant that neither NCLT nor NCLAT accorded due consideration to the above aspects while rejecting the application/ appeal of the appellant.

37. Per contra, on behalf of the respondents, it was urged that,- (a) the appellant had pressed its case only on the ground that it was a financial creditor, once this plea is found unsustainable, no relief can be granted to the appellant, as commercial wisdom of the COC is not justiciable; (b) NCLT has no power to recall its order of approval, the remedy for the appellant was to file an appeal within the time provided by the statute; and (c) there has been inordinate delay on the part of the appellant in questioning the order of approval.

38. At this stage, we may put on record that the appellant had set up its claim as a financial creditor. However, the appellant was found to be an operational creditor. Though a challenge to this finding has been laid but, during the course of arguments, the learned counsel for the appellant failed to demonstrate as to how could the appellant be considered a financial creditor. In view thereof, taking notice of the decision in ***Anand Sonbhadra*** ***(supra)***, we do not propose to deal with the submission that the appellant was a financial creditor.

39. Upon consideration of the rival submissions, following issues arise for our consideration in this appeal:

(i) Whether in exercise of powers under sub-section (5) of Section 60, the Adjudicating Authority (i.e., NCLT) can recall an order of approval passed under sub-section (1) of Section 31 of the IBC?.

(ii) Whether the application for recall of the order was barred by time?

(iii) Whether the resolution plan put forth by the resolution applicant did not meet the requirements of sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016?

(iv) As to what relief, if any, the appellant is entitled to?

Recall Application is maintainable.

40. Section 60 of the IBC specifies that the Adjudicating Authority in relation to insolvency resolution and liquidation for corporate persons including corporate debtors and personal guarantors thereof shall be the NCLT having territorial jurisdiction over the place where the registered office of the corporate person is located. Sub-section (5) of Section 60 provides that notwithstanding anything to the contrary contained in any other law for the time being in force, the NCLT shall have jurisdiction to entertain or dispose of: (a) any application or proceeding by or against the corporate debtor or corporate person; (b) any claim made by or against the corporate debtor or corporate person, including claims by or against any of its subsidiaries situated in India; and (c) any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC.

41. The NCLT has been constituted by the Central Government in exercise of power under Section 408 of the Companies Act, 2013. Section 408 of the Companies Act is in following terms:

> "The Central Government shall, by notification, constitute with effect from such date as may be specified therein, a tribunal to be known as the National Company Law Tribunal consisting of a President and such number of judicial and technical members as the Central Government may deem necessary, to be appointed by it by notification to exercise and discharge such powers and functions as are, or may be, conferred on it by or under this Act or any other law for the time being in force."

42. Rule 11 of the National Company Law Tribunal Rules, 2016, framed under Section 469 of the Companies Act 2013, which is in *pari materia* with Section 151[34] of Code of Civil Procedure, 1908[35], preserve the inherent powers of the Tribunal in the following terms:

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34 **Section 151.- Saving of inherent powers of Court. -** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court

35 CPC

> "Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Tribunal to make such orders as may be necessary for meeting the ends of justice or to prevent abuse of the process of the Tribunal."

43. In ***Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal***[36] a four-Judge Bench of this Court in the context of powers vested in the Court, while interpreting Section 151 CPC, observed:

> "23… The Section itself says that nothing in the Code shall be deemed to limit or otherwise affect the inherent power of the Court to make orders necessary for the ends of justice. In the face of such a clear statement, it is not possible to hold that the provisions of the Code control the inherent power by limiting it or otherwise affecting it. The inherent power has not been conferred upon the court; it is a power inherent in the Court by virtue of its duty to do justice between the parties before it."
>
> (Emphasis supplied)

44. In ***Grindlays Bank Ltd. vs. Central Govt. Industrial Tribunal***[37] a question arose whether Central Government Industrial Tribunal has power to recall/ set aside an *ex parte* award when the party aggrieved had been prevented from appearing by a sufficient cause. Holding that such power inheres in a Tribunal, this Court observed:

> "6. We are of the opinion that the Tribunal had the power to pass the impugned order if it thought fit in the interest of justice. It is true that there is no express provision in the Act or the rules framed thereunder giving the Tribunal jurisdiction to do so. But it is a well-known rule of statutory construction that a Tribunal or body should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for the purpose of doing justice between the parties. In a case of this nature, we are of the view that the Tribunal should be considered as invested with such incidental or ancillary

36 [1962] Supp. (1) S.C.R. 450 : AIR 1962 SC 527

37 [1981] 2 SCR 341 : 1980 Supp SCC 420

> powers unless there is any indication in the statute to the contrary. We do not find any such statutory prohibition. On the other hand, there are indications to the contrary."
>
> (Emphasis Supplied)

In addition to above, recognising the difference between a procedural review and a review on merits, it was observed:

> 13…………The expression "review" is used in the two distinct senses, namely (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a misapprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. …………. Obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected *ex debito justitiae* to prevent the abuse of its process, and such power inheres in every court or Tribunal."

45. In ***State of Punjab vs. Davinder Pal Singh Bhullar***[38], while considering the bar imposed on a Court by Section 362 of the Criminal Procedure Code, 1973 on review of a judgment or final order disposing of a case, it was observed:

> "46. If a judgment has been pronounced without jurisdiction or in violation of principles of natural justice or where the order has been pronounced without giving an opportunity of being heard to a party affected by it or where an order was obtained by abuse of the process of court which would really amount to its being without jurisdiction, inherent powers can be exercised to recall such order for the reason that in such an eventuality the order becomes a nullity and the provisions of Section 362 CrPC would not operate. In such an eventuality, the judgment is manifestly contrary to the audi alteram partem rule of natural justice. The power of recall is different from the power of altering/reviewing the judgment. However, the party seeking recall/alteration has to establish that it was not at fault."

38 [2011] 15 SCR 540 : (2011) 14 SCC 770

**Greater Noida Industrial Development Authority v.
Prabhjit Singh Soni & Anr.**

46. The above passage was cited and approved by a three-Judge Bench of this Court in ***New India Assurance Co. Ltd. vs. Krishna Kumar Pandey***[39].

47. In ***Budhia Swain vs. Gopinath Deb***[40], after considering a number of decisions, a two-Judge Bench of this Court observed:

> "8. In our opinion a tribunal or a court may recall an order earlier made by it if
>
> (i) the proceedings culminating into an order suffer from the inherent lack of jurisdiction and such lack of jurisdiction is patent,
>
> (ii) there exists fraud or collusion in obtaining the judgment,
>
> (iii) there has been a mistake of the court prejudicing a party, or
>
> (iv) a judgment was rendered in ignorance of the fact that a necessary party had not been served at all or had died and the estate was not represented.
>
> The power to recall a judgment will not be exercised when the ground for reopening the proceedings or vacating the judgment was available to be pleaded in the original action but was not done or where a proper remedy in some other proceeding such as by way of appeal or revision was available but was not availed. The right to seek vacation of a judgment may be lost by waiver, estoppel or acquiescence."

48. The law which emerges from the decisions above is that a Tribunal or a Court is invested with such ancillary or incidental powers as may be necessary to discharge its functions effectively for the purpose of doing justice between the parties and, in absence of a statutory prohibition, in an appropriate case, it can recall its order in exercise of such ancillary or incidental powers.

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39 (2021) 14 SCC 683

40 [1999] 2 SCR 1189 : (1999) 4 SCC 396

49. In a recent decision (i.e., ***Union Bank of India vs. Dinakar T. Vekatasubramanian & Ors.***), a five-member Full Bench of NCLAT held that though the power to review is not conferred upon the Tribunal but power to recall its judgment is inherent in the Tribunal and is preserved by Rule 11 of the NCLT Rules, 2016. It was held that power of recall of a judgment can be exercised when any procedural error is committed in delivering the earlier judgment; for example, necessary party has not been served or necessary party was not before the Tribunal when judgment was delivered adverse to a party. It was observed that there may be other grounds for recall of a judgment one of them being where fraud is played on the Court in obtaining a judgment. This decision of NCLAT was upheld by a two-Judge Bench of this Court *vide* order dated 31.07.2023 in ***Civil Appeal No.4620 of 2023 (Union Bank of India vs. Financial Creditors of M/s Amtek Auto Ltd. & Ors.)***.

50. In light of the discussion above, what emerges is, a Court or a Tribunal, in absence of any provision to the contrary, has inherent power to recall an order to secure the ends of justice and/or to prevent abuse of the process of the Court. Neither the IBC nor the Regulations framed thereunder, in any way, prohibit, exercise of such inherent power. Rather, Section 60(5)(c) of the IBC, which opens with a non-obstante clause, empowers the NCLT (the Adjudicating Authority) to entertain or dispose of any question of priorities or any question of law or facts, arising out of or in relation to the insolvency resolution or liquidation proceedings of the corporate debtor or corporate person under the IBC. Further, Rule 11 of the NCLT Rules, 2016 preserves the inherent power of the Tribunal. Therefore, even in absence of a specific provision empowering the Tribunal to recall its order, the Tribunal has power to recall its order. However, such power is to be exercised sparingly, and not as a tool to re-hear the matter. Ordinarily, an application for recall of an order is maintainable on limited grounds, inter alia, where (a) the order is without jurisdiction; (b) the party aggrieved with the order is not served with notice of the proceedings in which the order under recall has been passed; and (c) the order has been obtained by misrepresentation of facts or by playing fraud upon the Court /Tribunal resulting in gross failure of justice.

51. In the case on hand, the recall application was filed by claiming that,- (a) the appellant was not informed of the meetings of the COC; (b) the proceedings up to the stage of approval of the resolution plan by the Adjudicating Authority were *ex parte*; (c) the RP misrepresented that the appellant had submitted no claim when, otherwise, a claim was submitted of an amount higher than what was shown outstanding towards the appellant; and (d) there was gross mistake on part of the Adjudicating Authority in approving the plan which did not fulfil the conditions laid down in sub-section (2) of Section 30 of the IBC.

52. In our view, the grounds taken qualify as valid grounds on which a recall of the order of approval dated 04.08.2020 could be sought. We thus hold that the recall application was maintainable notwithstanding that an appeal lay before the NCLAT against the order of approval passed by the Adjudicating Authority.

The Recall Application was not barred by time.

53. As regards the plea that the recall application was barred by time, suffice it to say that I.A. No.344/ 2021 was filed on 6.10.2020 upon getting information on 24.09.2020 from the monitoring agency regarding approval of the plan. Likewise, I.A. No.1380/ 2021 was filed on 15.03.2021 immediately when suspension of the period of limitation for any suit, appeal, application or proceeding, between 15.03.2020 and 14.03.2021, was lifted in terms of this Court's order dated 8.03.2021 in ***RE: Cognizance For Extension of Limitation (supra)***. We, therefore, find no substance in the plea that the applications were barred by limitation.

The Resolution Plan did not meet the requirements of Section 30 (2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016

54. In our view the resolution plan did not meet the requirements of Section 30(2) of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016 for the following reasons:

a. The resolution plan disclosed that the appellant did not submit its claim, when the unrebutted case of the appellant had been that it had submitted its claim with proof on 30.01.2020 for a sum of Rs.43,40,31,951/- No doubt, the record indicates that the appellant was advised to submit its claim in Form B (meant

for operational creditor) in place of Form C (meant of financial creditor). But, assuming the appellant did not heed the advice, once the claim was submitted with proof, it could not have been overlooked merely because it was in a different Form. As already discussed above, in our view the Form in which a claim is to be submitted is directory. What is necessary is that the claim must have support from proof. Here, the resolution plan fails not only in acknowledging the claim made but also in mentioning the correct figure of the amount due and payable. According to the resolution plan, the amount outstanding was Rs. 13,47,40,819/- whereas, according to the appellant, the amount due and for which claim was made was Rs. 43,40,31,951/- This omission or error, as the case may be, in our view, materially affected the resolution plan as it was a vital information on which there ought to have been application of mind. Withholding the information adversely affected the interest of the appellant because, firstly, it affected its right of being served notice of the meeting of the COC, available under Section 24 (3) (c) of the IBC to an operational creditor with aggregate dues of not less than ten percent of the debt and, secondly, in the proposed plan, outlay for the appellant got reduced, being a percentage of the dues payable. In our view, for the reasons above, the resolution plan stood vitiated. However, neither NCLT nor NCLAT addressed itself on the aforesaid aspects which render their orders vulnerable and amenable to judicial review.

b. The resolution plan did not specifically place the appellant in the category of a secured creditor even though, by virtue of Section 13-A of the 1976 Act, in respect of the amount payable to it, a charge was created on the assets of the CD. As per Regulation 37 of the CIRP Regulations 2016, a resolution plan must provide for the measures, as may be necessary, for insolvency resolution of the CD for maximization of value of its assets, including, but not limited to, satisfaction or modification of any security interest. Further, as per *Explanation 1*, distribution under clause (b) of sub-section (2) of Section 30 must be fair and equitable to each class of creditors. Non-placement of the appellant in the class of secured creditors did affect its interest. However, neither NCLT nor NCLAT noticed this anomaly in the plan, which vitiates their order.

c. Under Regulation 38 (3) of the CIRP Regulations, 2016, a resolution plan must, *inter alia,* demonstrate that (a) it is feasible and viable; and (b) it has provisions for approvals required and the time-line for the same. In the instant case, the plan conceived utilisation of land owned by the appellant. Ordinarily, feasibility and viability of a plan are economic decisions best left to the commercial wisdom of the COC. However, where the plan envisages use of land not owned by the CD but by a third party, such as the appellant, which is a statutory body, bound by its own rules and regulations having statutory flavour, there has to be a closer examination of the plan's feasibility. Here, on the part of the CD there were defaults in payment of instalments which, allegedly, resulted in raising of demand and issuance of pre-cancellation notice. In these circumstances, whether the resolution plan envisages necessary approvals of the statutory authority is an important aspect on which feasibility of the plan depends. Unfortunately, the order of approval does not envisage such approvals. But neither NCLT nor NCLAT dealt with those aspects.

Relief

55. As we have found that neither NCLT nor NCLAT while deciding the application /appeal of the appellant took note of the fact that,- (a) the appellant had not been served notice of the meeting of the COC; (b) the entire proceedings up to the stage of approval of the resolution plan were *ex parte* to the appellant; (c) the appellant had submitted its claim, and was a secured creditor by operation of law, yet the resolution plan projected the appellant as one who did not submit its claim; and (d) the resolution plan did not meet all the parameters laid down in sub-section (2) of Section 30 of the IBC read with Regulations 37 and 38 of the CIRP Regulations, 2016, we are of the considered view that the appeals of the appellant are entitled to be allowed and are accordingly allowed. The impugned order dated 24.11.2022 is set aside. The order dated 04.08.2020 passed by the NCLT approving the resolution plan is set aside. The resolution plan shall be sent back to the COC for re-submission after satisfying the parameters set out by the Code as exposited above. There shall be no order as to costs.

Headnotes prepared by: Divya Pandey

Result of the case: Appeals allowed.

[2024] 2 S.C.R. 288 : 2024 INSC 104

Mallappa & Ors.
v.
State of Karnataka

(Criminal Appeal No. 1162 of 2011)

12 February 2024

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

Issue for Consideration

The trial Court acquitted appellants-accused nos.3, 4 and 5 for the commission of murder of one 'M'. However, the High Court reversed the order of acquittal and held the appellants guilty of the commission of murder. Whether the High Court was correct in reversing the order of acquittal of the trial Court and thereby convicting the accused persons u/s. 302 IPC.

Headnotes

Penal Code, 1860 – s.302 – Acquittal under – As per prosecution eight accused persons armed with axes, knives and clubs attacked 'M' and assualted him – PW-4 tried to run away, however, was assaulted with an axe on his head, back and on scrotum – PW-4 sustained injuries, became unconcious and fell on the ground – PW-3 hid himself inside the jali-trees – After assailants left, PW-3 went to M and found that he was dead and PW-4 was unconcious with blood flowing out of his injuries – PW-3 fearing for his life kept on hiding then left during night – On the next day he informed PW-2 (father of deceased) about the incident – Eight accused persons were tried and acquitted by the trial Court – The High Court acquitted all the accused persons except the three appellants – Propriety:

Held: In the instant case, the case of prosecution substantially rests on the testimonies of PW-3 and PW-4 read with various documents, especially the reports of medical examination and post mortem – The conduct of PW-3 renders his very presence at the place of incident as doubtful – Despite a heavy assault by multiple accused persons, he did not suffer any injury at all – That too when he was indeed chased by A-3 while attacking PW-4 – It is extremely doubtful that the assailants simply chose to give up on PW-3 and did not pursue him behind the bushes,

* Author

despite knowing that PW-3 could turn out to be an eye witness of the incident – The story that follows the story of hiding behind the bushes is equally doubtful and leaves one speculating – The timelines, the route taken by PW-3, complete disregard for severely injured PW-4, failure to inform the police post despite access to it etc. are some of the factors that raise a reasonable doubt on the entire story – The chain of circumstances created by the testimony of PW-3 is not consistent with the outcome of guilt – The version of PW-4 is that he was attacked from the back by A3 and thereafter, he fell unconscious – As per his testimony and the testimony of PW-3, PW-4 was attacked by an axe on his head, back and scrotum – The first point of corroboration is to be seen from the circumstances following the assault – The assault on PW-4 took place at around 4 P.M. and he was admittedly unconscious thereafter – He remained as such until he was "self-admitted" in the hospital at around 12:30 P.M. the following day – The second point for corroboration of this version could be taken from the wound certificate issued by PW-8 during the treatment of PW-4 at Government Hospital – The Trial Court relied upon the wound certificate and noted a contradiction between the condition of PW-4 at the time of admission – In the certificate, PW-4 is stated to be "self-admitted" but at the same time, he is stated to be unconscious – The injuries found on PW-4, as per the wound certificate, were simple in nature – PW-8 gave some treatment to PW-4, however the nature of treatment is not indicated – In the ordinary course of natural events, an injury inflicted by an axe, that too in a manner that the injured immediately fell unconscious and remained unconscious for almost 20 days, could not have been a simple injury – The High Court omitted to take note of two material aspects-the fact that the statement of PW-4 was recorded after a period of one month from the date of incident and the factum of family relationship between the deceased and PW-4 – The former aspect raises a grave suspicion of credibility, whereas the latter raises the suspicion of being an interested witness – The High Court went on to reverse the decision by taking its own view on a fresh appreciation of evidence without recording any illegality, error of law or of fact in the decision of the Trial Court – Thus, the High Court had erred in reversing the decision of acquittal, without arriving at any finding of illegality or perversity or error in the reasoning of the Trial Court. [Paras 29, 30, 33, 34, 39]

Criminal Jurisprudence – Criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty – All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice – The principles which come into play while deciding an appeal from acquittal could be summarized as:

Held: (i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary; (ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge; (iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed; (iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal; (v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts; (vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court. [Para 36]

Code of Criminal Procedure, 1973 – Appellate Power – Qualified Power of the High Court:

Held: In the exercise of appellate powers, there is no inhibition on the High Court to re-appreciate or re-visit the evidence on record – However, the power of the High Court to re-appreciate the evidence is a qualified power, especially when the order under challenge is of acquittal – The first and foremost question to be asked is whether the Trial Court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence – The second point for consideration is whether the finding of the Trial Court is illegal or affected by an error of law or fact – If not, the third consideration is whether the view taken by the Trial Court is a fairly possible view – A decision of acquittal is not meant to be reversed on a mere difference of opinion – What is required is an illegality or perversity. [Para 25]

Criminal Jurisprudence – Two-views theory – Reiterated.

Mallappa & Ors. v. State of Karnataka

Case Law Cited

Selvaraj v. State of Karnataka, [2015] 9 SCR 381 **: (2015) 10 SCC 230;** *Sanjeev v. State of H.P.,* **(2022) 6 SCC 294;** *Sanwat Singh v. State of Rajasthan,* [1961] 3 SCR 120 **: AIR 1961 SC 715;** *Sharad Birdhichand Sarda v. State of Maharashtra,* [1985] 1 SCR 88 **: (1984) 4 SCC 116 – relied on.**

List of Acts

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

List of Keywords

Murder; Acquittal; Testimonies; Chain of circumstances; Reasonable doubt; Appreciation of evidence; Illegality, error of law or of fact; Qualified Power of the High Court; Criminal Jurisprudence; Two-views theory; Material pieces of evidence.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1162 of 2011

From the Judgment and Order dated 31.05.2010 of the High Court of Karnataka at Bengaluru in CRLA No. 1363 of 2005

Appearances for Parties

Basavaprabhu Patil, Sr. Adv., Ms. Supreeta Sharanagouda, Sharanagouda Patil, Advs. for the Appellants.

Nishanth Patil, A.A.G., D. L. Chidananda, Adv. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Satish Chandra Sharma, J.

1. The wheels of justice may grind slow, but they grind fine. Mallappa S/o Ningappa Kanner, Hanamanth S/o Ningappa Kanner and Dharamanna S/o Ningappa Kanner are the appellants before us who were put on a trial, as accused no. 3, 4 and 5, for the commission of murder of deceased namely Marthandappa and were acquitted by the Trial Court/Fast Track Court-I at Gulbarga on 24.03.2005. The

judgment was not meant to finally seal the fate of the appellants as the State of Karnataka preferred an appeal against the order of the Trial Court before the High Court of Karnataka which was registered as Criminal Appeal No. 1363/2005. On 31.05.2010, the High Court reversed the order of acquittal and held the appellants guilty of the commission of murder of deceased Marthandappa. Accordingly, the appellants stood convicted and were sentenced to undergo life imprisonment. The appellants stand before us assailing the order of conviction of the High Court and praying for a declaration of innocence.

2. Pertinently, eight accused persons were tried and acquitted by the Trial Court. The High Court agreed with the acquittal of all the accused persons, except the three appellants before us.

PROSECUTION CASE

3. The case of the prosecution begins from one Nagamma, who is the wife of Accused No. 5 and deceased Marthandappa was allegedly having an illicit relationship with her. On account of the alleged illicit relationship, the relations between A1-A8 and Marthandappa were strained. On 28.06.1997, the fateful day, Marthandappa (the deceased), PW3 and PW4 were travelling in a bullock-cart from village Aidbhavi to the village Nagaral for cultivating their lands. They left the house of PW-2 (father of the deceased) at around 9 A.M. in a bullock cart to go to village Nagaral. PW-2 had agricultural lands at Aidbhavi as well as Nagaral. While they were travelling to village Nagaral, they crossed village Shantpur as they were proceeding on the bullock-cart towards Nagaral village. At around 4 P.M., when their bullock-cart arrived near the land of Balwantappa Channur, A1 to A8 came out of their hiding place and stopped the bullock-cart.

4. As per the prosecution case, A3, A4 and A6 were armed with axes (MO[1]s. 5, 6 &7), A5 was armed with knife (MO8) and Al, A2, A7 and A10 were armed with clubs (MOs 9, 10 and 1). The accused persons started by threatening Marthandappa stating that on account of his illegal acts, village women folk are not able to lead their life peacefully and then they proceeded towards Marthandappa, with the intention to kill him. A3 assaulted him with an axe on his right leg and caused injuries. A4 also assaulted him with an axe five/six

1 MO = Material Object

times on the right side of the stomach. A5 assaulted with a knife on the lip and back of Marthandappa, A6 assaulted with an axe on the right and left temple region and chin of Marthandappa. He also assaulted with an axe on the lap of Marthandappa. As the offensive act continued, A7 assaulted with a bullock-cart peg on the head of Marthandappa. A1, A2 and A8 assaulted with clubs on the back of Marthandappa.

5. Fearing for his life, PW-4 tried to run away and at that point of time, A3 assaulted him with an axe on the head, back and on the scrotum. PW-4 sustained injuries, became unconscious and fell on the ground.

6. PW-3, an eye witness of the incident, rushed to save himself and went inside the jali-trees. He saw the incident hiding from that particular place. Eventually, Marthandappa fell on the ground and Al to A8, believing that Marthandappa was no more, left the place. Finding it safe for him, PW3 then went to Marthandappa and found that Marthandappa was no more. He noticed that PW-4 was also lying unconscious with blood flowing out of his injuries. Thereafter, PW-3, fearing for his life, kept on hiding amidst the jali-trees and sometime during the night, he left the jali-trees and left for Devpura. On the next day, PW-3 reached the house of PW-2 at Aidbhavi and informed him regarding the incident. PW-2 then visited the scene of offence and saw the dead body of Marthandappa. He also saw PW-4 lying on the ground in an unconscious condition. Thereafter, on 29.06.1997 at around 3 P.M., he went to P.S. Shorapur and lodged a written complaint to the PW-10 as per Ex.P1 and PW-10 registered a case as Crime No. 78/97 and sent FIR (Ex.P13) through PW-1 to the Judicial Magistrate First Class[2], Shorapur. The copy of FIR was handed over to JMFC at around 4:30 P.M.

7. The facts further reveal that on 29.06.1997 at about 12:30 P.M., PW-4 went to the Government Hospital, Shorapur, and met the doctor (PW-8). He showed his injuries to PW-8 and PW-8 found three injuries (simple) on PW-4 and gave treatment to him, and later sent him for further treatment to the Government Hospital, Gulbarga. The doctor at Gulbarga treated PW-4 and issued a simple injury certificate to PW-8 (Ex.P12). After registering the case, PW-10 went to the scene of offence at Shorapur village along with PW-9 and saw the dead

2 Hereinafter referred as “JMFC”

body of Marthandappa and collected panchas (PW-7 and Malleshi). In the presence of Panchas, he conducted inquest mahazar on the dead body of Marthandappa, as per Ex.P9. On 29.06.1997, between 4.30 P.M. to 6.00 P.M. and thereafter, he handed over the dead body of Marthandappa to PW-9 with the requisition letter (Ex.P2) directing PW-9 to take the dead body to Government Hospital, Kakkera for getting the post-mortem examination done. PW-9 took the dead body of Marthandappa to the Government Hospital, Kakkera, and handed over the dead body to PW-5 (doctor) for post-mortem examination on 30.06.1997 at about 6.30 A.M. On 29.06.1997, PW-10, in the presence of Panchas (PW7 and Malleshi) conducted mahazar of scene of offence as per Ex.P10. From the scene of offence, he seized MO-1 (bullock-cart peg), MO-12 (pair of chappal), MO-13 (towel), MO-14 (blood stained mud), MO-15 (sample mud), MO-16(taita) and MO-17 (waist thread) and slips were affixed bearing signatures of the Panchas on them.

8. On 30.06.1997, PW-5 (doctor) conducted post-mortem examination on the dead body of Marthandappa from 6.30 am to 9.30 am. The doctor found 9 ante mortem injuries on him and issued a post-mortem report as per Ex.P3 stating the cause of death to be haemorrhage shock as a result of laceration of liver tissue. Notably, the report stated the time of death to be 36 to 48 hours prior to the post mortem examination. The doctor further handed over clothes and articles (MOs) found on the dead body as well as the dead body to PC (PW9). Thereafter, PW9 handed over the dead body to the relatives of Marthandappa for burial. The clothes and articles found on the dead body were brought to Kakkera by PW9, who produced them before PW-10. PW-10 seized them in the presence of panchas (PW7 and Malleshi) and also conducted mahazar of seizure as per Ex.P11 (MOs 1 to 4). Thereafter, he went to Aidbhavi village and recorded the statement of witnesses. Thereafter, he went to Mudagal and recorded the statement of Nagamma (wife of A5).

9. On 01.07.1997, PW-10 recorded statement of Balvantappa. On 04.07.1997, at about 5.30 A.M. at Tintini Bridge, PW-10 arrested A5 and interrogated him. A5 gave him information that he could produce knife from his house, thereby leading to discovery as per Ex.P14. A5, thereafter, took PW10 and panchas PW6 and Yamanappa) to his house situated in Aidbhavi vilage and from his house, he produced one knife (MO-8) and one axe (MO-5). PW-10 seized them as per

Ex.P14. PW-10, thereafter obtained judicial custody remand of A5 from JMFC, Shorapur and obtained permission to retain properties. On 14.07.1997 at about 4.00 A.M., PW-10 arrested A1 to A4 from Shorapur Bus Stand and brought them to the police station for interrogation. A1 gave information leading to discovery as per Ex.P15. A2 gave information leading to discovery as per Ex.P16 and A3 gave information leading to discovery as per Ex.P17. Thereafter, on 15.07.1997, A1 led police and panchas (PW6 and Yamanappa) to his house and from his house, he produced one stick (MO9) before the police and panchas and PW-10 conducted mahazar of seizure as per Ex.P5. PW-10 took the signatures of the panchas on it. Thereafter, A2 led police and panchas to his house and from his house, he produced one stick (MO-10). PW-10 conducted mahazar of seizure of these articles, as per Ex.P7. A3 led police and panchas to his house at Aidbhavi and from his house, he produced one axe (MO7) and PW-10 seized the same as per mahazar (Ex.P6) and took signatures of the panchas on it. PW-10 thereafter obtained judicial custody remand of A1 to A4 from JMFC, Shorapur. On 25.07.1997, PW10 arrested A7 from his house and remanded him to judicial custody and on 17.07.1997 at 6.30 a.m., arrested A6 from Gurgunta bus stand and interrogated him. A6 gave him information leading to discovery as per Ex.P18 and from his house, one knife (MO8) was recovered and PW-10 seized it under mahazar Ex.P8. Thereafter, A6 was also remanded to judicial custody. On 07.10.1997, PW-10 sent all the seized articles to FSL, Bangalore through PW9.

10. On 07.08.1997, PW-10 recorded the statement of PW4. On 22.08.1997, PW10 collected post-mortem report (Ex.P3) from the doctor (PW-5). On 30.08.1997, PW9 returned from Bangalore FSL Office and PW-9 produced all the articles in re-sealed condition before PW10 and seized them. On the same day, he collected injury certificate of Laxman (PW4) as per Ex.P12. On 14.09.1997, PW-10 received FSL report as per Ex.P19 and Ex.P20.

11. After completing investigation, he filed the charge-sheet before JMFC, Shorapur on 29.09.1997. The JMFC Court, Shorapur, passed the order of committal on 19.01.1998 and the accused persons appeared before the Principal Sessions Judge, Gulbarga on 22.03.2002. The Principal Sessions Judge framed charges against the accused persons for the commission of offences under Sections 147, 148, 149, 302, 307 and 504 of the Indian Penal Code and all the accused persons

pleaded not guilty and claimed trial. The prosecution examined PW1 to PW10 as witnesses for the prosecution, got marked Ex.P1 to Ex.P21 as well as MOs. 1 to17 as exhibits and materials in support of the prosecution case and closed the prosecution evidence. The defence marked Ex.D1 in support of their case. The trial court, after appreciating the evidence on record, acquitted all the persons under Section 235 Cr.P.C. The order of acquittal was assailed before the High Court and vide order dated 31.05.2010, the High Court convicted A3 to A5 (present appellants) and upheld the acquittal order with respect to accused Nos. 1,2, 6, 7 and 8.

12. In the course of this proceeding, we have been informed that appellant no. 3 is no more, and the present appeal is confined only to appellant Nos. 1 and 2.

13. Before we proceed to lay down the case set up by the parties before us, we may briefly highlight the reasons that prevailed upon the trial court while ordering acquittal. The trial court, after appreciating the evidence on record, acquitted the accused persons by assigning the following reasons:

    i. The evidence of eyewitness PW3 is not worthy of credit and his conduct after the alleged murder was artificial.

    ii. PW3 witnessed the assault on the deceased as well as on PW4, as per the prosecution version, however, he chose to hid behind the bushes till the sunset as he got frightened.

    iii. PW-3 admitted that there were number of buses plying on the route between Lingasgur to Shorapur and Gulbarga. However, his version, that he could catch the bus only on the next day at 6.00 A.M., is artificial. He could have availed the transport facility on 28.06.1997 itself after the assailants had left.

    iv. PW-3 states that his relatives are residing in Nagaral village, which is 4 km from the scene, but he did not go and inform them.

    v. PW-3 did not inform the people at Devpura or the passengers plying in the bus in which he travelled to

go to Gurugunte. From there, he catched another bus to Aidbhavi village. The incident took place around 4 P.M. and it took more than 18 hours for PW-3 to inform the father of the deceased PW-2. In the meanwhile, although he had opportunity, he did not inform the out-post police, which must have come in the course of his journey from Devpura to Aidbhavi.

vi. PW-3 admitted that he was conscious that he should get PW-4 treated after the incident, yet he did not make any sincere effort to get him treated. The deceased and PW-4 were assaulted by the accused. There was no reason for the accused persons to not assault PW-3. His version that he escaped and hid behind the bushes is artificial. Further, the evidence of PW-4 that he was unconscious till he was taken to hospital is artificial. There is no evidence to show the nature of treatment given to PW4 and to show his physical condition at Gulbarga Hospital.

vii. The father's name of PW-4 is shown as Siddaramegowda, whereas in the MLC register the name of the father of PW-4 is shown as Narasappa.

viii. In the wound certificate, it is mentioned that PW-4 "self admitted" at the hospital. The doctor PW-8 states that PW-4 was unconscious. In the wound certificate of PW-4, it is stated that the assault took place in the night. Whereas, the FIR shows that the incident took place around 4 P.M. in the day hours. The Trial Court finds that the evidence of PW-3 and PW-4 is incredible and thus, acquitted the accused.

14. The High Court, in appeal, after re-appreciating the evidence on record, held that the post-mortem report supported the case of the prosecution that the death of Marthandappa was homicidal. It further held that the prosecution has successfully proved the motive and occurrences of incidents on the basis of evidence of PW-3 and PW-4. The High Court further held that Wound Certificate of PW-4 corroborated the evidence of PW-4 regarding the injuries caused to him in the assault.

15. On the question of credibility, the High Court held that PW-4 is an injured witness and he has categorically stated that A1, A2, A7 and A8 assaulted the deceased with clubs on the head and on back, and A3, A4 and A6 assaulted the deceased with axe. His evidence established that A7 assaulted the deceased with knife and he was assaulted by A3 with an axe. The High Court has arrived at the conclusion that evidence of PW-4 is quite natural and there is nothing to disbelieve his veracity. It has also been observed that PW-4, after the assault, was found lying unconscious. He was admitted to the hospital on the next date at 12.30 P.M. The contents of the wound certificate at Ex.P8 show that PW-4 was semi-conscious and it corroborates the version of PW-4 about his condition that he fell unconscious and was semi-conscious at the time when he was admitted to the hospital.

16. In those circumstances, the High Court has arrived at a conclusion that there is no reason to disbelieve the evidence of PW-4, and also that he was a witness to the assault on the deceased and was also a victim of assault.

17. The High Court also considered the evidence of PW-3 who was the eye witness of the incident. The High Court has observed that PW-3 certainly had several options, like informing by-standers at the bus-stop, going to Nagaral village or going to the police, but he went to the village of the deceased father at his Aidbhavi village as he was keen on informing PW-2, as he was the most appropriate person to be informed about the incident. In such circumstances, the High Court has arrived at the conclusion that the conduct of PW-3 in not informing others and going to Aidbhavi village to inform PW-2, could not be a reason to disbelieve his statement. The High Court has arrived a conclusion that the evidence of PW-3 and PW-4, if read together, proves the alleged incident and the evidence of PW-3 and PW-4 establishes that Al, A2, A7 and A8 assaulted the deceased with clubs, however, there are no injuries reflected on the dead body of the deceased.

18. It has been further held that in respect of A3 to A6, the evidence of PW-3 and PW-4 is consistent and establishes their involvement in the assault and proves their guilt. The manner of assault in the overt acts of A3 to A6 corresponds with the injuries noted in the wound certificate and the post-mortem report. In those circumstances, the High Court has set aside the acquittal of A3, A4 and A5, and convicted them for offences punishable under Sections 302 read with Section

34 of the Indian Penal Code and confirmed the order of acquittal in respect of A1, A2, A7 and A8.

19. Assailing the order of the High Court, the appellants submit that the High Court has erred in re-appreciating the entire evidence without finding any fault with the appreciation of evidence by the Trial Court. They submit that re-appreciation of the entire evidence at the appellate stage is not permissible until and unless a grave error has been identified in the view taken by the Trial Court. It is further submitted that if appreciation of evidence leads to two possible views, then the decision of the Trial Court could not be reversed merely because another view was possible.

20. *Per contra*, it is submitted by the respondent State that the Trial Court did not appreciate the evidence in a proper manner which led to the acquittal of the accused persons. It is further submitted that the testimonies of PW-3 and PW-4 were incorrectly rejected by the Trial Court despite the fact that one of them was an eye witness of the entire incident and the other one was a victim of the assault. It is further submitted that once a grave error is found in the decision of the Trial Court, the High Court is fully empowered to re-appreciate the entire evidence and reach a different conclusion.

21. We have heard the rival submissions of the parties and have also carefully gone through the record.

22. We may now proceed to answer the principal question i.e. whether the High Court was correct in reversing the order of acquittal of the Trial Court and thereby convicting the accused persons under Section 302 IPC.

23. At the outset, it is relevant to note that accused Nos. 1 to 5 are brothers *inter se* and accused no. 6 to 8 are relatives of accused Nos. 1 to 5, residing at Aidbhavi, Taluk Lingasgur. The complainant PW-2 (Narsappa) is the father of the deceased Marthandappa and PW-4 and PW-3 are the nephews of PW2, and they are residing at village Aidbhavi. The accused persons are not unknown to the victims and complainant.

24. We may firstly discuss the position of law regarding the scope of intervention in a criminal appeal. For, that is the foundation of this challenge. It is the cardinal principle of criminal jurisprudence that there is a presumption of innocence in favour of the accused, unless

proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretized when the case ends in acquittal. It is so because once the Trial Court, on appreciation of the evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected to rebut the same in appeal.

25. No doubt, an order of acquittal is open to appeal and there is no quarrel about that. It is also beyond doubt that in the exercise of appellate powers, there is no inhibition on the High Court to re-appreciate or re-visit the evidence on record. However, the power of the High Court to re-appreciate the evidence is a qualified power, especially when the order under challenge is of acquittal. The first and foremost question to be asked is whether the Trial Court thoroughly appreciated the evidence on record and gave due consideration to all material pieces of evidence. The second point for consideration is whether the finding of the Trial Court is illegal or affected by an error of law or fact. If not, the third consideration is whether the view taken by the Trial Court is a fairly possible view. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity.

26. It may be noted that the possibility of two views in a criminal case is not an extraordinary phenomenon. The '*two-views theory*' has been judicially recognized by the Courts and it comes into play when the appreciation of evidence results into two equally plausible views. However, the controversy is to be resolved in favour of the accused. For, the very existence of an equally plausible view in favour of innocence of the accused is in itself a reasonable doubt in the case of the prosecution. Moreover, it reinforces the presumption of innocence. And therefore, when two views are possible, following the one in favour of innocence of the accused is the safest course of action. Furthermore, it is also settled that if the view of the Trial Court, in a case of acquittal, is a plausible view, it is not open for the High Court to convict the accused by reappreciating the evidence. If such a course is permissible, it would make it practically impossible to settle the rights and liabilities in the eyes of law. In ***Selvaraj v. State of Karnataka***[3],

3 [2015] 9 SCR 381 : (2015) 10 SCC 230

"13. Considering the reasons given by the trial court and on appraisal of the evidence, in our considered view, the view taken by the trial court was a possible one. Thus, the High Court should not have interfered with the judgment of acquittal. This Court in ***Jagan M. Seshadri v. State of T.N.*** [(2002) 9 SCC 639] has laid down that as the appreciation of evidence made by the trial court while recording the acquittal is a reasonable view, it is not permissible to interfere in appeal. The duty of the High Court while reversing the acquittal has been dealt with by this Court, thus:

"9. …We are constrained to observe that the High Court was dealing with an appeal against acquittal. It was required to deal with various grounds on which acquittal had been based and to dispel those grounds. It has not done so. Salutary principles while dealing with appeal against acquittal have been overlooked by the High Court. If the appreciation of evidence by the trial court did not suffer from any flaw, as indeed none has been pointed out in the impugned judgment, the order of acquittal could not have been set aside. The view taken by the learned trial court was a reasonable view and even if by any stretch of imagination, it could be said that another view was possible, that was not a ground sound enough to set aside an order of acquittal.""

(emphasis supplied)

In ***Sanjeev v. State of H.P.***[4], the Hon'ble Supreme Court analyzed the relevant decisions and summarized the approach of the appellate Court while deciding an appeal from the order of acquittal. It observed thus:

"7. It is well settled that:

7.1. While dealing with an appeal against acquittal, the reasons which had weighed with the trial court in acquitting the accused must be dealt with, in case the appellate court is of the view that the acquittal rendered by the trial court deserves to be

4 (2022) 6 SCC 294

upturned (see ***Vijay Mohan Singh v. State of Karnataka***[5], ***Anwar Ali v. State of H.P.***[6]***)***

7.2. With an order of acquittal by the trial court, the normal presumption of innocence in a criminal matter gets reinforced (see ***Atley v. State of U.P.***[7])

7.3. If two views are possible from the evidence on record, the appellate court must be extremely slow in interfering with the appeal against acquittal (see ***Sambasivan v. State of Kerala***[8])"

27. In this case, the case of the prosecution substantially rests on the testimonies of PW-3 and PW-4 read with various documents, especially the reports of medical examination and post mortem. PW3 is the eye witness of the incident. His testimony has been rejected by the Trial Court by terming it as artificial. PW-3 deposed that he was present at the place of incident when the accused persons started assaulting the deceased and PW-4 on 28.06.1997 at around 4 P.M. PW-3 deposed that A3 had assaulted PW-4 as he was running for his life along with PW-3. PW-4 was attacked from the back and PW-3 successfully managed to hide behind the bushes. Notably, PW-3 hid behind the bushes and observed the assault till Marthandappa was dead and PW-4 was unconscious. He then came out to check them and fearing for his life, he again rushed behind the bushes. He admitted that he was hiding behind the bushes till sunset. Thereafter, he came out and started walking towards Devpura, although he admitted that there were a number of buses plying on the route. But PW-3 takes no bus and keeps walking towards Devpura. On reaching there, he sat at the bus stand and kept on sitting there. Fast forward to the next morning, PW-3 catches the bus only at 6 A.M. on the next morning. The explanation as to how PW-3 spent the entire intervening night of 28-29.06.1997 is missing from the chain of circumstances. The statement that he was simply sitting at the bus stand for the entire night, while Marthandappa was dead and PW-4 was severely injured and unconscious, fails to inspire confidence. More so, when the entire reason for hiding behind the bushes was

5 [2019] 6 SCR 994 : (2019) 5 SCC 436

6 (2020) 10 SCC 166)

7 AIR 1955 SC 807

8 [1998] 3 SCR 280 : (1998) 5 SCC 412

the fear of life. Despite such fear, PW-3 did not choose to inform the police out-post, on the way from Devpura to Aidbhavi, and rather, he kept on sitting at the Devpura bus stop. He also admitted that his relatives were residing around 4 km from the place of incident at Nagaral. However, he chose not to inform them either. He also admitted that he took no steps to provide medical treatment to PW-4 who was lying unconscious at the place of incident as a result of the assault. The said fact could have been entertained if the place of incident was completely secluded. Such is not the case, as it is admitted that the place of incident fell on a bus route and buses were indeed plying.

28. It was almost 18 hours after the assault that PW-3 managed to reach Aidbhavi to inform PW-2 about the incident. The High Court found the conduct of PW-3 to be perfectly natural, as it was understandable that PW-3 wanted to inform PW-2 before anyone else. Such conduct would have been justified if PW-2 was residing in close proximity of the place of incident. The very fact that PW-3 did not even contemplate about providing medical help to PW-4 or to seek protection from the local police despite such a drastic assault and instead, chose to wait for 18 hours, raises a reasonable doubt on the credibility of his version. This circumstance assumes a greater importance in light of the fact that PW4 was the cousin brother of PW3 and not some stranger. The conduct of PW-3 was not that of a reasonable man placed in such circumstances and the Trial Court was right in terming it as artificial.

29. The conduct of PW-3 renders his very presence at the place of incident as doubtful. Despite a heavy assault by multiple accused persons, he did not suffer any injury at all. That too when he was indeed chased by A3 while attacking PW-4. It is extremely doubtful that the assailants simply chose to give up on PW-3 and did not pursue him behind the bushes, despite knowing that PW-3 could turn out to be an eye witness of the incident. The story that follows the story of hiding behind the bushes is equally doubtful and leaves one speculating. The timelines, the route taken by PW-3, complete disregard for severely injured PW-4, failure to inform the police post despite access to it etc. are some of the factors that raise a reasonable doubt on the entire story. The chain of circumstances created by the testimony of PW-3 is not consistent with the outcome of guilt.

30. The version of PW-4 is that he was attacked from the back by A3 and thereafter, he fell unconscious. As per his testimony and the testimony of PW-3, PW-4 was attacked by an axe on his head, back and scrotum. The first point of corroboration is to be seen from the circumstances following the assault. The assault on PW-4 took place at around 4 P.M. and he was admittedly unconscious thereafter. He remained as such until he was "self-admitted" in the hospital at around 12:30 P.M. the following day. The second point for corroboration of this version could be taken from the wound certificate issued by PW-8 during the treatment of PW-4 at Government Hospital, Shorapur. The Trial Court relied upon the wound certificate and noted a contradiction between the condition of PW-4 at the time of admission. In the certificate, PW-4 is stated to be "self-admitted" but at the same time, he is stated to be unconscious. The High Court rejected this contradiction as material by observing that PW-4 was semi-conscious at the time of admission and therefore, he could have admitted himself in the hospital. However, the inherent contradictions in the statement of PW-4 are not limited to this point.

31. The injuries found on PW-4, as per the wound certificate, were simple in nature. PW-8 gave some treatment to PW-4, however the nature of treatment is not indicated. Thereafter, PW-8 forwarded him to a hospital at Gulbarga where injury certificate Ex.P12 was prepared. Ex.P12 also recorded the nature of injury to be simple in nature. The nature of injury is to be corroborated with the nature of assault, as deposed by PW-4 and PW-3. They deposed that A3 had attacked PW-4 with an axe at three sensitive places i.e. head, back and scrotum. The attack was so severe that PW-4 immediately fell unconscious. In the ordinary course of natural events, an injury inflicted by an axe, that too in a manner that the injured immediately fell unconscious and remained unconscious for almost 20 days, could not have been a simple injury. More so, a simple injury of a standard that required no admission in the hospital.

32. Furthermore, PW-4 travelled to the hospital at Shorapur by a bus, but he failed to inform any passenger about the assault. Despite such injuries, including on the head, no one noticed his condition. He was unconscious for over 20 days and after he regained consciousness, his statement was recorded by PW-10. It is difficult to comprehend as

to how a severely injured person, who could not gain consciousness before 20 days, managed to go to the hospital on his own by using a public bus and later, to another hospital at a different place. It is difficult to comprehend that PW-4 was conscious enough to undertake two journeys to two different hospitals, by public transport, but did not have the senses to give a statement to the IO PW-10 before the passage of almost 30 days. During cross examination, PW-4 had deposed that he had sustained injuries on head and testicles only, and there was no other injury. The said statement was a material improvement from the versions initially put forth by PW-3 and PW-4 whereby, PW-4 had sustained injuries on the back as well. However, no such injury was recorded in the wound certificate and in all likelihood, the improvement was made for that reason. The testimony of PW-4 is impeachable for another reason – the time of the offence. As per his version, the time of assault was around 4 P.M., whereas, as per the wound certificate Ex.P12, the time of injury was at night. Similar issue with respect to timing was noticeable in the post mortem report as well.

33. Notably, all these aspects have been carefully analysed and appreciated by the Trial Court, but the High Court rejected all the doubts by observing that PW-4 was an injured witness and there was no reason to disbelieve his testimony. The High Court omitted to take note of two material aspects – the fact that the statement of PW-4 was recorded after a period of one month from the date of incident and the factum of family relationship between the deceased and PW-4. The former aspect raises a grave suspicion of credibility, whereas the latter raises the suspicion of being an interested witness. In normal circumstances, where a testimony is duly explained and inspires confidence, the Court is not expected to reject the testimony of an interested witness, however, when the testimony is full of contradictions and fails to match evenly with the supporting evidence (the wound certificate, for instance), a Court is bound to sift and weigh the evidence to test its true weight and credibility.

34. Pertinently, the Trial Court had reached its decision after a thorough appreciation of evidence and we have no doubt in observing that the view taken by the Trial Court was indeed a legally permissible view. The High Court went on to reverse the decision by taking its own view on a fresh appreciation of evidence. Moreover, the High

Court did so without recording any illegality, error of law or of fact in the decision of the Trial Court. In our considered view, the same was not permissible for the High Court, in light of the law discussed above. Setting aside an order of acquittal, which signifies a stronger presumption of innocence, on a mere change of opinion is not permissible. A low standard for turning an acquittal into conviction would be fraught with the danger of failure of justice.

35. So far as the question of independent appreciation of evidence by the High Court is concerned, be it noted that the High Court was fully empowered to do so, but in doing so, it ought to have appreciated the evidence in a thorough manner. In the present case, the High Court has not done so. Even the aspects discussed by the Trial Court have not been fully addressed and the High Court merely relied on a limited set of facts to arrive at a finding. The factors which raised reasonable doubts in the case of the prosecution were ignored by the High Court. For instance, the contradictions pertaining to time, which were carefully analyzed by the Trial Court, were not examined by the High Court at all. Similarly, the contradictions qua the nature of injuries were also not discussed. In an appeal, as much as in a trial, appreciation of evidence essentially requires a holistic view and not a myopic view. Appreciation of evidence requires sifting and weighing of material facts against each other and a conclusion of guilt could be arrived at only when the entire set of facts, lined together, points towards the only conclusion of guilt. Appreciation of partial evidence is no appreciation at all, and is bound to lead to absurd results. A word of caution in this regard was sounded by this Court in ***Sanwat Singh v. State of Rajasthan***[9], wherein it was observed thus:

> "9. The foregoing discussion yields the following results : (1) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (2) the principles laid down in Sheo Swarup case [LR 61 IA 398] afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (3) the different phraseology used in the judgments of this Court,

9 [1961] 3 SCR 120 : AIR 1961 SC 715

> such as, (i) "substantial and compelling reasons", (ii) "good and sufficiently cogent reasons", and (iii) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; ***but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified."***
>
> (emphasis supplied)

36. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

    (i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;

    (ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

    (iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

    (iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

    (v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.

37. In this case, the appellants, as a separate argument, have also submitted that the case is not based on circumstantial evidence and is based on direct evidence of PW-3 and PW-4, and therefore, the principles of circumstantial evidence shall not apply. The submission is erroneous for various reasons. *First*, the direct evidence of PW-3 and PW-4 is to be tested on its own strength, especially in light of their subsequent conduct after the incident. As per their version, they were accessories to the fact, however, their subsequent conduct left much to be desired and therefore, their direct testimony was found to be incredible, as already discussed above. *Secondly*, in the absence of credible direct evidence, the case essentially falls back on the circumstantial evidence, and *thirdly*, the prosecution has failed to complete the chain of circumstances. The contradictions between oral testimonies and medical examination reports, failure to seize essential materials from the scene of crime, failure to explain the mode of conveyance while going from one place to another, failure to prove the presence of PW-3 at the place of incident, failure to corroborate the injuries etc. are some of the deficiencies in the chain of circumstances. It would be apposite to refer to the decision of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***[10], wherein the "*Panchsheel*" or five principles of circumstantial evidence were laid down as follows:

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a

10 [1985] 1 SCR 88 : (1984) 4 SCC 116

grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

38. The circumstances in this case are far from conclusive and a conclusion of guilt could not be drawn from them. To sustain a conviction, the Court must form the view that the accused "must have" committed the offence, and not "may have". As noted in ***Sharad Birdichand Sarda***[11], the distinction between "may have" and "must have" is a legal distinction and not merely a grammatical one.

39. In light of the foregoing discussion, we hereby conclude that the High Court had erred in reversing the decision of acquittal, without arriving at any finding of illegality or perversity or error in the reasoning

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of the Trial Court. Even on a fresh appreciation of evidence, we find ourselves unable to agree with the findings of the High Court. Accordingly, the impugned order and judgment are set aside. We find no infirmity in the order of the Trial Court and the same stands restored. Consequently, the appellants are acquitted from all the charges levelled upon them. The appellants are directed to be released forthwith, if lying in custody.

40. The captioned appeal stands disposed of in the aforesaid terms. Interim applications, if any, shall also stand disposed of.

41. Parties to bear their own costs.

Headnotes prepared by: Ankit Gyan

Result of the case: Appeal disposed of.