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Lucknow Nagar Nigam & Others
v.
Kohli Brothers Colour Lab. Pvt. Ltd. & Others

(Civil Appeal No. 2878 of 2024)

22 February 2024

[B.V. Nagarathna* and Ujjal Bhuyan, JJ.]

Issue for Consideration

1) Whether statutory vesting of property termed as enemy property under the provisions of the Enemy Property Act, 1968 amounts to expropriation which leads to change of its status inasmuch as its ownership is transferred to the Union of India;

2) If there is a transfer of ownership by its statutory vesting in the Custodian for Enemy Property, whether the Union within the meaning of Article 285 of the Constitution would be entitled to exemption from payment of property or other local taxes to Municipal Corporation under provisions of the UP Municipal Corporation Adhiniyam, 1959 (Act of 1959); and

3) Despite becoming the property of the Union, whether, clause (2) of Article 285 enables the appellant to impose property or other local taxes on the respondent, which is lessee of the subject enemy property.

Headnotes

Enemy Property Act, 1968 – Whether statutory vesting of enemy property including the subject property in the Custodian for Enemy Property amounts to expropriation and transfer of ownership so as to confer ownership of such enemy property on the Custodian – Enemy Property Rules, 2015 – r.15.

Held: The Custodian for Enemy Property in India, in whom the enemy properties vest including the subject property, does not acquire ownership of the said properties – The enemy properties vest in the Custodian as a trustee only for the management and

* Author

administration of such properties – The Central Government may, on a reference or complaint or on its own motion initiate a process of divestment of enemy property vested in the Custodian to the owner thereof or to such other person vide Rule 15 of the Rules – Hence, the vesting of the enemy property in the Custodian is only as a temporary measure and he acts as a trustee of the said properties – In view of the position of a Custodian, who under the Enemy Property Act, 1968, acts as the trustee for the enemy property under the Act and not as the owner of the property, but as a protector of the property vested in him, the Custodian can never be an owner or having any right, title or interest in the enemy property as owner.[Paras 16.1, 22.4]

Taxation – Of Enemy property – Constitution of India – Art. 285 – If ownership of enemy property is conferred on the Custodian for Enemy Property, whether such property becomes Union property within meaning of Art. 285 of the Constitution and therefore, it is exempt from payment of property or other local taxes to appellant-Municipal Corporation under provisions of the Act of 1959 – Whether despite such enemy property becoming property of the Union, clause (2) of Article 285 of the Constitution enables appellant to impose property or other local taxes on the respondent which is lessee of the subject property – Enemy Property Act, 1968 – UP Municipal Corporation Adhiniyam, 1959.

Held: Vesting of enemy property in the Custodian does not transfer ownership of such property in the Custodian and by that process in the Union or Central Government, but since the Custodian is only a trustee of the enemy property, the same is liable to tax in accordance with law, including to the appellant – The Custodian is only authorised to pay the taxes on the subject enemy property – The Custodian while doing so is not acting on behalf of the Union Government being the owner of the enemy property, rather, the Custodian who is appointed by the Central Government under the provisions of the Act, which is a Central legislation only discharges his duties and functions under the provisions of the Parliamentary legislation i.e. the Act under consideration – Such discharge of duties and functions, including the payment of taxes vis-à-vis enemy property vested in him would not also by the same logic imply that the Custodian

is acting as if the property vested in him has become the Union property – Mere vesting of enemy property in the Custodian does not transfer ownership of the same from the enemy to the Union or to the Central Government; the ownership remains with the enemy but the Custodian only protects and manages the enemy property and in discharging his duties as the Custodian or the protector of enemy property he acts in accordance with the provision of the Act and on the instructions or guidance of the Central Government – The reason as to why the Central Government is empowered to issue guidelines or instructions to the Custodian is because the Custodian is appointed under the Act which is a Parliamentary legislation and the reason why the Parliament has passed the said law is in order to have a uniformity vis-à-vis all enemy properties throughout the length and breadth of the country in that the same are protected, managed and dealt with uniformly in accordance with the provisions of the Act – Union of India cannot assume ownership of the enemy properties once the said property is vested in the Custodian – This is because, there is no transfer of ownership from the owner of the enemy property to the Custodian and consequently, there is no ownership rights transferred to the Union of India – Therefore, the enemy properties which vest in the Custodian are not Union properties – As the enemy properties are not Union properties, clause (1) of Article 285 does not apply to enemy properties – Clause (2) of Article 285 is an exception to clause (1) and would apply only if the enemy properties are Union properties and not otherwise – High Court was not right in holding that the respondent as occupier of the subject enemy property, is not liable to pay any property tax or other local taxes to the appellant – Consequently, any demand for payment of taxes under the Act of 1959 made and thereby paid by the respondent to the appellant-authority shall not be refunded – However, if no demand notices have been issued till date, the same shall not be issued but from the current fiscal year onwards (2024-2025), the appellant shall be entitled to levy and collect the property tax as well as water tax and sewerage charges and any other local taxes in accordance with law. [Paras 17.9, 22.4]

Constitution of India – Art.300A – Art. 300A states that no person shall be deprived of his property save by authority of law – Expressions "law", "person", "property" and "by authority of law" – Meaning of – Whether having regard to

Art. 300A, taking possession of the enemy property for the purpose of administration of the same by the Custodian, is an instance of transfer of ownership from the true owner to the Custodian and thereby to the Union – Enemy Property Act, 1968.

Held: The word "law" is with reference to an Act of Parliament or of a State Legislature, a rule or a statutory order having the force of law – Although, to hold property is not a fundamental right, yet it is a constitutional right – The expression person in Article 300-A covers not only a legal or juristic person but also a person who is not a citizen of India – The expression property is also of a wide scope and includes not only tangible or intangible property but also all rights, title and interest in a property – Before a person can be deprived of his right to property, the law must expressly and explicitly state so – Thus, the expression by authority of law means by or under a law made by the competent Legislature – Having regard to the salutary principles of Art. 300-A, one cannot construe the taking of possession of the enemy property for the purpose of administration of the same by the Custodian, as an instance of transfer of ownership from the true owner to the Custodian and thereby to the Union – This position is totally unlike the position under the provisions of the Land Acquisition Act, 1894 or the subsequent legislation of 2013 which are expropriatory legislations under which acquisition of land would inevitably result in transfer of the ownership of the land from the owner to the State which is the acquiring authority, but the same would be subject to payment of a reasonable and fair compensation to the owner. [Paras 18 and 18.2]

Words and Phrases – Expression "vest" and "vesting" – Meaning of.

Held: The expression 'vest' or 'vesting' has no precise definition and it would depend upon the context in which the expression is used under a particular enactment – The word 'vesting' is a word of variable input and has more than one meaning which must be discerned and the exact connotation must be found by looking into the scheme of law and the context in which it is used – The setting in which it is used would lend colour to it and divulge the legislative intent – Vesting of property in a person or authority does not always mean transfer of absolute title in the property. [Para 16]

Lucknow Nagar Nigam & Others v. Kohli Brothers Colour Lab. Pvt. Ltd. & Others

Enemy Property Act, 1968 – Jurisprudential aspects of ownership of property vis-à-vis the status of the Custodian of Enemy Property for India under the Act – Jurisprudential aspects of vesting or taking possession as per provisions of the Act – Relationship between possession and ownership. [Paras 14 to 14.16]

Constitution of India – Article 285 – Scope and ambit of the two clauses of Art. 285 – Discussed. [Paras 21.1 to 21.10]

Case Law Cited

Union of India v. Raja Mohammad Amir Mohammad Khan, [2005] Suppl. 4 SCR 390 **: (2005) 8 SCC 696;** *Delhi Administration v. Madan Lal Nangia,* [2003] Suppl. 4 SCR 360 **: (2003) 10 SCC 321;** *Lieutenant Governor of Delhi v. Matwal Chand (Dead) through LRs,* [2015] 10 SCR 346 **: (2015) 15 SCC 576;** *Municipal Commissioner of Dum Dum Municipality v. Indian Tourism Development Corporation,* [1995] Suppl. 2 SCR 433 **: (1995) 5 SCC 251;** *Electronics Corporation of India v. Secretary, Revenue Department, Govt. of Andhra Pradesh,* [1999] 2 SCR 1078 **: (1999) 4 SCC 458;** *Union of India v. State of Uttar Pradesh,* [2007] 11 SCR 792 **: (2007) 11 SCC 324;** *Rajkot Municipal Corporation v. Union of India,* **(2013) 14 SCC 599;** *State of Uttar Pradesh v. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti,* **(2008) 12 SCC 675;** *NDMC v. State of Punjab,* [1996] Suppl. 10 SCR 472 **: (1997) 7 SCC 339;** *Fruit and Vegetable Merchants Union, Subzi Mandi, Delhi v. Delhi Improvement Trust, Regal Buildings, Cannaught Place,* [1957] 1 SCR 1 **: AIR 1957 SC 344;** *Maharaj Singh v. State of Uttar Pradesh,* [1977] 1 SCR 1072 **: (1977) 1 SCC 155;** *Dr. M. Ismail Faruqui vs. Union of India,* [1994] Suppl. 5 SCR 1 **: (1994) 6 SCC 360;** *Indian Handicrafts Emporium v. Union of India,* [2003] Suppl. 3 SCR 43 **: (2003) 7 SCC 589;** *Chandigarh Housing Board v. Major-General Devinder Singh (Retd.),* [2007] 3 SCR 1049 **: (2007) 9 SCC 67;** *KT Plantation Pvt. Ltd. v. State of Karnataka,* [2011] 13 SCR 636 **: (2011) 9 SCC 1;** *Union of India v. City Municipal Council, Bellary,* [1979] 1 SCR 573 **: AIR 1978 SC 1803;** *Kohli*

Brothers v. Amir Mohammad Khan, **(2012) 12 SCC 625 – referred to.**

State of Andhra Pradesh v. V. Subba Rao, **2011 SCC OnLine AP 838;** *State of Gujarat v. The Board of Trustees of Port of Kandla,* **(1979) 1 GLR 732;** *Bibhutibhushan Datta v. Anadinath Datta,* **AIR 1934 Cal 87;** *The Governor-General of India in Council v. The Corporation of Calcutta,* **AIR 1948 Cal 116;** *The Corporation of Calcutta v. Governors of St. Thomas' School, Calcutta,* **AIR 1949 FC 121 – referred to.**

List of Acts

Enemy Property Act, 1968; Enemy Property Rules, 2015; Defence of India Act, 1971; UP Municipal Corporation Adhiniyam, 1959; Constitution of India.

List of Keywords

Statutory vesting; Enemy property; Expropriation; Ownership; Possession; Transfer; Custodian; Exemption; Tax; Municipal; Trustee; Central legislation; Union property; Parliamentary legislation; Property tax; Law, Person, Property; Authority of law; Fundamental right; Constitutional right; Citizen; Expropriatory legislation; Compensation; Vest; Vesting; Connotation; Absolute title; Jurisprudential aspect.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2878 of 2024

From the Judgment and Order dated 29.03.2017 of the High Court of Judicature at Allahabad, Lucknow Bench in WPMB No. 2317 of 2012

Appearances for Parties

Kavin Gulati, Sr. Adv., Yash Pal Dhingra, Mukesh Verma, Pankaj Kumar Singh, Dushyant Sharma, Advs. for the Appellants.

Balbir Singh, A.S.G., S. Gurukrishna Kumar, Rana Mukherjee, Sr. Advs., Sunil Kumar Jain, Rajan Kumar Chourasia, Ms. Aakanksha Kaul, Ms. Suhasini Sen, Ms. Gargi Khanna, Rupesh Kumar, Bhuvan Kapoor, Arvind Kumar Sharma, Randhir Singh, Devesh Tuli, Dr. Vijendra Singh, Deepak Goel, Ms. Apurva Singh, Sagar Mehlawat, Kapil Prajapati, Advs. for the Respondents.

Lucknow Nagar Nigam & Others v. Kohli Brothers Colour Lab. Pvt. Ltd. & Others

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

Leave granted.

2. The present Civil Appeal has been filed by the Lucknow Nagar Nigam ('Municipal Corporation') impugning the judgment of the High Court of Allahabad that has allowed the Writ Petition filed by respondent herein ('the assessee'), thereby holding that the assessee is exempt from payment of property tax under the provisions of the UP Municipal Corporation Adhiniyam, 1959 (hereinafter referred to as "Act of 1959", for brevity sake).

Bird's Eye View of the Controversy:

3. Whether statutory vesting of property termed as enemy property under the provisions of the Enemy Property Act, 1968 (hereinafter referred to as "the Act" for the sake of convenience) amounts to expropriation which leads to the change of its status inasmuch as its ownership is transferred to the Union of India, is a question that has arisen in the present appeal. If there is a transfer of ownership by its statutory vesting in the Custodian for Enemy Property, whether the Union within the meaning of Article 285 of the Constitution of India would be entitled to exemption from payment of property or other local taxes to Municipal Corporation under the provision of the Act of 1959 is another question that has arisen in the present appeal. Further, despite becoming the property of the Union, whether, clause (2) of Article 285 enables the appellant herein to impose property or other local taxes on the respondent, which is the lessee of the subject property is the third question which arises in this appeal.

Relevant Facts of the Case:

4. The subject property is an Enemy Property within the meaning of the Act bearing House No.31/28/04(31/59) located on Mahatma Gandhi Marg, Lucknow, owned by the Raja of Mahmudabad, who migrated to Pakistan in the year 1947. A portion of the property is currently occupied and utilized for profit-generating purposes by the respondent-assessee, in this case.

4.1 Historically, prior to the fiscal year 1998-1999, the appellant-Municipal Corporation imposed and collected taxes in

accordance with Rule No.174 'ka' of the Act of 1959 from the assessee. However, in the fiscal year 1998-1999, it came to the Municipal Corporation's attention that the assessee was operating a commercial establishment within the premises. Consequently, the appellant-Municipal Corporation conducted an assessment based on Capital Value and issued a notice to the assessee regarding the assessed Annual Value.

4.2 It is pertinent to note that respondent No.2, Office of the Custodian of Enemy Property for India (for short 'the Custodian'), under the Ministry of Commerce, Government of India, issued a Certificate on 03.10.2002, stating that the subject property bearing premises No.53-54, Lawrie Building Hazaratganj, Lucknow, is Enemy Property vested with the Custodian. The Certificate also explicitly stated that the Custodian was obligated to pay house tax and other local taxes on behalf of this property.

4.3 The assessee, along with other tenants, *inter-alia*, contested the assessment orders issued by the Municipal Corporation and approached the High Court of Allahabad at Lucknow by filing Writ Petition being Misc. Bench No. 3979 of 2003. However, this legal action was ultimately uncontested by the tenants and was subsequently dismissed *vide* order dated 30.03.2017.

4.4 Due to outstanding dues of Rs.1,621,987.00/- under the head of House Tax concerning the Enemy Property No.31/58 Hazaratganj, the Municipal Corporation, *vide* letter dated 28.03.2005 notified the District Magistrate, Lucknow, of its intention to proceed with attachment and sealing of the said premises under Sections 506-509 of the Act of 1959.

4.5 At this juncture, it is necessary to state that Raja Mohammed Amir Mohammad Khan, the son of the Raja of Mahmudabad, who remained in India as an Indian citizen, had been actively seeking the release of enemy properties owned by his late father. He contended that these properties should no longer be vested with the Custodian after his father's demise as they were now vested in him, an Indian citizen. While the Government had agreed to release 25% of these properties, it had not yet acted upon this commitment. In response, Raja Mohammed Amir Mohammad Khan approached the Bombay High Court by way of filing WP No.1524 of 1997. The High Court ruled

in his favor, directing the Custodian to surrender possession of the properties to him. Being aggrieved with this decision, the Union of India approached this Court by way of filing SLP (C) No.22452 of 2001, which was converted to Civil Appeal No.2501 of 2002. This Court by its judgment dated 21.10.2005 reported in ***Union of India vs. Raja Mohammad Amir Mohammad Khan***, ***(2005) 8 SCC 696 ('Amir Mohammad Khan')***, dismissed the appeal preferred by the Union of India and directed the Union of India to get the buildings (residence or offices) vacated from such officers and handover the possession to Raja Mohammed Amir Mohammad Khan within eight weeks. The Court further directed that the officers who are in occupation of buildings for their residences or for their offices shall immediately vacate and hand over the buildings or the properties to the Custodian to enable him to hand over the possession.

4.6 As a result of these orders, proceedings were initiated by various tenants, including respondent No.1. This Court, in SLP (Civil) No.14943 of 2006 *vide* order dated 08.09.2006, clarified its earlier judgment dated 21.10.2005 passed in Civil Appeal No.2501 of 2002. It was clarified by this Court that individuals who were allotted properties by the Custodian or who came into possession after 1965, i.e., following the declaration of Raja Mahmudabad's property as an enemy property and the appointment of the Custodian, were required to vacate these properties. However, persons claiming possession prior to the Custodian's appointment, based on valid tenancy agreements established by Raja Mahmudabad or his General Power of Attorney, were exempted from this directive. The enquiry conducted in pursuance to the above orders of this Court dated 08.09.2006 resulted in a report in favour of respondent No.1 herein as well as other similarly situated tenants. Ergo, they continued to remain in possession *vide* ***Amir Mohammad Khan.***

4.7 Following these events, on 28.05.2011, the appellant No.3, issued a notice to the assessee, demanding payment of Rs. 7,57,239.00/-. The notice warned of proceedings for recovery and attachment through the District Magistrate under Section 64 if the payment was not settled within three days.

4.8 Aggrieved by the aforesaid action, the assessee approached the High Court of Allahabad at Lucknow by filing Writ Petition being Misc. Bench No.2317 of 2012 seeking the following reliefs:

"(a) issue a writ of prohibition or a writ, order or direction in the nature of prohibition prohibiting the opposite parties no.1 & 2 not to make any assessment or raise bill for payment of House Tax or Water Tax/ or the property in the name and style of Lawrie Building situated at 50, Hazratganj, Lucknow being the property of Union of India and exempted from State taxation;

(b) issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the impugned bills/ recovery notice in respect of payment of House Tax for the year 2010-11, issued by the opposite party no.I, contained in Annexure Number 1 to the writ petition;

(c) issue a writ of certiorari or a writ, order or direction in the nature of certiorari quashing the impugned bills/recovery notice dated 28.5.2011, issued by the opposite party no.2, contained in Annexure Number 2 to the writ petition; and

(d) issue a writ of mandamus or a writ, order or direction in the nature of mandamus commanding _the respondent numbers 1 to 3 to refund the amount of Rs.7,29,7461- and Rs.2 lacs deposited by the petitioner along with interest at the rate of 18% per annum and within such time as may kindly be stipulated by this Hon'ble Court"

4.9 During the pendency of the said proceedings, appellants' counsel conceded that, as per the provisions of the Constitution of India, the appellants could not levy taxes on property belonging to the Government of India or Union properties. However, the appellants reserved the right to demand applicable fees for services rendered, such as water and sewerage charges.

4.10 By virtue of the impugned judgment and order dated 29.03.2017, the High Court allowed the writ petition and quashed the recovery notice dated 28.05.2011 on the ground that this case pertained

exclusively to taxes, namely House Tax and Water Tax, which are not applicable to the respondent No.1 since the property in question is an enemy property. The High Court further directed respondent No.1 to make representations for the recovery of any amounts previously paid to the appellants.

Hence, the appellants have preferred this civil appeal.

Respondent No.2 has filed his counter affidavit which we have perused.

Submissions:

Submissions of the appellants:

5. Sri Kavin Gulati, learned senior counsel appearing on behalf of the Municipal Corporation, at the outset, submitted that the High Court erroneously held that the House Tax and Water Tax levied herein are not leviable on the assessee respondent herein in respect of property which is admittedly an enemy property and not property of the Union or Central Government. Therefore, it was submitted:

a) that the property is merely in the custody of the Custodian as specified under the Act. That the preamble of the Act provides that this is "*An Act to provide for the continued vesting of Enemy Property*". That there is no declaration by the Union Government through any legislation declaring the properties to be the property of the Union Government. The only declaration that is contained is to vest the property in the Custodian without a further declaration that the property vests absolutely in the Union Government free from all encumbrances. That whenever the legislature desired that any property vests absolutely in the Central Government, it would be specifically provided so as in the case of Sections 16 and 17 of the Land Acquisition Act, 1984 as well as in the case of Section 269 of the Income Tax Act, 1961. But the same is conspicuous by its absence under the Act under consideration;

b) that a perusal of the scheme of the Act, more particularly, the Preamble, Section 2(c) and its proviso, Sections 15(1), 17(1)(c), and 18 read with Rule 5(1) and proviso 2, 5(2), 5(3) and 15(1) cumulatively would establish that the Custodian has certain obligations regarding Enemy Property. However, the Central Government or the Custodian is not vested with ownership of

the same. Section 2(c), which defines enemy property reads that it "means any property for the time being belonging to or held or managed on behalf of an enemy…". That the expression "for the time being" would show that the nature of vesting is not permanent and that the vesting is only for the management of the enemy property;

c) that for the Union Government to claim ownership of enemy property, it must follow the tenets of Article 300-A of the Constitution of India as well as other relevant provisions of the Constitution, which allow the acquisition of private properties only on payment of a fair compensation. This constitutional right is available to all persons and not just to citizens of India. Being aware of the aforesaid position that enemy properties do not become properties of the Union of India, the legislature has under Section 8(2)(vi) of the Act permitted the Custodian for Enemy Property to deposit Municipal Taxes *vis-à-vis* enemy property vested in him;

d) that even though the Union of India may have overarching control over Enemy Properties, the status of the Union or Central Government is not that of an owner. The Custodian is a statutory authority in whom there is vesting of enemy property, which is different from having ownership over the same. The fact that the Custodian can sell properties to third parties is akin to the powers available to a Receiver or a Liquidator who can exercise similar powers of sale [*vide* ***Delhi Administration vs. Madan Lal Nangia, (2003) 10 SCC 321 ("Madan Lal Nangia")*** Paras 14,15; ***Lieutenant Governor of Delhi vs. Matwal Chand (Dead) through LRs. (2015) 15 SCC 576 ("Matwal Chand")***, Para 14; ***Municipal Commissioner of Dum Dum Municipality vs. Indian Tourism Development Corporation*, (1995) 5 SCC 251 ("Dum Dum Municipality")**, Paras 14,18, 22 and 35 and ***State of Andhra Pradesh vs. V.Subba Rao, 2011 SCC OnLine AP 838 ("Subba Rao")***, Paras 23-25];

e) that Article 285 (1) is not attracted to the present case as the bar under Article 285 (1) is only applicable to the properties 'of the Union'. Even when the property is given on lease by the Union to a private party, then under Section 179 of the Act of 1959, tax is to be levied on the 'occupier'. Reliance was placed on the judgment of the Constitution Bench of this Court in ***Electronics***

***Corporation of India vs. Secretary, Revenue Department, Govt. of Andhra Pradesh*, (1999) 4 SCC 458 ("Electronics Corporation")** wherein it was held that Article 285 will not be applicable in cases when the land belonging to the Government of India was leased out to a Government Company;

f) that this Court in ***Union of India vs. State of Uttar Pradesh*, (2007) 11 SCC 324** held that service charges are a fee and cannot be said to be hit by Article 285 of the Constitution;

g) that pursuant to this Court's orders dated 19.11.2009 in ***Rajkot Municipal Corporation vs. Union of India, Civil Appeal No.9458-63 of 2003 ("Rajkot Municipal Corporation")***, the Ministry of Urban Development, Government of India issued clarification/instructions dated 17.12.2009 to all Secretaries (Urban Development) of all State Governments. The relevant portion of the said clarification/instructions dated 17.12.2009 is as follows:

> "(1) The UOI & its Departments will pay service charges for the services provided by appellant Municipal Corporations. No Property Tax. will be paid by UOI but service charges calculated @ 75%, 50% or 33 1/3% of Property Tax levied on property owners will be paid, depending upon utilisation of full or partial or Nil Services. For this, purpose agreements will be entered into by UOI represented by concerned Departments with respective Municipal Corporation."

h) that due to non-payment of taxes since the year 1998-1999, Jal Sansthan Lucknow appellant No.3 herein, served final Notice under the provisions of the Land Revenue Act of the State of UP to respondent No.1 to pay the pending bills of Water Tax/ Sewer Tax/Water price of Rs. 7,57,239/- by 31.03.2011;

i) that it is settled law that the exemption from state taxation of property of the Union Government is only against property taxes and not against all taxes including the commercial taxes and services by local administration/authorities. However, the High Court in its final Judgment and Order dated 29.03.2017, erroneously equated the commercial tenancy of a private person in Enemy Property with the property of the Central

Government and accordingly, has quashed the recovery notice dated: 28.05.2011;

j) that the Enemy Property occupied by private persons for private business interests is not synonymous with the interest of the State and is starkly in contrast to the objectives and scheme of the Constitution. Accordingly, it was contended that the interest or property of a private person i.e. respondent No.1 is not exempted from property taxes under Article 285 of the Constitution of India;

k) that the Custodian under the Act is empowered to realize from occupants all taxes, fees and charges and pay to the local authority. In the present case, it is admitted by the Custodian-respondent No.2 that local taxes are payable to the local authority in respect of the enemy property in question *vide* Certificate dated 03.10.2002;

l) that although the Municipal Commissioner granted a concession before the High Court, the said concession was due to a threat of summoning him to file a personal affidavit. In this regard, learned senior counsel argued that there can be no concession or estoppel against the statute. The power to levy tax is plenary. If the State is held to be bound by a concession made in one case, it would result in serious consequences for the State as such a concession is against public interest. That it was held in ***State of Uttar Pradesh vs. Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti, (2008) 12 SCC 675*** that statement, assurance, or even an undertaking of any officer or counsel is irrelevant and that there can be no estoppel against the statute.

With the aforesaid submission, learned senior counsel prayed that the impugned order passed by the High Court may be set aside.

Submissions of the respondent No.1–assessee:

6. *Per contra*, learned senior counsel Sri Guru Krishna Kumar, appearing for the assessee, supported the impugned judgment and submitted that the High Court has proceeded to pass the impugned order on a sound appreciation of the facts of the matter and the applicable law and the same would not call for any interference by this Court. It was further contended as under:

a) that the appellant-Municipal Corporation has approached the court with unclean hands and has deliberately suppressed critical facts. The Municipal Corporation's reliance on the case of ***Amir Mohammad Khan*** is misleading. In this regard, it was submitted that the Municipal Corporation has conspicuously omitted to disclose that the judgment in the aforementioned case has been rendered nugatory due to the promulgation of an Ordinance and the enactment of the Enemy Property (Amendment and Validation) Act, 2017 (hereinafter referred to as, "Amendment Act, 2017"). Further, as a result of the said judgment and various tenants' claims, respondent No.1 herein approached this Court seeking a clarification. This Court by order dated 08.09.2006, clarified that persons in possession of properties based on duly authenticated tenancy agreements before the appointment of the Custodian declaring the property as enemy property would not be covered by the judgment in ***Amir Mohammad Khan***. Accordingly, the respondent No.1 has continued to be in possession.

b) Reliance was placed on the Amendment Act, 2017 as per which the enemy property vested in the Custodian will remain vested in the Custodian regardless of change in circumstances such as the death of the enemy; the extinction of the enemy status; the winding up of business or a change in nationality of the legal heir and successor. The Act further clarifies that "enemy property vested in the Custodian" includes all rights, titles, and interests in or benefits arising from such property. It includes the right of expropriation of the enemy property, in exercise of the police powers of the State. Also, the principles of acquisition or requisition and payment of compensation will not apply to such a legislation.

c) that the property in question unequivocally belongs to the Central Government, specifically the Custodian; Enemy Property is thus 'property of the Union.' The assessee is merely a tenant of the Custodian of the Enemy Property and therefore, no taxes can be levied on this property.

d) that Article 285 of the Constitution provides exemption from State taxation in respect of properties of the Union of India. He buttressed his submission by stating that how the property sought to be taxed is being used is irrelevant consideration

as far as the interpretation of Article 285 of the Constitution of India was concerned, *vide* ***NDMC vs. State of Punjab, (1997) 7 SCC 339 ("NDMC")***. There is an absolute and emphatic ban on state taxation on the property of the Union and the use of such property is irrelevant.

e) that apart from Article 285, Section 172 of the Act of 1959 specifically provides that the Corporation may impose taxes subject to the provisions of Article 285 of the Constitution. Likewise, Section 177 of the said Act provides exceptions in respect of the levy of tax amongst others to buildings and land vesting in the Union of India. However, Section 8(2)(vi) of the Act and/or Section 173 of the Act of 1959 cannot amount to "law" authorizing levy of property tax on Union property in terms of Article 285(1) of the Constitution.

f) that property vested in the Union was expressly excluded from the scope of general tax on land and building. In this regard, it was submitted that the impugned judgment was incorrect to the extent that it allows Union property to be taxed on the basis of an extended definition of 'owner', and is in conflict with the judgment of this Court in ***NDMC*** and therefore, not good law. The property in question is indisputably 'property of the Union' as per Article 285 of the Constitution.

g) that the declaration of a property as enemy property would be by exercise of police power of the State. In other words, Article 300-A only limits the powers of the State inasmuch as no person shall be deprived of his property save by authority of law, implying that there can be no deprivation without any sanction of law. Deprivation by any other mode is not acquisition or taking possession under Article 300-A. It was submitted that war between two or more countries is a reason for which no compensation is payable for acquisition of enemy property. The Act as amended has not been (and cannot be) challenged by the Municipal Corporation and has to be treated as valid and be given its full effect.

h) that the joint submission of Municipal Corporation and the Union of India that Section 8(2)(vi) of the Act is a law relatable to Article 285 of the Constitution of India was neither raised before the High Court nor in any pleading before this Court and is a clear afterthought raised for the first time during oral replies;

i) in the alternative, this Court may balance the equities to make the demand prospective considering the grave hardship that the demand of entire past amount would cause to respondent No.1 in case this Court holds against respondent No.1.

With the aforesaid submissions, it was prayed that the present appeal be dismissed as being devoid of any merit and the impugned order of the High Court be affirmed.

Submissions of the respondent No.2:

7. Learned counsel Sri Rupesh Kumar, appearing on behalf of the Custodian of the subject Enemy Property, respondent No.2 herein, submitted as under:

a) that the subject property belongs to a Pakistani National namely, Raja of Mahmudabad and therefore, the property is vested in the Custodian of Enemy Property for India under the Act as amended by the Amendment Act, 2017 and is an undisputed enemy property;

b) that the property belonging to the Union Government is exempted from state taxation under article 285(1) of the Constitution of India. However, there is no such exemption in respect of fee/ service charges or other charges and this position has been conclusively decided by this Court in ***Union of India vs. State of Uttar Pradesh*, *(2007) 11 SCC 324.*** Further, this stand has been reiterated by this Court in ***Rajkot Municipal Corporation***. Consequently, the Ministry of Urban Development, Government of India *vide* order No.11025/ 26/2003 UCD dated l7.l2.2009 issued a clarification/direction regarding the levy of taxes and service charges in light of the judgments passed by this Court.

c) that the respondent No.2 Custodian *vide* his certificate dated 03.10.2002 has already clarified that it is under an obligation to pay house tax and other local taxes as respondent No.1 is running a private business for profit from the said premises and therefore, not similar to a Central Government enterprise and accordingly is liable for taxation by the local authorities;

d) that this Court in the case of ***NDMC*** has held that private parties are not exempted from taxation. Therefore, the private person in occupancy of enemy property for personal benefit is neither

synonymous with Central Government nor can he agitate it before the Court.

Learned ASG Sri Balbir Singh also made submissions in the matter later on.

With the aforesaid submissions, it was prayed for this Court to pass orders as this Court may think fit and proper.

Submissions of the respondent No.3 - State of Uttar Pradesh:

8. State of Uttar Pradesh, at the outset, adopted the contentions raised by the appellant-Municipal Corporation and further submitted as under:

a) Admittedly, respondent No.1-assessee is a private entity and a lessee of the Custodian of the enemy property in question and the demand was raised by the appellant-Municipal Corporation on the assessee and not on the Custodian or the Central Government. A private entity, that is running its business, on a property and continuing on lease under the Custodian as per the provisions of the Act cannot claim the benefit of Article 285 of the Constitution of India;

b) that the Union of India has also taken a strident stand that though the property is vested in the Custodian for the enemy property in India, the running of the business by respondent No.1 is not akin or synonymous with the running of the business by the Central Government and that therefore tax is payable by respondent No.1 to the appellant herein;

c) that vesting, as envisaged under the Act does not make such properties as properties owned by the Central Government or Union properties. In this connection, reference was made to the observations of this Court in ***Amir Mohammad Khan***, which shall be discussed later in the judgment.

In light of the aforesaid submissions, it was urged that the view taken by the Hon'ble High Court in the impugned judgment and order needs to be set aside.

Points for consideration:

9. Having heard learned senior counsel and learned counsel for the respective parties, the following points would arise for our consideration:

1. Whether statutory vesting of enemy property including the subject property in the Custodian amounts to expropriation and transfer of ownership so as to confer ownership of such enemy property on the Custodian?

2. Consequently, if the ownership of such enemy property is conferred on the Custodian for Enemy Property, whether such property becomes Union property within the meaning of Article 285 of the Constitution and therefore, it is exempt from payment of property or other local taxes to the appellant-Municipal Corporation under the provisions of the Act of 1959?

3. Whether despite such enemy property becoming property of the Union, clause (2) of Article 285 of the Constitution enables appellant herein to impose property or other local taxes on the respondent which is lessee of the subject property?

4. Whether the High Court was right in holding in favour of the respondent?

5. What order?

Since these questions are inter-related, they shall be considered together.

Preface:

9.1 Before we proceed further, we would like to preface the discussion with a historical perspective.

9.2 Jean-Jacques Rousseau in his treatise *the Social Contract* said that *"War is constituted by a relation between things, and not between persons… War then is a relation, not between man and man, but between State and State…"* The general aim of the administration of enemy property is to eliminate enemy influence from the national economy. The mischief that such state instruments seek to cure is the provision of aid and comfort to the enemy, for instance, through the making available of funds for war financing. Enemy property can be disposed of by various means including custodianship, liquidation, expropriation, confiscation or nationalization. The means of custodianship imply a fiduciary administration. The whole *raison d'etre* of a statutory regime that seeks to administer enemy property through a custodianship is to preserve and protect the properties

until the war is over. After all, the law of settlement of enemy property is governed not only by considerations of diplomatic strategy but also by fundamental principles of fair governance.

9.3 In 1962, in the wake of the Chinese aggression, the Custodian of Enemy Property for India was called upon to take charge of the Chinese assets in India with the object of vesting the movable and immovable properties of the Chinese subjects left in India under the Defence of India Rules, 1962 specifying the enemy nationals and the properties held by them. Similarly, in the wake of the Indo-Pak war of 1965 and 1971, there was migration of people from India to Pakistan. Under the Defence of India Rules framed under the Defence of India Act, 1962, the Government of India took over the properties and companies of such persons who had taken Pakistani nationality.

9.4 At this juncture, we may notice the expression 'on behalf of an enemy' occurring in the definition of enemy property in Rule 133-I of Defence of India (Amendment) Rules, 1962, and Subrule 4 of Rule 138 of Defence of India Rules, 1971 implying that the enemy property is only held and managed by the Custodian for a specific purpose. We ought to appreciate that the Statement of Objects and Reasons of the Enemy Property Act, 1968 intend to continue the vesting and maintenance of the properties by the Custodian of Enemy Property until the Government of India arrives at a settlement with the Governments of enemy countries. The intent of the Parliament is further illuminated by the Tashkent Declaration by India and Pakistan dated January 10, 1966, which included a clause stating that the two countries would discuss the return of the properties and assets taken over by either side in connection with the conflict.

Legal framework:

Provisions of the Act:

10. The Parliament has enacted the said Act to provide for the continued vesting of enemy property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 and the Defence of India Rules, 1971 and for matters connected therewith.

10.1 Part IV of the Defence of India Rules, 1962 deals *inter alia* with restriction of movements and activities of persons. While

Part XIV-A deals with control of trading with enemy, Part XIV-B deals with control of enemy firms. Section 133-A defines the expression 'enemy' *inter alia* to mean any individual resident in enemy territory. In Part XIV-B, the definition of enemy subject and enemy firm have been given and also the definition of enemy property. Under the said Rules, the Controllers, Deputy Controllers or Inspectors appointed by the Central Government had to carry out the supervision of firms suspected to be enemy firms and do all other ancillary and incidental acts as delineated under the said Rules.

10.2 Similarly, under the Defence of India Act, 1971, Part IV deals with restriction of movement and activities of person. Part XVI deals with control of trading with enemy and the definition of enemy is in Rule 130 of the said Rules and similarly, Controllers or Deputy Controller were appointed for controlling the trading with enemy. Part XVII deals with control of enemy firms to carry out the business of enemy firms, etc. Rule 151 of the 1971 Rules clearly states with a view to preserving enemy property, the Central Government may appoint a Custodian of Enemy Property for India and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local areas as may be prescribed.

The Act under consideration is essentially to provide for the continued vesting of enemy property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962, and the Defence of India Rules, 1971 and for matters connected therewith.

10.3 At this stage, we can refer to the relevant provisions of the Act. The expression "Custodian", "enemy" or "enemy subject" or "enemy firm" and "enemy property" are defined as under:

> "**2. Definitions**.- In this Act, unless the context otherwise requires,-
>
> (a) "Custodian" means the Custodian of Enemy Property for India appointed or deemed to have been appointed under section 3 and includes a Deputy Custodian and an Assistant Custodian of Enemy Property appointed or deemed to have been appointed under that section;

(b) "enemy" or "enemy subject" or "enemy firm" means a person or country who or which was an enemy, an enemy subject including his legal heir and successor whether or not a citizen of India or the citizen of a country which is not an enemy or the enemy, enemy subject or his legal heir and successor who has changed his nationality or an enemy firm, including its succeeding firm whether or not partners or members of such succeeding firm are citizen of India or the citizen of a country which is not an enemy or such firm which has changed its nationality, as the case may be, under the Defence of India Act, 1962, and the Defence of India Rules, 1962 or the Defence of India Act, 1971 (42 of 1971) and the Defence of India Rules, 1971, does not include a citizen of India other than those citizens of India, being the legal heir and successor of the "enemy" or "enemy subject" or "enemy firm";

(c) "enemy property" means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm:

Provided that where an individual enemy subject dies in the territories to which this Act extends, or dies in the territories to which the Act extends or dies in any territory outside India, any property which immediately before his death, belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the purposes of this Act;"

10.4 Section 3 of the Act deals with appointment of Custodian of Enemy Property for India and Deputy Custodian, while Section 4 deals with appointment of Inspectors of Enemy Property. Section 5 states that property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 to continue to vest in the Custodian. The said provisions read as under:

"3. Appointment of Custodian of Enemy Property for India and Deputy Custodian, etc.—The Central Government may, by notification in the Official Gazette, appoint a Custodian of Enemy Property for India and one or more Deputy Custodians and Assistant Custodians of Enemy Property for such local areas as may be specified in the notification:

Provided that the Custodian of Enemy Property for India and any Deputy Custodian or Assistant Custodian of Enemy Property appointed under the Defence of India Rules, 1962 or the Defence of India Rules, 1971, as the case may be, shall be deemed to have been appointed under this section.

4. Appointment of Inspectors of Enemy Property.— The Central Government may, either generally or for any particular area, by notification in the Official Gazette, appoint one or more Inspectors of Enemy Property for securing compliance with the provisions of this Act and may, by general or special order, provide for the distribution and allocation of the work to be performed by them for securing such compliance:

Provided that every Inspector of Enemy Firms appointed under the Defence of India Rules, 1962 or the Defence of India Rules, 1971, as the case may be, shall be deemed to be an Inspector of Enemy Property appointed under this section.

5. Property vested in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 to continue to vest in Custodian.—(1) Notwithstanding the expiration of the Defence of India Act, 1962 (51 of 1962), and the Defence of India Rules, 1962, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of this Act, shall, as from such commencement, vest in the Custodian.

(2) Notwithstanding the expiration of the Defence of India Act, 1971 (42 of 1971) and the Defence of India Rules, 1971, all enemy property vested before such expiration in the Custodian of Enemy Property for India appointed under the said Rules and continuing to vest in him immediately before the commencement of the Enemy Property (Amendment) Act, 1977 (40 of 1977) shall, as from such commencement, vest in the Custodian.

(3) The enemy property vested in the Custodian shall, notwithstanding that the enemy or the enemy subject or the enemy firm has ceased to be an enemy due to death, extinction, winding up of business or change of nationality or that the legal heir and successor is a citizen of India or the citizen of a country which is not an enemy, continue to remain, save as otherwise provided in this Act, vested in the Custodian.

Explanation. – For the purposes of this sub-section, "enemy property vested in the Custodian" shall include and shall always be deemed to have been included all rights, titles, and interest in, or any benefit arising out of, such property vested in him under this Act."

10.5 Section 5A and Section 5B were inserted with retrospective effect from 07.01.2016 and 10.07.1968 by Act 3 of 2017. They read as under:

"5A. Issue of certificate by Custodian. —The Custodian may, after making such inquiry as he deems necessary, by order, declare that the property of the enemy or the enemy subject or the enemy firm described in the order, vests in him under this Act and issue a certificate to this effect and such certificate shall be the evidence of the facts stated therein.

5B. Law of succession or any custom or usage not to apply to enemy property.—Nothing contained in any law for the time being in force relating to succession or any custom or usage governing succession of property shall apply in relation to

the enemy property under this Act and no person (including his legal heir and successor) shall have any right and shall be deemed not to have any right (including all rights, titles and interests or any benefit arising out of such property) in relation to such enemy property.

Explanation.—For the purposes of this section, the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law in the matters of succession of property."

10.6 Section 6 has been substituted by Section 6 of Act 3 of 2017 with retrospective effect from 10.07.1968. Prior to its substitution, it read as under:

"6. Prohibition to transfer any property vested in Custodian by an enemy, enemy subject or enemy firm.—(1) No enemy or enemy subject or enemy firm shall have any right and shall never be deemed to have any right to transfer any property vested in the Custodian under this Act, whether before or after the commencement of this Act and any transfer of such property shall be void and shall always be deemed to have been void.

(2) Where any property vested in the Custodian under this Act had been transferred, before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, by an enemy or enemy subject or enemy firm and such transfer has been declared, by an order, made by the Central Government, to be void, and the property had been vested or deemed to have been vested in the Custodian by virtue of the said order made under section 6, as it stood before its substitution by section 6 of the Enemy Property (Amendment and Validation) Act, 2017 such property shall, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority, continue to vest or be deemed to have been vested in the

Custodian and no person (including an enemy or enemy subject or enemy firm) shall have any right or deemed to have any right (including all rights, titles and interests or any benefit arising out of such property) over the said property vested or deemed to have been vested in the Custodian."

10.7 Section 7 deals with payment to Custodian of money otherwise payable to an enemy, enemy subject or enemy firm, the same reads as under:

"7. Payment to Custodian of money otherwise payable to an enemy, enemy subject or enemy firm. - (1) Any sum payable by way of dividend, interest, share profits or otherwise to or for the benefit of an enemy or an enemy subject or an enemy firm shall, unless otherwise ordered by the Central Government, be paid by the person by whom such sum would have been payable but for the prohibition under the Defence of India Rules, 1962 or the Defence of India Rules, 1971, as the case may be, to the Custodian or such person as may be authorised by him in this behalf and shall be held by the Custodian or such person subject to the provisions of this Act.

(2) In cases in which money would, but for the prohibition under the Defence of India Rules, 1962 or the Defence of India Rules, 1971, as the case may be, be payable in a foreign currency to or for the benefit of an enemy or an enemy subject or an enemy firm (other than cases in which money is payable under a contract in which provision is made for a specified rate of exchange), the payment shall be made to the Custodian in rupee currency at the middle official rate of exchange fixed by the Reserve Bank of India on the date on which the payment became due to that enemy, enemy subject or enemy firm.

(3) The Custodian shall, subject to the provisions of section 8, deal with any money paid to him under the Defence of India Rules, 1962 or the Defence of India Rules, 1971 as the case may be or under this

Act and any property vested in him under this Act in such manner as the Central Government may direct."

10.8 The powers of Custodian in respect of enemy property vested in him as amended are delineated in Section 8 which reads as under:

> **"8. Power of Custodian in respect of enemy property vested in him.—** (1) With respect to the property vested in the Custodian under this Act, the Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property till it is disposed of in accordance with the provisions of this Act.
>
> (2) Without prejudice to the generality of the foregoing provision, the Custodian or such person as may be specifically authorised by him in this behalf, may, for the said purpose,—
>
> (i) carry on the business of the enemy;
>
> (ia) fix and collect the rent, standard rent, lease rent, licence fee or usage charges, as the case may be, in respect of enemy property;
>
> (ii) take action for recovering any money due to the enemy;
>
> (iii) make any contract and execute any document in the name and on behalf of the enemy;
>
> (iv) institute, defend or continue any suit or other legal proceeding, refer any dispute to arbitration and compromise any debts, claims or liabilities;
>
> (iva) secure vacant possession of the enemy property by evicting the unauthorised or illegal occupant or trespasser and remove unauthorised or illegal constructions, if any.
>
> (v) raise on the security of the property such loans as may be necessary;
>
> (vi) incur out of the property any expenditure including the payment of any taxes, duties, cesses and rates to Government or to any local authority and

of any wages, salaries, pensions, provident fund contributions to, or in respect of, any employee of the enemy and the repayment of any debts due by the enemy to persons other than enemies;

(vii) transfer by way of sale, mortgage or lease or otherwise dispose of any of the properties;

(viii) invest any moneys held by him on behalf of enemies for the purchase of Treasury Bills or such other Government securities as may be approved by the Central Government for the purpose;

(ix) make payments to the enemy and his dependents;

(x) make payments on behalf of the enemy to persons other than those who are enemies, of dues outstanding on the 25th October, 1962 or on the 3rd December, 1971; and

(xi) make such other payments out of the funds of the enemy as may be directed by the Central Government."

10.9 Section 8A deals with sale of property by Custodian which has been inserted with retrospective effect from 07.01.2016 while Section 10A deals with power to issue certificate of sale. The same are extracted as under:

> **"8A. Sale of property by Custodian**.—(1) Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority or any law for the time being in force, the Custodian may, within such time as may be specified by the Central Government in this behalf, dispose of whether by sale or otherwise, as the case may be, with prior approval of the Central Government, by general or special order, enemy properties vested in him immediately before the date of commencement of the Enemy Property (Amendment and Validation) Act, 2017 in accordance with the provisions of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017.

(2) The Custodian may, for the purpose of disposal of enemy property under sub-section (1), make requisition of the services of any police officer to assist him and it shall be the duty of such officer to comply with such requisition.

(3) The Custodian shall, on disposal of enemy property under sub-section (1) immediately deposit the sale proceeds into the Consolidated Fund of India and intimate details thereof to the Central Government.

(4) The Custodian shall send a report to the Central Government at such intervals, as it may specify, for the enemy properties disposed of under sub-section (1), containing such details, (including the price for which such property has been sold and the particulars of the buyer to whom the properties have been sold or disposed of and the details of the proceeds of sale or disposal deposited into the Consolidated Fund of India) as it may specify.

(5) The Central Government may, by general or special order, issue such directions to the Custodian on the matters relating to disposal of enemy property under sub-section (1) and such directions shall be binding upon the Custodian and the buyer of the enemy properties referred to in that sub-section and other persons connected to such sale or disposal.

(6) The Central Government may, by general or special order, make such guidelines for disposal of enemy property under sub-section (1).

(7) Notwithstanding anything contained in this section, the Central Government may direct that disposal of enemy property under sub-section (1) shall be made by any other authority or Ministry or Department instead of Custodian and in that case all the provisions of this section shall apply to such authority or Ministry or Department in respect of disposal of enemy property under sub-section (1).

(8) Notwithstanding anything contained in sub-sections (1) to (7), the Central Government may deal with or utilise the enemy property in such manner as it may deem fit.

x x x

10A. Power to issue certificate of sale.—(1) Where the Custodian proposes to sell any enemy immovable property vested in him, to any person, he may on receipt of the sale proceeds of such property, issue a certificate of sale in favour of such person and such certificate of sale shall, notwithstanding the fact that the original title deeds of the property have not been handed over to the transferee, be valid and conclusive proof of ownership of such property by such person.

(2) Notwithstanding anything contained in any law for the time being in force, the certificate of sale, referred to in sub-section (1), issued by the Custodian shall be a valid instrument for the registration of the property in favour of the transferee and the registration in respect of enemy property for which such certificate of sale had been issued by the Custodian, shall not be refused on the ground of lack of original title deeds in respect of such property or for any such other reason."

10.10 Section 9 states that all enemy property vested in the Custodian under this Act shall be exempt from attachment, seizure or sale in execution of a decree of a civil court or orders of any other authority. The same is extracted as under:

"9. Exemption from attachment, etc. - All enemy property vested in the Custodian under this Act shall be exempt from attachment, seizure or sale in execution of decree of a civil court or orders of any other authority."

10.11 Section 12 speaks of protection for complying with orders of Custodian and the same reads as under:

"12. Protection for complying with orders of Custodian.- Where any order with respect to any money or property is addressed to any person by the

Custodian and accompanied by a certificate of the Custodian that the money or property is money or property vested in him under this Act, the certificate shall be evidence of the facts stated therein and if that person complies with the orders of the Custodian, he shall not be liable to any suit or other legal proceeding by reason only of such compliance."

10.12 Section 13 deals with validity of action taken in pursuance of orders of Custodian while Section 14 deals with proceeding against companies whose assets vest in custodian, which read as under:

"13. Validity of action taken in pursuance of orders of Custodian.—Where under this Act,—

(a) any money is paid to the Custodian; or

(b) any property is vested in the Custodian or an order is given to any person by the Custodian in relation to any property which appears to the Custodian to be enemy property vested in him under this Act,

neither the payment, vesting nor order of the Custodian nor any proceedings in consequence thereof shall be invalidated or affected by reason only that at a material time,—

(i) some person who was or might have been interested in the money or property, and who was an enemy or an enemy firm, has died or had ceased to be an enemy or an enemy firm; or

(ii) some person who was so interested and who was believed by the Custodian to be an enemy or an enemy firm, was not an enemy or an enemy firm."

14. Proceedings against companies whose assets vest in Custodian - Where the enemy property vested in the Custodian under this Act consists of assets of a company, no proceeding, civil or criminal, shall be instituted under the Companies Act, 1956 (1 of 1956), against the company, or any director, manager or other officer thereof except with the consent in writing of the Custodian."

10.13 Section 17 pertains to levy of fees and the same reads as under:

> "**17. Levy of fees.—** (1) There shall be levied by the Custodian fees equal to five per centum of—
>
> (a) the amount of moneys paid to him;
>
> (b) the proceeds of the sale or transfer of any property which has been vested in him under this Act; and
>
> (c) the value of the residual property, if any, at the time of its transfer to the original owner or other person specified by the Central Government under section 18:
>
> Provided that in the case of an enemy whose property is allowed by the Custodian to be managed by some person specially authorised in that behalf, there shall be levied a fee of five per centum of the gross income of the enemy or such less fee as may be specifically fixed by the Central Government after taking into consideration the cost of direct management incurred by that Government, the cost of superior supervision and any risks that may be incurred by that Government in respect of the management:
>
> Provided further that the Central Government may, for reasons to be recorded in writing, reduce or remit the fees leviable under this sub-section in any special case or class of cases.
>
> Explanation.—In this sub-section "gross income of the enemy" means income derived out of the properties of the enemy vested in the Custodian under this Act.
>
> (2) The value of any property for the purpose of assessing the fees shall be the price which, in the opinion of the Central Government or of an authority empowered in this behalf by the Central Government, such property would fetch if sold in the open market.
>
> (3) The fees in respect of property may be levied out of any proceeds of the sale or transfer thereof or out of any income accrued therefrom or out of any other

property belonging to the same enemy and vested in the Custodian under this Act.

(4) The fees levied under this section shall be credited to the Central Government."

10.14 Section 18 deals with transfer of property vested as enemy property in certain cases and the said provision reads as under:

> **"18. Transfer of property vested as enemy property in certain cases.—**The Central Government may, on receipt of a representation from a person, aggrieved by an order vesting a property as enemy property in the Custodian within a period of thirty days from the date of receipt of such order or from the date of its publication in the Official Gazette, whichever is earlier and after giving a reasonable opportunity of being heard, if it is of the opinion that any enemy property vested in the Custodian under this Act and remaining with him was not an enemy property, it may by general or special order, direct the Custodian that such property vested as enemy property in the Custodian may be transferred to the person from whom such property was acquired and vested in the Custodian."

10.15 Section 18A, Section 18B and Section 18C though related to Section 18, however, are not relevant for the purposes of this case. Section 22 gives overriding effect to this Act and the same reads as under:

> **"22. Effect of laws inconsistent with the Act.—**The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force, (including any law of succession or any custom or usage in relation to succession of property)."

Section 22A is a validation clause which reads as under:

> **"22A. Validation.**—Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,—

(a) the provisions of this Act, as amended by the Enemy Property (Amendment and Validation) Act, 2017, shall have and shall always be deemed to have effect for all purposes as if the provisions of this Act, as amended by the said Act, had been in force at all material times;

(b) any enemy property divested from the Custodian to any person under the provisions of this Act, as it stood immediately before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, shall stand transferred to and vest or continue to vest, free from all encumbrances, in the Custodian in the same manner as it was vested in the Custodian before such divesting of enemy property under the provisions of this Act, as if the provisions of this Act, as amended by the aforesaid Act, were in force at all material times;

(c) no suit or other proceedings shall, without prejudice to the generality of the foregoing provisions, be maintained or continued in any court or tribunal or authority for the enforcement of any decree or order or direction given by such court or tribunal or authority directing divestment of enemy property from the Custodian vested in him under section 5 of this Act, as it stood before the commencement of the Enemy Property (Amendment and Validation) Act, 2017, and such enemy property shall continue to vest in the Custodian under section 5 of this Act, as amended by the aforesaid Act, as the said section, as amended by the aforesaid Act was in force at all material times;

(d) any transfer of any enemy property, vested in the Custodian, by virtue of any order of attachment, seizure or sale in execution of decree of a civil court or orders of any tribunal or other authority in respect of enemy property vested in the Custodian which is contrary to the provisions of this Act, as amended by the Enemy Property

(Amendment and Validation) Act, 2017, shall be deemed to be null and void and notwithstanding such transfer, continue to vest in the Custodian under this Act."

10.16 Section 24 states that certain orders made under the Defence of India Rules, 1962, to continue in force and the same is extracted as under:

> **"24. Certain orders made under the Defence of India Rules, 1962, to continue in force. -** (1) Every order which was made under the Defence of India Rules, 1962, by the Central Government or by the Custodian of Enemy Property for India appointed under those Rules, relating to enemy property and which was in force immediately before the expiration thereof shall, in so far as such order is not inconsistent with the provisions of this Act, be deemed to continue in force and to have been made under this Act.
>
> (2) Every order which was made under the Defence of India Rules, 1971 by the Central Government or by the Custodian of Enemy Property for India appointed under those rules relating to enemy property and which was in force immediately before the expiration thereof shall, in so far as such order is not inconsistent with the provisions of this Act, be deemed to continue in force and to have been made under this Act."

The Enemy Property Rules, 2015:

10.17 The Enemy Property Rules, 2015 deal with procedure for identification of immovable property, procedure for declaration and vesting of the enemy property. While Rule 5 deals with procedure for preservation, management and control of immovable property, Rule 6 deals with procedure for taking possession of moveable property; on the other hand, Rule 7 deals with procedure for taking possession of certain moveable property. Rule 15 deals with procedure for divestment of enemy property vested in Custodian which reads as under:

> **"15. Procedure for divestment of enemy property vested in Custodian.-** (1) The Central Government may, on a reference or complaint or on its own motion,

initiate process for divestment of an enemy property vested in the Custodian, to the owner thereof or to such other person.

(2) An officer of the rank of Joint Secretary or above in the Government of India shall be the Chairperson of the proceedings for divestment of the enemy property under this rule.

(3) The Chairperson shall give thirty days' notice to all concerned including the Custodian, requiring them to submit a reply, produce all documentary evidence and appear in person or through authorised representative:

Provided that if any party fails to appear on the date fixed for hearing, then a second and final notice shall be served through registered post and if he again fails to appear after the second notice, then the proceedings shall be heard *ex parte*:

Provided further that the Chairperson shall record the reasons for such *ex parte* proceedings.

(4) The notices shall be served on all concerned parties before each hearing.

(5) The presenting officer who has been engaged for presentation of the case on behalf of the Central Government, shall examine such witnesses and documentary evidences in respect of the property as he thinks fit.

(6) On completion of the proceedings, the details including depositions shall be furnished to the parties.

(7) The Chairperson, after examining the evidence and calling for further reports and inquiry as may be necessary, shall pass such orders thereon as it thinks fit, and a copy of the said orders shall be sent to the parties."

11. Articles 285, 289, 296 and 300-A of the Constitution of India are relevant while interpreting the Act and read as under:

"**285. Exemption of property of the Union from State taxation**.—(1) The property of the Union shall, save

in so far as Parliament may by law otherwise provide, be exempt from all taxes imposed by a State or by any authority within a State.

(2) Nothing in clause (1) shall, until Parliament by law otherwise provides, prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of this Constitution liable or treated as liable, so long as that tax continues to be levied in that State.

x x x

289. Exemption of property and income of a State from Union taxation.— (1) The property and income of a State shall be exempt from Union taxation.

(2) Nothing in clause (1) shall prevent the Union from imposing, or authorising the imposition of any tax to such extent, if any, as Parliament may by law provide in respect of a trade or business of any kind carried on by, or on behalf of, the Government of a State, or any operations connected therewith, or any property used or occupied for the purposes of such trade or business, or any income accruing or arising in connection therewith.

(3) Nothing in clause (2) shall apply to any trade or business, or to be incidental to the ordinary functions of Government."

x x x

296. Property accruing by escheat or lapse or as bona vacantia. - Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as *bona vacantia* for want of a rightful owner, shall, if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union:

Provided that any property which at the date when it would have so accrued to His Majesty or to the Ruler of an Indian State was in the possession or under the control of the

Government of India or the Government of a State shall, according as the purposes for which it was then used or held were purposes of the Union or of a State, vest in the Union or in that State.

Explanation: In this article, the expressions "Ruler" and "Indian State" have the same meanings as in Article 363.

x x x

300-A. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law."

12. The Uttar Pradesh Municipalities Act, 1916 (hereinafter referred to as "Act of 1916") consolidates and amends the law relating to Municipalities in the erstwhile United Provinces and presently State of Uttar Pradesh. The city of Lucknow was a municipality and later was constituted as Nagar Nigam or Corporation under the Act of 1959 and till then the Act of 1916 was applicable. Hence, the relevant provisions of the Act of 1916 are extracted as under:

"128. Taxes which may be imposed.- (1) Subject to any general rules or special order of the State Government in this behalf, the taxes which a Municipality may impose in the whole or part of a municipality are,-

(i) a tax on the annual value of building or lands or of both;

(ii) a tax on trades and callings carried on within the municipal limits and deriving special advantages from, or imposing special burdens on municipal services;

(iii) a tax on trades, callings and vocations including all employments remunerated by salary or fees;

(iii-a) a theatre tax which means a tax on amusements or entertainments;

(iv) a tax on vehicles and other conveyances plying for hire or kept within the municipality or on boats moored therein;

(v) a tax on dogs kept within the municipality;

(vi) a tax on animals used for riding, driving, draught or burden, when kept within the municipality;

(vii) [***]

(viii) [***]

(ix) a tax on inhabitants assessed according to their circumstances and property;

(x) a water tax on the annual value of buildings or lands or of both;

(x-a) a drainage tax on the annual value of buildings leviable on such buildings as are situated within a distance, to be fixed by rule in this behalf for each municipality from the nearest sewer line;

(xi) a scavenging tax;

(xii) a conservancy tax for the collection, removal and disposal of excrementious and polluted matter from privies, urinals, cesspools;

(xiii) [***]

(xiii-A) [***]

(xiii-B) a tax on deeds of transfer of immovable property situated within the limits of the municipality;

(xiv) [***]

(2) Provided that taxes under clauses (iii) and (ix) of sub-section (1) shall not be levied at the same time [***] nor shall the taxes under clauses (x-a) and (xii) of sub-section (1) be levied at the same time;

Provided further that no tax under clause (xiii-B) of sub-section (1) shall be levied on deeds of transfer of immovable property situated within such area of the municipality as forms part of the local area of any Improvement Trust created under Section 3 of the U.P. Town Improvement Act, 1919 (UP Act No. VIII of 1919):

Provided also that no tax under clause (iv) of sub-section (1) shall be levied in respect of any motor vehicle.

(3) Nothing in this section shall authorize the imposition

of any tax which the State Legislature has no power to impose in the State under the Constitution:

Provided that a Municipality which immediately before the commencement of the Constitution was lawfully levying any such tax under this section as then in force, may continue to levy that tax until provision to the contrary is made by Parliament.

(i) A tax on the annual value of buildings or lands or both;

(ii) A water tax on the annual value of buildings or lands or both;

(iii) A drainage tax on the annual value of buildings leviable on such buildings as are situated within a distance, to be fixed by rules in this behalf for each municipality from the nearest sewer lines;

(iv) A conservancy tax for the collection, removal and disposal of excrementious and polluted matter from privies, urinals, cesspools;

(2) x x x

(3) The municipal taxes shall be assessed and levied in accordance with the provisions of this Act and the rules and bye-laws framed thereunder.

(4) Nothing in this section shall authorize the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution:

Provided that a Municipality which immediately before the commencement of the Constitution was lawfully levying any such tax under this section as then in force, may continue to levy that tax until provisions to the contrary is made by the Parliament.

x x x

129-A. Levy of tax on annual value of buildings or lands or both.- The Tax on annual value of buildings or lands or both shall be levied in respect of all buildings and lands situated in the municipal limit except,-

x x x

(e) building and land vested in the Union of India, except where provisions of clause (2) of Article 285 of the Constitution of India, apply;"

12.1 Section 140 of the said Act defines annual value.

13. The relevant provisions of the Act of 1959 are extracted as under as they are applicable to Lucknow Nagar Nigam (Municipal Corporation) – the appellant herein:

> **"172. Taxes to be imposed under this Act.** – (1) For the purposes of this Act and subject to the provisions thereof and of Article 285 of the Constitution of India the Corporation shall impose the following taxes, namely-
>
> (a) property taxes;
>
> x x x
>
> (3) The Corporation taxes shall be assessed and levied in accordance with the provisions of this Act and the rules and bye-laws framed thereunder.
>
> (4) Nothing in this section shall authorize the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution of India:
>
> Provided that where any tax was being lawfully levied in the area included in the City immediately before the commencement of the Constitution of India such tax may continue to be levied and applied for the purposes of this Act until provision to the contrary is made by Parliament.
>
> **173. Property taxes leviable.** – (1) For the purposes of sub-section (1) of Section172 property taxes shall comprise the following taxes which shall, subject to the exceptions, limitations and conditions hereinafter provided, be levied on buildings and lands in the City -
>
> (a) a general tax which may be levied, if the Corporation so determines, on a graduated scale;
>
> (b) a water tax;
>
> (c) drainage tax leviable in areas provided with sewer system by the Corporation;

(d) a conservancy tax in areas in which the Corporation undertakes, the collection; removal and disposal of excrementitious and polluted matter from privies, urinals and cesspools.

(2) Save as otherwise expressly provided in this Act or rules made thereunder, these taxes shall be levied on the annual value of buildings or land as the case may be:

Provided that the aggregate of the property taxes shall in no case be less than 15 per cent nor more than 25 per cent of the annual value of the building of land or both assessed to such taxes.

174. Definition of "Annual Value" – "Annual value" means –

(a) in the case of railway stations, colleges, schools, hostels, factories, commercial buildings, and other non-residential buildings, a proportion not below 5 per cent, to be fixed by rule made in this behalf of the sum obtained by adding the estimated present cost of erecting the building, less depreciation at a rate to be fixed by rules, to the estimated value of the land appurtenant thereto; and

(b) in the case of a building or land not falling within the provisions of clause (a), the gross annual rent for which such building exclusive of furniture or machinery therein, or such land is actually let, or where the building or land is not let or in the opinion of the assessing authority is let for a sum less than its fair letting value, might reasonably be expected to be let from year to year.

Provided that where the annual value of any building would, by reason of exceptional circumstances, in the opinion of the Corporation, be excessive if calculated in the aforesaid manner, the Corporation may fix the annual value at any less amount which appears to it equitable.

Provided further that where the Corporation so resolves, the annual value in the case of owner occupied buildings and land shall for the purposes of assessment of property taxes be deemed to be 25 per cent less than the annual value otherwise determined under this Section.

175. Restrictions on imposition of water tax.-The imposition of a tax under clause (b) of sub-section (1) of Section 173 shall be subject to the restriction that the tax shall not be imposed –

(i) on any land exclusively for agricultural purposes, unless the water is supplied by the Corporation for such purposes; or

(ii) on a plot of land or building the annual value whereof does not exceed rupees three hundred and sixty and to which no water is supplied by the Corporation; or

(iii) on any plot or building, no part of which is within the radius prescribed for the City, from the nearest stand-pipe or other waterworks whereat water is made available to the public by the Corporation.

Explanation. - For the purposes of this section –

(a) 'building' shall include the compound, if any, thereof, and, where there are several buildings in a common compound, all such buildings, and the common compound;

(b) 'a plot of land' means any piece of land held by a single occupier, or held in common by several co-occupiers, whereof no one portion is entirely separated from any other portion by the land of another occupier or of other occupiers or by public property.

x x x

177. General tax on what premises to be levied. – The general tax shall be levied in respect of all buildings and lands in the City except -

x x x

(f) buildings and lands vesting in the Union of India except where provisions of clause (2) of Article 285 of the Constitution of India apply;

x x x

179. Primary responsibility for certain property taxes on annual value. – (1) Except where otherwise prescribed,

every tax (other than a drainage tax or a conservancy tax) on the annual value of buildings or lands shall be leviable primarily from the actual occupier of the property upon which the tax is assessed, if he is the owner of the buildings or lands or holds them on a building or other lease from the Central or the State Government or from the Corporation, or on a building lease from any person.

(2) In any other case the tax shall be primarily leviable as follows, namely, -

(a) if the property is let from the lessor;

(b) if the property is sublet from the superior lessor;

(c) if the property is unlet from the person in whom the right to let the same vests.

(d) if the property is let in pursuance of an order under the Uttar Pradesh Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972, from the tenant.

(3) On failure to recover any sum due on account of such tax from the person primarily liable, the Mukhya Nagar Adhikari may recover from the occupier of any part of the buildings or lands in respect of which it is due that portion thereof which bears to the whole amount due the same ratio as the rent annually payable by such occupier bears to the aggregate amount of rent payable in respect of the whole of the said building or lands, or to the aggregate amount of the letting value thereof in the authenticated assessment list.

(4) An occupier who makes any payment for which he is not primarily liable under the foregoing provisions shall, in the absence of any contract to the contrary, be entitled to be reimbursed by the person primarily liable.

180. Liability for payment of other such taxes. – (1) A drainage tax, or a conservancy tax on the annual value of buildings or lands shall be levied from the actual occupier of the property upon which the taxes are assessed:

Provided that, where such property is let to more occupiers than one, the Mukhya Nagar Adhikari may at his option

levy the tax from the lessor instead of from the actual occupiers.

(2) A lessor from whom a tax is levied under the proviso to sub-section (1) may, in the absence of a contract to the contrary, recover the tax from any or all of the actual occupiers.

181. Property taxes to be a first charge on premises on which they are assessed. – (1) Property taxes due under this Act in respect of any building or land shall, subject to the prior payment of the land revenue, if any, due to the State Government thereupon, be a first charge, in the case of any building or land held immediately from the State, upon the interest in such building or land of the person liable for such taxes and upon the movable property, if any, found within or upon such building or land and belonging to such person; and, in the case of any other building or land, upon the said building or land and belonging to the person liable for such taxes.

Explanation. - The term «property taxes» in this section shall be deemed to include any charges payable for water supplied to any premises and the costs of recovery of property taxes as specified in the rules.

(2) In any decree in a suit for the enforcement of the charge created by subsection (1), the Court may order the payment to the Corporation of interest on the sum found to be due at such rate as the Court deems reasonable from the date of the institution of the suit until realization, and such interest and the cost of enforcing the said charge, including the costs of the suit and the cost of bringing the premises or movable property in question to sale under the decree, shall, subject as aforesaid, be a first charge on such premises and movable property along with the amount found to be due, and the Court may direct payment thereof to be made to the Corporation out of the sale proceeds."

Legal status of the Custodian under the Act:

14. At this stage, it would be useful to dilate on the jurisprudential aspect of ownership of property and examine the nuances thereof *vis-à-vis* the status of the Custodian of Enemy Property for India under the Act.

14.1 According to Salmond on Jurisprudence, the expression 'ownership' in a generic sense, extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam, in re propria or in re aliena.* Every man is the owner of the rights which he owns. Ownership in its generic sense as a relation in which a person stands to any right vested in him, is opposed to two other possible relations between a person and a right. In the first place, it is opposed to possession. A man has possessory right without owning it or secondly, he may own a right without possessing it. Thirdly, the ownership and possession may be united as they usually are, in the context of *de jure* and the *de facto* relation being co-existent or coincident.

14.2 In the first of the above, possession is a *de facto* relationship while the second is *de jure* ownership or relationship. In the second sense, the ownership of a right is opposed to the encumbrance of it. The owner of the right is he, in whom the right itself is vested, while the encumbrancer of it is he, in whom, is vested, not the right itself, but some adverse, dominant and limiting right in respect of it. In law, there are no separate names for every distinct kind of encumbrancer. However, an encumbrance is opposite to ownership; every encumbrancer is nevertheless himself the owner of the encumbrance, that is to say, he, in whom, an encumbrance stands in a definite relation, not merely to it, but also to the right encumbered by it.

How is ownership acquired? :

14.3 Ownership is an important right *vis-à-vis* any property and more so immovable property. What are the modes of acquisition of ownership? Under the provisions of the Transfer of Property Act, 1882, acquisition of ownership in relation to immovable property is by a transfer or conveyance. The expression "transfer" is defined with reference to the word convey which is an assurance *inter vivos* under the provisions of the said Act. Thus, the transferor must have an interest in the property before he can convey it. A person who has no interest in the property, cannot convey any interest in the property, in other words, he cannot sever himself from it and yet convey it. Further, there are various modes of transfer of

immovable property known to law. Section 54 of the Transfer of Property Act defines a sale to be a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. The definition of sale itself indicates that in order to constitute a sale, there must be transfer of ownership from one person to another, i.e., all rights and interests in the property which is possessed by a person are transferred by him with his free consent to another person for a price called consideration. The conveyance has to be regarded in accordance with law. Then only the transaction of sale is complete and title in the property passes from the seller to the buyer. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. On the other hand, any transfer by operation of law, or by or in execution of a decree or order of a court within the meaning of Section 2(d) of the Transfer of Property Act are outside the scope of Section 54, and need not be registered. Thus, where the property is sold at a court auction, a certificate of sale issued by the court is enough as the purchaser's document of title. But in order to constitute a sale, the parties must intend to transfer the ownership of the property for a price to be paid in present time or in future. Sub-section (2) of Section 55 states that the seller shall be deemed to contract with the buyer that interest which the seller professes to transfer to the buyer which subsists and he has power to transfer the same. Proviso thereto further states that, where the sale is made by a person in a fiduciary character, he shall be deemed to contract with the buyer that the seller has done no act whereby the property is encumbered or whereby he is hindered from transferring it.

14.4 Similarly, gift is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee. Such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void. The donor is the person who gives. Any person who is *sui juris* can make a gift of his property. Therefore, it is only a person who is the owner of the property, can gift

his property and according to the provisions of the Transfer of Property Act.

14.5 In the same vein, an exchange is when an exchange of immovable property takes place when two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only. A transfer of property in completion of an exchange can be made only in a manner provided for the transfer of such property by sale. In the case of an exchange also, the person must have the ownership in the property before the same can be exchanged for any immovable property.

14.6 Similarly, transfer of ownership of movable property is by sale, gift or exchange and in the case of a sale, the provisions of the Sale of Goods Act, 1930 would apply.

14.7 Transfer of ownership other than transfer *inter vivos* is by succession or inheritance under a testament or a will/codicil in which case, the provisions of the Indian Succession Act, 1925 would have to be adhered to.

14.8 In the context of acquisition of land under the power of eminent domain such as under the provisions of Land Acquisition Act, 1894 or the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, there is divesting of ownership of the owner of the property only when land "vests absolutely in the Government free from all encumbrances" such as under Section 16 of the Land Acquisition Act, 1894. This Court in ***Fruit and Vegetable Merchants Union, Subzi Mandi, Delhi vs. Delhi Improvement Trust, Regal Buildings, Cannaught Place*, AIR *1957 SC 344*** has held that the property acquired becomes the property of the Government without any conditions or limitations either as to title or possession when it vests free from all encumbrances in the Government. The word encumbrances means a burden or charge upon property or a claim or lien upon an estate or on the land. Encumber means burden of legal liability on property, and therefore, when there is encumbrance on a land, it constitutes a burden on the title which diminishes the value of the land. But where the land acquired by the State is free from all encumbrances, it vests

absolutely and free from all encumbrances. In such a case, it would be an incidence of transfer of ownership from the owner of the land to the Government as there would be divesting of land from its true owner.

14.9 Amongst the distinct kinds of ownerships, a trust ownership and beneficial ownership is relevant to the case. A trust is a very important and curious instance of duplicate ownership. According to Salmond, the trust property is that which is owned by two persons at the same time, the relation between the two owners being such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the 'trustee' and his ownership is the 'trust ownership'; the latter is called the 'beneficiary' and his is beneficial ownership.

14.10 The trustee's ownership of any property is a matter of form rather than a substance and nominal rather than real. A trustee is not effectively an owner at all but in essence a mere agent, upon whom the law has conferred the power and imposed the duty of administering the property of another person. The trustee is a person to whom the property, substantially that of someone else is technically attributed by the law on the footing that the rights and powers that it vests under him are to be used by him on behalf of the real owner. As between the trustee and beneficiary, the law recognises that the property belongs to the latter and not to the former. But as between the trustee and the third persons, the fiction prevails, inasmuch as the trustee is clothed with the rights of his beneficiary and personate or represent him in dealings with the world at large. This principle is actuated under various provisions of the Act including Section 8 thereof *vis-à-vis* an enemy who is the owner of a property and the Custodian in whom the property vests under the provisions of the Act. This position becomes clear on a reading of the Rules under the Defence of India Rules, 1962 and 1971 as discussed above.

14.11 Thus, the trusteeship is to protect the rights and interests of persons, who, for any reason are unable effectively to protect them for themselves. The law vests those rights and interests for safe custody in a trustee, who is capable of guarding them

and dealing with them and who is placed under an obligation to use it for the benefit of him to whom they in truth belong. One of the classes of persons on whose behalf the protection of the trusteeship is called is in respect of the property of those persons who are absent in the country, such as a person who has migrated to a country which is described as an enemy country by the Government of India as defined under the provisions of the Act under consideration.

14.12 Thus, under the Act, the Custodian acts as a trustee. A trust is more than an obligation to use the property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is already concurrently vested. Since the beneficiary is himself the owner of the enemy property, in the instant case, the Custodian who is the trustee appointed under the Act is therefore a statutory authority constituted for the administration of the enemy property, who is only a nominal owner of the property so administered by him *vis-à-vis* third parties. As already noted, the nominal ownership in the trustee is only for the purpose of using the rights and powers vesting with the trustee i.e., Custodian under the Act to be used by him or on behalf of the real owner of the property is absent, since he has left the country for an enemy country.

14.13 The trustee or Custodian under the Act may, in pursuance of the powers vested in him under the Act which actually creates a trust by operation of law, can lease or mortgage the property without the concurrence of the beneficiary under the provisions of the Act just as the beneficiary could have dealt in the same way with his ownership of the property independently of the trustee as there is no bar in law to do so other than the provisions of the Act. Thus, a relationship of trusteeship exists between the trustee and all persons beneficially interested in the property, either as owners or encumbrancers.

Possession:

14.14 There is another jurisprudential angle to the matter. Under the Act the Custodian takes possession of the enemy property, in as much as, the enemy property vests with the Custodian under the provisions of the Act. What does this entail?

14.15 While discussing on the jurisprudential aspects of vesting or taking possession in the instant case as per the provisions of the Act, it is necessary to reiterate and bear in mind the following aspects:

(i) That there are three possible situations: first, the possession usually exists both in law and in fact; secondly, the possession may exist in fact but not in law; thirdly, the possession may exist in law but not in fact. This is also called 'constructive possession'. In the case of the Custodian for Enemy Property, possession exists in law under the provisions of the Act but may be in fact in the hands of a third party such as a tenant or a mortgagee of the owner of such property who is declared an enemy under the Act.

(ii) Further, whatever may be owned may be possessed but whatever may be possessed may not be owned. This statement is however subject to important qualifications. For example, there can be possession of an interested person without ownership of any kind. Conversely, there are many rights, which can be owned in relation to a property but which are not capable of being possessed. There are those which may be termed 'transitory'. For example, a creditor does not possess the debt that is due to him as it is a transitory right, which in its very nature cannot survive in exercise, but a man may possess an easement over the land because it has exercise in continued existence or consistent with each other.

(iii) Moving further, while discussing the concept of possession, it is necessary to understand two elements: first is *animus possidendi*. The intent necessary to constitute possession is the intent to appropriate to oneself the exclusive use of the thing possessed. It is an exclusive claim to a material object for the purpose of using the thing oneself by excluding interference of other persons. The claim of the possessor must be exclusive, which however need not be absolute. But *animus possidendi* need not amount to a claim or intent to use

the thing as *owner.* The tenant or a pledgee may have possession no less real than that of the owner himself, just as a Custodian under the provisions of the Act in the instant case. Thus, the *animus possidendi* need not be a claim on one's own behalf. A trustee or Custodian under the Act may have possession of enemy property, though he claims an exclusive right of the thing on behalf of another than himself. This is *vis-à-vis* third parties. He definitely does not have a right of ownership over the enemy property possessed by him as the ownership of the said property continues in the enemy.

(iv) The second concept is that to constitute possession, the *animus domini* is not in itself sufficient but must be embodied in a *corpus.* There are two aspects with regard to *corpus* of possession: first is the relationship of the possessor to other persons and the second, is the relation of the possessor to the thing possessed. The necessary relation between the possessor and the thing possessed is such as to admit of his making such use of it as accords with the nature of the thing and of his claim to it. There must be a correlation between him and the thing possessed, which is not inconsistent with the nature of the claim he makes to it.

(v) Thus, possession is acquired whenever the two elements of *corpus* and *animus* come into co-existence and it is lost as soon as either of them disappears.

(vi) The modes of acquisition of possession are two in number, namely, taking and delivery. Taking is the acquisition of possession without the consent of the previous possessor such as in the case of the Custodian *vis-à-vis* enemy property. Delivery, on the other hand is the acquisition of possession with the consent and co-operation of the previous possessor.

Relation between Possession and Ownership:

14.16 According to Rudolf von Ihering, a jurist "Possession is the objective realisation of ownership". It is in *fact* what ownership is in *right.* Ownership is the guarantee of the law, while the

possession is the guarantee of the fact. Normally, ownership and possession co-exist but not always. This aspect of the case is crucial for answering the contentions raised by the respective parties.

Analysis:

Let us apply the aforesaid jurisprudential principles to the provisions of the Act under consideration.

15. Section 2 (c) of the Act defines enemy property to mean any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm: That even when an enemy subject dies in the territories to which the Act extends, or dies in any territory outside India, any property which immediately before his death, belonged to or was held by him or was managed on his behalf, may, notwithstanding his death, continue to be regarded as enemy property for the purposes of the Act. The Act when enacted extended to the whole of India except the State of Jammu and Kashmir and it applies also to all citizens of India outside India and to branches and agencies outside India of companies or bodies corporate registered or incorporated in India. On a combined reading of the above, it is clear that the Act applies to any property belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm, even if, the enemy or enemy subject or enemy firm is outside India and to branches and agencies outside India of companies or bodies corporate registered or incorporated in India. That as per Explanation (1), the definition of enemy property in clause (c) of Section 2, it is clarified that "enemy property" shall, notwithstanding that the enemy or the enemy subject or the enemy firm has ceased to be an enemy due to death, extinction, winding up of business or change of nationality or that the legal heir and successor is a citizen of India or the citizen of a country which is not an enemy, continue and always be deemed to be continued as an enemy property. Explanation (2) states that for the purposes of this clause, the expression enemy property shall mean and include and shall be deemed to have always meant and included all rights, titles and interest in, or any benefit arising out of, enemy property in the context of such property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm. The Explanation to sub-section (3) of Section 5 of the Act also

states that for the purposes of this sub-section, "enemy property vested in the Custodian" shall include and shall always be deemed to have been included all rights, titles, and interest in, or any benefit arising out of, such property vested in him under the Act.

15.1 Therefore, the moot question is, what is the nature and extent of rights, titles, and interest in or any benefit arising out of, such property which is vested in the Custodian? Does it mean vesting of the ownership of the rights, titles, and interest in, or any benefit arising out of such enemy property owned by the enemy which becomes vested in the Custodian in the sense that the Custodian becomes the owner of the property; thereby there is a divesting of the ownership or a transfer of ownership of such property from the ownership of the enemy to the Custodian.

15.2 We do not think that such an interpretation can be given for the simple reason that clause (c) of Section 2 clearly states that enemy property means any property for the time being belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm being vested in the Custodian. Therefore, the provision of the Act recognises the ownership of the enemy *vis-à-vis* the enemy property and the enemy property belonging to or held or managed on behalf of an enemy, an enemy subject or an enemy firm being vested in the Custodian. What exactly is vested in the Custodian? The Explanations i.e. Explanation (2) of clause (c) of Section 2 as well as Explanation (2) to sub-section (3) of Section 5 of the Act, being identical state that all rights, titles, and interest in, or any benefit arising out of such enemy property vest in the Custodian. This means that only the rights etc. *vis-à-vis* enemy property vest in the Custodian. By that, the Custodian does not acquire ownership rights in the property. It continues to vest with the enemy. This is because ownership of immovable property can be transferred from one person to another i.e. transfer *inter vivos* can only transferred in accordance with the provisions of the Transfer of Property Act.

15.3 On a conspectus reading of the aforesaid provisions, what emerges is that under Section 3 of the Act, the Custodian of Enemy Property for India is appointed by the Central

Government by issuance of a notification in the official gazette so also Deputy Custodians and Assistant Custodians of Enemy Property could be appointed for certain local areas as may be specified in the notification. Since the Act is in continuation of the Defence of India Rules, 1962 as well as Defence of India Rules, 1971, as the case may be, the Custodian of Enemy Property for India appointed under the aforesaid Rules shall be deemed to have been appointed under Section 3 of the Act. The expressions "enemy" or "enemy subject" or "enemy firm" are defined in clause (b) of Section 2; The use of the words "for the time being", "belonging to" and "held" or "managed on behalf of an enemy, an enemy subject or an enemy firm" in clause (b) of Section 2 of the Act are significant. The said provision clearly recognizes ownership of the enemy property by the enemy or property held by an enemy or managed on behalf of an enemy, an enemy subject or an enemy firm. The proviso states that where an individual subject dies in the territories to which the Act extends, any property which immediately before his death belonged to or was held by him or managed on his behalf, may, notwithstanding his death, continue to be recorded as enemy property for the purposes of this Act. This proviso clearly recognizes that the death of an enemy would not result in the enemy property ceasing to be so. Explanation (1) to Section 2(c) also states that enemy property shall continue to remain as enemy property even on the death of the enemy or extinction, winding up of business or change of nationality to continue to remain an enemy property. This is even if the legal heir and successor is a citizen of India or a citizen of a country which is not an enemy country. Explanation (2) thereof states that enemy property shall mean and include and shall be deemed to have always meant and included all rights, titles and interests in, or any benefit arising out of such property. This Explanation gives meaning to the scope of the expressions belonging to, held or managed on behalf of an enemy, an enemy subject or enemy firm.

15.4 If a certificate is issued by the Custodian that the enemy property has vested in him under the Act, the same shall be evidence of the facts stated therein *vide* Section 5-A of the Act. Section 5-B of the Act begins with a *non obstante* clause

which states that nothing contained in any law for the time being in force relating to succession or any custom or usage governing succession of property shall apply in relation to the enemy property under this Act and no person (including his legal heir and successor) shall have any right and shall be deemed not to have any right (including all rights, titles, and interests or any benefit arising out of such property) in relation to such enemy property. This provision regarding extinction of rights, titles or interests or any benefit arising out of the enemy property is deemed to have been lost is by operation of law and by a legal fiction only in so far as a heir or successor is concerned. If any property is vested in the Custodian as enemy property, then no enemy or enemy subject or enemy firm shall have any right to transfer any such property and any such transfer shall always be deemed to have been void. Therefore, by a deeming fiction and by operation of law the right, title and interest in any property vested in the Custodian under the Act shall be extinguished *vis-à-vis* any enemy or enemy subject or enemy firm once such property is vested in the Custodian only with regard to succession to such enemy property or transfer of such property by an enemy, enemy subject or enemy firm. This would imply that the enemy, enemy subject as well as enemy firm would continue to remain the owner of such property and would continue to vest with the Custodian on the death of the enemy.

15.5 The pertinent question which arises is, whether, vesting of any enemy property in the Custodian under the provisions of the Act which belonged or was held or managed on behalf of an enemy, an enemy subject or an enemy firm would result in "transfer of title" in the said enemy property to the Custodian and therefore to the Central Government or to the Union. In order to discern an answer to this question, it is necessary to read further the provisions of the Act from Section 7 onwards.

15.6 Section 7 states that any sum otherwise payable to an enemy, enemy subject or an enemy firm in the form of dividend, interests share profits or otherwise to or for the benefit of an enemy or an enemy subject or an enemy firm, unless otherwise ordered by the Central Government, be paid by the person by

whom such sum would have been payable to the Custodian or such other person as may be authorised by him in this behalf and shall be held by the Custodian or such person subject to the provisions of the Act. This provision indicates that the Custodian only holds in trust the sums payable by any person to an enemy subject or an enemy firm. This is because the Custodian of Enemy Property acts as a trustee of the enemy property vested in him as well as a trustee of all monetary dues payable to an enemy, enemy subject or enemy firm. The Custodian shall, subject to the provisions of Section 8, deal with any money paid to him under the Act or under the Defence of India Rules, 1962 or 1971 as the case may be. Further, any property vested in the Custodian under the Act shall be dealt with by him as the Central Government may direct.

15.7 What are the powers of the Custodian in respect of property vested in him? This is dealt with in Section 8 of the Act. The Custodian may take or authorise the taking of such measures as he considers necessary or expedient for preserving such property till it is disposed of in accordance with the provisions of the Act. Sub-section (2) of Section 8 speaks of eleven exigencies which a Custodian or such person as may be specifically authorised by him may take. The same are extracted above. A reading of the above clearly indicates that the Custodian or his authorised person can carry on the business of the enemy; fix and collect the rent etc. in respect of enemy property; take action for recovering any money due to the enemy; make any contract and execute any document in the name and on behalf of the enemy; institute or defend any legal proceeding; secure vacant possession of the enemy property; raise on the security of the property such loans as may be necessary; incur out of the property any expenditure including payment of any taxes, duties, cesses and rates to Government, or to any local authority, pay wages, salaries, pensions, etc. to or in respect of any employee of the enemy and repayment of any debts due by the enemy to persons other than enemies; transfer or otherwise dispose of any of the enemy properties; invest any moneys held by him on behalf of the enemies for the purpose of Government securities

etc.; make payments to the enemy at his dependants; make payments on behalf of the enemy to persons other that those enemies, of dues outstanding; make such other payments out of the funds of the enemy as may be directed by the Central Government.

15.8 What emerges from the above is that the activities that the Custodian or his authorised person carries out *vis-à-vis* the enemy such as the business of the enemy or in respect of managing the enemy property would also clearly indicate that the Custodian of the Enemy Property holds the said property in trust or as a trustee and not as an owner of the enemy property or by exercising rights of ownership over the enemy property. Carrying on the business of the enemy and dealing with the property of the enemy vested in the Custodian is in order to protect the business belonging to an enemy or enemy subject or enemy firm, who has left the country. The Custodian of Enemy Property for India who acts on behalf of the Enemy holds in trust the enemy property vested in him under the provisions of the Act. He does so as a trustee and therefore, the principles and legal doctrines applicable to a trustee are applicable to the Custodian accordingly.

15.9 It is trite that a trustee or Custodian in the instant case can never be the owner of the property. The vesting of property in a trustee or the Custodian which, in the instant case, is enemy property as defined under the Act is for the purpose of managing the said property and protecting it, so that the property does not fall into the hands of trespassers, unauthorised persons or render it as being ownerless and therefore, a free for all, so to say owing to the absence of the owner. The object and purpose of the Act is to ensure that the enemy property, which vests in the Custodian, is held in trust and is looked after, protected and managed as per the provisions of the Act. The statement of objects and reasons of the Act makes this position clear.

Jurisprudential aspect of vesting:

16. A discussion on the aforesaid provisions under the Act would indicate that the Custodian takes charge of the enemy property which vests in him by operation of law. Then the following questions would arise:

(i) Does vesting of enemy property in the Custodian imply that the Custodian assumes ownership rights *vis-à-vis* enemy property vested in him?

(ii) Secondly, whether the vesting of enemy property in the Custodian would imply that it becomes the property of the Union?

These are the two crucial questions which are required to be answered in this case in order to decide the matter in all its perspectives.

16.1 The expression 'vest' or 'vesting' has no precise definition and it would depend upon the context in which the expression is used under a particular enactment. This Court has held that the expression 'vest' is of fluid or flexible content and can, if the context so dictates, bear the limited sense of "being in possession and enjoyment". (*See:* ***Maharaj Singh vs. State of Uttar Pradesh, (1977) 1 SCC 155)*** (Para 18)]. In ***Dr. M. Ismail Faruqui vs. Union of India, (1994) 6 SCC 360 : AIR 1995 SC 605,*** it was observed that the word 'vest' has to be understood in the different contexts in which the word occurs. In the context of acquisition of certain area under the Ayodhya Act, 1993, it was observed that the vesting of the disputed area in Central Government is limited, as a statutory receiver, with the duty of its management and administration. According to Section 7 of the said Act, till it is handed over in terms of the adjudication made in the suit, the word 'vest' takes varying colours from the context and the situation in which the word is used in the statute.

Under the Land Acquisition Act, 1894, vesting in the State, is from the date of taking possession under Sections 16 or 17(2) which is free from all encumbrances. But under the Land Reforms Act like abolition of estates and taking over thereof, the vesting takes effect from the date of publication of the notification in the official gazette until the occupant of the land is granted the occupancy rights. This is however not the position when enemy property vests in the Custodian under the provisions of the Act. The vesting of enemy property in the Custodian is not free from encumbrances. Therefore, the expression 'vest' has no fixed connotation. It is a word of variable input and therefore has to be understood in different contexts and under different circumstances. Therefore, the

context and situation in which the word is used in the statute is significant in order to interpret the said expression. Under certain statutes, the word 'vesting' would mean placing into possession and not conferring ownership of the person who comes into possession of property. Therefore, the word 'vesting' is a word of variable input and has more than one meaning which must be discerned and the exact connotation must be found by looking into the scheme of law and the context in which it is used. The setting in which it is used would lend colour to it and divulge the legislative intent.

In ***State of Gujarat vs. The Board of Trustees of Port of Kandla, (1979) 1 GLR 732, ("Trustees of Port of Kandla")***, it was observed that the vesting of property in the Board of trustees is for the limited purpose of administration, control and management only without the Central Government having divested itself of ownership. Thus, vesting of property in a person or authority does not always mean transfer of absolute title in the property.

In ***Bibhutibhushan Datta vs. Anadinath Datta, AIR 1934 Cal 87***, ***("Bibhutibhusan Datta"),*** it was observed that mere transference of management or control of a property, when transfer of proprietary rights is not intended, the requirements of vesting is not satisfied in terms of Section 10 of the Limitation Act.

Under the Act under consideration, the vesting of the enemy property in the Custodian is not free from encumbrances but vesting is in accordance with the status of the property as held by the enemy, enemy subject or enemy firm prior to its vesting. Therefore, only when enemy property vests in the Custodian free from all encumbrances it will be a transfer of ownership from the owner of such property to the Custodian. This is because under the Act, Custodian holds or manages the property for and on behalf of the enemy, enemy subject or enemy firm only temporarily and there is no transfer of ownership to the Custodian or the Union of India. Hence, there is no necessity of payment of compensation to the owners of such properties.

Under Section 5A of the Act under consideration, when property vests in the Custodian under the provision of the Act, he may

issue a certificate to that effect and such certificate shall be evidence of the facts stated therein. Further, under Section 7 (1) of the Act, any sum payable by way of dividend, interest, share profits or otherwise to or for the benefit of an enemy or an enemy subject or an enemy firm shall, unless otherwise ordered by the Central Government, be paid by the person by whom such sum would have been payable to the Custodian or such person as may be authorised by him in that behalf and shall be held by the Custodian or such person subject to the provisions of the Act. Under Section 7 (3) of the Act, the Custodian shall, subject to Section 8 of the Act, can deal with any money paid to him or any property vested in him under the Act in such manner as the Central Government may direct.

Section 8-A of the Act begins with a *non-obstante* clause and it states that notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority or any law for the time being in force, the Custodian may, within such time as may be specified by the Central Government in this behalf, dispose of whether by sale or otherwise, as the case may be, with prior approval of the Central Government, by general or special order, enemy properties vested in him immediately before the date of commencement of the Amendment Act, 2017 in accordance with the provisions of this Act, as amended by the Amendment Act, 2017. The sale proceeds have to be deposited into the Consolidated Fund of India and the details thereof have to be intimated to the Central Government. The directions issued by the Central Government, by way of general or special order, *vis-à-vis* disposal of enemy property is binding upon the Custodian and the buyer of the enemy properties and the other persons connected to such sale or disposal. Further, instead of the Custodian disposing of enemy property, any Ministry or Department of the Central Government may do so as authorised and the provision of Section 8A applies to such authority or Ministry or Department. The Central Government can also deal with or utilise enemy property in such manner as it may deem fit.

The scheme of Section 8A of the Act is only to regulate the disposal of the enemy property by the Custodian bearing in mind the guidelines and/or directions issued by the Central

Government and to deposit the sale proceeds into the Consolidated Fund of India. The Custodian would nevertheless be acting as a trustee of the enemy property but under the directions of the Central Government as the Custodian is appointed under the Central Government and he, with the prior approval of the Central Government may dispose of the enemy property for valid reasons. It could be for the reasons that there is no succession to the enemy property or the said property is in a dilapidated condition or, if for any reason, there is litigation or legal or other complications arising which would make it difficult for the Custodian as the trustee of such property to manage the same. In such circumstance, there could be alienation of the said property. On such alienation, the sale proceeds would have to be deposited in the Consolidated Fund of India, as the Custodian, being an officer appointed under the provisions of the Act by the Central Government, would be discharging his duties under the Act. But the power of sale of an enemy property as envisaged under Section 8A of the Act, in our view, would also not imply that the Custodian would be acting as the owner of the property but only as a Custodian of such property. This view is further supported by Section 9 of the Act, which states that all enemy property vested in the Custodian under the Act shall be exempt from attachment, seizure or sale in execution of a decree of a civil court or orders of any other authority. Therefore, it is the duty of the Custodian as the trustee of the enemy property to ensure that the said property is saved from attachment, seizure or sale in execution of a decree of a civil court or orders of any other authority.

Section 10 of the Act also categorically states that where the Custodian proposes to sell any security issued by a company and belonging to an enemy, the company may, with the consent of the Custodian, purchase the securities, notwithstanding anything to the contrary in any law or in any regulations of the company and any securities so purchased may be re-issued by the company as and when it thinks fit so to do. Where the Custodian executes and transfers any securities, he has to register them (securities) in the name of the transferee, notwithstanding that the regulations of the

company do not permit such registration in the absence of the certificate, script or other evidence of title relating to the securities transferred. The expression securities includes shares, stocks, bonds, debentures and debenture stock but does not include bills of exchange.

On sale of any immovable property vested in him to any person and on receipt of the sale proceeds of such property, the Custodian has to issue a certificate of sale in favour of the transferee and even in the absence of handing over the original title deeds of the property, the sale shall be valid and conclusive proof of transfer of ownership of such property to such person, who has the certificate registered in his name. Such transfer is obviously from the owner of the enemy property who is represented by the Custodian who only executes the sale and transfers the ownership of such property from the ownership of the enemy, enemy subject or enemy firm to the buyer of such property. The Custodian does not sell the enemy property as the owner of such property as no ownership rights are vested in him.

Section 15 of the Act states that the Custodian may call from persons who, in his opinion, have any interest in, or control over, any enemy property vested in him under this Act, such returns as may be prescribed. In such an event, every person from whom a return is called for shall be bound to submit such return within the prescribed period. All such returns shall be recorded in such registers as may be prescribed, which shall be open to inspection subject to reasonable restrictions as may be imposed by the Custodian, if in the opinion of the Custodian, the person seeking inspection is interested in any particular enemy property as a creditor or otherwise.

Such being the position of a Custodian, who under the Act, acts as the trustee for the enemy property under the Act and not as the owner of the property, but as a protector of the property vested in him, the Custodian can never be an owner or having any right, title or interest in the enemy property as owner. While Section 5-B states that any law related to succession or any custom or usage governing succession of property shall not apply in relation to enemy property under

the Act as no person including a legal heir and successor of an enemy or enemy subject or enemy firm shall be deemed to have any right, title or interest or any benefit arising out of such property in relation to enemy property, this provision does not at the same time confer any right, title and interest or any benefit arising out of enemy property in the Custodian for Enemy Property. A Custodian is thus only a trustee of the enemy property. In the absence of any transfer of ownership or any benefit arising from enemy property being conferred on the Custodian, he acts merely as a trustee of the said property and not as the owner of enemy property. The Explanation to Section 5(3) states that for the purpose of that sub-section only 'enemy property vested in the Custodian' shall always be deemed to have included all rights, titles and interests in or any benefit arising out of such property vested in him under the Act. This is by a deeming provision and by a fiction only for the limited purpose of extinction of rights of succession on the death of the enemy or extinction or winding up of the business of enemy property or change of nationality of the legal heir or successor.

Thus, if no ownership rights are conferred on the Custodian and he is appointed *vis-à-vis* any enemy property as a Custodian, in law, he cannot be construed to be the owner of such property. This position is also discerned from the manner in which the Custodian acts vis-à-vis the enemy property as a protector of such property and not as its owner. If the Custodian himself cannot be construed to be the owner of the enemy property, then much less the Central Government or Union can be considered to be the owner of such property. In our view, the Union or the Central Government cannot usurp rights of ownership and exercise all such rights of ownership *vis-à-vis* enemy property. In the absence of any provision conferring such ownership on the Custodian, the Central Government, which appoints the Custodian of Enemy Property in India by issuance of a notification in the Official Gazette to carry on his functions under the provisions of the Act, cannot assume ownership rights over such property. The same is having regard to the fact that the Act is a piece of parliamentary legislation and therefore, the State Legislatures or Governments have

no competence to take steps under the Act and therefore, the Central Government appoints the Custodian of Enemy Property in India.

17. However, it was contended by Sri Balbir Singh, learned ASG appearing along with Sri Rupesh Kumar, learned counsel for the Custodian that by the appointment of the Custodian by the Central Government, the powers of the Custodian in respect of enemy property vested in him and such other actions that he may take *vis-à-vis* enemy property, would clearly indicate that the Custodian acts at the behest of the Central Government and therefore, the enemy property becomes Union property even though the same is vested in the Custodian who, in any case, is appointed by the Central Government. In order to buttress this submission, our attention was drawn to Section 8-A which begins with a *non-obstante* clause and which states that the Custodian may, with the approval of the Central Government, dispose of enemy property by sale or otherwise, as the case may be, the enemy property vested in him immediately before the date of commencement of the Amendment Act, 2017, in accordance with the provisions of the Act as amended by the Amendment Act, 2017. Further, the Custodian, on disposal of enemy property, has to deposit the sale proceeds into the Consolidated Fund of India immediately and intimate details thereof to the Central Government. Also, the Custodian has to submit a report of the enemy properties disposed of enclosing details of sale etc. The Central Government may also issue directions and guidelines to the Custodian in matters related to disposal of enemy property which are binding on the Custodian and the buyer. Moreover, the Central Government may deal with or utilise the enemy property in a manner as it may deem fit. On sale of any enemy property vested in the Custodian to any person he may, on receipt of the sale proceeds of such property, issue a certificate of sale notwithstanding the fact that the original title deeds of the property have not been handed over to that transferee. That once such certificate of sale is issued, the same shall be valid as conclusive proof of ownership of property by such person. Further, the certificate issued by the Custodian shall be a valid instrument for registration of the property in favour of the transferee as the registration in respect of enemy property for which such certificate has been issued by the Custodian, shall not be refused on the ground of lack of original title deeds in respect of such property or for any other matter.

17.1 In our view, although the Custodian for the Enemy Property is empowered to alienate enemy property under the provisions of the Act, he does so as a trustee of the said property and not as the owner thereof or as the Central Government being the owner. As already stated, the ownership continues to remain with the enemy but the management and the custody of the property only remain with the Custodian and in the absence of the enemy, the Custodian is empowered to sell or alienate such property and can issue a sale certificate as is expedient to do so. This is in the interest of or benefit of the enemy property. Thus, the transfer of such enemy property by sale or otherwise is for and on behalf of the enemy who is not available in the country and in order to ensure that such property is not dissipated owing to the owner of the property being absent in the country. Thus in order to protect the enemy property, the Custodian is empowered to even sell the enemy property and deposit the sale proceeds with the Central Government. The sale or transfer of ownership of the enemy property in favour of the transferee is, in fact, on behalf of the enemy who is the owner of the property through the legal and statutory authority of the Custodian which empowers him to alienate the property for good and sound reasons and in the interest of the enemy property irrespective of whether there is any claim made by the enemy or his heirs or descendants. It is for this reason that the original title deeds may remain with the enemy or his family *vis-à-vis* the enemy property and in lieu of handing over of the title deeds of the property to the vendee or purchaser of the enemy property, a certificate of sale is issued in favour of such person by the Custodian and such certificate of sale is a valid instrument for seeking registration of the property in favour of the transferee. When the registration of the sale is made in favour of the transferee by the Custodian, the latter is acting as a trustee and not as the owner of the enemy property. Therefore, it cannot be accepted that the Custodian is acting as the owner of the property and by that logic the enemy property would become the property of the Union.

17.2 Further, since the Custodian is the trustee of the enemy property, if any monies are due to the enemy or if any order has been made with regard to enemy property vested in the

Custodian which are paid or complied with by any person, as the case may be, and a certificate is issued in that regard by the Custodian, such a person, to whom the certificate is issued, shall not be liable to any suit or other legal proceeding, by reason only of such compliance. This aspect also indicates that payment made to the Custodian is payment to the enemy, enemy subject or enemy firm who accepts the same for and on behalf of the enemy and the payer is thus absolved of all his liabilities and obligations to the enemy.

17.3 In ***Amir Mohammad Khan,*** it was observed by this Court that vesting of enemy property in the Custodian is limited to temporary possession, management and control of the property till it becomes incapable of being used by the enemy subject for carrying on business and trading therein. This does not divest the enemy subject of his right, title and interest in the property. The aforesaid two aspects are totally distinct. However, in the said case this Court observed that on the death of the enemy subject the said property would cease to be enemy property if the same is succeeded to by his heir who is a citizen of India. Hence the Custodian could not be permitted to continue with the possession thereof and would be duty bound to release the property to the true owner. In our view, it is only in respect of succession to the enemy property on death of the enemy which has been abrogated by the Parliament by insertion of Explanations (1) and (2) to clause (b) of Section 2 which defines enemy or enemy subject or enemy firm which are with effect from 21.03.2018. Therefore, the jurisprudential position of the Custodian for Enemy Property *vis-à-vis* the enemy continues to remain as that of a trustee although the enemy property may vest in such Custodian for the protection, preservation and management thereof. Thus, such vesting of property in the Custodian does not result in the transfer of ownership from the owner of the property who is an enemy or enemy subject or enemy firm within the meaning of clause (b) of Section 2 of the Act to the Custodian. When the Custodian appointed by the Central Government in whom enemy property vests is only a trustee and does not adorn the status of an owner of such enemy property, consequently, the Central Government or the Union

even within the meaning of Article 285 of the Constitution cannot usurp the ownership of such property.

17.4 That when enemy property is not the property of the Union within the meaning of Article 285 of the Constitution, there is no exemption from taxes imposed on by a State or by any authority within a State. When the aforesaid position of law was discussed during the course of submission and specifically put to Sri Balbir Singh, learned ASG by the Bench, the response was that the enemy property being the property of the Union is exempt from all taxes imposed by a State or by any authority within a State, save insofar as Parliament may by law otherwise provide. That in the instant case, Section 8(2)(vi) authorises the Custodian to make payments out of the enemy property any taxes, dues, cesses or rates to the State Government or to any local authority and therefore, the Parliament has by the said provision authorised the payment of taxes to the State Government or the local authority such as the appellant herein and hence, there is no exemption from payment of taxes in respect of enemy property which is by that reason Union property. In other words, the contention was premised on the fact that once the enemy property vests in the Custodian, it automatically becomes the property of the Union and having regard to the saving clause in Articles 285(1) of the Constitution, and bearing in mind Section 8(2)(vi) of the Act, there is no exemption from the payment of property tax in the instant case.

17.5 Thus, while both the appellant-Municipal Corporation or Nagar Nigam and the Union of India are at *ad idem* on the legal position that the property tax is liable to be paid to the appellant in the instant case but it is for different reasons or basis.

17.6 In this context, Mr. Kavin Gulati, learned senior counsel for the appellant emphasised that the subject property in question is not Union property but it is enemy property vested with the Custodian under the Act and continues to be so and is therefore, subject to payment of taxes, etc. to the appellant-Corporation and Section 8(2)(vi) is only an enabling provision. The Custodian collects the taxes on behalf of the enemy and pays it to the appellant and not as owner of the enemy property.

17.7 *Per contra*, Shri Guru Krishna Kumar, learned senior counsel appearing for the respondent-lessee contended that the subject property being enemy property vested with the Custodian under the Act is the property of the Union or Central Government and therefore, is exempt from any taxation under clause (1) of Article 285 of the Constitution.

17.8 Interestingly, while both learned ASG Sri Balbir Singh, appearing for the Union of India and Sri Gurukrishna Kumar, learned senior counsel appearing for the respondent-lessee have contended that the subject property is Union property, between them there is also a difference in their stand in the matter. While learned ASG contended that there is no exemption from payment of municipal taxes, on the other hand, learned senior counsel Sri Gurukrishna Kumar appearing for the respondent-lessee contended that the subject property being Union property is totally exempt from any kind of taxes to be paid to any Government or local authority.

17.9 But in view of our above analysis, we hold that the vesting of enemy property in the Custodian does not transfer ownership of such property in the Custodian and by that process in the Union or Central Government, but since the Custodian is only a trustee of the enemy property, the same is liable to tax in accordance with law, including to the appellant herein. The Custodian is only authorised to pay the taxes on the subject enemy property by virtue of sub-section (2) of Section 8 of the Act. The Custodian while doing so is not acting on behalf of the Union Government being the owner of the enemy property, rather, the Custodian who is appointed by the Central Government under the provisions of the Act, which is a Central legislation only discharges his duties and functions under the provisions of the Parliamentary legislation i.e. the Act under consideration. Such discharge of duties and functions, including the payment of taxes *vis-à-vis* enemy property vested in him would not also by the same logic imply that the Custodian is acting as if the property vested in him has become the Union property. We emphasise again that mere vesting of enemy property in the Custodian does not transfer ownership of the same from the enemy to the Union or to the Central Government; the ownership remains with

the enemy but the Custodian only protects and manages the enemy property and in discharging his duties as the Custodian or the protector of enemy property he acts in accordance with the provision of the Act and on the instructions or guidance of the Central Government. The reason as to why the Central Government is empowered to issue guidelines or instructions to the Custodian is because the Custodian is appointed under the Act which is a Parliamentary legislation and the reason why the Parliament has passed the said law is in order to have a uniformity *vis-à-vis* all enemy properties throughout the length and breadth of the country in that the same are protected, managed and dealt with uniformly in accordance with the provisions of the Act.

18. We say so because Article 300-A of the Constitution states that no person shall be deprived of his property save by authority of law. The word "law" is with reference to an Act of Parliament or of a State Legislature, a rule or a statutory order having the force of law. Although, to hold property is not a fundamental right, yet it is a constitutional right. The expression person in Article 300-A covers not only a legal or juristic person but also a person who is not a citizen of India. The expression property is also of a wide scope and includes not only tangible or intangible property but also all rights, title and interest in a property. Deprivation of property may take place in various ways, but where there is only control of property short of deprivation would not entail payment of compensation *vide* ***Indian Handicrafts Emporium vs. Union of India, (2003) 7 SCC 589,*** (Paras 109 and 111) and ***Chandigarh Housing Board vs. Major-General Devinder Singh (Retd.), (2007) 9 SCC 67, (Para 11)***. However, deprivation of property is to be distinguished from restriction of the rights following from ownership, which falls short of dispossession of the owner from those rights. Deprivation also takes within its nomenclature acquisition in accordance with law and not without any sanction of law. Before a person can be deprived of his right to property, the law must expressly and explicitly state so. Thus, the expression by authority of law means by or under a law made by the competent Legislature.

18.1 In ***KT Plantation Pvt. Ltd. vs. State of Karnataka, (2011) 9 SCC 1***, it was observed that though the right to claim compensation or the obligation of the State to pay

compensation to a person who is deprived of his property is not expressly included in Article 300-A of the Constitution, it is in-built in the Article. Within the scope of Article 300-A the doctrine of eminent domain could also be read inasmuch as the said doctrine states that the acquisition of property must be in the public interest and there must be payment of just and fair compensation therefor. When acquisition of property takes place either under the Land Acquisition Act, 1984 or the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, it is always for a public purpose and on payment of compensation to the owner of the said property. The State then possesses the power to take control of the property of the owner thereof for the benefit of the public and when the State so acts it is obliged to compensate the owner upon making just compensation as the owner of the property would lose all his rights *vis-à-vis* the acquired land.

18.2 However, this position has to be distinguished *vis-à-vis* the Custodian for Enemy Property under the Act, as he takes possession of the enemy property only for the purpose of managing the same as per the provisions of the Act and does not become the owner of the property inasmuch as the ownership of the property from the enemy or enemy subject or enemy firm does not get transferred to the Custodian. On the other hand, if it is to be recognised that ownership of the property gets transferred from the enemy to the Custodian who takes possession of the property and administers it or manages it and thereby the ownership would then be that of the Union, in that event, it would be a deprivation of the property of the true owner who may be an enemy or an enemy subject or enemy firm but such deprivation of property cannot be without payment of compensation. Having regard to the salutary principles of Article 300-A of the Act, we cannot construe the taking possession of the enemy property for the purpose of administration of the same by the Custodian, as an instance of transfer of ownership from the true owner to the Custodian and thereby to the Union. This position is totally unlike the position under the provisions of the Land Acquisition Act, 1894 or the subsequent legislation of 2013

which are expropriatory legislations under which acquisition of land would inevitably result in transfer of the ownership of the land from the owner to the State which is the acquiring authority, but the same would be subject to payment of a reasonable and fair compensation to the owner.

18.3 Further even under Article 296 of the Constitution, the manner in which ownership of certain types of property gets vested directly with the Union is stated when such property vests with the Union by virtue of the application of the doctrine of escheat or doctrine of *bona vacantia*. But under the provisions of the Act, the Custodian is appointed only to protect the property and to manage it as a trustee and not as an owner by vesting in the Custodian free from all encumbrances. By that, the Union cannot assume rights of ownership over such property through the Custodian.

19. Therefore, we see no substance in the arguments of learned ASG appearing for the Union of India as well as that of Sri Guru Krishna Kumar appearing for the respondent-lessee to the effect that enemy property vested with the Custodian becomes property of the Union.

20. There is another angle to the case which revolves around Article 285 of the Constitution. Clause (1) of Article 285 of the Constitution corresponds to the first paragraph of Section 154 and clause (2) corresponds to the proviso to Section 154 of the Government of India Act, 1935. For a more comprehensive understanding of the subject, it would also be useful to read Articles 286, 287, 288, 289 and Article 296 also.

Article 289:

21. Clause (1) of Article 289 exempts from Union taxation any income of a State, whether it is derived from governmental or non-governmental activities. However, an exception is provided in clause (2) thereof in that the income derived by a State from trade or business would be taxable, provided a law is made by Parliament in that behalf. Clause (3) is an exception to the exception prescribed in clause (2) which states that the income derived from a particular trade or business may still be immune from Union taxation if Parliament declares that the said trade or business is incidental to the ordinary functions of Government. This Article broadly corresponds to Section 155 of the Government of India Act, 1935 but has certain other conditions thereto.

Articles 285 and 289 provide for the immunity of the property of the Union and the State from mutual taxation on the basis of the Federal principle.

NDMC is a decision of nine-Judge Bench which dealt with a question whether the properties owned and occupied by various States within the National Capital Territory of Delhi are entitled to be exempted from the levy of taxes under the provision of Delhi Municipal Corporation Act, 1957 and New Delhi Municipal Council Act, 1994 by virtue of the provisions of Article 289(1) of the Constitution. The pertinent question was, whether, by virtue of Article 289(1), the States are entitled to exemption from the levy of taxes imposed by laws made by Parliament under Article 246(4) upon their properties situated within Union Territories. The Delhi High Court had taken the view that the properties of the States situated in the Union Territory of Delhi are exempt from property taxes levied under the municipal enactments in force in the Union Territory of Delhi. The said view was challenged in the appeals preferred by the New Delhi Municipal Council and the Delhi Municipal Corporation which are functioning under the respective parliamentary enactments.

While considering Article 285 as well as the Article 289 of the Constitution which deal with exemption of property of the Union from State taxation and exemption of property and income of State from Union taxation, respectively, by a 5:4 majority judgment speaking through B.P. Jeevan Reddy, J., it was observed that in a federation there are two coalescing units, namely, the Federal Government or the Centre and the States or the Provinces. Articles 285 and 289 deal with the concept of doctrine of immunity from taxation. While the immunity created in favour of the Union is absolute, the immunity created in favour of the States is a qualified one. Article 285 provides a complete and absolute ban on all taxes that could be imposed by a State on Union property. There is no way in which a State Legislature can levy a tax upon the property of the Union but Article 289 is distinct. Although, the property and income of a State is exempt from Union taxation, the same is qualified inasmuch as the aforesaid ban imposed by clause (1) of Article 289 would not prevent the Union from imposition or from imposing or authorising the imposition of, any tax to such extent, if any, as Parliament may by law provide in respect of - (a) a trade or business of any kind carried on by, or on behalf of, the Government of a State, or (b) any

operations connected such trade or business or (c) or any property used or occupied for the purposes of such trade or business, or (d) any income accruing or arising in connection with such trade or business.

Article 289 clause (3) empowers Parliament to declare, by law, which trade or business or any class of trades or businesses is incidental to the ordinary functions of the Government, whereupon the trades/businesses so specified go out of the purview of clause (2) of Article 289. It was held that levy of taxes on property by the Punjab Municipal Act, 1911 (as extended to Part 'C' State (Law) Act, 1950), the Delhi Municipal Corporation Act, 1957 and the New Delhi Municipal Council Act, 1994 (both parliamentary enactments) constitute "Union taxation" within the meaning of Article 289(1). That by virtue of the exemption provided by clause (1), taxes are not leviable on State properties but clauses (1) and (2) of Article 289 go together, form part of one scheme and have to be read together. Therefore, Municipal Laws of Delhi are inapplicable to the properties of State Government to the extent such properties are governed and saved by clause (1) of Article 289 and that insofar as the properties used or occupied for the purpose of a trade or business carried on by the State Government, the ban in clause (1) does not avail to them and the taxes thereon must be held to be valid and effective. It was observed that the levy of the property taxes under the three enactments, namely, the Delhi Municipal Corporation Act, 1957; the New Delhi Municipal Council Act, 1994 and the Punjab Municipal Act, 1911 are valid to the extent the provisions related to land and building owned by State Government and used or occupied for the purposes of any trade or business carried on by the State Government. In other words, the levy is invalid and inapplicable only to the extent of those lands or buildings which are not used or occupied for the purposes of any trade or business carried on by the State Government. That it is for the authority under the said enactment to determine with notice to the affected State Government, which land or building is used or occupied for the purpose of any trade or business carried out or on behalf of that State Government. It was further observed that the said judgment was to operate prospectively commencing on 01.04.1996 onwards by invoking the Article 142 of the Constitution.

Another aspect which was argued in the said case was that the exemption provided by clause (1) of Article 289 would not apply to

compensatory taxes like water tax, drainage tax and so on. However, it was contended that even in respect of a composite taxes, known as property tax, insofar as the taxes on the services are concerned, the ban under clause (1) of Article 289 would not apply. However, the Court did not express any opinion on this aspect of the matter.

Article 285:

21.1 Article 285 speaks about the doctrine of immunity restricting the taxing powers of the governments in a federation. The doctrine is based on the principle that there ought to be inter-governmental tax immunities between the Centre and the States. In a Constitution such as ours which has a federal character, where both the Union and State Governments have the powers to levy taxes even on governmental property, the immunity is intended for the smooth working of the Governments and for saving time and efforts in cross taxation. Clause (1) of Article 285 deals with immunity of the property of the Union from State taxation. Article 285 embodies a narrower aspect of the doctrine of "Immunity of Instrumentalities" as propounded in the United States inasmuch as it exempts only property and not the functions or instrumentalities of the Union.

21.2 Article 285(1) states that the property of the Union shall be exempted from all taxes imposed by the State or by any authority within a State unless so provided for by the Parliament by law. Clause (2) of Article 285 states that nothing in clause (1) shall prevent any authority within a State from levying any tax on any property of the Union to which such property was immediately before the commencement of the Constitution liable or treated as liable, so long as that tax continues to be levied in that State. Clause (2) of Article 285 is a clause which is transitional in nature and is in the nature of a saving clause intended to save all taxes levied on the property of the Union prior to the commencement of the Constitution so long as the taxes continues to be levied in that State. However, this saving clause is subject to any law that the Parliament may provide otherwise.

21.3 While applying clause (1) of Article 285, two considerations must be taken into account: firstly, whether the tax is claimed in respect of property, and secondly, whether such property

is vested in the Union Government. The expression property must be given its widest meaning to include both tangible and intangible property as well as moveable and immovable property. The immunity conferred under clause (1) of the Article 285 is only in respect of a tax on property. The rationale for providing Articles 285 and 289 of the Constitution is based on the principle that one sovereign cannot tax another sovereign. Thus, under Article 285, all property of the Union is exempted from State taxes, while Article 289 exempts all incomes and property of a State from Union taxation; no distinction is made between the Union property used for commercial purposes or used for governmental functions. Thus, irrespective of use of the Union property is put to, there is an exemption.

21.4 The expression 'vest' is not found in Article 285, though, it occurred in Section 154 of the Government of India Act, 1935. However, this does not really make a difference, so long as the owner of the property is the Union. For instance, property which is requisitioned by the Union does not affect the ownership of the requisitioned property. But, if the Union Government erects buildings on requisitioned lands, the buildings become property of the Union within the meaning of Article 285 although, the Union is not the owner of the land upon which the building stands *vide* ***The Governor-General of India in Council vs. The Corporation of Calcutta, AIR 1948 Cal 116*** affirmed by ***The Corporation of Calcutta vs. Governors of St. Thomas' School, Calcutta, AIR 1949 FC 121.***

21.5 The immunity from taxation on property of the Union therefore depends upon the factum of the ownership of the property. If a property accrues to the Union by escheat, lapse or *bona vacantia* under Article 296 of the Constitution, such property would be immune from State taxation. Thus, where the Union Government is not the owner of the property but is a lessee from a private owner, a tax on such owner is not exempted under Article 285 of the Constitution. Similarly, where the Union Government is using the property for governmental purposes or has control over its use, does not give it immunity from State taxation. Conversely, where the Government is the lessor, a tax on the interest of the private lessee is not a tax on the property of the Union. Since the immunity is confined to property vested

in the Union, the same cannot be claimed by entities other than the Union. In order to ascertain this aspect i.e., whether the statutory corporation or other entities do not come within the scope and the ambit of Article 285, the doctrine of "piercing the veil" may be pressed into service. Thus, Article 285 would not apply when the property to be taxed is not of Union of India but of a distinct and separate legal entity. Thus, the State cannot levy road tax on the vehicles owned by the Central Government or the Railway, which is a Ministry of the Union Government.

21.6 In ***Union of India vs. City Municipal Council, Bellary, AIR 1978 SC 1803 ("City Municipal Council")***, it was observed that the property of the Union is exempt from all taxes imposed by the State or by any authority within the State under Article 285(1), unless the claim can be supported and sustained within the parameters of Article 285 (2). The expression "save in so far as Parliament may by law otherwise provide" in clause (1) of Article 285 is to enable the Parliament to control Union property. Thus, the Parliament may by law permit a State or any authority or instrumentality within a State to impose tax on Union property. But if no such law is made by the Parliament the immunity would continue. Similarly, clause (2) of Article 285 which is in the nature of an exception to clause (1) thereof, has given an overriding power to Parliament to take away any existing taxation of a State or a local authority of Union property prior to the commencement of the Constitution and which has continued to be levied in the State even after the enforcement thereof. In ***City Municipal Council,*** question arose whether the Railway (Local Authorities Taxation) Act, 1941 which created a liability on the Railways to taxation by local authorities was contrary to Article 285 (1) of the Constitution. It was held that the aforesaid Act being enacted prior to the enforcement of the Constitution was not a law which came within the scope of the expression "save in so far as Parliament may by law otherwise provide" in clause (1) of Article 285. Hence, it was observed that the said law could not be enforced after the enforcement of the Constitution, and the Railway property was immune from State taxation.

21.7 As already noted, clause (2) of Article 285 is in the nature of an exception or a proviso to clause (1) of the said Article.

However, it empowers Parliament to restrict the exception. In other words, any local taxes on Union property which were saved by virtue of clause (2) of Article 285 shall cease to be valid as soon as the Parliament by law provides to that effect. This implies that clause (2) of Article 285 which saves the existing power of the State and the local lawful bodies to tax Union property would continue and the s*tatus quo* would be maintained till Parliament would legislate otherwise. In clause (2) of Article 285, the expression "liable or treated as liable" is of significance. The conditions necessary to bring a property within clause (2) of Article 285 in order to make it liable to taxation are as under:

"(a) Physical existence of the property immediately before the commencement of the Constitution;

(b) Liability of the property to the tax on that date;

(c) Physical existence of the property now, i.e., at the time when the tax is sought to be levied;

(d) Liability of the property to tax now;

(e) The tax in question must be the 'same tax' as that which was levied or leviable at the commencement of the Constitution;

(f) The local authority seeking to levy the tax must be in the same State to which the pre-Constitution authority belonged."

[Source: Shorter Constitution of India by D.D. Basu, 16th Edition]

21.8 The aforesaid conditions would mean that the nature, type and the property on which the tax is being levied prior to the commencement of the Constitution must be the same, as also the local authority of the same State to which it belongs before the commencement of the Constitution. If the conditions of clause (2) of Article 285 are not satisfied, the pre-Constitution tax cannot be continued to be levied by a State by virtue of Article 372(1) as the latter Article states that the continuance of the existing law would be 'subject to the other provisions of the Constitution'. Hence, any law which is inconsistent with Article 285 cannot be continued by virtue of Article 372(1) of the Constitution.

21.9 The expression "immediately before the commencement of this Constitution" under clause (2) of Article 285 would mean that the property is liable or treated as liable to tax until the Union Parliament legislates to the contrary. One of the ways of interpreting this is that the property must have been liable to taxation even under the Government of India Act, 1935 in as much as if any property was not liable to be taxed under the said Act, in other words, if there was an immunity during the enforcement of the said Act then it would not have been taxed from the date of enforcement of the Constitution. It is also necessary to understand the meaning of expression "that tax" in clause (2) of Article 285 which would have a relation to its nature and character and not its quantum or rates. So long as the taxes remains the same, the State or local authority can always increase or reduce its rate, in accordance with law. The variation of the quantum or rate would not affect its power to continue to levy the tax so long as it remains "that tax," in its nature and character. Thus, if the tax remains the same, it is only the Parliament which can prevent the continuance of levy of that tax by the State or local authority or by any law. This Court in ***City Municipal Council*** held that it does not matter whether the liability is imposed by one statute or other as long as liability is of a particular kind of tax.

21.10 Section 172 of the Act of 1959 categorically states that subject to Article 285 of the Constitution, the corporation shall impose, *inter alia,* property taxes assessed and levied in accordance with the provisions of the Act of 1959 and the rules and bye-laws framed thereunder. Sub-section (4) of Section 172 of the Act of 1959 states that nothing in the said sub-section shall authorize the imposition of any tax which the State Legislature has no power to impose in the State under the Constitution of India provided that where any tax was being lawfully levied in the area included in the city immediately before the commencement of the Constitution of India, such tax may continue to be levied and applied for the purposes of the Act of 1959 until provision to the contrary is made by Parliament. Section 172, in fact, summarises Article 285 of the Constitution in the context of levy of property taxes imposed

under the said Act by the Corporation. Section 173 deals with property tax leviable which is again subject to Section 172(1) of the Act of 1959. It includes a general tax, a water tax, drainage tax and conservancy tax. The said taxes shall be levied on the annual value of the building and land, as the case may be. However, the aggregate of the property taxes shall in no cases be less than 15 per cent nor more than 25 per cent of the annual value of the building or land or both assessed to such taxes. The definition of annual value is given under Section 174 of the Act of 1959. Restrictions on imposition of water tax are delineated under Section 175 while the primary responsibility for certain property taxes on annual value is stated in Section 179. It states that the property tax shall be leviable primarily from the actual occupier of the property upon which the tax is assessed, if he is the owner of the buildings or lands or holds them on a building or other lease from the Central or the State Government or from the Corporation, or on a building leased from any person. In any other case, tax shall be leviable as per sub-section (2) of Section 179 of the Act of 1959. The drainage taxes are assessed. Therefore, the levy of property taxes or other taxes on land and building is subject to Article 285 of the Constitution.

21.11 We have already discussed the scope and ambit of the two clauses of Article 285 of the Constitution. Applying the same to the present case and having regard to the reasoning given by us in the earlier part of this judgment, we have held that enemy property is not the property of the Union although it may vest with the Custodian for Enemy Property in India who is a person appointed by the Central Government. If the enemy property is not the Union property in terms of clause (1) of Article 285 of the Constitution then such property cannot be exempt from the taxes imposed by the State or by any authority within the State unless otherwise provided by the Parliament.

21.12 For the sake of completeness of the discussion assuming for a moment that the vesting of the enemy property with the Custodian becomes the property of the Union, then clause (2) of Article 285 would apply in the instant case.

This is because an authority within the State is not prevented from levying any tax on any property of the Union to which such property was immediately before the commencement of the Constitution was liable or treated as liable so long as that tax continued to be levied in that State. Applying the same to the facts of the present case, it is noted that the property in question which is located in Lucknow within the State of Uttar Pradesh and in respect of which the Act of 1959 applies was earlier governed by the Act of 1916. On a perusal of the relevant provisions of the Act of 1916, it becomes clear that the property tax was leviable on the subject property. Act of 1916 is a pre-Constitution enactment and therefore immediately before the commencement of the Constitution, the subject property was liable to property tax under the Act of 1916 and therefore until the Parliament by law provides otherwise, the appellant corporation can continue to levy municipal taxes including the property tax on the subject property as it was liable to pay such tax prior to the commencement of the Constitution under the provisions of 1916 Act. For ease of reference, the relevant provisions of the 1916 Act are also extracted above. Therefore, even as per the provisions of clause (2) of Article 285 even if the subject property is assumed to be Union property under clause (2) of Article 285, the appellant-Corporation is entitled to levy the property tax and the municipal tax on the said property even though, it vests with the Custodian under the provisions of the Act. That is why under Section 8 of the Act, Custodian is duty bound to pay the taxes, duties, cesses and rates to the municipal authority.

We wish to also make another observation. Since the year 1968, there have been lakhs of Indians who have settled overseas without giving up their Indian citizenship. They have acquired several movable and immovable properties in India. If, in an unforeseen eventuality, any of the countries in which such Indians are settled, is declared to be an enemy country then all such Indians who are settled abroad would possibly become enemy subjects, enemy firms and enemy companies within the definition of the Act. In such an event, the Custodian will have to take possession of such properties. Vesting of

such enemy properties in the Custodian is thus only for the purpose of administration and management of such properties.

In view of our discussion made above, there would be no transfer of ownership and such properties vest in the Custodian for their protection and management only. By such vesting, the Union cannot usurp ownership of such properties. In the same vein, when many persons who are resident in India left their properties and settled in enemy countries, the Custodian has taken possession of such properties which is only for the purpose of protection and maintenance and to be handed over as and when a conducive environment between the countries arises.

We also observe that it was never the intention under the Defence of India Rules, 1962 and 1971 or under the provisions of the Act that enemy subjects would lose all their right, title and interest in the properties once the said properties vest in the Custodian and thereby become Union properties. In this regard, we also would like to emphasise that the expression "vest in the Union" is clearly mentioned in Article 296 of the Constitution. The said provision deals with properties which for want of a rightful owner or as *bona vacantia* would vest in a State if the property is in a State or vest in the Union in any other case. The Constitution has therefore clearly differentiated between vesting of properties in the Union or a State which is totally distinct from vesting of enemy properties in the Custodian for Enemy Property.

It is reiterated that the Custodian who is appointed under the provisions of the Act by the Central Government discharges his duties and carries out his functions under the provisions of the Act in terms of the directions of the Central Government. This is because the Act is a piece of Parliamentary legislation and in order to achieve a uniform policy *vis-à-vis* management and administration of enemy properties throughout the length and breadth of the country. It, therefore, cannot be held that the properties vest with the Union within the meaning of Article 285 of the Constitution. In our view, the said Article has no application to enemy properties.

22. In ***Amir Mohammad Khan*** case, the father of the respondent therein was a Raja, who had migrated to Pakistan in 1957 and became a citizen of that country. However, the respondent therein and his mother (since deceased) continued to reside in India as Indian citizen. Under the provisions of the Enemy Property (Custody and Registration) Order, 1965, the property of the respondent's father in India vested in the Custodian of Enemy Property. After the enactment of the Act under consideration, by virtue of Section 24 thereof, the property continued to be vested in the Custodian. In 1973, the Raja died in London. The respondent then sought the Government of India and the Custodian to release that property as the same stood vested in him as an Indian citizen. In 1981, the Government of India agreed to release 25% of the property to the legal heirs and successors of the late Raja in India and the Custodian of the Enemy Property asked the respondent for legal evidence regarding such heirs and successors. In 1986, at the instance of the respondent, the civil court declared that the respondent was the sole heir and successor of his father and thereby entitled to 25% or whatever percentage it might be of the suit property. The said judgment became final. Since, the properties were not handed over to the respondent, he filed a writ petition before the Bombay High Court which was allowed by directing that the possession of the properties should be handed over to the respondent. The Union of India filed an appeal before this Court by way of a Special Leave. Dismissing the appeal, this Court held that the Act was enacted for the purpose of continued vesting of enemy property in the Custodian of Enemy Property for India under the Defence of India Rules, 1962 and the Defence of India Rules, 1971.

22.1 This Court observed that the respondent therein was the sole heir and successor of the late Raja and properties belonging to the late Raja was succeeded to by the respondent by way of succession and the properties in question could no longer be enemy property within the meaning of Section 2(c) of the Act. Therefore, the Custodian could not be permitted to continue in possession of such properties. During the pendency of the Writ Petition before it, the High Court directed the appellant therein to place on record a copy of the note put up for release of the property of the respondent's father and the decision taken thereon by the Cabinet.

22.2 The Union of India was directed by this Court to get the buildings (residence or offices) of the subject property vacated from such officers and hand over the possession to the respondent therein within eight weeks. While holding so, this Court observed that on a conjoint reading of Sections 6, 8 and 18 of the Act, the enemy subject is not divested of his right, title and interest of the property which vest in the Custodian is limited to the extent of possession, management and control over the property temporarily. The object of the Act was to prevent a subject of an enemy State from carrying on business and trading in the property situated in India. It is, therefore, contemplated that temporary vesting of the property takes place in the Custodian so that the property till such time, as it is enemy property, cannot be used for such purpose. The question considered was, whether, after the inheritance of the property by the respondent therein who was a citizen of India, upon the death of the original owner of the property who was declared to be an enemy, the property continued to be enemy property? It was answered in the negative. It was observed that the definition of enemy provided under Section 2 (b) of the Act excluded a citizen of India as an enemy or enemy subject or an enemy firm. Therefore, the respondent herein who was born in India and his Indian citizenship not being in question could not by any stretch of imagination be held to be enemy or enemy subject under Section 2(b). Similarly, under Section 2(c) the property belonging to enemy could not be termed as an enemy property.

22.3 It was further observed that after the death of the enemy, the right, title and interest of the enemy was succeeded to by his heirs who are Indian citizens. Therefore, the enemy property would cease to be a property belonging of the enemy, hence the Custodian could not be permitted to continue with the possession of such property. In this regard, it was observed that the reliance placed by the Union of India on Section 13 of the Act was totally misplaced. That in the said case this Court noted that Union of India - appellant therein had agreed to release 25% of the property in favour of the respondent therein on production of proof of his having succeeded to the property of his father. That the property of an enemy could

be released in favour of an Indian citizen provided he had succeeded to the estate of the deceased enemy subject. That the title of the enemy property did not vest with the Custodian but the property vested in the Custodian for the purposes of management, control and possession of the properties only. In the said case, Union of India had admitted that under the provision of the Act, title of the property of an enemy does not vest in the Custodian but the Custodian takes over the enemy property only for the purpose of possession, control and management. That an Indian citizen is excluded from the definition of an "enemy" or "enemy subject" under Section 2(b) of the Act. That on the death of the enemy subject, his successors and legal heirs being Indian citizens were entitled to succeed to the subject property as it ceased to be an enemy property. That even though a decision was taken to release only 25% of the property to the respondent therein, the same was also not implemented, for over three decades. Therefore, the direction was issued to the appellant-Union of India therein to get the buildings (residence or offices) vacated from such officers and hand over the possession to the respondent therein within eight weeks. The appeal of the Union of India was dismissed with costs of Rs.5 lakhs. This decision was rendered on 21.10.2005.

22.4 Thereafter, on 08.09.2006 in the case of ***Kohli Brothers vs. Amir Mohammad Khan, (2012) 12 SCC 625 ("Kohli Brothers")***, this Court disposed of certain Special Leave Petitions with the clarification that persons who were inducted/ allotted properties by the Custodian or who came in possession after 1965 i.e. on or after declaring the property of the Raja of Mahmudabad as enemy property and appointment of the Custodian, had to vacate the properties in their possession. But persons claiming possession prior to the appointment of the Custodian declaring the property of Raja of Mahmudabad, father of the respondent therein, as enemy property, based on duly authenticated tenancy created by the then Raja of Mahmudabad or his general power of attorney was not to be covered by this Court's judgment passed in ***Amir Mohammad Khan***.

In this regard, it would be useful to reiterate the statement and objects of the Act wherein it has been stated that immovable property, cash balances and firms belonging to Chinese nationals in India were vested in the Custodian of Enemy Property for India appointed under the Defence of India Rules, 1962. Similarly, upon the aggression by Pakistan in 1965, enemy properties were vested in the Custodian of Enemy Property under the power derived from the Defence of India Rules, 1962. That the properties vested in the Custodian of Enemy Property in India has to continue as it has not been possible for the Government of India so far to arrive at a settlement with the respective Governments of those countries.

On a perusal of the impugned order, it is noted that the learned counsel appearing for the appellant-Lucknow Nagar Nigam had submitted before the High Court that the Nagar Nigam may not charge in respect of property of Central Government but may demand fee, if any, with respect to services provided like water charge or sewerage charge. The present case relates to house tax and water tax. The High Court construed the said submission as an admission of the fact that the subject property is the Central Government's property and therefore, quashed the recovery sought to be made by the appellant-Nagar Nigam. In fact, the submission of the learned counsel for the appellant-Nagar Nigam has to be construed in the context of the provisions of the Act as well as the relevant provisions of the Constitution which we have now interpreted.

Therefore, whatever amount have already been deposited by the respondent herein, the same shall not be refunded to them. But, if no other demand has been made till date, such demand shall not be made. However, from the current fiscal year onwards (2024-2025), the appellant shall be entitled to levy and collect the property tax as well as water tax and sewerage charges and any other local taxes in accordance with law. We have granted a relaxation to the respondent in view of the fact that the High Court by the impugned order dated 29.03.2017, had held in favour of the respondent herein

and we are now reversing the said order.

In view of the aforesaid discussion, we arrive at the following conclusions:

1) That the Custodian for Enemy Property in India, in whom the enemy properties vest including the subject property, does not acquire ownership of the said properties. The enemy properties vest in the Custodian as a trustee only for the management and administration of such properties.

2) That the Central Government may, on a reference or complaint or on its own motion initiate a process of divestment of enemy property vested in the Custodian to the owner thereof or to such other person *vide* Rule 15 of the Rules. Hence, the vesting of the enemy property in the Custodian is only as a temporary measure and he acts as a trustee of the said properties.

3) That in view of the above conclusion, Union of India cannot assume ownership of the enemy properties once the said property is vested in the Custodian. This is because, there is no transfer of ownership from the owner of the enemy property to the Custodian and consequently, there is no ownership rights transferred to the Union of India. Therefore, the enemy properties which vest in the Custodian are not Union properties.

4) As the enemy properties are not Union properties, clause (1) of Article 285 does not apply to enemy properties. Clause (2) of Article 285 is an exception to clause (1) and would apply only if the enemy properties are Union properties and not otherwise.

5) In view of the above, the High Court was not right in holding that the respondent as occupier of the subject property, is not liable to pay any property tax or other local taxes to the appellant. In the result, the impugned order of the High Court dated 29.03.2017 passed in Misc. Bench No.2317 of 2012 is liable to be set aside and is accordingly set aside.

6) Consequently, any demand for payment of taxes under the Act of 1959 made and thereby paid by the respondent to the appellant-authority shall not be refunded. However, if no demand notices have been issued till date, the same shall not be issued but from the current fiscal year onwards (2024-2025), the appellant shall be entitled to levy and collect the property tax as well as water tax and sewerage charges and any other local taxes in accordance with law.

In the result, the appeal is allowed in the aforesaid terms.

Parties to bear their respective costs.

Headnotes prepared by: Bibhuti Bhushan Bose

Result of the case: Appeal allowed.

[2024] 2 S.C.R. 935 : 2024 INSC 151

Basavaraj
v.
Indira and Others

(Civil Appeal No. 2886 of 2012)

29 February 2024

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

Issue for Consideration

High Court, if justified in allowing the amendment application, changing the nature of suit from partition to declaration.

Headnotes

Code of Civil Procedure, 1908 – Ord. VI r. 17 – Amendment of pleadings – When allowed – On facts, suit for partition and separate possession – When the matter reached the stage of arguments, application for amendment of the plaint filed by the respondents No. 1 and 2, seeking relief of declaration of the earlier compromise decree being null and void, pleading oversight and mistake, on the part of the respondents No. 1 and 2 – Trial court dismissed the application, however, the High Court allowed the same – Correctness:

Held: Application for amendment may be rejected if it seeks to introduce totally different, new and inconsistent case or changes the fundamental character of the suit – Ord. VI r. 17 prevents an application for amendment after the trial has commenced unless the Court comes to the conclusion that despite due diligence the party could not have raised the issue before the commencement of trial – Important factor, to be considered is as to whether the amendment would cause prejudice to the other side or it fundamentally changes the nature and character of the case or a fresh suit on the amended claim would be barred on the date of filing the application – On facts, the relief sought would certainly change the nature of the suit, which may be impermissible – If the amendment is allowed, it would certainly prejudice the

* Author

appellant – What cannot be done directly, cannot be allowed to be done indirectly – Application for amendment was filed 5 years after passing of the compromise decree, which is sought to be challenged by way of amendment – Limitation for challenging any decree is three years – As with the passage of time, right had accrued in favour of the appellant with reference to challenge to the compromise decree, the same cannot be taken away on account of delay in filing the application – Even if on any ground the amendment could be permitted, still no relief could be claimed as all the parties thereto were not before the Court in the suit in question – Impugned order passed by the High Court is set aside – Application for amendment of the plaint is dismissed. [Paras 8-14]

Code of Civil Procedure, 1908 – Ord. 23 – Compromise decree – Challenge to, when:

Held: Appeal is not maintainable against a consent decree – No separate suit can be filed – Consent decree operates as an estoppel and binding unless it is set aside by the court by an order on an application under the proviso to Order XXIII r. 3 – Only remedy available to a party to a consent decree is to approach the Court which recorded the compromise as it was opined to be nothing else but a contract between the parties superimposed with the seal of approval of the Court. [Para 7]

Case Law Cited

Revajeetu Builders and Developers v. Narayanaswamy and sons and others, [2009] 15 SCR 103 **: (2009) 10 SCC 84 – relied on.**

Vidyabai and others v. Padmalatha and another, [2008] 17 SCR 505 **: (2009) 2 SCC 409;** *Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy and others,* **(2001) 8 SCC 115;** *Estralla Rubber v. Dass Estate (P) Ltd.,* [2001] Suppl. 3 SCR 68 **: (2001) 8 SCC 97;** *Pushpa Devi Bhagat (Dead) through L.R. Sadhna Rai (Smt.) v. Rajinder Singh and others,* [2006]

Suppl. 3 SCR 370 **: (2006) 5 SCC 566;** *M. Revanna v. Anjanamma (Dead) by legal representatives and others,* **(2019) 4 SCC 332 – referred to.**

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Application for amendment; Due diligence; Commencement of trial; Suit for partition and separate possession; Compromise decree; Oversight and by mistake; Delay; Consent decree.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.2886 of 2012

From the Judgment and Order dated 18.08.2010 of the High Court of Karnataka at Bangalore in WP No. 82086 of 2010

Appearances for Parties

Nishanth Patil, Ayush P. Shah, Vignesh Adithya S., Ankolekar Gurudatta, Advs. for the Appellant.

Ashok Kumar Gupta II, Shankar Divate, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. Vide impugned order[1] passed by the High Court[2], an application filed by respondents No. 1 and 2/plaintiffs for amendment of the plaint was allowed subject to costs of ₹2,000/-.

2. Briefly, the facts available on record are that respondents No. 1 and 2 filed a suit[3] for partition of the ancestral property belonging to their grand father pleading that no actual partition of the property has ever taken place. When the suit was at the fag end, an application was filed by respondents No. 1 and 2 seeking amendment of the plaint.

1 Order dated 18.08.2010 passed in W.P. No. 82086 of 2010

2 High Court of Karnataka, Circuit Bench at Gulbarga

3 Original Suit No. 151 of 2005

The amendment sought was to add prayer in the suit for a declaration that an earlier compromise decree dated 14.10.2004 was null and void. As prayer was not made earlier, the court fee required thereon was also sought to be affixed. The ground on which the amendment was sought was that due to oversight and mistake, the respondents No. 1 and 2/plaintiffs were unable to seek the relief of declaration. No prejudice as such would be caused to the defendants as limited relief is for fair partition of the ancestral property. The Trial Court[4] dismissed the application. However, when the order[5] was challenged before the High Court, the same was set aside and the amendment prayed for by the plaintiffs was allowed subject to payment of costs.

3. Learned counsel for the appellant submitted that in the case in hand, there was a family partition in Original Suit No. 401 of 2003 filed by Smt. Mahadevi and Smt. Sharnamma, wife and daughter-in-law respectively of defendant No.1/Shivasharnappa, impleading the plaintiffs and the defendants as party. A compromise decree dated 14.10.2004 was passed by the Lok Adalat, District Legal Services Authority, Gulbarga. Thereafter, respondents No. 1 and 2 filed a fresh suit in 2005 seeking partition of the ancestral property. Though in the suit pleading was there with reference to the earlier compromise decree, however for the reasons best known to the plaintiffs, no challenge was made to the same. As a result of the order passed by the High Court, the nature of the suit was changed from partition to declaration, which is impermissible.

   3.1 Further in terms of proviso to Order VI Rule 17 CPC, no amendment could be allowed after commencement of the trial. In the case in hand, the suit was at the fag end, as fixed for arguments.

   3.2 It was further submitted that the compromise decree was passed on 14.10.2004. In terms of the provisions of Order XXIII Rule 3 CPC, the same could be challenged only before the same Court and not before any other Court.

   3.3 He further contended that there was a specific stand taken by the appellant/defendant No. 2 in the written statement that

4 First Additional Civil Judge (Senior Division) at Gulbarga

5 Order dated 31.05.2010

there being a compromise decree in existence, no relief may be admissible to respondents No. 1 and 2, unless that decree is challenged. The written statement was filed in August 2005, still no steps taken by the respondents No. 1 and 2 in that direction. Part of the suit property having been sold, an amendment was carried out in the plaint in July 2006 to implead the subsequent purchaser. Even at that stage, this relief was not sought.

3.4 It was further contended that the relief of declaration of compromise decree being null and void prayed for by way of amendment otherwise also was time barred as the compromise decree was passed on 14.10.2004. The application for amendment was filed on 08.02.2010. Even the court fee was sought to be affixed at the time of filing of application for amendment.

3.5 The application filed by respondents No. 1 and 2 did not meet the pre-conditions laid down in Order VI Rule 17 CPC for permitting respondents No. 1 and 2 to amend the pleadings at the fag end of the trial. No due diligence was pleaded. All what was stated was that there was oversight on the part of respondents No. 1 and 2/plaintiffs.

3.6 Referring to the parties who were there in the compromise decree, it was argued that some of them are not parties in the suit in question, hence otherwise also challenge to the compromise decree may not be maintainable.

3.7 In support of the arguments, reliance was placed upon the judgments of this Court in **Revajeetu Builders and Developers v. Narayanaswamy and sons and others**[6] and **Vidyabai and others v. Padmalatha and another**[7]

4. In response, learned counsel for respondents No. 1 and 2 submitted that it was merely an oversight mistake which occurred at the time of filing of the suit and at the subsequent stage for which the amendment was prayed for by respondents No. 1 and 2. It is not a case where the pleadings to that effect are not available on record. Respondents No. 1 and 2 had fairly pleaded about the earlier compromise decree.

6 [2009] 15 SCR 103 : (2009) 10 SCC 84

7 [2008] 17 SCR 505 : (2009) 2 SCC 409

Inadvertently, the prayer for declaration thereof as null and void could not be made. The court fee also could not be deposited. No fresh evidence is to be led. The case is at the arguments stage. The same can be argued with mere re-framing of the issues. It will avoid multiplicity of litigation and ultimately complete justice will be done amongst the parties, who are merely praying for partition of the ancestral property. The other side can be compensated with costs, as was even done by the High Court. No prejudice as such will be caused to the appellant. Substantial justice will be done to the parties. In support of the arguments, reliance was placed upon a judgment of this Court in **Dondapati Narayana Reddy v. Duggireddy Venkatanarayana Reddy and others**[8] and **Estralla Rubber v. Dass Estate (P) Ltd.**[9]

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

6. It is a case in which the appellant has been forced into avoidable unnecessary litigation to rush to this Court. The suit was filed by respondents No. 1 and 2 in 2005 seeking partition of the ancestral property. It was specifically pleaded in the suit that there was a compromise decree between the parties. However, as may be the advice to respondents No. 1 and 2, despite there being a compromise decree existing between the parties, no prayer was made in the suit with reference thereto, if any grievance was there. It remained simpliciter a suit for partition. A specific stand was taken by the appellant in the written statement to the effect that the suit is not maintainable unless cancellation of the compromise decree is prayed for as the same would operate as res-judicata. The written statement was filed in August 2005. Despite the specific pleading of the appellant, the respondents No. 1 and 2 did not take any steps.

   6.1 During the pendency of the suit, an amendment was carried out by respondents No. 1 and 2 to implead respondent No. 4 in the suit who was the purchaser of a part of the suit property. The same was allowed on 01.07.2006. Thereafter, trial of the suit continued. When it reached at the stage of arguments in February 2010 an application was filed by respondents No. 1 and

8 (2001) 8 SCC 115

9 [2001] Suppl. 3 SCR 68 : (2001) 8 SCC 97

2 seeking amendment of the plaint. The reasons assigned to file the belated application seeking amendment of the plaint were that due to oversight and by mistake, the respondents No.1 and 2 failed to seek relief of declaration of the compromise decree being null and void and were unable to deposit the court fee.

7. The law with reference to challenge to a compromise decree is well settled. It was opined in **Pushpa Devi Bhagat (Dead) through L.R. Sadhna Rai (Smt.) v. Rajinder Singh and others**[10] that (i) appeal is not maintainable against a consent decree; (ii) no separate suit can be filed; (iii) consent decree operates as an estoppel and binding unless it is set aside by the court by an order on an application under the proviso to Order XXIII Rule 3 C.P.C.; and (iv) the only remedy available to a party to a consent decree is to approach the Court which recorded the compromise as it was opined to be nothing else but a contract between the parties superimposed with the seal of approval of the Court. Relevant part of paragraph No. 17 thereof is extracted below:

> "17. The position that emerges from the amended provisions of Order 23 can be summed up thus:
>
> (i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.
>
> (ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.
>
> (iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.
>
> (iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

10 [2006] Suppl. 3 SCR 370 : (2006) 5 SCC 566

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made…"

8. Proviso to Order VI Rule 17 CPC provides that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In the case in hand, this is not even the pleaded case of respondents No. 1 and 2 before the Trial Court in the application for amendment that due diligence was there at the time of filing of the suit in not seeking relief prayed for by way of amendment. All what was pleaded was oversight. The same cannot be accepted as a ground to allow any amendment in the pleadings at the fag end of the trial especially when admittedly the facts were in knowledge of the respondents No. 1 and 2/plaintiffs.

8.1 The relevant paragraphs of the application seeking amendment of the plaint are reproduced hereunder:

"2. That, due to over sight and by mistake the Plaintiff was unable to sought relief declaration of decree as null and void and unable to pay required court fee some unavoidable circumstances and the proposed amendment is very essential for deciding the matter in dispute.

3. xxx

4. That, if the proposed amendment is allowed no prejudice will be cause to the other side, on the other hand if it is not allowed then the deponent will be put to great loss and will also leads multiplicity of litigation's. Hence it is just and proper to allow the proposed amendment to meet the ends of justice."(sic)

9. This Court in **M. Revanna v. Anjanamma (Dead) by legal representatives and others**[11] opined that an application for amendment may be rejected if it seeks to introduce totally different, new and inconsistent case or changes the fundamental character of the suit. Order VI Rule 17 C.P.C. prevents an application for amendment after the trial has commenced unless the Court comes to the conclusion that despite due diligence the party could not have raised the issue. The burden is on the party seeking amendment after commencement of trial to show that in spite of due diligence such amendment could not be sought earlier. It is not a matter of right. Paragraph No. 7 thereof is extracted below:

> "7. Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order 6 Rule 17 CPC virtually prevents an application for amendment of pleadings from being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the court needs to take into consideration whether the application for amendment is bona fide or mala fide and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money."
>
> (emphasis supplied)

11 (2019) 4 SCC 332

10. Initially, the suit was filed for partition and separate possession. By way of amendment, relief of declaration of the compromise decree being null and void was also sought. The same would certainly change the nature of the suit, which may be impermissible.

11. This Court in **Revajeetu's** case (supra) enumerated the factors to be taken into consideration by the court while dealing with an application for amendment. One of the important factor is as to whether the amendment would cause prejudice to the other side or it fundamentally changes the nature and character of the case or a fresh suit on the amended claim would be barred on the date of filing the application.

12. If the amendment is allowed in the case in hand, certainly prejudice will be caused to the appellant. This is one of the important factors to be seen at the time of consideration of any application for amendment of pleadings. Any right accrued to the opposite party cannot be taken away on account of delay in filing the application.

    12.1 In the case in hand, the compromise decree was passed on 14.10.2004 in which the plaintiffs were party. The application for amendment of the plaint was filed on 08.02.2010 i.e. 5 years and 03 months after passing of the compromise decree, which is sought to be challenged by way of amendment. The limitation for challenging any decree is three years (Reference can be made to Article 59 in Part-IV of the Schedule attached to the Limitation Act, 1963). A fresh suit to challenge the same may not be maintainable. Meaning thereby, the relief sought by way of amendment was time barred. As with the passage of time, right had accrued in favour of the appellant with reference to challenge to the compromise decree, the same cannot be taken away. In case the amendment in the plaint is allowed, this will certainly cause prejudice to the appellant. What cannot be done directly, cannot be allowed to be done indirectly.

13. Further, a perusal of the memo of parties in the suit in question and in the compromise decree shows that the plaintiffs i.e. Sharnamma @ Mahananda wife of Basvaraj and Mahadevi wife of Shivsharnappa Nasi in Original Suit No. 401 of 2003 are not party to the present litigation. Even if on any ground the amendment could be permitted, still no relief could be claimed with reference to setting aside of the

compromise decree as all the parties thereto were not before the Court in the suit in question.

14. For the reasons mentioned above, the present appeal is allowed. The impugned order passed by the High Court is set aside. The application filed for amendment of the plaint is dismissed. The appellant shall be entitled to cost of the proceedings, which are assessed at ₹1,00,000/- to be paid jointly or severally by respondents No. 1 and 2. The appellant shall be paid the amount of cost on the next date of hearing before the Trial Court by way of demand draft.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal allowed.

[2024] 2 S.C.R. 946 : 2024 INSC 150

High Court Bar Association, Allahabad
v.
State of U.P. & Ors.

Criminal Appeal No. 3589 of 2023

29 February 2024

[Dr Dhananjaya Y. Chandrachud, CJI, Abhay S. Oka,* J. B. Pardiwala, Manoj Misra and Pankaj Mithal,* JJ.]

Issue for Consideration

What is the object behind passing interim orders; Whether the High Courts are empowered to vacate or modify interim relief; Whether an interim order can come to an end automatically only due to the lapse of time; What is the scope of exercise of powers u/Art. 142 of the Constitution; Position of the High Courts and its power of superintendence; Whether the Court should deal with an issue not arising for consideration; Effect of directions issued by the Constitutional Courts to decide pending cases in a time-bound manner; Whether the Supreme Court, in the exercise of its jurisdiction u/Art. 142 of the Constitution of India, can order automatic vacation of all interim orders of the High Courts of staying proceedings of Civil and Criminal cases on the expiry of a certain period; Whether the Supreme Court, in the exercise of its jurisdiction u/Art. 142 of the Constitution of India, can direct the High Courts to decide pending cases in which interim orders of stay of proceedings has been granted on a day-to-day basis and within a fixed period; Procedure to be adopted by High Courts while passing interim order of stay of proceedings and for dealing with the applications for vacating interim stay.

Headnotes

Interim Orders – Object of:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) An order of interim relief is usually granted in the aid of the final relief sought in the case – An occasion for passing an order of stay of the proceedings normally arises when the High Court is dealing with a challenge to an interim or interlocutory order passed during the pendency of the main case before a trial or appellate Court – The High Court can grant relief of the stay of hearing of the main

* Author

proceedings on being satisfied that a prima facie case is made out and that the failure to stay the proceedings before the concerned Court in all probability may render the remedy adopted infructuous – When the High Court passes an interim order of stay, though the interim order may not expressly say so, the three factors, viz; prima facie case, irreparable loss, and balance of convenience, are always in the back of the judges' minds – Though interim orders of stay of proceedings cannot be routinely passed as a matter of course, it cannot be said that such orders can be passed only in exceptional cases – Nevertheless, the High Courts, while passing orders of stay in serious cases like the offences under the PC Act or serious offences against women and children, must be more cautious and circumspect. [Para 13]

Interim Orders – Whether the High Courts are empowered to vacate or modify interim relief:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) The High Courts are always empowered to vacate or modify an order of interim relief passed after hearing the parties on the following, amongst other grounds: - (a)If a litigant, after getting an order of stay, deliberately prolongs the proceedings either by seeking adjournments on unwarranted grounds or by remaining absent when the main case in which interim relief is granted is called out for hearing before the High Court with the object of taking undue advantage of the order of stay; (b)The High Court finds that the order of interim relief is granted as a result of either suppression or misrepresentation of material facts by the party in whose favour the interim order of stay has been made; and (c) The High Court finds that there is a material change in circumstances requiring interference with the interim order passed earlier – In a given case, a long passage of time may bring about a material change in circumstances – These grounds are not exhaustive – There can be other valid grounds for vacating an order of stay. [Para 15]

Interim Orders – Whether an interim order can come to an end automatically only due to the lapse of time:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) Elementary principles of natural justice, which are well recognised in jurisprudence, mandate that an order of vacating interim relief or modification of the interim relief is passed only after hearing all

the affected parties – An order of vacating interim relief passed without hearing the beneficiary of the order is against the basic tenets of justice – Application of mind is an essential part of any decision-making process – Therefore, without application of mind, an order of interim stay cannot be vacated only on the ground of lapse of time when the litigant is not responsible for the delay – An interim order lawfully passed by a Court after hearing all contesting parties is not rendered illegal only due to the long passage of time. [Para 16]

Constitution of India – What is the scope of exercise of powers u/Art. 142 of the Constitution:

Held: **(Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.)** Important parameters for the exercise of the jurisdiction u/Art. 142 of the Constitution of India which are relevant for deciding the reference are as follows: (i) The jurisdiction can be exercised to do complete justice between the parties before the Court – It cannot be exercised to nullify the benefits derived by a large number of litigants based on judicial orders validly passed in their favour who are not parties to the proceedings before this Court; (ii) Article 142 does not empower this Court to ignore the substantive rights of the litigants; (iii) While exercising the jurisdiction u/Art. 142 of the Constitution of India, this Court can always issue procedural directions to the Courts for streamlining procedural aspects and ironing out the creases in the procedural laws to ensure expeditious and timely disposal of cases – However, while doing so, this Court cannot affect the substantive rights of those litigants who are not parties to the case before it – The right to be heard before an adverse order is passed is not a matter of procedure but a substantive right; and (iv) The power of this Court u/Art. 142 cannot be exercised to defeat the principles of natural justice, which are an integral part of jurisprudence. [Para 37]

Constitution of India – Position of the High Courts and its power of superintendence:

Held: **(Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.)** A High Court is also a constitutional Court – It is well settled that it is not judicially subordinate to the Supreme Court – A High Court is constitutionally independent of the Supreme Court of India – The power of the High Court u/Art. 227 of the Constitution to have

judicial superintendence over all the Courts within its jurisdiction will include the power to stay the proceedings before such Courts – By a blanket direction in the exercise of power u/Art. 142 of the Constitution of India, the Supreme Court cannot interfere with the jurisdiction conferred on the High Court of granting interim relief by limiting its jurisdiction to pass interim orders valid only for six months at a time – Putting such constraints on the power of the High Court will also amount to making a dent on the jurisdiction of the High Courts u/Art. 226 of the Constitution, which is an essential feature that forms part of the basic structure of the Constitution. [Paras 23 and 24]

Practice and Procedure – Whether the Court should deal with an issue not arising for consideration:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) In the case of Sanjeev Coke Manufacturing Company, a Constitution Bench of the Supreme Court held that (Judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn – Judicial pronouncements cannot be immaculate legal conceptions – It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords – It is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon. [Para 25]

Constitution of India – Art. 226 (3) – Making of an application for vacating interim relief:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) On its plain reading, clause (3) is applicable only when an interim relief is granted without furnishing a copy of the writ petition along with supporting documents to the opposite party and without hearing the opposite party – Even assuming that clause (3) is not directory, it provides for an automatic vacation of interim relief only if the aggrieved party makes an application for vacating the interim relief and when the application for vacating stay is not heard within the time specified – Clause (3) will not apply when an interim order in a writ petition u/Art. 226 is passed after the service of a copy of the writ petition on all concerned parties and after giving them an opportunity of being heard – It applies only to ex-parte ad interim

orders. [Para 26] **Per Pankaj Mithal, J.** (concurring) It is noticeable that u/Art. 226(3) of the Constitution of India, the automatic vacation of the stay order envisages making of an application to the High Court for the vacation of the interim stay order – Therefore, filing of an application for vacating the stay order is a *sine qua non* for triggering the automatic vacation of the stay order u/Art. 226(3) if such an application is not decided within the time prescribed of two weeks. [Para 6]

Directions by Supreme Court – Effect of directions issued by the Constitutional Courts to decide pending cases in a time-bound manner – The three Judges Bench of the Supreme Court issued various directions in *Asian Resurfacing* – The net effect of the directions issued in paragraphs 36 and 37 of Asian Resurfacing is that the petition in which the High Court has granted a stay of the proceedings of the trial, must be decided within a maximum period of six months – If it is not decided within six months, the interim stay will be vacated automatically, virtually making the pending case infructuous:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) The Constitution Benches of the Supreme Court have considered the issue of fixing timelines for the disposal of cases in the cases of Abdul Rehman Antulay and P. Ramachandra Rao – The principles laid down in the decision will apply even to civil cases before the trial courts – The same principles will also apply to a direction issued to the High Courts to decide cases on a day-to-day basis or within a specific time – Thus, the directions of the Court that provide for automatic vacation of the order of stay and the disposal of all cases in which a stay has been granted on a day-to-day basis virtually amount to judicial legislation – The jurisdiction of this Court cannot be exercised to make such a judicial legislation – Only the legislature can provide that cases of a particular category should be decided within a specific time – There are many statutes which incorporate such provisions – However, all such provisions are usually held to be directory – A judicial notice will have to be taken of the fact that in all the High Courts of larger strength having jurisdiction over larger States, the daily cause lists of individual Benches of the cases of the aforesaid categories are of more than a hundred matters – Therefore, once a case is entertained by the High Court and the stay is granted, the case has a long life – The High Courts cannot be expected to

decide, on a priority basis or a day-to-day basis, only those cases in which a stay of proceedings has been granted while ignoring several other categories of cases that may require more priority to be given – Therefore, constitutional Courts should not normally fix a time-bound schedule for disposal of cases pending in any Court – The pattern of pendency of various categories of cases pending in every Court, including High Courts, is different – The situation at the grassroots level is better known to the judges of the concerned Courts – Therefore, the issue of giving out-of turn priority to certain cases should be best left to the concerned Courts – The orders fixing the outer limit for the disposal of cases should be passed only in exceptional circumstances to meet extraordinary situations. [Paras 28, 29, 30, 32, 33]

Constitution of India – Interim Orders – (i) Whether the Supreme Court, in the exercise of its jurisdiction u/Art. 142 of the Constitution of India, can order automatic vacation of all interim orders of the High Courts of staying proceedings of Civil and Criminal cases on the expiry of a certain period; (ii) Whether the Supreme Court, in the exercise of its jurisdiction u/Art. 142 of the Constitution of India, can direct the High Courts to decide pending cases in which interim orders of stay of proceedings has been granted on a day-to-day basis and within a fixed period:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) The three Judges Bench of the Supreme Court decided the case of Asian Resurfacing and issued directions in paragraphs 36 and 37 – The direction issued in paragraph 36 was regarding automatic vacation of stay and direction in paragragh 37 was for conducting day-to-day hearing within a time frame – The present Bench of the Judges does not concur with the three judges Bench which decided the case of Asian Resurfacing and issued directions in paragraphs 36 and 37 – Both directions were issued in the exercise of jurisdiction u/Art.142 of the Constitution – There cannot be automatic vacation of stay granted by the High Court – The direction issued (in the case of Asian Resurfacing) to decide all the cases in which an interim stay has been granted on a day-to-day basis within a time frame is also not approved – Blanket directions cannot be issued in the exercise of the jurisdiction u/Art. 142 of the Constitution of India – Both the questions framed above are answered in the negative. [Paras 12, 36]

Interim Orders – Stay order cannot be automatically vacated:

Held: Per Pankaj Mithal, J. (concurring): The stay order granted in any proceedings would not automatically stand vacated on the expiry of a particular period until and unless an application to that effect has been filed by the other side and is decided following the principles of natural justice by a speaking order – It is expedient in the interest of justice to provide that a reasoned stay order once granted in any civil or criminal proceedings, if not specified to be time bound, would remain in operation till the decision of the main matter or until and unless an application is moved for its vacation and a speaking order is passed adhering to the principles of natural justice either extending, modifying, varying or vacating the same. [Paras 7 and 8]

Practice and Procedure – Procedure to be adopted by High Courts while passing interim order of stay of proceedings and for dealing with the applications for vacating interim stay:

Held: (Per Abhay S. Oka, J. for himself and Dr. Dhananjaya Y. Chandrachud, CJI., J.B. Pardiwala, Manoj Misra, JJ.) To avoid any prejudice to the opposite parties, while granting ex-parte ad-interim relief without hearing the affected parties, the High Courts should normally grant ad-interim relief for a limited duration – After hearing the contesting parties, the Court may or may not confirm the earlier ad-interim order – Ad-interim relief, once granted, can be vacated or affirmed only after application of mind by the concerned Court – Hence, the Courts must give necessary priority to the hearing of the prayer for interim relief where adinterim relief has been granted – Though the High Court is not expected to record detailed reasons while dealing with the prayer for the grant of stay or interim relief, the order must give sufficient indication of the application of mind to the relevant factors – An interim order passed after hearing the contesting parties cannot be vacated by the High Court without giving sufficient opportunity of being heard to the party whose prayer for interim relief has been granted – Even if interim relief is granted after hearing both sides, as observed earlier, the aggrieved party is not precluded from applying for vacating the same on the available grounds – In such a case, the High Court must give necessary priority to the hearing of applications for vacating the stay, if the main case cannot be immediately taken up for hearing – Applications for vacating interim reliefs cannot be kept pending for an inordinately long time. [Paras 34 and 35]

Case Law Cited

Asian Resurfacing of Road Agency Private Limited & Anr. v. Central Bureau of Investigation, [2018] 2 SCR 1045 **: (2018) 16 SCC 299 – Reconsidered.**

Prem Chand Garg & Anr. v. The Excise Commissioner, U.P. and Ors., [1963] Suppl. 1 SCR 885 **: (1962) SCC Online SC 37;** *Supreme Court Bar Association v. Union of India & Anr.*, [1998] 2 SCR 795 **: (1998) 4 SCC 409;** *L. Chandra Kumar v. Union of India & Ors.*, [1997] 2 SCR 1186 **: (1997) 3 SCC 261;** *Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Ltd. & Anr*, [1983] 1 SCR 1000 **: (1983) 1 SCC 147;** *Abdul Rehman Antulay & Ors. v. R.S. Nayak & Anr*, [1991] Suppl. 3 SCR 325 **: (1992) 1 SCC 225;** *P. Ramachandra Rao v. State of Karnataka*, [2002] 3 SCR 60 **: (2002) 4 SCC 578 – followed.**

Deputy Commissioner of Income Tax & Anr. v. Pepsi Foods Limited, [2021] 4 SCR 1 **: (2021) 7 SCC 413;** *Tirupati Balaji Developers (P) Ltd. & Ors. v. State of Bihar & Ors.*, [2004] Suppl. 1 SCR 494 **: (2004) 5 SCC 1 – relied on.**

Mohan Lal Magan Lal Thacker v. State of Gujarat, [1968] 2 SCR 685 : **AIR 1968 SC 733**; *Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur*, [1965] 1 SCR 970 **:** AIR 1965 SC 895; *Kailash v. Nanhku & Ors*, [2005] 3 SCR 289 : **(2005) 4 SCC 480**; *Deoraj v. State of Maharashtra & Ors.*, [2004] 3 SCR 920 : **(2004) 4 SCC 697**; *All India Judges' Association & Ors. v. Union of India & Ors.*, [2002] 2 SCR 712 : **(2002) 4 SCC 247**; *Imtiyaz Ahmed v. State of Uttar Pradesh & Ors.*, [2017] 1 SCR 305 : **(2017) 3 SCC 658 – referred to.**

List of Acts

Constitution of India; Constitution (Forty-fourth Amendment) Act, 1978; Prevention of Corruption Act, 1988; Income Tax Act, 1961.

List of Keywords

Interim orders; Vacation or modification of interim relief; Automatic end of interim relief; Lapse of time; Enforcement of decrees and orders of Supreme Court and orders as to

discovery, etc; Interim orders of the High Courts; Interim orders of stay of proceedings; Day-to-day basis hearing; Position of the High Courts; High Court's power of superintendence; Issue not arising for consideration; Deciding pending cases in a time-bound manner; Effect of directions issued by the Constitutional Courts; Procedure to be adopted by High Courts while passing interim order; Applications for vacating interim stay.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.3589 of 2023

With

Special Leave Petition (Crl.) Nos. 13284-13289 of 2023 and Criminal Appeal... Diary No. 49052 of 2023

From the Judgment and Order dated 03.11.2023 of the High Court of Judicature at Allahabad in A482 No. 28574 of 2019

Appearances for Parties

Rakesh Dwivedi, VK Shukla, Kavin Gulati, S.G. Hasnain, Ravindra Singh, Dinesh Goswami, Sr. Advs., Shantanu Krishna, Nitin Sharma, Nikhil Sharma, Eklavya Dwivedi, Shantanu Sagar, Anukul Raj, Ankit Mishra, Harmeet Singh Ruprah, Abhinav Shrivastava, Manu Yadav, Himanshu Tyagi, Kumar Ayush, Ronak Chaturavedi, Ram Kaushik, Syed Mohd Fazal, Archit Mandhyan, Raman Yadav, Prabhat Ranjan Raj, Sidharth Sarthi, Anil Kumar, Gunjesh Ranjan, Animesh Tripathi, Anant Prakash, Mrs. Kanupriya Mishra, Amit Kumar Singh, Salil Srivastava, Shaurya Vardhan Singh, Ankit Dwivedi, Mrs. Mukti Chowdhary, Gyanendra Kumar, Mrs. Vijaya Singh, Shashwat Anand, Apoorv Mishra, Shashank Shukla, Ashutosh Thakur, Vaibhav Jain, Rituvendra Singh, Aniruddh Kumar, Rajrshi Gupta, Imran Ullah, Tarun Agarwal, Ankit Saran, Namit Srivastava, Rakesh Dubey, Swetashwa Agarwal, Javed H Khan, Praval Tripathi, Shariq Ahmed, Satwik Misra, Ishit Saharia, Ashish Singh, Amit Singh, Sanjay Kumar Singh, Piyush Kumar, Paritosh Kumar Singh, Pai Amit, N. Ashwani Kumar, Ms. Pankhuri Bhardwaj, Ms. Bhavana Duhoon, Ms. Ranu Purohit, Abhiyudaya Vats, Ms. Vanshika Dubey, Kushal Dube, Tathagata Dutta, P. Ashok, Advs. for the Appellant.

Tushar Mehta, SG, Ajay Kumar Misra, Adv. Gen/Sr. Adv., Vijay Hansaria, Sr. Adv., Tanmaya Agarwal, Wrick Chatterjee, Mrs. Aditi

Agarwal, Vinayak Mohan, Mahfooz Ahsan Nazki, Polanki Gowtham, Ms. Rajeswari Mukherjee, K.V. Girish Chowdary, T. Vijaya Bhaskar Reddy, Ms. Archita Nigam, Meeran Maqbool, Ms. Ruchi Guasain, Fuzail Ahmad Ayyubi, Ibad Mushtaq, Ms. Akanksha Rai, Ms. Anasuya Choudhury, Ms. Kavya Jhawar, Gaurav Mehrotra, Talha Abdul Rahman, Nadeem Murtaza, Akber Ahmed, Abhinit Jaiswal, Harsh Vardhan Mehrotra, Ms. Maria Fatima, Ms. Alina Masoodi, M. Shaz Khan, Adnan Yousuf Bhat, Ms. Anasuya Chaudhoury, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

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* Ed Note : Pagination as per original judgment.

A. FACTUAL BACKGROUND

By the order dated 1st December 2023, a Bench of three Hon'ble Judges of this Court expressed a view that a decision of this Court in the case of ***Asian Resurfacing of Road Agency Private Limited & Anr. v. Central Bureau of Investigation***[1] requires reconsideration by a larger Bench.

I. Directions in Asian Resurfacing

1. In ***Asian Resurfacing***[1], this Court dealt with the scope of interference by the High Court with an order of framing charge passed by the Special Judge under the provisions of the Prevention of Corruption Act, 1988 (for short, 'the PC Act'). The issue was whether an order of framing charge was an interlocutory order. The High Court held that an order of framing charge under the PC Act was interlocutory. A Bench of two Hon'ble Judges of this Court, by the order dated 9th September 2013, referred the case to a larger Bench to consider the issue of whether the case of ***Mohan Lal Magan Lal Thacker v. State of Gujarat***[2] was correctly decided. A Bench of three Hon'ble Judges held that the order of framing charge was neither an interlocutory nor a final order. Therefore, it was held that the High Court has jurisdiction in appropriate cases to consider a challenge to an order of framing charge. Furthermore, the High Court has jurisdiction to grant a stay of the trial proceedings. Thereafter, it proceeded to consider in which cases a stay of the proceedings ought to be granted. The Bench considered the question in the context of a criminal trial, particularly under the PC Act. In paragraphs 30 and 31, the Bench observed thus:

> **"30.** It is well accepted that delay in a criminal trial, particularly in the PC Act cases, has deleterious effect on the administration of justice in which the society has a

1 [2018] 2 SCR 1045 : (2018) 16 SCC 299

2 [1968] 2 SCR 685 : AIR 1968 SC 733

vital interest. Delay in trials affects the faith in Rule of Law and efficacy of the legal system. It affects social welfare and development. Even in civil or tax cases it has been laid down that power to grant stay has to be exercised with restraint. Mere prima facie case is not enough. Party seeking stay must be put to terms and stay should not be an incentive to delay. The order granting stay must show application of mind. The power to grant stay is coupled with accountability. [*Siliguri Municipality* v. *Amalendu Das*, (1984) 2 SCC 436, para 4 : 1984 SCC (Tax) 133; *CCE* v. *Dunlop India Ltd.*, (1985) 1 SCC 260, para 5 : 1985 SCC (Tax) 75; *State (UT of Pondicherry)* v. *P.V. Suresh*, (1994) 2 SCC 70, para 15 and *State of W.B.* v. *Calcutta Hardware Stores*, (1986) 2 SCC 203, para 5]

31. Wherever stay is granted, a speaking order must be passed showing that the case was of exceptional nature and delay on account of stay will not prejudice the interest of speedy trial in a corruption case. Once stay is granted, proceedings should not be adjourned, and concluded within two-three months."

(Emphasis added)

2. We have been called upon to decide the correctness of the view taken in paragraphs 36 and 37 of the said decision, which read thus:

"**36.** In view of the above, situation of proceedings remaining pending for long on account of stay needs to be remedied. Remedy is required not only for corruption cases but for all civil and criminal cases where on account of stay, civil and criminal proceedings are held up. At times, proceedings are adjourned sine die on account of stay. Even after stay is vacated, intimation is not received and proceedings are not taken up. In an attempt to remedy this situation, **we consider it appropriate to direct that in all pending cases where stay against proceedings of a civil or criminal trial is operating, the same will come to an end on expiry of six months from today unless in an exceptional case by a speaking order such stay is extended. In cases where stay is granted in future, the same**

will end on expiry of six months from the date of such order unless similar extension is granted by a speaking order. The speaking order must show that the case was of such exceptional nature that continuing the stay was more important than having the trial finalised. The trial court where order of stay of civil or criminal proceedings is produced, may fix a date not beyond six months of the order of stay so that on expiry of period of stay, proceedings can commence unless order of extension of stay is produced.

37. Thus, we declare the law to be that order framing charge is not purely an interlocutory order nor a final order. Jurisdiction of the High Court is not barred irrespective of the label of a petition, be it under Sections 397 or 482 CrPC or Article 227 of the Constitution. However, the said jurisdiction is to be exercised consistent with the legislative policy to ensure expeditious disposal of a trial without the same being in any manner hampered. Thus considered, the challenge to an order of charge should be entertained in a rarest of rare case only to correct a patent error of jurisdiction and not to reappreciate the matter. **Even where such challenge is entertained and stay is granted, the matter must be decided on day-to-day basis so that stay does not operate for an unduly long period. Though no mandatory time-limit may be fixed, the decision may not exceed two-three months normally. If it remains pending longer, duration of stay should not exceed six months, unless extension is granted by a specific speaking order, as already indicated.** Mandate of speedy justice applies to the PC Act cases as well as other cases where at trial stage proceedings are stayed by the higher court i.e. the High Court or a court below the High Court, as the case may be. In all pending matters before the High Courts or other courts relating to the PC Act or all other civil or criminal cases, where stay of proceedings in a pending trial is operating, stay will automatically lapse after six months from today unless extended by a speaking order on the above parameters. Same course may also be adopted by civil and criminal

> appellate/Revisional Courts under the jurisdiction of the High Courts. The trial courts may, on expiry of the above period, resume the proceedings without waiting for any other intimation unless express order extending stay is produced."
>
> **(Emphasis added)**

3. A Miscellaneous Application was filed in the decided case, in light of the order passed on 4th December 2019 by the Learned Additional Chief Judicial Magistrate, Pune. When the learned Magistrate was called upon to proceed with the trial on the ground of automatic vacation of stay after the expiry of a period of six months, the learned Magistrate expressed a view that when the jurisdictional High Court had passed an order of stay, a Court subordinate to the High Court cannot pass any order contrary to the order of stay. By the order dated 15th October 2020, this Court held that when the stay granted by the High Court automatically expires, unless an extension is granted for good reasons, the Trial Court, on expiry of a period of six months, must set a date for trial and go ahead with the same. Later, an attempt was made to seek clarification of the law laid down in the case of ***Asian Resurfacing***[1]. This Court, by the order dated 25th April 2022, did not apply the direction issued in ***Asian Resurfacing***[1] to the facts of the case before it. An attempt was made to apply the directions to an order of stay of the order of the learned Single Judge of the High Court passed by a Division Bench in a Letters Patent Appeal.

II. Order of reference to Larger Bench

4. In the order of reference dated 1st December 2023, in paragraph 10, this Court observed thus:

> **"10.** We have reservations in regard to the correctness of the broad formulations of principle in the above terms. There can be no gainsaying the fact that a stay of an indefinite nature results in prolonging civil or criminal proceedings, as the case may be, unduly. At the same time, it needs to be factored in that the delay is not always on account of conduct of the parties involved. The delay may also be occasioned by the inability of the Court to take up proceedings expeditiously. **The principle which**

has been laid down in the above decision to the effect that the stay shall automatically stand vacated (which would mean an automatic vacation of stay without application of judicial mind to whether the stay should or should not be extended further) is liable to result in a serious miscarriage of justice."

(Emphasis added)

5. We are called upon to decide the following questions: -

(a) Whether this Court, in the exercise of its jurisdiction under Article 142 of the Constitution of India, can order automatic vacation of all interim orders of the High Courts of staying proceedings of Civil and Criminal cases on the expiry of a certain period?

(b) Whether this Court, in the exercise of its jurisdiction under Article 142 of the Constitution of India, can direct the High Courts to decide pending cases in which interim orders of stay of proceedings has been granted on a day-to-day basis and within a fixed period?

B. SUBMISSIONS

6. The main submissions were canvassed by Shri Rakesh Dwivedi, the learned senior counsel appearing on behalf of the appellant in Criminal Appeal no.3589 of 2023. We are summarising the submissions of Shri Rakesh Dwivedi as follows:

a. Automatic Vacation of the interim order is in the nature of judicial legislation. This Court cannot engage in judicial legislation;

b. Article 226 is a part of the basic structure of the Constitution of India, and it can neither be shut out nor whittled down by the exercise of powers under Articles 141 and 142;

c. The High Court is also a constitutional Court which is not judicially subordinate to this Court;

d. An order granting interim relief cannot be passed without an application of judicial mind. Application of mind is a pre-requisite of judicial decision making. The absence of application of mind would render a decision arbitrary. Similarly, an order vacating interim relief cannot be passed without the application of judicial mind;

e. If an interim order is to be passed, it should be initially for a short period so that there is an effective opportunity for the respondent to contest the same;

f. Two Constitution Benches in the cases of ***Abdul Rehman Antulay & Ors. v. R.S. Nayak & Anr.***[3] and ***P. Ramachandra Rao v. State of Karnataka***[4] held that it is not permissible for this Court to fix the time limit for completion of a trial;

g. No such directions could have been issued in the exercise of the jurisdiction of this Court under Article 142 of the Constitution of India;

h. Even under Article 226 (3) of the Constitution, an interim order cannot be automatically vacated unless a specific application is made for vacating the interim order;

i. A provision of automatic vacation of the Appellate Tribunal's stay order was incorporated in Section 254 (2A) of the Income Tax Act, 1961 (for short, 'the IT Act'). It provided that if an appeal preferred before the Appellate Tribunal was not disposed of within 365 days, the stay shall stand vacated even if the delay in disposing of the appeal is not attributable to the assessee. This court struck down the provision in the case of ***Deputy Commissioner of Income Tax & Anr. v. Pepsi Foods Limited***[5] on the ground that it was manifestly arbitrary; and

j. The automatic vacation of interim relief is unjust, unfair and unreasonable.

7. Shri Tushar Mehta, the learned Solicitor General appearing for the State of Uttar Pradesh, supported the submissions of Shri Dwivedi. In addition, he submitted that:

a. As held by the Constitution Bench in the case of ***Raza Buland Sugar Co. Ltd. v. Municipal Board, Rampur***[6], laws of procedure are grounded in principles of natural justice, which require that no decision can be reached behind the back of a person and in his absence;

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3 [1991] Suppl. 3 SCR 325 : (1992) 1 SCC 225

4 [2002] 3 SCR 60 : (2002) 4 SCC 578

5 [2021] 4 SCR 1 : (2021) 7 SCC 413

6 [1965] 1 SCR 970 : AIR 1965 SC 895

b. If the condition imposed by a provision of law to do a certain thing within a time frame is upon the institution and the consequences of that institution failing to comply with the condition are to fall upon someone who has no control over the institution, the provision of law will have to be construed as directory;

c. An interim relief order is always granted after considering the three factors: prima facie case, the balance of convenience and irreparable injury to the aggrieved party. Once a finding is recorded regarding the entitlement of the appellant/ applicant to get the order of stay, the order does not become automatically bad on the ground that it has lived for six months; and

d. In the decision of this Court in ***Kailash v. Nanhku & Ors***[7], it has been held that the process of justice may be speeded up and hurried, but fairness, which is the basic element of justice, cannot be permitted to be buried. The discretion conferred upon the High Court cannot be taken away by exercising power under Article 142 of the Constitution of India.

8. Shri Gaurav Mehrotra, the learned counsel appearing for the applicant in I.A. no.252872 of 2023 in Criminal Appeal no.3589 of 2023, in addition to the aforesaid submissions, relied upon a decision of the Constitution Bench in the case of ***Sanjeev Coke Manufacturing Company v. M/s. Bharat Coking Coal Ltd. & Anr***[8], to contend that the Court should not decide any important question without there being a proper *lis.*

9. Shri Vijay Hansaria, the learned senior counsel appearing for the Gauhati High Court Bar Association, made the following submissions:

a. As regards the interpretation of clause (3) of Article 226 of the Constitution of India, various High Courts have taken different views on the issue of whether the provision for automatic vacation of stay is mandatory or directory. He urged that the provision will have to be held as a directory;

7 [2005] 3 SCR 289 : (2005) 4 SCC 480

8 [1983] 1 SCR 1000 : (1983) 1 SCC 147

b. In ***Asian Resurfacing***[1], the Court was dealing with a petition filed in the High Court arising from a prosecution under the PC Act. The cases of other categories were not the subject matter of challenge before this Court;

c. The power under Article 142 of the Constitution of India can be exercised for doing complete justice in any case or matter pending before it. The issue of the duration of the order of stay did not arise in the case of ***Asian Resurfacing***[1]; and

d. A successful litigant whose application for stay is allowed by the High Court cannot be prejudiced only on the ground that the High Court does not hear the main case within six months for reasons beyond the control of the said litigant.

10. Shri Amit Pai, the learned counsel appearing for the appellant in one of the appeals, while adopting the submissions, relied upon a decision of this Court in the case of ***Deoraj v. State of Maharashtra & Ors.***[9] and contended that recourse is taken to the order of grant of interim relief as the conclusion of hearing on merits is likely to take some time. He submitted that the said object has not been considered in ***Asian Resurfacing***[1]. He urged that passing an interim order of stay is a judicial act. Therefore, such an order must be vacated only by a judicial act.

11. Prof (Dr) Pankaj K Phadnis, representing the intervenor – Abhinav Bharat Congress, has filed written submissions. He has contended that he was not permitted to join the hearing through video conferencing. He has come out with the draft of Supreme Court Rules, 2024. His submissions, based on the draft, are entirely irrelevant.

C. ANALYSIS

12. We have no manner of doubt that the direction issued in paragraph 36 of ***Asian Resurfacing***[1] regarding automatic vacation of stay has been issued in the exercise of the jurisdiction of this Court under Article 142 of the Constitution of India. Even the direction in paragraph 37 of conducting day-to-day hearing has been issued in exercise of the same jurisdiction. The effect of the direction issued in paragraph 36 is that the interim order of stay granted

9 [2004] 3 SCR 920 : (2004) 4 SCC 697

in favour of a litigant stands vacated without even giving him an opportunity of being heard, though there may not be any default on his part.

I. Object of passing interim orders

13. Before we examine the questions, we need to advert to the object of passing orders of interim relief pending the final disposal of the main case. The reason is that the object of passing interim order has not been considered while deciding ***Asian Resurfacing***[1]**.** An order of interim relief is usually granted in the aid of the final relief sought in the case. An occasion for passing an order of stay of the proceedings normally arises when the High Court is dealing with a challenge to an interim or interlocutory order passed during the pendency of the main case before a trial or appellate Court. The High Court can grant relief of the stay of hearing of the main proceedings on being satisfied that a prima facie case is made out and that the failure to stay the proceedings before the concerned Court in all probability may render the remedy adopted infructuous. When the High Court passes an interim order of stay, though the interim order may not expressly say so, the three factors, viz; prima facie case, irreparable loss, and balance of convenience, are always in the back of the judges' minds. Though interim orders of stay of proceedings cannot be routinely passed as a matter of course, it cannot be said that such orders can be passed only in exceptional cases. Nevertheless, the High Courts, while passing orders of stay in serious cases like the offences under the PC Act or serious offences against women and children, must be more cautious and circumspect. An occasion for passing an order of stay of proceeding arises as it is not possible for the High Court to take up the case for final hearing immediately. While entertaining a challenge to an order passed in a pending case, if the pending case is not stayed, the trial or the appellate Court may decide the pending case, rendering the remedy before the High Court ineffective. Such a situation often leads to the passing of an order of remand. In our legal system, which is facing a docket explosion, an order of remand should be made only as a last resort. The orders of remand not only result in more delays but also increase the cost of litigation. Therefore, to avoid the possibility of passing an order of remand, the grant of stay of proceedings is called for in many cases.

II. High Court's power to vacate or modify interim relief

14. When a High Court grants a stay of the proceedings while issuing notice without giving an opportunity of being heard to the contesting parties, it is not an interim order, but it is an ad-interim order of stay. It can be converted into an interim order of stay only after an opportunity of being heard is granted on the prayer for interim relief to all the parties to the proceedings. Ad-interim orders, by their very nature, should be of a limited duration. Therefore, such orders do not pose any problem.

15. The High Courts are always empowered to vacate or modify an order of interim relief passed after hearing the parties on the following, amongst other grounds: -

(a) If a litigant, after getting an order of stay, deliberately prolongs the proceedings either by seeking adjournments on unwarranted grounds or by remaining absent when the main case in which interim relief is granted is called out for hearing before the High Court with the object of taking undue advantage of the order of stay;

(b) The High Court finds that the order of interim relief is granted as a result of either suppression or misrepresentation of material facts by the party in whose favour the interim order of stay has been made; and

(c) The High Court finds that there is a material change in circumstances requiring interference with the interim order passed earlier. In a given case, a long passage of time may bring about a material change in circumstances.

These grounds are not exhaustive. There can be other valid grounds for vacating an order of stay.

III. Whether an Interim Order can come to an end automatically only due to the lapse of time

16. Interim order of stay can come to an end: -

(a) By disposal of the main case by the High Court, in which the interim order has been passed. The disposal can be either on merits or for default or other reasons such as the abatement of the case; or

(b) by a judicial order vacating interim relief, passed after hearing the contesting parties on the available grounds, some of which we have already referred to by way of illustration.

Elementary principles of natural justice, which are well recognised in our jurisprudence, mandate that an order of vacating interim relief or modification of the interim relief is passed only after hearing all the affected parties. An order of vacating interim relief passed without hearing the beneficiary of the order is against the basic tenets of justice. Application of mind is an essential part of any decision-making process. Therefore, without application of mind, an order of interim stay cannot be vacated only on the ground of lapse of time when the litigant is not responsible for the delay. An interim order lawfully passed by a Court after hearing all contesting parties is not rendered illegal only due to the long passage of time. Moreover, the directions issued in ***Asian Resurfacing***[1] regarding automatic vacation of interim orders of stay passed by all High Courts are applicable, irrespective of the merits of individual cases. If a High Court concludes after hearing all the concerned parties that a case was made out for the grant of stay of proceedings of a civil or criminal case, the order of stay cannot stand automatically set aside on expiry of the period of six months only on the ground that the High Court could not hear the main case. If such an approach is adopted, it will be completely contrary to the concept of fairness. If an interim order is automatically vacated without any fault on the part of the litigant only because the High Court cannot hear the main case, the maxim *"actus curiae neminem gravabit"* will apply. No litigant should be allowed to suffer due to the fault of the Court. If that happens, it is the bounden duty of the Court to rectify its mistake.

17. In the subsequent clarification in the case of ***Asian Resurfacing***[1], a direction has been issued to the Trial Courts to immediately fix a date for hearing after the expiry of the period of six months without waiting for any formal order of vacating stay passed by the High Court. This gives an unfair advantage to the respondent in the case before the High Court. Moreover, it adversely affects a litigant's right to the remedies under Articles 226 and 227 of the Constitution of India. Such orders virtually defeat the right of a litigant to seek and avail of statutory remedies such as revisions, appeals, and applications under Section 482 of the Code of Criminal Procedure,

1973 (for short, 'Cr. PC') as well as the remedies under the Code of Civil Procedure, 1908 (for short, 'CPC'). All interim orders of stay passed by all High Courts cannot be set at naught by a stroke of pen only on the ground of lapse of time.

18. The legislature attempted to provide for an automatic vacation of stay granted by the Income Tax Appellate Tribunal by introducing the third proviso to Section 254 (2A) of the IT Act. It provided that if an appeal in which the stay was granted was not heard within a period of 365 days, it would amount to the automatic vacation of stay. In the case of ***Pepsi Foods Limited***[5], this Court held that a provision automatically vacating a stay was manifestly arbitrary and, therefore, violative of Article 14 of the Constitution of India. Paragraphs 20 and 22 of the said decision read thus:

> **"20. Judged by both these parameters, there can be no doubt that the third proviso to Section 254(2-A) of the Income Tax Act, introduced by the Finance Act, 2008, would be both arbitrary and discriminatory and, therefore, liable to be struck down as offending Article 14 of the Constitution of India. First and foremost, as has correctly been held in the impugned judgment, unequals are treated equally in that no differentiation is made by the third proviso between the assessees who are responsible for delaying the proceedings and assessees who are not so responsible.** This is a little peculiar in that the legislature itself has made the aforesaid differentiation in the second proviso to Section 254(2-A) of the Income Tax Act, making it clear that a stay order may be extended up to a period of 365 days upon satisfaction that the delay in disposing of the appeal is not attributable to the assessee. We have already seen as to how, as correctly held by *Narang Overseas* [*Narang Overseas (P) Ltd.* v. *Income Tax Appellate Tribunal*, 2007 SCC OnLine Bom 671 : (2007) 295 ITR 22] , the second proviso was introduced by the Finance Act, 2007 to mitigate the rigour of the first proviso to Section 254(2-A) of the Income Tax Act in its previous *avatar*. Ordinarily, the Appellate Tribunal, *where possible*, is to hear and decide appeals within a period of four years from the end of the financial year in which such appeal is filed. It is only when a stay of the

impugned order before the Appellate Tribunal is granted, that the appeal is required to be disposed of within 365 days. So far as the disposal of an appeal by the Appellate Tribunal is concerned, this is a directory provision. However, so far as vacation of stay on expiry of the said period is concerned, this condition becomes mandatory so far as the assessee is concerned."

21. .. ..

22. Since the object of the third proviso to Section 254(2-A) of the Income Tax Act is the automatic vacation of a stay that has been granted on the completion of 365 days, whether or not the assessee is responsible for the delay caused in hearing the appeal, such object being itself discriminatory, in the sense pointed out above, is liable to be struck down as violating Article 14 of the Constitution of India. Also, the said proviso would result in the automatic vacation of a stay upon the expiry of 365 days even if the Appellate Tribunal could not take up the appeal in time for no fault of the assessee. Further, the vacation of stay in favour of the Revenue would ensue even if the Revenue is itself responsible for the delay in hearing the appeal. In this sense, the said proviso is also manifestly arbitrary being a provision which is capricious, irrational and disproportionate so far as the assessee is concerned."

(Emphasis added)

Therefore, even if the legislature were to come out with such a provision for automatic vacation of stay, the same may not stand judicial scrutiny as it may suffer from manifest arbitrariness.

IV. Scope of exercise of powers under Article 142 of the Constitution

19. The directions issued in ***Asian Resurfacing***[1] are obviously issued in the exercise of jurisdiction of this Court under Article 142 of the Constitution, which confers jurisdiction on this Court to pass such a decree or make such order necessary for doing complete justice in any case or matter pending before it. In ***Asian Resurfacing***[1], the first issue was, whether an order framing of charge in a case

under the PC Act was in the nature of an interlocutory order. The second question was of the scope of powers of the High Court to stay proceedings of the trial under the PC Act while entertaining a challenge to an order of framing charge. The question regarding the duration of the interim orders passed by the High Courts in various other proceedings did not specifically arise for consideration in the case of ***Asian Resurfacing***[1]. The provisions of Article 142 of the Constitution of India are meant to further the cause of justice and to secure complete justice. The directions in the exercise of power under Article 142 cannot be issued to defeat justice. The jurisdiction under Article 142 cannot be invoked to pass blanket orders setting at naught a very large number of interim orders lawfully passed by all the High Courts, and that too, without hearing the contesting parties. The jurisdiction under Article 142 can be invoked only to deal with extraordinary situations for doing complete justice between the parties before the Court.

20. While dealing with the scope of power under Article 142, a Constitution Bench of this Court in the case of ***Prem Chand Garg & Anr. v. The Excise Commissioner, U.P. and Ors.***[10]**,** in paragraphs 12 and 13 held thus:

> **"12.** Basing himself on this decision, the Solicitor-General argues that the power conferred on this Court under Article 142(1) is comparable to the privileges claimed by the members of the State Legislatures under the latter part of Article 194(3), and so, there can be no question of striking down an order passed by this Court under Article 142(1) on the ground that it is inconsistent with Article 32. It would be noticed that this argument proceeds on the basis that the order for security infringes the fundamental right guaranteed by Article 32 and it suggests that under Article 142(1) this Court has jurisdiction to pass such an order. In our opinion, the argument thus presented is misconceived. In this connection, it is necessary to appreciate the actual decision in the case of *Sharma* [(1959) 1 SCR 806 at 859-860] and its effect. The actual decision was that the rights claimable under the latter part of Article 194(3) were

10 [1963] Supp. 1 S.C.R. 885 : 1962 SCC Online SC 37

not subject to Article 19(1)(*a*), because the said rights had been expressly provided for by a constitutional provision viz. Article 194(3), and it would be impossible to hold that one part of the Constitution is inconsistent with another part. The position would, however, be entirely different if the State Legislature was to pass a law in regard to the privileges of its members. Such a law would obviously have to be consistent with Article 19(1)(*a*). If any of the provisions of such a law were to contravene any of the fundamental rights guaranteed by Part III, they would be struck down as being unconstitutional. Similarly, there can be no doubt that if in respect of petitions under Article 32 a law is made by Parliament as contemplated by Article 145(1), and such a law, in substance, corresponds to the provisions of Order 25 Rule 1 or Order 41 Rule 10, it would be struck down on the ground that it purports to restrict the fundamental right guaranteed by Article 32. The position of an order made either under the rules framed by this Court or under the jurisdiction of this Court under Article 142(1) can be no different. If this aspect of the matter is borne in mind, there would be no difficulty in rejecting the Solicitor-General's argument based on Article 142(1). **The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws.** Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32.

13. In this connection, it may be pertinent to point out that the wide powers which are given to this Court for doing complete justice between the parties, can be

used by this Court, for instance, in adding parties to the proceedings pending before it, or in admitting additional evidence, or in remanding the case, or in allowing a new point to be taken for the first time. **It is plain that in exercising these and similar other powers, this Court would not be bound by the relevant provisions of procedure if it is satisfied that a departure from the said procedure is necessary to do complete justice between the parties**."

(Emphasis added)

21. Another Constitution Bench in the case of ***Supreme Court Bar Association v. Union of India & Anr.***[11], in paragraphs 47 and 48, held thus:

> **"47.** The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are *complementary* to those powers which are *specifically conferred on the Court by various statutes though are not limited by those statutes*. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of *supplementary* powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, *to prevent injustice* in the process of litigation and *to do complete justice between the parties*. **This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary *whenever it is just and equitable to do so* and in particular to ensure the observance of the due process of law, *to do complete justice between the parties*, while administering justice according to law.** There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of

11 [1998] 2 SCR 795 : (1998) 4 SCC 409

justice". **It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to *ignore* the substantive rights of a litigant while dealing with a cause pending before it.** This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. **Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly.** Punishing a contemner advocate, while dealing with a contempt of court case by suspending his licence to practice, a power otherwise statutorily available *only* to the Bar Council of India, on the ground that the contemner is also an advocate, is, therefore, not permissible in exercise of the jurisdiction under Article 142. The construction of Article 142 must be functionally informed by the salutary purposes of the article, viz., *to do complete justice between the parties*. It cannot be otherwise. As already noticed in a case of contempt of court, the contemner and the court cannot be said to be litigating parties.

48. The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is *necessary for doing complete justice* "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" *in a cause or matter before it.* Indeed this Court is not a court of restricted jurisdiction of only dispute-settling. It is well recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" (see *K. Veeraswami* v. *Union of India* [(1991) 3 SCC 655 : 1991 SCC (Cri) 734]

> but the substantive statutory provisions dealing with the subject-matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be *controlled* by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise *may come directly in conflict* with what has been expressly provided for in a statute dealing expressly with the subject."
>
> **(Emphasis added)**

22. It is very difficult to exhaustively lay down the parameters for the exercise of powers under Article 142 of the Constitution of India due to the very nature of such powers. However, a few important parameters which are relevant to the issues involved in the reference are as follows:-

(i) The jurisdiction can be exercised to do complete justice between the parties before the Court. It cannot be exercised to nullify the benefits derived by a large number of litigants based on judicial orders validly passed in their favour who are not parties to the proceedings before this Court;

(ii) Article 142 does not empower this Court to ignore the substantive rights of the litigants; and

(iii) While exercising the jurisdiction under Article 142 of the Constitution of India, this Court can always issue procedural directions to the Courts for streamlining procedural aspects and ironing out the creases in the procedural laws to ensure expeditious and timely disposal of cases. This is because, while exercising the jurisdiction under Article 142, this Court may not be bound by procedural requirements of law. However, while doing so, this Court cannot affect the substantive rights of those litigants who are not parties to the case before it. The right to be heard before an adverse order is passed is not a matter of procedure but a substantive right.

(iv) The power of this Court under Article 142 cannot be exercised to defeat the principles of natural justice, which are an integral part of our jurisprudence.

V. Position of the High Courts and its power of superintendence

23. A High Court is also a constitutional Court. It is well settled that it is not judicially subordinate to this Court. In the case of ***Tirupati Balaji Developers (P) Ltd. & Ors. v. State of Bihar & Ors.***[12], this Court has explained the position of the High Courts vis-à-vis this Court. In paragraph 8, this Court observed thus:

> **"8. Under the constitutional scheme as framed for the judiciary, the Supreme Court and the High Courts, both are courts of record. The High Court is not a court "subordinate" to the Supreme Court.** In a way the canvas of judicial powers vesting in the High Court is wider inasmuch as it has jurisdiction to issue all prerogative writs conferred by Article 226 of the Constitution for the enforcement of any of the rights conferred by Part III of the Constitution and *for any other purpose* while the original jurisdiction of the Supreme Court to issue prerogative writs remains confined to the enforcement of fundamental rights and to deal with some such matters, such as Presidential elections or inter-State disputes which the Constitution does not envisage being heard and determined by High Courts. **The High Court exercises power of superintendence under Article 227 of the Constitution over all subordinate courts and tribunals; the Supreme Court has not been conferred with any power of superintendence. If the Supreme Court and the High Courts both were to be thought of as brothers in the administration of justice, the High Court has larger jurisdiction but the Supreme Court still remains the elder brother.** There are a few provisions which give an edge, and assign a superior place in the hierarchy, to the Supreme Court over High Courts. So far as the appellate jurisdiction is concerned, in all civil and criminal matters, the Supreme Court is the highest and the ultimate court of appeal. It is the final interpreter of the law. Under Article 139-A, the Supreme Court may transfer any case pending before one High Court to another High Court or may withdraw the case to itself. Under Article 141

12 [2004] Supp. 1 SCR 494 : (2004) 5 SCC 1

> the law declared by the Supreme Court shall be binding on all courts, including High Courts, within the territory of India. Under Article 144 all authorities, civil and judicial, in the territory of India — and that would include High Courts as well — shall act in aid of the Supreme Court."
>
> **(Emphasis added)**

A High Court is constitutionally independent of the Supreme Court of India and is not subordinate to this Court. This Court has dealt with the issue of jurisdiction of the High Courts in the case of ***L. Chandra Kumar v. Union of India & Ors***[13]**.** The relevant part of paragraph 78 and paragraph 79 read thus:

> **"78.** .. .. **We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Article 226 and in this Court under Article 32 of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of High Courts and the Supreme Court to test the constitutional validity of legislations can never be ousted or excluded.**
>
> **79. We also hold that the power vested in the High Courts to exercise judicial superintendence over the decisions of all courts and tribunals within their respective jurisdictions is also part of the basic structure of the Constitution.** This is because a situation where the High Courts are divested of all other judicial functions apart from that of constitutional interpretation, is equally to be avoided."
>
> **(Emphasis added)**

24. The power of the High Court under Article 227 of the Constitution to have judicial superintendence over all the Courts within its jurisdiction will include the power to stay the proceedings before such Courts. By a blanket direction in the exercise of power under Article 142 of the Constitution of India, this Court cannot interfere with the jurisdiction

13 [1997] 2 SCR 1186 : (1997) 3 SCC 261

conferred on the High Court of granting interim relief by limiting its jurisdiction to pass interim orders valid only for six months at a time. Putting such constraints on the power of the High Court will also amount to making a dent on the jurisdiction of the High Courts under Article 226 of the Constitution, which is an essential feature that forms part of the basic structure of the Constitution.

VI. Whether the Court should deal with an issue not arising for consideration

25. In the case of ***Sanjeev Coke Manufacturing Company***,[8] a Constitution Bench of this Court in paragraph 11 held thus:

> **"11.** .....We have serious reservations on the question whether it is open to a court to answer academic or hypothetical questions on such considerations, particularly so when serious constitutional issues are involved. **We (Judges) are not authorised to make disembodied pronouncements on serious and cloudy issues of constitutional policy without battle lines being properly drawn. Judicial pronouncements cannot be immaculate legal conceptions. It is but right that no important point of law should be decided without a proper lis between parties properly ranged on either side and a crossing of the swords. We think it is inexpedient for the Supreme Court to delve into problems which do not arise and express opinion thereon."**
>
> **(Emphasis added)**

In ***Asian Resurfacing***[1], there was no *lis* before this Court arising out of the orders of stay granted in different categories of cases pending before the various High Courts. This Court was dealing with a case under the PC Act. Thus, an attempt was made to delve into an issue which did not arise for consideration.

VII. Clause (3) Of Article 226 of the Constitution

26. In this case, it is unnecessary for this Court to decide whether clause (3) of Article 226 of the Constitution of India is mandatory or directory. Clause (3) of Article 226 reads thus:

> **"226. Power of High Courts to issue certain writs:**
>
> (1) .. ..
>
> (2) .. ..
>
> (3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
>
> (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
>
> (b) giving such party an opportunity of being heard,
>
> makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated."

On its plain reading, clause (3) is applicable only when an interim relief is granted without furnishing a copy of the writ petition along with supporting documents to the opposite party and without hearing the opposite party. Even assuming that clause (3) is not directory, it provides for an automatic vacation of interim relief only if the aggrieved party makes an application for vacating the interim relief and when the application for vacating stay is not heard within the time specified. Clause (3) will not apply when an interim order in a writ petition under Article 226 is passed after the service of a copy of the writ petition on all concerned parties and after giving them an opportunity of being heard. It applies only to *ex-parte* ad interim orders.

VIII. Directions issued by the constitutional Courts to decide pending cases in a time-bound manner

27. The net effect of the directions issued in paragraphs 36 and 37 of ***Asian Resurfacing***[1] is that the petition in which the High Court has granted a stay of the proceedings of the trial, must be decided within a maximum period of six months. If it is not decided within six months, the interim stay will be vacated automatically, virtually making the pending case infructuous. In fact, in paragraph 37, this Court directed that the challenge to the order of framing charge should be entertained in a rare case, and when the stay is granted, the case should be decided by the High Court on a day-to-day basis so that the stay does not operate for an unduly long period.

28. The Constitution Benches of this Court have considered the issue of fixing timelines for the disposal of cases in the cases of ***Abdul Rehman Antulay***[3] and ***P. Ramachandra Rao***[4]. In the case of ***Abdul Rehman Antulay***[3], in paragraph 83, this Court held thus:

> **"83.** But then speedy trial or other expressions conveying the said concept — are necessarily relative in nature. One may ask — speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind. For example, take the very case in which Ranjan Dwivedi (petitioner in Writ Petition No. 268 of 1987) is the accused. 151 witnesses have been examined by the prosecution over a period of five years. Examination of some of the witnesses runs into more than 100 typed pages each. The oral evidence adduced by the prosecution so far runs into, we are told, 4000 pages. Even though, it was proposed to go on with the case five days of a week and week after week, it was not possible for various reasons viz., non-availability of the counsel, non-availability of accused, interlocutory proceedings and other systemic delays. A murder case may be a simple one involving say a dozen witnesses which can

be concluded in a week while another case may involve a large number of witnesses, and may take several weeks. Some offences by their very nature e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public servants and high public officials take longer time for investigation and trial. Then again, the workload in each court, district, region and State varies. This fact is too well known to merit illustration at our hands. In many places, requisite number of courts are not available. In some places, frequent strikes by members of the bar interferes with the work schedules. In short, it is not possible in the very nature of things and present-day circumstances to draw a time-limit beyond which a criminal proceeding will not be allowed to go. Even in the USA, the Supreme Court has refused to draw such a line. Except for the Patna Full Bench decision under appeal, no other decision of any High Court in this country taking such a view has been brought to our notice. Nor, to our knowledge, in United Kingdom. Wherever a complaint of infringement of right to speedy trial is made the court has to consider all the circumstances of the case including those mentioned above and arrive at a decision whether in fact the proceedings have been pending for an unjustifiably long period. In many cases, the accused may himself have been responsible for the delay. In such cases, he cannot be allowed to take advantage of his own wrong. In some cases, delays may occur for which neither the prosecution nor the accused can be blamed but the system itself. Such delays too cannot be treated as unjustifiable — broadly speaking. Of course, if it is a minor offence — not being an economic offence — and the delay is too long, not caused by the accused, different considerations may arise. Each case must be left to be decided on its own facts having regard to the principles enunciated hereinafter. **For all the above reasons, we are of the opinion that it is neither advisable nor feasible to draw or prescribe an outer time-limit for conclusion of all criminal proceedings.** It is not necessary to do so for effectuating the right to speedy trial. We are also

not satisfied that without such an outer limit, the right becomes illusory."

(Emphasis added)

In paragraph 27 of the decision in the case of ***P. Ramachandra Rao***[4], this Court observed thus:

> **"27. Prescribing periods of limitation at the end of which the trial court would be obliged to terminate the proceedings and necessarily acquit or discharge the accused, and further, making such directions applicable to all the cases in the present and for the future amounts to legislation, which, in our opinion, cannot be done by judicial directives and within the arena of the judicial law-making power available to constitutional courts, howsoever liberally we may interpret Articles 32, 21, 141 and 142 of the Constitution.** The dividing line is fine but perceptible. Courts can declare the law, they can interpret the law, they can remove obvious lacunae and fill the gaps but they cannot entrench upon in the field of legislation properly meant for the legislature. Binding directions can be issued for enforcing the law and appropriate directions may issue, including laying down of time-limits or chalking out a calendar for proceedings to follow, to redeem the injustice done or for taking care of rights violated, in a given case or set of cases, depending on facts brought to the notice of the court. **This is permissible for the judiciary to do. But it may not, like the legislature, enact a provision akin to or on the lines of Chapter XXXVI of the Code of Criminal Procedure, 1973."**
>
> **(Emphasis added)**

The principles laid down in the decision will apply even to civil cases before the trial courts. The same principles will also apply to a direction issued to the High Courts to decide cases on a day-to-day basis or within a specific time. Thus, the directions of the Court that provide for automatic vacation of the order of stay and the disposal of all cases in which a stay has been granted on a day-to-day basis virtually amount to judicial legislation. The jurisdiction of this Court cannot be exercised to make such a judicial legislation. Only the

legislature can provide that cases of a particular category should be decided within a specific time. There are many statutes which incorporate such provisions. However, all such provisions are usually held to be directory.

29. Ideally, the cases in which the stay of proceedings of the civil/criminal trials is granted should be disposed of expeditiously by the High Courts. However, we do not live in an ideal world. A judicial notice will have to be taken of the fact that except High Courts of smaller strength having jurisdiction over smaller States, each High Court is flooded with petitions under Article 227 of the Constitution of India for challenging the interim orders passed in civil and criminal proceedings, the petitions under Section 482 of the Cr.PC for challenging the orders passed in the criminal proceedings and petitions filed in the exercise of revisional jurisdiction under the CPC and the Cr. PC. A judicial notice will have to be taken of the fact that in all the High Courts of larger strength having jurisdiction over larger States, the daily cause lists of individual Benches of the cases of the aforesaid categories are of more than a hundred matters. Therefore, once a case is entertained by the High Court and the stay is granted, the case has a long life.

30. There is a huge filing of regular appeals, both civil and criminal in High Courts. After all, the High Courts deal with many other important matters, such as criminal appeals against acquittal and conviction, bail petitions, writ petitions, and other proceedings that involve the issues of liberty under Article 21 of the Constitution of India. The High Courts deal with matrimonial disputes, old appeals against decrees of civil courts, and appeals against appellate decrees. There are cases where senior citizens or second or third-generation litigants are parties. The High Courts cannot be expected to decide, on a priority basis or a day-to-day basis, only those cases in which a stay of proceedings has been granted while ignoring several other categories of cases that may require more priority to be given.

31. The situation in Trial and district Courts is even worse. In 2002, in the case of ***All India Judges' Association & Ors. v. Union of India & Ors.***[14], this Court passed an order directing that the judge-to-population ratio within twenty years should be 50 per million. Even

14 [2002] 2 SCR 712 : (2002) 4 SCC 247

as of today, we are not able to reach the ratio of even 25 per million. The directions issued in the case of ***Imtiyaz Ahmed v. State of Uttar Pradesh & Ors.***[15] have not been complied with by the States by increasing the Judge strength of the Trial and District Courts. The figures of pendency of cases in our trial Courts are staggering. There are different categories of cases which, by their very nature, are required to be given utmost priority, such as the cases of the accused in jail and the cases of senior citizens. For example, there are many legislations like the Hindu Marriage Act, 1955, the Protection of Women from Domestic Violence Act, 2005, the Negotiable Instruments Act, 1881 etc which prescribe specific time limits for the disposal of cases. However, due to the huge filing and pendency, our Courts cannot conclude the trials within the time provided by the statutes. There is a provision in the Code of Criminal Procedure, 1973, in the form of Section 309, which requires criminal cases to be heard on a day-to-day basis once the recording of evidence commences. The same Section provides that in case of certain serious offences against women, the cases must be decided within two months of filing the charge sheet. Unfortunately, our Criminal Courts are not in a position to implement the said provision. Apart from dealing with huge arrears, our Trial Courts face the challenge of dealing with a large number of cases made time-bound by our constitutional Courts. Therefore, in the ordinary course, the constitutional Courts should not exercise the power to direct the disposal of a case before any District or Trial Court within a time span. In many cases, while rejecting a bail petition, a time limit is fixed for disposal of trial on the ground that the petitioner has undergone incarceration for a long time without realising that the concerned trial Court may have many pending cases where the accused are in jail for a longer period. The same logic will apply to the cases pending before the High Courts. When we exercise such power of directing High Courts to decide cases in a time-bound manner, we are not aware of the exact position of pendency of old cases in the said Courts, which require priority to be given. Bail petitions remain pending for a long time. There are appeals against conviction pending where the appellants have been denied bail.

32. Therefore, constitutional Courts should not normally fix a time-bound schedule for disposal of cases pending in any Court. The pattern of

15 [2017] 1 SCR 305 : (2017) 3 SCC 658

pendency of various categories of cases pending in every Court, including High Courts, is different. The situation at the grassroots level is better known to the judges of the concerned Courts. Therefore, the issue of giving out-of-turn priority to certain cases should be best left to the concerned Courts. The orders fixing the outer limit for the disposal of cases should be passed only in exceptional circumstances to meet extraordinary situations.

33. There is another important reason for adopting the said approach. Not every litigant can easily afford to file proceedings in the constitutional Courts. Those litigants who can afford to approach the constitutional Courts cannot be allowed to take undue advantage by getting an order directing out-of-turn disposal of their cases while all other litigants patiently wait in the queue for their turn to come. The Courts, superior in the judicial hierarchy, cannot interfere with the day-to-day functioning of the other Courts by directing that only certain cases should be decided out of turn within a time frame. In a sense, no Court of law is inferior to the other. This Court is not superior to the High Courts in the judicial hierarchy. Therefore, the Judges of the High Courts should be allowed to set their priorities on a rational basis. Thus, as far as setting the outer limit is concerned, it should be best left to the concerned Courts unless there are very extraordinary circumstances.

IX. Procedure to be adopted by High Courts while passing interim order of stay of proceedings and for dealing with the applications for vacating interim stay

34. At the same time, we cannot ignore that once the High Court stays a trial, it takes a very long time for the High Court to decide the main case. To avoid any prejudice to the opposite parties, while granting *ex-parte* ad-interim relief without hearing the affected parties, the High Courts should normally grant ad-interim relief for a limited duration. After hearing the contesting parties, the Court may or may not confirm the earlier ad-interim order. Ad-interim relief, once granted, can be vacated or affirmed only after application of mind by the concerned Court. Hence, the Courts must give necessary priority to the hearing of the prayer for interim relief where ad-interim relief has been granted. Though the High Court is not expected to record detailed reasons while dealing with the prayer for the grant of stay or interim relief, the order must give sufficient indication of the application of mind to the relevant factors.

35. An interim order passed after hearing the contesting parties cannot be vacated by the High Court without giving sufficient opportunity of being heard to the party whose prayer for interim relief has been granted. Even if interim relief is granted after hearing both sides, as observed earlier, the aggrieved party is not precluded from applying for vacating the same on the available grounds. In such a case, the High Court must give necessary priority to the hearing of applications for vacating the stay, if the main case cannot be immediately taken up for hearing. Applications for vacating interim reliefs cannot be kept pending for an inordinately long time. The High Courts cannot take recourse to the easy option of directing that the same should be heard along with the main case. The same principles will apply where ad-interim relief is granted. If an ad-interim order continues for a long time, the affected party can always apply for vacating ad-interim relief. The High Court is expected to take up even such applications on a priority basis. If an application for vacating *ex-parte* ad interim relief is filed on the ground of suppression of facts, the same must be taken up at the earliest.

D. CONCLUSIONS

36. Hence, with greatest respect to the Bench which decided the case, we are unable to concur with the directions issued in paragraphs 36 and 37 of the decision in the case of ***Asian Resurfacing***[1]. We hold that there cannot be automatic vacation of stay granted by the High Court. We do not approve the direction issued to decide all the cases in which an interim stay has been granted on a day-to-day basis within a time frame. We hold that such blanket directions cannot be issued in the exercise of the jurisdiction under Article 142 of the Constitution of India. We answer both the questions framed in paragraph 5 above in the negative.

37. Subject to what we have held earlier, we summarise our main conclusions as follows:

a. A direction that all the interim orders of stay of proceedings passed by every High Court automatically expire only by reason of lapse of time cannot be issued in the exercise of the jurisdiction of this Court under Article 142 of the Constitution of India;

b. Important parameters for the exercise of the jurisdiction under Article 142 of the Constitution of India which are relevant for deciding the reference are as follows:

(i) The jurisdiction can be exercised to do complete justice between the parties before the Court. It cannot be exercised to nullify the benefits derived by a large number of litigants based on judicial orders validly passed in their favour who are not parties to the proceedings before this Court;

(ii) Article 142 does not empower this Court to ignore the substantive rights of the litigants;

(iii) While exercising the jurisdiction under Article 142 of the Constitution of India, this Court can always issue procedural directions to the Courts for streamlining procedural aspects and ironing out the creases in the procedural laws to ensure expeditious and timely disposal of cases. However, while doing so, this Court cannot affect the substantive rights of those litigants who are not parties to the case before it. The right to be heard before an adverse order is passed is not a matter of procedure but a substantive right; and

(iv) The power of this Court under Article 142 cannot be exercised to defeat the principles of natural justice, which are an integral part of our jurisprudence.

c. Constitutional Courts, in the ordinary course, should refrain from fixing a time-bound schedule for the disposal of cases pending before any other Courts. Constitutional Courts may issue directions for the time-bound disposal of cases only in exceptional circumstances. The issue of prioritising the disposal of cases should be best left to the decision of the concerned Courts where the cases are pending; and

d. While dealing with the prayers for the grant of interim relief, the High Courts should take into consideration the guidelines incorporated in paragraphs 34 and 35 above.

38. We clarify that in the cases in which trials have been concluded as a result of the automatic vacation of stay based only on the decision in the case of ***Asian Resurfacing***[1], the orders of automatic vacation of stay shall remain valid.

39. The reference is answered accordingly. We direct the Registry to place the pending petitions before the appropriate Benches for expeditious disposal.

Pankaj Mithal, J.

1. Concurring with the opinion expressed by my brother Justice Oka for himself and other puisne Judges, including the Hon'ble Chief Justice, I would like to add that in ***Asian Resurfacing of Road Agency Private Limited & Anr. vs. Central Bureau of Investigation***[1], this Court while deciding the issues arising therein went ahead in observing and directing that where a challenge to an order framing charge is entertained and stay is granted, the matter must be decided on day to day basis so that the stay may not continue for an unduly long time. It was further observed that though no mandatory time limit may be fixed for deciding such a challenge, the stay order may not normally exceed two to three months or a maximum of six months unless it is extended by specific speaking order. Further directions were issued that in all pending matters before the High Court or other Courts relating to Prevention of Corruption Act or all other civil or criminal cases where stay is operating in pending trials, it will automatically lapse after six months unless a speaking order is passed extending the same. The Trial Court may, on expiry of the above period resume the proceedings without waiting for any intimation unless express order extending the stay is produced before the Court.

2. The above directions in ***Asian Resurfacing*** issued in exercise of power of doing complete justice under Article 142 of the Constitution of India are analogous to the constitutional provision as contained in clause (3) of Article 226 of the Constitution of India which has been inserted with effect from 1.8.1979 *vide* the Constitution (Forty-fourth Amendment) Act, 1978. It reads as under:

> "(3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
>
> (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
>
> (b) giving such party an opportunity of being heard,

1 [2018] 2 SCR 1045 : (2018) 16 SCC 299

> makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated."

3. No doubt, the above provision is in respect to petitions filed before the High Court invoking the extraordinary jurisdiction of the Court and is not meant to be applied specifically to other proceedings, nonetheless the principles behind the said provision can always be extended to other proceedings as has been done in ***Asian Resurfacing***. It is worth noting that wherever under a statute any such time limit has been prescribed or is fixed for deciding a particular nature of proceeding, it has been held to be directory in nature rather than mandatory. So appears to be the position with regard to the applicability of Article 226(3) of the Constitution of India.

4. It is well recognised that no one can be made to suffer on account of any mistake or fault of the Court which means that even delay on part of the Court in deciding the proceedings or any application therein would not be detrimental to any of the parties to the litigation much less to the party in whose favour an interim stay order is passed.

5. It is settled in law that grant of interim stay order ought to be ordinarily by a speaking order and therefore as a necessary corollary, a stay order once granted cannot be vacated otherwise than by a speaking order, more so, when its extension also requires reasons to be recorded.

6. It is noticeable that under Article 226(3) of the Constitution of India, the automatic vacation of the stay order envisages making of an application to the High Court for the vacation of the interim stay order. Therefore, filing of an application for vacating the stay order is a *sine qua non* for triggering the automatic vacation of the stay

order under Article 226(3) if such an application is not decided within the time prescribed of two weeks.

7. In other words, applying the above analogy or principle, the stay order granted in any proceedings would not automatically stand vacated on the expiry of a particular period until and unless an application to that effect has been filed by the other side and is decided following the principles of natural justice by a speaking order.

8. Sometimes, in quest of justice we end up doing injustice. ***Asian Resurfacing*** is a clear example of the same. Such a situation created ought to be avoided in the normal course or if at all it arises be remedied at the earliest. In doing so, we have to adopt a practical and a more pragmatic approach rather than a technical one which may create more problems burdening the courts with superfluous or useless work. It is well said that useless work drives out the useful work. Accordingly, it is expedient in the interest of justice to provide that a reasoned stay order once granted in any civil or criminal proceedings, if not specified to be time bound, would remain in operation till the decision of the main matter or until and unless an application is moved for its vacation and a speaking order is passed adhering to the principles of natural justice either extending, modifying, varying or vacating the same.

9. The reference made to this Court is answered and disposed of accordingly.

Headnotes prepared by: Ankit Gyan

Result of the case:
Reference answered.

[2024] 2 S.C.R. 989 : 2024 INSC 167

Dattatraya
v.
The State of Maharashtra

Criminal Appeal No. 666 of 2012

01 February 2024

[Sudhanshu Dhulia and Prasanna B. Varale, JJ.]

Issue for Consideration

Whether the courts below were justified in convicting the appellant u/ss. 302 and 316 IPC and sentencing to undergo life imprisonment and 10 years of R.I. respectively along with fine, for causing death of his wife as also the child she was bearing by pouring kerosene on her and then setting her on fire.

Headnotes

Penal Code, 1860 – ss. 304 Part II and 316 – Culpable homicide not amounting to murder – Causing death of quick unborn child by act amounting to culpable homicide – Prosecution case that on the fateful night the husband in an inebriated state, picked a fight with his nine months pregnant wife and then poured kerosene on her, as a result she sustained in 98% burn injuries and subsequently died – She also gave birth to still born child – Dying declaration recorded – Maternal grand mother of the deceased witness to the incident – Conviction of the appellant u/ss. 302 and 316 and sentenced to life imprisonment and 10 years of R.I. respectively along with fine by the courts below – Correctness:

Held: Prosecution has been able to prove its case beyond reasonable doubt regarding the incident – Maternal grand mother of the deceased witnessed the incident – She along with the maternal aunt clearly established the facts – Even though PW 1 who recorded dying declaration was declared hostile, there is sufficient evidence to prove that it was the appellant who had poured kerosene on the deceased which led to the burn injuries and the death of the deceased and the child she was bearing – Fact that the deceased gave birth to a stillborn child on the next day while she was still alive and the death was caused by the act of the appellant, makes a case u/s. 316 – From every available

evidence placed by the prosecution, it is a case where a sudden fight took place between the husband and wife – Deceased at that time was carrying a pregnancy of nine months and it was the act of pouring kerosene on the deceased that resulted in the fire and the subsequent burn injuries and the ultimate death of the deceased – Said act at the hands of the appellant would be covered under the fourth exception given u/s 300 – Act of the appellant was not premeditated, but is a result of sudden fight and quarrel in the heat of passion – Thus, it would be a case of culpable homicide not amounting to murder u/s. 304 Part II in as much as, though the accused had knowledge of the consequences of the act he was committing, yet there was no intention to cause death – Findings of s. 302 converted to that of s. 304 Part II and the accused sentenced to 10 years of R.I – Since the appellant has already undergone incarceration for more than 10 years, he be released forthwith from the jail unless required in some other offence. [Paras 11, 12, 14, 17-21]

Case Law Cited

Kalu Ram v. State of Rajasthan, **(2000) 10 SCC 324 – referred to.**

List of Acts

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

List of Keywords

Causing death of quick unborn child by act amounting to culpable homicide; Dying declaration; Life imprisonment; Culpable homicide not amounting to murder; Knowledge of the consequences of the act; Intention to cause death; Premeditated act; Sudden fight and quarrel in the heat of passion; Prove its case beyond reasonable doubt; Evidence; Witnesses; Sufficient proof; Burn injuries; Incarceration.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.666 of 2012

From the Judgment and Order dated 23.11.2010 of the High Court of Bombay at Aurangabad in CRLA No.6 of 2009

Appearances for Parties

Sudhanshu S . Choudhari, Sr. Adv., Ms. Rucha Pande, M Veera Ragavan, Ms. Gautami Yadav, Pranjal Chapalgaonkar, M. A. Chinnasamy, Advs. for the Appellant.

Bharat Bagla, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Sourav Singh, Aditya Krishna, Ms. Raavi Sharma, Adarsh Dubey, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

This appeal arises out of the final judgment and order dated 23.11.2010 passed by the Aurangabad Bench of Bombay High Court in Criminal Appeal No. 06/2009 whereby the conviction of the appellant under Sections 302 and 316 of the Indian Penal Code (for short 'IPC') was upheld and the appellant was sentenced to undergo life imprisonment under Section 302 and 10 years of R.I. under Section 316 of IPC, and was directed to pay fine amount of Rs.5000 and Rs.2000/-, respectively.

2. The facts of this case are that the appellant (32 years of age in the year 2007), was married to one, Meenabai Dattatraya Gawali, (who was 30 years of age on the date of the incident). The wife Meenabai (deceased) was having a pregnancy of nine months at that time. It is the case of the prosecution that the appellant came home at about 10.00 P.M. on the fateful night of 26.01.2007 in an inebriated state. He then picked a fight with his wife while she was cooking food in the kitchen and poured kerosene on her and as the stove burst, the wife sustained burn injuries, which in hospital were determined as 98%. She was taken to the Civil Hospital, Solapur at about midnight, where the first injury report itself indicates that she sustained burn injuries of about 98%. A statement is then recorded of the deceased at 01.30 AM on 27.01.2007, which states as under:-

" ***STATEMENT***

Solapur
Dated-27/01/2007
Time-01.30 AM
Saturday after completing Friday

Patient is conscious oriental and fit for giving valid statement at present.

1.41 AM – 27.01.2007 – Sd/- Deshpande

Smt.Minabai Datta Gavli, age 30 years, R/o. A. Kata Savargaon, Tq.Taljapur, District. Osmanabad gives statement that in the night on Friday 26.01.2007 at 10 PM there was trifle dispute between husband and wife and at the time of cooking Mr. Dattatraya Gavli, age 40 years, service-wireman with the anger of dispute poured rockel on me. At that time stove flared up and I burned up to 98%. My husband is also burned 40%, Mr. Datta Gavli has also burnt. He got burnt while putting out the fire. At that time husband had drunk liquor. He was addicted to liquor. My grandmother admitted in Civil Hospital at night 12 am. Now I am under treatment and giving statement myself.

Yours faithfully
Thumb Impression
Thumb Impression of left hand of
Smt. Minabai Dattatraya Gavli

Before (M.V.Wagh) Executive Magistrate Office, Solapur.

Patient was conscious oriented and fit for giving valid statement.
(Exh.33)
Sd/- A.P.Deshpande-"

3. A case is then registered at Tamalwadi Police Station, as Crime No. 12/2007, filed under Section 307 of the IPC against the appellant.

4. As we have already stated above, the deceased at that time was nine months pregnant. She gave birth to a stillborn child on the next day i.e., 28.01.2007 and died on 04.02.2007.

5. The offence which was registered under Section 307 of the IPC was converted into an offence under Section 302 of the IPC and another charge under Section 316[1] was added.

1 Section 316.**Causing death of quick unborn child by act amounting to culpable homicide**.-- Who-

6. The police after an investigation filed its chargesheet in the Court of Judicial Magistrate, F.C., Tuljapur, which was registered as RCC No.96/2007 and the case was committed to Sessions, where it was ultimately placed before Addl. Sessions Court, Usmanabad, Maharashtra. The appellant faced the Trial Court where he was convicted of offences under Sections 302 and 316 of IPC and sentenced to undergo life imprisonment and 10 years of rigorous imprisonment respectively, along with fine and default stipulation.

7. The matter was taken in an appeal before the Bombay High Court by the appellant which was dismissed.

8. The Special Leave Petition later was filed by the appellant before this Court in which leave was granted vide order dated 09.04.2012.

9. We have heard Mr.Sudhanshu S. Choudhari, learned counsel appearing for the appellant and Mr.Bharat Bagla, learned counsel appearing for the respondent, at some length.

10. The prosecution in this case had examined nine prosecution witnesses and placed relevant documents such as medical reports, dying declaration etc., in order to establish its case. The appellant gave his statement under Section 313 of the Cr.P.C., but did not produce any defence witnesses. In his statement, under Section 313 of the Cr.P.C., the appellant admits to the fact that at the relevant point of time, PW-7 who is the maternal grandmother of the deceased (the wife of the appellant) was residing with them. He also admits that his wife was nine months pregnant at the time of the incident and gave birth to a stillborn child on 28.01.2007. He, however, denies all instances of quarreling with his wife and committing the act as alleged by the prosecution. PW-7 here is the star witness of the prosecution, who was present in the house and was witness to the crime. There is also a dying declaration.

11. After hearing the learned counsel for the parties and then examining the evidence placed by the prosecution, we find that there is an overwhelming evidence placed by the prosecution before the Trial Court regarding the incident itself. The prosecution has been able

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ever does any act under such circumstances, that if he thereby caused death he would be guilty of culpable homicide, and does by such act cause the death of a quick unborn child, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

to prove its case beyond reasonable doubt regarding the incident itself inasmuch as the incident took place on midnight of 26.01.2007 and 27.01.2007, and the appellant who was in an inebriated state, picked a quarrel with his wife and while she was cooking his meal in the kitchen, poured kerosene on her as a result of which she sustained burn injuries and subsequently died.

12. The fact that the appellant had quarreled with the deceased and had poured kerosene on her is well established. The statement given by the deceased herself, which the prosecution has placed as a dying declaration, categorically states that she was being tortured at the hands of her husband and that her husband was having an affair with another woman, and that on the fateful day, he returned late at night in an inebriated state had a fight with her and then threw kerosene on her, as a result, she sustained burn injuries. But then, she also states that he also tried to extinguish the fire and as a result, he too got burn injuries. The other evidence as we have stated above, is in the form of PW-7, Chaturabai Tukaram Kale, who is the maternal grand mother of the deceased, who was residing with the deceased and her husband (appellant) eight to nine days prior to the incident, and was taking care of the deceased as she was on the family way. She also supports the story that the appellant was having an affair with another woman which was the main reason for the quarrel between the couple. On the fateful day, the two were quarreling because of this reason alone and the appellant, thereafter, threw kerosene on his wife, and set her on fire. Having witnessed the incident she came out of the house and started shouting that my grand daughter has been set on fire.

13. Another prosecution witness which is worth mentioning here is PW-8 i.e. Vimal Suryakant Salunkhe, who is the maternal aunt, of the deceased and the daughter of PW-7. This witness was told by the deceased that the appellant had kept a mistress and this resulted in frequent fights between husband and wife (i.e., the deceased). Deceased had also informed her that her husband i.e., the accused, was addicted to liquor. She was told about the incident by her mother (PW-7) at about 1 'O' Clock in the night, and the fact that the burn injuries were caused by the act of the accused (the appellant). On information received from her mother (PW-7), she went to the Civil Hospital, Solapur, along with her husband where she saw Meena (the deceased), in a burnt condition and it was the deceased who

told her that the appellant had kept a mistress at Kati-Sawargaon and it was for this reason, that he was picking quarrels with her. At the time of the incident, she was cooking food on the stove for her husband and it was for this reason that when he poured kerosene on her, which was lying in the can, the stove burst and she came out of the room shouting for help. She was also asked by people who had gathered at the house by that time as to why her husband has done this to her. This witness (PW-8), then states that the deceased died in the hospital after nine days. She had also recognized the accused who was before the Court. This witness was again put to a lengthy cross examination without giving any benefit to the defence.

14. Both PW-7 and PW-8 have clearly established the fact that the burn injuries were caused by the appellant and that he had returned to his house in an inebriated state and was under the influence of liquor while he did the act, after picking a quarrel with his wife. The presence of PW-7, being a witness, in the house at the time of the incident was never in doubt.

15. The statement was given to PW-8 by the deceased stating how she sustained burn injuries at the hands of her husband, i.e., the present appellant, and the same was first recorded in the statement which was given immediately after she had reached the hospital at about 01.30 AM on 27.01.2007, before PW-1. PW-1 was working as 'Avval Karkun'[2] in the Tahsil Office, North Solapur, at the relevant point of time and was requested by the police at 12:30 AM in the night to record the dying declaration of the deceased at Civil Hospital, Solapur.

16. The examination-in-chief of PW-1 reads as under:-

> " ***Exam-in-Chief by APP Shri Jadhav***
>
> ***1. I am working as Aval Karkun in Tahsil office, North Solapur. Since 2d Jan. 2007 I am working as Special Executive Magistrate. For two days, work of recording of dying declaration was allotted to me on Friday and Saturday. On 26th Jan. 2007 I was in my house. Police had been to my house in the night at about 12.30 O'clock. I was requested to record the dying declaration orally. Thereafter***

2 Special Executive Magistrate

I had been to Civil Hospital, Solapur. A letter was given to me for recording dying declaration of Meena Gawali and her husband Datta Gawali. I am having the copy of letter with me. I had given my endorsement on the office copy of the letter of the police. The said letter now shown to me is same. It is at exh.23. Thereafter I had been to Medical officer Shri A.P. Deshpande and requested him to show the patient. The patients were shown to me. Both the patients sustained burn injuries. Before recording DD I requested medical officer to examine the patient and certify about the same. Doctor examined Dattatraya Bhanudas Gawali. Dr. Deshpande accordingly made the endorsement on the statement of Dattatraya Gawali at the top of the same. The patient disclosed his name as Dattatraya Bhanudas Gawali R/o. Kati Sawargaon. As per the statement given by the patient, I recorded the same. I read over the statement to Dattarya and he admitted the same to be correct. I obtained the left thumb mark of the patient. I again requested the Medical officer to examine the patient and to tell me as to whether he is conscious or not. Doctor examined patient and certified the patient to be conscious. The endorsement now shown to me is of medical officer. While recording the statement I myself, Datta Gawali and medical officer only were there. I put my signature on the statement. The statement now shown to me is the same. It is in my hand writing. It is at exh. 24. The patient disclosed me that on 26.01.2007, in the night there was quarrel between myself and my wife and at the relevant time, I poured kerosene on her person in the angry mood when she was cooking food. Dur to that according to the patient they both sustained burn injury. He told me that he was under the influence of liquor.

2. I also recorded the dying declaration of Meenabai Gawali and requested Dr. A.P. Deshpande to

examine patient before recording her statement. After examining the patient Doctor told me that patient was conscious and was in position to give statement. Accordingly doctor put his endorsement on the dying declaration in the beginning of the statement. The patient disclosed her name as Meena Datta Gawali, R/o. Kati Sawargaon. Meenabai told me that in the nigh on 26.01.2007 when she was cooking the food there was quarrel between herself and her husband and at the relevant time her husband poured kerosene on her person in angry mood due to which there was bursting of stove in which she sustained burn injury. She also told that her husband was under the influence of liquor. Accordingly I recorded the dying declaration given by Meenabai. The same was read over to the deceased which she admitted to be true and correct. I also obtained the left thumb mark of the patient on the dying declaration. Again I requested the medical officer to examine the patient and tell me as to whether she was in position to give statement or not. Doctor A.P. Deshpande again examined the patient and certified the patient to be conscious. Accordingly he put the endorsement alongwith his signature on the dying declaration. At the time of recording of dying declaration I myself, patient and doctor only were there. The dying declaration now shown to me is the same. It is in my hand writing. It bears my signature. It is at exh. 25. The contents therein are true and correct. Thereafter I handed over the statements to the police chauky, Civil hospital, Solapur."

17. This witness was cross-examined by the defence as there was some discrepancy in his statement as to whether the deceased was in a proper state of mind to give a statement. His examination-in-chief was taken again by the Assistant Public Prosecutor and the witness was declared hostile only to the extent of discrepancy that the patient was not in a position to talk. But nothing substantially

moves on this aspect, inasmuch as, even if we do not consider the dying declaration of the deceased which was given at 01.30 AM in the night on 27.01.2007, there is sufficient evidence to prove that it was the appellant who had poured kerosene on the deceased which led to the burn injuries and the death of the deceased and the child she was bearing. There is no doubt that an offence under Section 316 has clearly been made out. We only have to examine whether an offence here is under Section 302 of IPC or is it of a lesser magnitude.

18. Having considered the entire evidence at length, we are also of the considered opinion that under the given facts and circumstances of the case, it would not be a case of murder but of culpable homicide not amounting to murder for the reasons which we want to state as under.

19. We have, by and large, accepted the case of the prosecution as to the incident itself. There is sufficient evidence to prove that the burn injury was caused to the deceased by an act done at the hands of the appellant and it was the appellant who had come to his house under the influence of liquor and poured kerosene on his wife while she was cooking food for him on a stove, which resulted in bursting of the stove and causing burn injuries on the deceased. There is also sufficient proof of the fact that the husband and wife were having frequent fights even earlier. This has come out in the deposition of PW-7 and her cross-examination has inspired our confidence as well as that of PW-8 though she is not an eye-witness to the incident. The fact that the deceased gave birth to a stillborn child on the next day i.e., 28.01.2007 while she was still alive and the death was caused by the act of the appellant which we have already stated above, also makes a case under Section 316 of the Indian Penal Code.

20. From every available evidence, which was placed by the prosecution, it is a case where a sudden fight took place between the husband and wife. The deceased at that time was carrying a pregnancy of nine months and it was the act of pouring kerosene on the deceased that resulted in the fire and the subsequent burn injuries and the ultimate death of the deceased. In our considered opinion, this act at the hands of the appellant will be covered under the fourth exception given under Section 300 of the IPC, i.e., “Culpable homicide is not murder if it is committed without premeditation in a sudden fight in

the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner".

21. The act of the appellant is not premeditated, but is a result of sudden fight and quarrel in the heat of passion. Therefore, we convert the findings of Section 302 to that of 304 Part-II, as we are of the opinion that though the appellant had knowledge that such an act can result in the death of the deceased, but there was no intention to kill the deceased. Therefore, this is an offence which would come under Part-II not under Part-I of Section 304 of the IPC.

On almost similar facts, (as are present in the case at hand), this Court had converted the findings of Section 302 to that of Section 304 Part II IPC. The case of which reference is being made here is ***Kalu Ram*** *v.* ***State of Rajasthan (2000) 10 SCC 324***. The appellant who had been convicted under Section 302 IPC for causing death of his wife by pouring kerosene on her and then setting her on fire was convicted by the Trial Court under Section 302, which was upheld by the High Court. The facts of the case are as follows :-

In the above case, the appellant who in an inebriated state was pressurizing his wife to part with some ornaments so that he could buy some more liquor. On her refusal he poured kerosene on her and set her on fire by lighting a matchstick. But then he also tried to pour water on her to save her. This Court was thus of the opinion that :

> ***"7….Very probably he would not have anticipated that the act done by him would have escalated to such a proportion that she might die. If he had ever intended her to die he would not have alerted his senses to bring water in an effort to rescue her. We are inclined to think that all that the accused thought of was to inflict burns to her and to frighten her but unfortunately the situation slipped out of his control and it went to the fatal extent. He would not have intended to inflict the injuries which she sustained on account of his act. Therefore we are persuaded to bring down the offence from first degree murder to culpable homicide not amounting to murder.***
>
> ***8. We therefore alter the conviction from Section 302 IPC to Section 304 Part II IPC..."***

The facts of the present case, as we have already discussed above, by and large reflect the same situation, nature of crime as well as the act of the accused and the consequences of his action. We are inclined to accept the arguments raised by the learned senior counsel for the appellant, Mr. Sudhanshu S. Choudhari that under the present circumstances it would indeed be a case of culpable homicide not amounting to murder as given in Section 304 Part II in as much as, though the accused had knowledge of the consequences of the act he was committing, yet there was no intention to cause death.

The appeal is partly allowed. We convert the findings of Section 302 to that of Section 304 Part II of IPC and sentence the accused to 10 years of R.I. To this extent the findings given by the trial court and High Court will stand modified. We have also been informed that the appellant has already undergone incarceration for more than 10 years. Therefore, he shall be released forthwith from the jail, unless he is required in some other offence.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal partly allowed.

[2024] 2 S.C.R. 1001 : 2024 INSC 148

Bharti Cellular Limited (Now Bharti Airtel Limited)
v.
Assistant Commissioner of Income Tax, Circle 57, Kolkata and Another

(Civil Appeal No. 7257 of 2011)

28 February 2024

[Sanjiv Khanna* and S.V.N. Bhatti, JJ.]

Issue for Consideration

The liability to deduct tax at source u/s.194-H, Income Tax Act, 1961 on the amount which, as per the Revenue, is a commission payable to an agent by the assessees-cellular mobile telephone service providers under the franchise/distributorship agreement between the assessees and the franchisees/distributors.

Headnotes

Income Tax Act, 1961 – s.194-H – When not attracted – Assessees entered into franchise or distribution agreements and sold start-up kits, recharge vouchers at a discounted price to the franchisee/distributors – As per Revenue, the difference between 'discounted price' and 'sale price' in the hands of the franchisee/distributors being in the nature of 'commission or brokerage' was the income of the franchisee/ distributors, the relationship between the assessees and the franchisee/distributor was in the nature of principal and agent, and thus, the assesses were liable to deduct tax at source u/s.194-H – As per the assessees, neither the discount was a 'commission or brokerage' u/Explanation (i) to s.194-H nor were the franchisees/distributors their agents:

Held: Whether in law the relationship between the parties is that of principal-agent is answered by applying s.182, Contract Act, 1872 – The obligation to deduct tax at source in terms of s.194-H arises when the legal relationship of principal-agent is established – Contractual obligations of the distributors/franchisees, do not reflect a fiduciary character of the relationship, or the business being done on the principal's account – Franchisees/distributors earn their income when they sell the prepaid products to the retailer or the end-user/customer – Their profit consists of the difference between the sale price received by them from the

* Author

retailer/end-user/customer and the discounted price at which they 'acquired' the product – Though the discounted price is fixed or negotiated between the assessee and the franchisee/ distributor, the sale price received by the franchisee/distributor is within their sole discretion – Assessee has no say in this matter – Assessee does not at any stage either pay or credit the account of the franchisee/distributor with the income by way of commission or brokerage on which tax at source u/s.194-H is to be deducted – Expression "direct or indirect" used in s.194-H Explanation (i) is no doubt meant to ensure that "the person responsible for paying" does not dodge the obligation to deduct tax at source, even when the payment is indirectly made by the principal-payer to the agent-payee however, deduction of tax at source in terms of s.194-H is not to be extended and widened in ambit to apply to true/genuine business transactions, where the assessee is not the person responsible for paying or crediting income– Assessees neither pay nor credit any income to the person with whom he has contracted and are not privy to the transactions between distributors/franchisees and third parties– It is impossible for the assessees to deduct tax at source and comply with s.194-H, on the difference between the total/sum consideration received by the distributors/ franchisees from third parties and the amount paid by the distributors/franchisees to them – Payee receives payment when the third party makes the payment – This payment is not the payment received or payable by the assessee as the principal – The distributor/franchisee is not the trustee who is to account for this payment to the assessee as the principal – Assessees not under legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from the third parties/ customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors – s.194-H not applicable to the facts and circumstances of this case – Judgments of High Courts of Delhi and Calcutta set aside. [Paras 6, 29, 31, 34, 36, 37 and 42]

Contract Act, 1872 – s.182 – 'agent' and 'principal' – Whether a legal relationship of a principal and agent exists, factors to be taken into consideration:

Held: (a) The essential characteristic of an agent is the legal power vested with the agent to alter his principal's legal

relationship with a third party and the principal's co-relative liability to have his relations altered – (b) As the agent acts on behalf of the principal, one of the prime elements of the relationship is the exercise of a degree of control by the principal over the conduct of the activities of the agent – This degree of control is less than the control exercised by the master on the servant, and is different from the rights and obligations in case of principal to principal and independent contractor relationship – (c) The task entrusted by the principal to the agent should result in a fiduciary relationship – The fiduciary relationship is the manifestation of consent by one person to another to act on his or her behalf and subject to his or her control, and the reciprocal consent by the other to do so – (d) As the business done by the agent is on the principal's account, the agent is liable to render accounts thereof to the principal – An agent is entitled to remuneration from the principal for the work he performs for the principal – Other relevant aspects/considerations, discussed. [Paras 8, 9]

Income Tax Act, 1961 – Explanation (i) to s.194-H:

Held: The words "direct" or "indirect" in Explanation (i) to s.194-H are with reference to the act of payment – The legislative intent to include "indirect" payment ensures that the net cast by the section is plugged and not avoided or escaped, albeit it does not dilute the requirement that the payment must be on behalf "the person responsible for paying"– This means that the payment/ credit in the account should arise from the obligation of "the person responsible for paying" – The payee should be the person who has the right to receive the payment from "the person responsible for paying" – Further, explanation (i) to s.194-H, by using the word "indirectly", does not regulate or curtail the manner in which the assessee can conduct business and enter into commercial relationships – Neither does the word "indirectly" create an obligation where the main provision does not apply – The tax legislation recognises diverse relationships and modes in which commerce and trade are conducted, albeit obligation to tax at source arises only if the conditions as mentioned in s.194-H are met and not otherwise – This principle does not negate the compliance required by law – Latter portion of the Explanation (i) to s.194-H is a requirement and a pre-condition – It should not be read as diminishing or derogating the requirement of

the principal and agent relationship between the payer and the recipient/payee. [Paras 4, 5 and 34]

Income Tax Act, 1961 – Issue as regards the liability to deduct tax at source u/s.194-H on the amount which, as per the Revenue, is a commission payable to an agent by the assessees under the franchise/distributorship agreement between the assessees and the franchisees/distributors – Plea of the Revenue relying upon the decision of this Court in Singapore Airlines Ltd. and Another v. Commissioner of Income Tax [2022] 9 SCR 1 that assessees would be liable to deduct tax at source even if they are not making payment or crediting the income to the account of the franchisee/ distributor:

Held: Rejected – When the obligation, and the time and manner in which the tax is mandated by law to be deducted at source, is fixed by the statute, the same cannot be shifted/altered/modified or postponed on a concession in the court by the Revenue – The concession may be granted, when permissible, by way of a circular issued in accordance with s.119 – Decision in Singapore Airlines Limited can not be read in the manner as suggested by the Revenue. [Para 38]

Franchise agreement and distributorship agreement – Distinction – Legal position of a distributor different from agent – Distributor, an independent contractor:

Held: Legal position of a distributor, it is to be generally regarded as different from that of an agent – The distributor buys goods on his account and sells them in his territory – In such cases, distributor is an independent contractor – Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party – Franchise agreements are normally considered as sui generis, though they have been in existence for some time – They provide a mechanism whereby goods and services may be distributed – In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services – There is a close relationship between a franchisor and a franchisee because a franchisee's operations are closely regulated, and this possibly is a distinction between a franchise agreement and a

distributorship agreement – Franchise agreements are extremely detailed and complex – Notwithstanding the strict restrictions placed on the franchisees, the relationship may in a given case be that of an independent contractor – Facts of each case and the authority given by 'principal' to the franchisees matter and are determinative – Further, an independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract – But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary – As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied – The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons – An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer. [Paras 39, 40]

Law relating to agency – Exclusion of servants and independent contractors:

Held: 'Agent' denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor – Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency – Term 'agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; viz. an independent contractor who may, incidentally, also affect the legal position of his principal in other ways – This can be ascertained by referring to and examining the indicia mentioned in clauses (a) to (d) in paragraph 8 of this judgment – It is in the restricted sense in which the term agent is used in Explanation (i) to s.194-H of the Income Tax Act, 1961. [Para 41]

Doctrine/Principles – Doctrine of presumption against doubtful penalisation:

Held: The deduction of tax provisions should be programmatically and realistically construed – In case of a legal or factual doubt in a given case, the assessee can rely on the doctrine of presumption against doubtful penalisation – Whether or not the said doctrine should be applied will depend on facts and circumstances of the case, including the past practice followed by the assessee and accepted by the department – When there is apparent divergence of opinion, to avoid litigation and pitfalls associated, it may be advisable for the Central Board of Direct Taxes to clarify doubts by issuing appropriate instruction/circular after ascertaining view of the assesses and stakeholders. [Para 35]

Words and expressions – 'power'; 'authority'.

Case Law Cited

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Bhopal Sugar Industries Limited v. Sales Tax Officer, Bhopal, **[1977] 3 SCR 578 : (1977) 3 SCC 147**; *Commissioner of Income Tax, Ahmedabad and Others v. Ahmedabad Stamp Vendors Association*, **(2014) 16 SCC 114**; *Ahmedabad Stamp Vendors Association v. Union of India*, **(2002) 257 ITR 202 (Guj.)**; *Director, Prasar Bharati v. Commissioner of Income Tax, Thiruvananthapuram*, [2018] 3 SCR 287 **: (2018) 7 SCC 800**; *Securities and Exchange Board of India v. Sunil Krishna Khaitan and Others*, [2022] 18 SCR 987 **: (2023) 2 SCC 643 – referred to.**

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Seavey, The Rationale of Agency, 29 YALE L.J. 859, 866 (1920); G.H.L. Fridman, The Law of Agency 33 (Butterworths, 7 ed. 1996) **– referred to**.

List of Acts

Income Tax Act, 1961; Contract Act, 1872; Indian Telegraph Act, 1885.

List of Keywords

Liability to deduct tax at source; Cellular mobile telephone service providers; Agent; Principal; Franchise/distributorship agreement; Commission; Brokerage; Power; Authority; Fiduciary character of the relationship; Servants; Independent contractor; Independent agent; Law relating to agency; Doctrine of presumption against doubtful penalisation.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.7257 of 2011

With

Civil Appeal Nos. 2652-2653, 4949-4950, 4947-4948 of 2015, 7455 of 2018, 111, 2860 of 2021, 8902 of 2022, 7729, 7735, 7736, 7737, 7738, 7739, 7740, 7741, 7742, 7743, 7679, 7680, 7681, 7682, 7744, 7745, 7746, 7747, 7748, 7848, 7849, 7852, 7853, 7854, 7855, 7856, 7857, 7859 of 2023, 3514, 3515, 3516 And 3517 of 2024

From the Judgment and Order dated 19.05.2011 of the High Court at Calcutta in ITA No.222 of 2006

Appearances for Parties

Balbir Singh, N. Venkatraman, A.S.Gs., Arvind P. Datar, Ajay Vohra, Arijit Prasad, Kavin Gulati, Sr. Advs., Kumar Visalaksh, Udit Jain, Archit Gupta, Arihant Tater, Ajitesh Dayal Singh, Praveen Kumar, Harish Pandey, Raj Bahadur Yadav, Digvijay Dam, V.C. Bharathi, Santosh Kumar, Rupesh Kumar, Prahlad Singh, Alka Agarwal, Ms. Ankita Anilkumar Singh, Deepak Kumar, Indrajit Prasad, Shyam Gopal, Aditya Rathore, Naman Tandon, Samarvir Singh, Prasenjeet Mohapatra, Sachit Jolly, Ms. Anuradha Dutt, Ms. Disha Jham, Ms. Soumya Singh, Ms. B. Vijayalakshmi Menon, Abhishek Vikas, Mahesh Agarwal, Rishi Agrawala, Ms. Sayree Basu Mullick, Ms. Madhvi Agarwal, M.S. Ananth, Ms. Sayree Basu Mullik, Abhinabh Garg, E.C. Agrawala, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Sanjiv Khanna, J.

This common judgment decides the aforestated appeals preferred by the Revenue and the assessees, who are cellular mobile telephone service providers. The issue relates to the liability to deduct tax at source under Section 194-H of the Income Tax Act, 1961[1] on the amount which, as per the Revenue, is a commission payable to an agent by the assessees under the franchise/ distributorship agreement between the assessees and the franchisees/distributors. As per the assessees, neither are they paying a commission or brokerage to the franchisees/distributors, nor are the franchisees/distributors their agents. The High Courts of Delhi and Calcutta have held that the assessees were liable to deduct tax at source under Section 194-H of the Act, whereas the High Courts of Rajasthan, Karnataka and Bombay have held that Section 194-H of the Act is not attracted to the circumstances under consideration.

2. To avoid prolixity and repetition, we are not referring to the facts and arguments in the beginning, and will preface our judgment by reproducing Section 194-H of the Act and explaining its contours. The relevant portion of Section 194-H reads as under:

> "**194-H. Commission or brokerage.—** Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission (not being insurance commission referred to in Section 194-D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rate of five per cent:
>
> Provided that no deduction shall be made under this section in a case where the amount of such income or,

1 "The Act", for short.

as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed fifteen thousand rupees:

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed one crore rupees in case of business or fifty lakh rupees in case of profession during the financial year immediately preceding the financial year in which such commission or brokerage is credited or paid, shall be liable to deduct income tax under this section.

Provided also that no deduction shall be made under this section on any commission or brokerage payable by Bharat Sanchar Nigam Limited or Mahanagar Telephone Nigam Limited to their public call office franchisees.

xx xx xx"

3. Section 194-H of the Act imposes the obligation to deduct tax at source, states that any person responsible for paying at the time of credit or at the time of payment, whichever is earlier, to a resident any income by way of commission or brokerage, shall deduct income tax at the prescribed rate The expression "any person (...) responsible for paying" is a term of art, defined *vide* Section 204[2] of the Act. As per

2 **204. Meaning of "person responsible for paying"**.—For the purposes of the foregoing provisions of this chapter and Section 285, the expression "person responsible for paying" means—
(i) in the case of payments of income chargeable under the head "Salaries" other than payments by the Central Government or the Government of a State, the employer himself or, if the employer is a company, the company itself, including the principal officer thereof;
(ii) in the case of payments of income chargeable under the head "Interest on securities" other than payments made by or on behalf of the Central Government or the Government of a State, the local authority, corporation or company, including the principal officer thereof;
(ii-a) in the case of any sum payable to a non-resident Indian, being any sum representing consideration for the transfer by him of any foreign exchange asset, which is not a short-term capital asset, the authorised person responsible for remitting such sum to the non-resident Indian or for crediting such sum of his Non-resident (External) Account maintained in accordance with the Foreign Exchange Management Act, 1999 (42 of 1999)], and any rules made thereunder;
(ii-b) in the case of furnishing of information relating to payment to a non-resident, not being a company, or to a foreign company, of any sum, whether or not chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof;
(iii) in the case of credit or, as the case may be, payment of any other sum chargeable under the provisions of this Act, the payer himself, or, if the payer is a company, the company itself including the principal officer thereof.

the clause (iii) of Section 204, in the case of credit or in the case of payment in cases not covered by clauses (i), (ii), (ii)(a), (ii)(b), "the person responsible for paying" is the payer himself, or if the payer is a company, the company itself and the principal officer thereof.

4. Explanation (i) to Section 194-H[3] of the Act defines the expressions 'commission' or 'brokerage', as:

> "Explanation. — For the purposes of this section, —
>
> (i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities;"
>
> Payment is received when it is actually received or paid. The payment is receivable when the amount is actually credited in the books of the payer to the account of the payee, though the actual payment may take place in future. The payment received or

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(iv) in the case of credit, or as the case may be, payment of any sum chargeable under the provisions of this Act made by or on behalf of the Central Government or the Government of a State, the drawing and disbursing officer or any other person, by whatever name called, responsible for crediting, or as the case may be, paying such sum.

(v) in the case of a person not resident in India, the person himself or any person authorised by such person or the agent of such person in India including any person treated as an agent under Section 163.]

Explanation. —For the purposes of this section, —

(a) "non-resident Indian" and "foreign exchange asset" shall have the meanings assigned to them in Chapter XII-A;

(b) "authorised person" shall have the meaning assigned to it in clause (*c*) of Section 2 of the Foreign Exchange Management Act, 1999 (42 of 1999).

3 Sub-section 1 to Section 194-H of the Act can be interpreted as requiring deduction of tax at source on commission and brokerage, even when the principal and agent relationship does not exist between the parties. Explanation (i) to Section 194-H of the Act can be read as expanding and widening the scope of the provision of sub-section (1) to include in the ambit of brokerage and commission, payments made by the principal to the agent, when covered under the four corners of the said explanation. We would not like to pronounce on this aspect as it has not been argued by the Revenue, and it appears that the requirement of relationship of principal and agent has been read into the main section. Further, applying common or commercial parlance meaning to the terms 'brokerage' or 'commission', given the wide divergence in which it is understood, would lead to confusion and has pitfalls. Deduction of Tax provisions should be pragmatically and realistically construed, and not as enmeshes or by adopting catch-as-catch-can approach. When doubts exist, the Central Board of Direct Taxes may examine this question and may issue appropriate instructions/circular after ascertaining the views of assessees and other stakeholders. The decision should be clear, and we trust and hope that an obligation, if imposed, will be prospective. (See paragraph 34 of the judgment.)

> receivable should be to a person acting on behalf of another person. The words "another person" refers to "the person responsible for paying". The words "direct" or "indirect" in Explanation (i) to Section 194-H of the Act are with reference to the act of payment. Without doubt, the legislative intent to include "indirect" payment ensures that the net cast by the section is plugged and not avoided or escaped, *albeit* it does not dilute the requirement that the payment must be on behalf "the person responsible for paying". This means that the payment/credit in the account should arise from the obligation of "the person responsible for paying". The payee should be the person who has the right to receive the payment from "the person responsible for paying". When this condition is satisfied, it does not matter if the payment is made "indirectly".[4]

5. The services rendered by the agent to the principal, according to the latter portion of Explanation (i) to Section 194-H of the Act, should not be in the nature of professional services. Further, Explanation (i) to Section 194-H of the Act restricts application of Section 194-H of the Act to the services rendered by the agent to the principal in the course of buying and selling of goods, or in relation to any transaction relating to any asset, valuable article, or thing, not being securities. The latter portion of the Explanation (i) to Section 194-H of the Act is a requirement and a pre-condition. It should not be read as diminishing or derogating the requirement of the principal and agent relationship between the payer and the recipient/payee.

6. It is settled by a series of judgments of this Court that the expression 'acting on behalf of another person' postulates the existence of a legal relationship of principal and agent, between the payer and the recipient/payee.[5] The law of agency is technical. Whether in law the relationship between the parties is that of principal-agent is answered

4 We are unable to visualize 'indirect' credit in the books of the payer to the account of the payee. Credit entry is required even in cases of set-off. Nevertheless, this judgment should not be read as laying down that 'indirect' credit in the books shall not require deduction of tax under Section 194-H of the Act.

5 *Singapore Airlines Ltd. and Another* v. *Commissioner of Income Tax*, [2022] 9 S.C.R. 1 : (2023) 1 SCC 497, ¶¶ 23-29.

by applying Section 182 of the Contract Act, 1872[6]. Therefore, the obligation to deduct tax at source in terms of Section 194-H of the Act arises when the legal relationship of principal-agent is established. It is necessary to clarify this position, as in day to day life, the expression 'agency' is used to include a vast number of relationships, which are strictly, not relationships between a principal and agent.

7. Section 182 of the Contract Act, defines the words 'agent' and 'principal' and reads as under:

> "182. "Agent" and "principal" defined.— An "agent" is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal"."

Agency in terms of Section 182 exists when the principal employs another person, who is not his employee, to act or represent him in dealings with a third person. An agent renders services to the principal. The agent does what has been entrusted to him by the principal to do. It is the principal he represents before third parties, and not himself. As the transaction by the agent is on behalf of the principal whom the agent represents, the contract is between the principal and the third party. Accordingly the agent, except in some circumstances, is not liable to the third party.

8. Agency is therefore a triangular relationship between the principal, agent and the third party. In order to understand this relationship, one has to examine the *inter se* relationship between the principal and the third party and the agent and the third party. When we examine whether a legal relationship of a principal and agent exists, the following factors/aspects should be taken into consideration:

   (a) The essential characteristic of an agent is the legal power vested with the agent to alter his principal's legal relationship with a third party and the principal's co-relative liability to have his relations altered.[7]

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6 "Contract Act", for short.

7 F.E. Dowrick, *The Relationship of Principal and Agent,* 17 MLR 24, 37 (1954).

(b) As the agent acts on behalf of the principal, one of the prime elements of the relationship is the exercise of a degree of control by the principal over the conduct of the activities of the agent. This degree of control is less than the control exercised by the master on the servant, and is different from the rights and obligations in case of principal to principal and independent contractor relationship.

(c) The task entrusted by the principal to the agent should result in a fiduciary relationship. The fiduciary relationship is the manifestation of consent by one person to another to act on his or her behalf and subject to his or her control, and the reciprocal consent by the other to do so.[8]

(d) As the business done by the agent is on the principal's account, the agent is liable to render accounts thereof to the principal. An agent is entitled to remuneration from the principal for the work he performs for the principal.

9. At this stage, three other relevant aspects/considerations should be noted. First is the difference between 'power' and 'authority'. The two terms though connected, are not synonymous. Authority refers to a factual position, that is, the terms of contract between the two parties. The power of the agent however, is not, strictly speaking, conferred by the contract or by the principal but by the law of agency. When a person gives authority to another person to do the acts which bring the law of agency into play, then, the law vests power with the agent to affect the principal's legal relationship with the third parties. The extent and existence of the power with the agent is determined by public policy. The authority, as observed above, refers to the factual situation. The second consideration is that the primary task of an agent is to enter into contracts on behalf of his principal, or to dispose of his principal's property. The factors mentioned in clauses (b) to (d) in paragraph 8 above flow, and are indicia of this primary task. Clauses (b) to (d) of paragraph 8 are useful as tests or standards to examine the true nature or character of the relationship. Lastly, the substance of the relationship between the parties, notwithstanding the nomenclature given by the parties to the relationship, is of primary importance. The true nature of the relationship is examined by reference to the functions, responsibility

8 Restatement (Third) of Agency (American Law Institute Publishers 2007).

and obligations of the so-called agent to the principal and to the third parties.

10. An agent is distinct from a servant, in that an agent is subject to less control than a servant, and has complete, or almost complete discretion as to how to perform an undertaking. As Seavey said, "a servant (...) is an agent under more complete control than is a non-servant".[9] The difference is "in the degree of control rather than in the acts performed. The servant sells primarily his services measured by time; the agent his ability to produce results."[10] This distinction can be criticised, for servants may have very wide discretion, and may not really be subject to control at all in practice, while agents may have their power to act circumscribed by detailed instructions.[11]

11. This Court in ***Bhopal Sugar Industries Limited v. Sales Tax Officer, Bhopal***[12]**,** has expounded the difference between principal-agent and principal-principal relationship, in the following words:-

> "5. … the essence of the matter is that in a contract of sale, title to the property passes on to the buyer on delivery of the goods for a price paid or promised. Once this happens the buyer becomes the owner of the property and the seller has no vestige of title left in the property. The concept of a sale has, however, undergone a revolutionary change, having regard to the complexities of the modern times and the expanding needs of the society, which has made a departure from the doctrine of laissez faire by including a transaction within the fold of a sale even though the seller may by virtue of an agreement impose a number of restrictions on the buyer, e.g. fixation of price, submission of accounts, selling in a particular area or territory and so on. These restrictions per se would not convert a contract of sale into one of agency, because in spite of these restrictions the transaction would still be a sale and subject to all the incidents of a sale. A contract of agency, however, differs essentially from a contract of sale inasmuch as an agent after taking delivery of the property

9 Warren A. Seavey, The Rationale of Agency, 29 YALE L.J. 859, 866 (1920).

10 *Ibid.*

11 G.H.L. Fridman, The Law of Agency 33 (Butterworths, 7 ed. 1996).

12 [1977] 3 SCR 578 : (1977) 3 SCC 147.

> does not sell it as his own property but sells the same as the property of the principal and under his instructions and directions. Furthermore, since the agent is not the owner of the goods, if any loss is suffered by the agent he is to be indemnified by the principal. This is yet another dominant factor which distinguishes an agent from a buyer—pure and simple. In Halsbury's Laws of England, Vol. 1, 4th Edn., in para 807 at p. 485, the following observations are made:
>
> > "807. Rights of agent. —The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency, provided that such implication is not excluded by the express terms of the contract between them, and provided that such expenses and liabilities are in fact occasioned by his employment."

12. The aforesaid judgment in the context of distinction between a contract of sale and contract of agency observes that the agent is authorised to sell or buy on behalf of the principal, whereas the essence of contract of sale is the transfer of title of goods for the price paid or promised to be paid. In case of an agency to sell, the agent who sells them to the third parties, sells them not as his own property, but as a property of the principal, who continues to be the owner of the goods till the sale. The transferee is the debtor and liable to account for the price to be paid to the principal, and not to the agent for the proceeds of the sale. An agent is entitled to his fee or commission from the principal.

13. This distinction and test was referred to by this Court in ***Commissioner of Income Tax, Ahmedabad and Others*** v. ***Ahmedabad Stamp Vendors Association***[13], which is a case relating to Section 194-H of the Act. This Court had approved the decision of the High Court in ***Ahmedabad Stamp Vendors Association*** v. ***Union of India***[14]. We may also refer to two more decisions of this Court. In the case

13 (2014) 16 SCC 114.

14 (2002) 257 ITR 202 (Guj.).

of ***Director, Prasar Bharati v. Commissioner of Income Tax, Thiruvananthapuram***[15], this Court has observed that the explanation appended to Section 194-H of the Act defining the expression 'commission or brokerage' is an inclusive definition giving wide meaning to the expression 'commission'. The second decision is in the case of ***Singapore Airlines Limited v. Commissioner of Income Tax, Delhi***[16], which we shall refer to subsequently in some detail as to its exact purport and ratio. However, at this stage, we would like to examine in some detail commercial relationships in the nature of an independent contractor, that are legally, principal to principal dealings.

14. The passage from ***Bhopal Sugar Industries Limited*** (supra) highlights the principles and the complexities involved in determining the correct nature of the legal relationship between a principal and an agent. Law permits individuals to enter into complex contracts incorporating multiple rights and obligations. The relationships between contacting parties have become multi-dimensional, which may not strictly fall within an employer-employee, principal-agent or principal-principal relationship. A singular contract may create different legal relationships and obligations. Independent contractors on occasion act for themselves, and at other times may be creating legal relations between their employers and third persons. For example, a solicitor may start by giving advice (independent contractor), and then as a consequence make a contract for his employer with another person (agent).

15. In ***Labreche*** v. ***Harasymiw***[17], Valin J. delineated the question of what an agency involves, stating that: (i) it refers to the power of the agent to affect the principal's position. However, this is not the sole test, though it still remains one of the main criteria in determining whether someone is an agent. There are several features in the definition of an agent[18]. There can be several situations where one person represents or acts for another, but this does not create the relationship of principal and agent. It is only when the representation

15 [2018] 3 SCR 287 : (2018) 7 SCC 800.

16 [2022] 9 SCR 1 : (2023) 1 SCC 497.

17 (1992) 89 DLR (4th) 95 at 107.

18 *See* ¶8 of the judgment.

or action on another's behalf affects the latter's legal position, that is to say his rights against, or his liability towards, other people, that the law of agency applies; (ii) the second feature is the importance of the way in which law regards the relationship which is created. The effect of the law is that it regulates the way in which parties conduct themselves. The conduct of the parties is considered in terms of law, regardless of the language or nomenclature used by the parties. The true factual position must be investigated to determine whether a relationship of agency has come into existence between a set of parties or individuals.

16. The significant observation in the aforesaid judgment is that all kinds of interactions with third parties or interested parties, resulting from the introduction of the third parties with one who wishes a particular undertaking to be performed, may not be a result of an agency. For instance, a retail dealer or supplier of goods, obtains goods from a wholesale supplier or a manufacturer for subsequent resale to retail customers or suppliers who, in turn, deals with retail dealers or shopkeepers. Such 'middlemen' are sometimes referred to as 'agents', when in fact they are franchisees of the manufacturer or supplier, or are distributors of the manufactures' goods, perhaps with a 'sole agency' or special dealership for his goods. Such 'agents' can be real buyers, acting as principals on their own behalf. Consequently, they are not liable to the manufacturer or supplier in the way an agent might be for failure of duty, nor do their contracts with other parties – whether it be suppliers, retail dealers or individual customers – hold the party who sold to them, liable, for any breach including misrepresentation or sale of defective goods. The seller's contractual or tortious liability is different from the manufacturer's liability on account of warranty/guarantee, statutory liability or even obligation to a third party who purchases the goods or avails services from/through the independent contractor. An agent renders service to the principal, who he/she represents, and therefore the principal, and not the agent, is liable to the third parties. Further, the money received by an independent contractor from his customers will belong to the independent contractor and not to the party who sold to him. The money will be a part of such independent contractor's property in the event of his bankruptcy or liquidation. This may be the case even if the contract of sale is one of 'sale or return'. It is important to avoid confusion, by applying the legal tests, that may arise where

the functions of the 'buyer' – described as an 'agent' – is really as that of a 'middleman', and the necessary elements for creation of principal and an agent relationship are absent. Two level commercial transaction can result in an tripartite arrangement/agreement with respective rights and obligations, without any of the two parties having principal-agent relationship.

17. Clause (d) in paragraph 8 observes that the agent is liable to render accounts to the principal as the business done by the agent is on principal's account. The agent is entitled to remuneration from the principal for the work he performs. To decide whether a contracting party acts for himself as an independent contractor, we may examine whether in the course of work, he intends to make profits for himself, or is entitled to receive prearranged remuneration. If the party is concerned about acting for himself and making the maximum profits possible, he is usually regarded as a buyer, or an independent contractor and not as an agent of the principal. This would be true even when certain terms and conditions have been fixed relating to the manner in which the seller conducts his business. We shall subsequently further elucidate on the characteristics of an independent contractor, and differentiate them from the principal-agent relationship.

18. We now turn to the facts of the present case. The assessees, as noticed above, are cellular mobile telephone service providers in different circles as per the licence granted to them under Section 4 of the Indian Telegraph Act, 1885[19] by the Department of Telecommunications[20], Government of India. To carry on business, the assessees have to comply with the licence conditions and the rules and regulations of the DoT and the Telecom Regulatory Authority of India.[21] Cellular mobile telephone service providers have wide latitude to select the business model they wish to adopt in their dealings with third parties, subject to statutory compliances being made by the operators. As per the business model adopted by the telecom companies, the users can avail post-paid and prepaid connections. In the present case, we are only concerned with the business operations under the prepaid model.

19 The '1885 Act', for short.

20 'DoT', for short.

21 'TRAI', for short.

19. Under the prepaid business model, the end-users or customers are required to pay for services in advance, which can be done by purchasing recharge vouchers or top-up cards from the retailers. For a new prepaid connection, the customers or end-users purchase a kit, called a start-up pack, which contains a Subscriber Identification Mobile card[22], commonly known as SIM card, and a coupon of the specified value as advance payment to avail the telecom services.

20. The assessees have entered into franchise or distribution agreements with several parties, the terms and conditions of which we would refer to subsequently. It is the case of the assessees that they sell the start-up kits and recharge vouchers of the specified value at a discounted price to the franchisee/distributors. The discounts are given on the printed price of the packs. This discount, as per the assessees, is not a 'commission or brokerage' under Explanation (i) to Section 194-H of the Act. The Revenue, on the other hand, submits that the difference between 'discounted price' and 'sale price' in the hands of the franchisee/distributors being in the nature of 'commission or brokerage' is the income of the franchisee/distributors, the relationship between the assessees and the franchisee/distributor is in the nature of principal and agent, and therefore, the assesses are liable to deduct tax at source under Section 194-H of the Act.

21. In order to decide the dispute in question, we would like to refer to some of the relevant clauses of the franchisee/distributor agreement between Bharti Airtel Limited and the franchisee/distributors, which read as under[23]:

Bharti Airtel Limited

> "WHEREAS THE FRANCHISEE has approached BML and have expressed their keen desire to be one of the FRANCHISEE's to undertake the job of promoting and marketing of Pre Paid and also other related services all under the brand name of "MAGIC" to the potential

22 'SIM card', for short.

23 Agreements in the case of assessees Vodafone Idea Limited (formerly known as Vodafone Mobile Services Limited) and Idea Cellular Limited (now known as Vodafone Idea Limited) are somewhat different. To avoid repetition or prolixity, we are not reproducing the said clauses.

subscribers, under the terms of this Agreement. The FRANCHISEE has also represented that they have infrastructure, manpower and experience in the above area and they possess the financial to perform the above functions and such other functions as may be assigned to them by BML from time to time.

XX XX XX

A. It is expressly understood that the Agreement does not confer any exclusive right to the FRANCHISEE to market the Services nor does the Agreement gives any territorial right to the FRANCHISEE. The BML expressly reserves its right to enter into similar arrangements with other party(ies) to market and promote the Services and to market the Services directly to the customers if considered appropriate in terms of business exigency and market requirements.

XX XX XX

2.1 Subject to the terms and conditions of this Agreement, BML hereby appoints Central Supply Corporation, as its FRANCHISEE to promote and market the Pre Paid Services of BML and more particularly in terms of the policies of BML as shall be informed by BML from time to time and the FRANCHISEE hereby accepts the appointment as the FRANCHISEE of BML.

XX XX XX

2.3 The parties recognize that it is commercially prudent and desirable for the FRANCHISEE in the performance of the obligations under this Agreement to appointment (sic) Retailers/outlets for the retail promotion and marketing of Pre Paid services. In such an event the FRANCHISEE shall obtain the prior approval of BML for appointment(s) of Retailers/outlets, and also to the terms and conditions of such appointment.

2.4 The FRANCHISEE acknowledges that the business of cellular mobile services is extremely competitive and exists

in an ever expanding market. The FRANCHISEE agrees and acknowledges that during the term of this Agreement it shall not undertake the activities under this Agreement for any other provider of Cellular Mobile Telephone Services or any similar competitive business.

XX XX XX

3.1 The FRANCHISEE warrants and represents that:

(a) It has all necessary statutory, regulatory and municipal permissions, approvals and permits for the running and operation of its establishment and for the conduct of its business, more particularly for the business as provided for in this Agreement.

(b) It is in compliance of all laws, regulars and rules in the conduct of its business and the running of its business establishment.

3.2 The FRANCHISEE shall indemnify and keep indemnified BML from and against all and any costs, expenses and charges imposed on BML as a result of any action by a statutory, regulatory or municipal authority arising out of non-compliance by the FRANCHISEE of laws, rules or regulations in the running, operation and conduct of its business and business establishment, more particularly with respect to the conduct of its business provided for in this Agreement.

XX XX XX

4.1 The FRANCHISEE shall maintain a suitable establishment for the conduct of its business and the performance of its obligations under this Agreement. The FRANCHISEE shall use its best efforts to actively provide effective ways to market and promote the Pre Paid Services and shall always act in the interest of both BML and the subscribers to the Services of BML.

4.2 As covenanted for in clause 2.4, the FRANCHISEE shall not involve himself in any manner either directly or indirectly in any business or activity which is competitive with the business

of activities of BML. The FRANCHISEE acknowledges that the adherence to this provision is a material obligation of the FRANCHISEE under this Agreement.

XX XX XX

4.4 The FRANCHISEE shall, in the conduct of its business and performing its obligations under this Agreement, conform and adhere to the policies of BML communicated to the FRANCHISEE from time to time. The FRANCHISEE shall not charge the customers of BML for the services anything more than the rates specified by the BML from time to time.

4.5 The FRANCHISEE shall employ adequate employees for performing its obligations under this Agreement and in the promoting and marketing of the Pre Paid Services. All contractual and statutory payments, including wages and salaries to the employees of the FRANCHISEE, shall be the sole liability and responsibility of the FRANCHISEE.

4.6 The FRANCHISEE in respect of its business establishment shall, if so desired by BML, in order to effectively project the Franchisee, make alterations, modifications in and install such furniture, fixture and air conditioning equipment, fax, computer, with internet connection as required necessary and mutually agreed upon and the cost of such alterations, renovation shall be borne exclusively by the FRANCHISEE.

4.7 The FRANCHISEE agrees and undertakes to maintain proper and sufficient quantities of the prepaid start up packs and recharge coupons in respect of the Pre Paid service in order to meet the market requirements at all times and in accordance with the guidelines and instructions issued by BML from time to time.

4.8 The FRANCHISEE shall use its best efforts and endeavours to market and promote the Pre Paid Services to meet the growing demands of the Subscribers. At no point of time shall any right, title or interest pass to the FRANCHISEE in respect of the Pre-Paid Cards for the Pre Paid Services given to the subscribers for connection

to the Service and all right, title, ownership and property rights in such cards shall at all times vest with BML.

4.9 The FRANCHISEE shall seek prior written approval from BML for its promotional literature campaign (including promotional material which bears the Trademarks, logos and trade names of BML) for the Pre Paid Services. BML will not share the expenditure incurred by the FRANCHISEE for such advertising and publicity of the Services unless agreed to earlier in writing. Any share of the expenditure stated above and the ratio for the same shall be decided by BML from time to time at its sole discretion.

4.10 The FRANCHISEE shall be solely liable and responsible, at its business premises, for the safety and storage of all pre paid start up kits, recharge cards and other material in respect of the Pre Paid Services. BML shall not be liable for any loss, pilferage or damage to the items as stated here above and the FRANCHISEE shall indemnify BML from all loss caused to BML arising out of any loss, pilferage or damage to the items as stated here above.

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4.12 The liability to insure and keep insured the items as stated in Clause 4.10 at the business establishment of the FRANCHISEE shall be of the FRANCHISEE and the liability for any loss or damage due to any fire, burglary, theft, etc. will be that of the FRANCHISEE.

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4.14 The FRANCHISEE shall be responsible for collection of all necessary agreement/contract forms and other related forms, and for obtaining the signature of the customer on these forms. The FRANCHISEE shall forward all such forms, duly completed in all respects and signed by customers to BML for its verification and records.

XX XX XX

5.1 From time to time, BML will review with the FRANCHISEE minimum subscription, targets for the Pre Paid Services,

taking into account the market development and market potential and other relevant factors. The achievements of these prescribed targets by the FRANCHISEE is a material obligation of the FRANCHISEE under this Agreement.

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6.2 The FRANCISEE shall employ a fully trained service staff whose training has been completed in accordance with the standards set out by BML.

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8.1 The FRANCHISEE's price and payment for services will be specified by BML from time to time. The rates are subject to variation during the terms of this Agreement at the sole discretion of BML and shall be intimated to the Distributor from time to time.

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8.3 All other tax liabilities arising in connection with or out of the agreement transactions pertaining to the FRANCHISEE shall be the responsibility of the FRANCHISEE.

XX XX XX

10.1 The FRANCHISEE accepts for all purposes that all trademarks, logos, trade names or identifying marks and slogans used by BML in respect of the Service and the Pre Paid Services, whether registered or not, constitute the exclusive property of BML or their affiliated companies as the case may be, and cannot be used by the FRNCHISEE except in connection with the promotion and marketing of the Services of BML and that too with the express written consent of BML. The FRANCHISEE shall not contest, at any time, the right of the BML or its affiliated companies to any such Trademark or trade name used or claimed by BML or such affiliated companies in respect of the Service or Pre Paid Services.

XX XX XX

11.2 During the term of this Agreement, the FRANCHISEE is authorised to use BML's trademarks, logos and trade names only in connection with the FRANCHISEE's use of such trademarks, logos and trade names as set out in this Agreement. The FRANCHISEE's use of such trademarks, logos and trade names shall be in accordance with the guidelines issued by BML. Nothing herein shall give the FRANCHISEE any right, title or interest in such trademarks, logos or trade names, in the event of termination of this Agreement, however caused, the FRANCHISEE'S right to use such Trademarks, logos or trade names shall cease forthwith. The FRANCHISEE agrees not to attach any additional trademarks, logos or trade designation to the Trademarks of BML.

11.3 For as long as this Agreement continues in force but not thereafter, the FRANCHISEE may identify itself as an authorised FRANCHISEE of BML, but shall not use the Trademarks, logos and trade names of BML as part of its proprietorship name/corporate/partnership name or otherwise indicate to the public that it is an affiliate of BML.

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11.5 BML shall allow the FRANCHISEE to use its logo to be displayed on the sign board to be placed at the FRANCHISEE's outlet(s) and on the each memos and/or official business documents issued by the FRANCHISEE towards the services effected from the outlet(s). However, the intellectual property rights associated with Trademarks, logos and trade names are and shall remain the sole property of BML.

XX XX XX

14.1 BML shall not be liable to the FRANCHISEE or any other party by virtue of the termination of this Agreement for any reason whatsoever, including but not limited to any claim for loss of profits or compensation or prospective profits or on account of any expenditure, investments, leases, capital improvements or any other commitments

made by the FRANCHISEE in connection with the business made in reliance upon or by virtue of FRANCHISEE's appointment under this Agreement. It is expressly agreed that no compensation whatsoever shall be payable by BML to the FRANCHISEE upon the termination of this Agreement.

14.2 Upon receipt of any notice of termination of this Agreement the FRANCHISEE shall conduct all its operations until the effective date of termination mentioned in such notice in the manner which is consistent with the obligation of the FRANCHISEE hereunder and the FRANCHISEE shall not prejudice the reputation or goodwill of BML and the interests of the subscribers in any manner whatsoever.

14.3 Upon termination of this Agreement for any reason, the FRANCHISEE shall cease to represent himself as the authorised FRANCHISEE of BML and shall not act in a manner, which is likely to cause confusion or to deceive the public. The FRANCHISEE shall promptly remove all Trademarks, signs, words, trademarks (sic), logos and any other representations connected with BML. In the event the FRANCHISEE fails to comply with the above, BML shall have the right to enter upon the FRANCHISEE's premises and remove, without liability, all Trademarks, signs, logos, trademarks (sic), materials written documents and any other representations connected with BML and the FRANCHISEE shall reimburse to BML all costs and expenses incurred thereof.

14.4 In the event of termination of this Agreement, FRANCHISEE shall return to BML by the effective date of termination all advertising and promotional materials, marketing aids and other documents and materials received and all Confidential Information received under this Agreement.

14.5 Both parties agree that goodwill created with respect to Service and Pre Paid Services is the exclusive property of BML. Any expenditure for promotion, advertising and other efforts by FRANCHISEE is made with the knowledge that this Agreement may be terminated pursuant to

> Article 13 hereof. Under no circumstance shall BML be obliged to pay to the FRANCHISEE upon termination of this Agreement any termination pay or compensation for subscriber acquisition, special indemnification, or any other termination compensation.
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> xx xx xx
>
> 16.1 The FRANCHISEE understands that it is an independently owned business entity and this Agreement does not make the FRANCHISEE, its employees, associates or agents as employees, agents or legal representatives of BML for any purpose whatsoever. The FRANCHISEE has no express or implied right or authority to assume or to undertake any obligation in respect of or on behalf of or in the name of BML, or to bind BML in any manner. In case, the FRANCHISEE, its employees, associates or agents hold out as employees, agents, or legal representatives of BML, the FRANCHISEE shall forthwith upon demand make good any/all loss, cost, damages, including consequential loss, suffered by BML on this account.
>
> 16.2 It is understood that the relationship between the parties is solely on principal-to-principal. FRANCHISEE shall not acquire, by virtue of any provision of this Agreement or otherwise, any right, power or capacity to act as an agent or commercial representative of BML for any purpose whatsoever. Nothing contained in the contract shall be deemed or construed as creating a joint venture relationship or legal partnership etc. between BML and the FRANCHISEE.
>
> 16.3 The FRANCHISEE shall not obtain/offer the pre paid cards and/or recharge coupons for the Pre Paid Service from any other source other than BML unless such permission is granted in writing by BML in order to meet the specific needs of the market and subscribers as determined by BML.
>
> xx xx Xx"

22. As per the agreement, the franchisee/distributor is appointed for marketing of prepaid services and for appointing the retailer or

outlets for sale promotion. It is pertinent to note that the retailers or outlets for sale promotion are appointed by the franchisee/ distributor and not the assessee. The franchisees/distributors have agreed not to undertake activities mentioned in the agreement for any other competitive cellular mobile telephone service provider in the business. The franchisees/distributors have to comply with statutory, regulatory and municipal permissions while conducting the business. The franchisees/distributors have agreed to indemnify and keep indemnified the assessee against any and all costs, expenses and charges imposed on the assessee because of any action by a statutory, regulatory or municipal authority due to non-compliance by the franchisee/ distributor. The franchisee/ distributor has to maintain a suitable establishment for the conduct of business and performance of obligations. While doing so, the franchisee/distributor shall conform and adhere to the policies communicated to it from time to time by the assessee. The franchisee/distributor shall employ adequate employees for performing its obligations, and all contractual and statutory payments, including wages, are to be paid by the franchisee/distributor. The assessee can, if it so desires, call upon the franchisee/distributor to make alterations, modifications in furniture, air conditioning equipment etc., as required and necessary and mutually agreed. Costs of such alternations and distributions are to be borne by the franchisee/ distributor.

23. The franchisee/distributor has to maintain proper and sufficient quantities of prepaid start-up packs and recharge coupons to meet the market requirements. The franchisee/distributor shall follow the guidelines and directions issued by the assessee from time to time. At no point of time, the right, title, or interest in the prepaid cards shall pass on to the franchisee/distributor. All rights, title ownership and property rights in the cards shall rest with the assessee. The franchisee/distributor shall be solely responsible and liable for safety and storage of prepaid start-up kits, recharge cards and other material. The assessee will not be liable for any loss, pilferage or damage to the pre-paid coupons/starter-kits. The franchisee/ distributor is to indemnify the assessee for any loss caused on this account. The franchisee/distributor is to insure the prepaid start-up kits/ recharge coupons. The liability for any loss

or damage due to fire, burglary, theft etc. is that of the franchisee/ distributor.

24. On termination of the agreement, the franchisee/distributor shall continue its operation till the effective date of termination mentioned in the notice. Upon termination, the franchisee/distributor is required to return all advertising and promotional material, etc. to the assessee by the effective date of termination. Further, the assessee is not liable to the franchisee/distributor or any other party for any loss of profits or compensation or prospective profits or on account of any expenditure, etc. in the event of termination.

25. The assessee is to review the minimum subscriptions/targets for prepaid services taking into account market development and potential and other relevant factors. The franchisee/distributor is to employ a fully trained service staff, who have undergone training in accordance to the standards set out by the assessee. The franchisee/distributor will be responsible to collect all necessary agreement/contract forms and other related forms, after obtaining signatures of the customers on the said forms. These forms, duly completed in all respects and signed by the customers, will be forwarded to the assessee for its verification and record.

26. The franchisee's/distributor's price and payment for services will be specified by the assessee from time to time. The rates can be varied during the terms of the agreement at the discretion of the assessee and such variation is to be intimated to the franchisee/ distributor. All tax liabilities in connection with, or arising out of, the transactions pertaining to the agreement shall be the responsibility of the franchisee/distributor.

27. The trademarks, logos, trade names or identifying marks and slogans used by the assessee, whether registered or not, are exclusive property of the assessee or the affiliated companies. The use of such marks, logos etc. will be in accordance with the guidelines issued by the assessee. As long as the agreement is in force, but not thereafter, the franchisee/distributor shall identify itself as an authorised franchisee, but shall not use trademarks, logos, tradenames, as part of its proprietorship name/corporate/ partnership name or otherwise. The franchisee/distributor is entitled to use its logo on the side door at its outlets and on its memos and official business documents towards the services effected from the outlet.

28. On the question of actual business financial model adopted and followed, it is an admitted position that the franchisees/distributors were required to pay in advance the price of the welcome kit containing the SIM card, recharge vouchers, top-up cards, e-tops, etc. The abovementioned price was a discounted one. Such discounts were given on the price printed on the pack of the prepaid service products. The franchisee/distributor paid the discounted price regardless of, and even before, the prepaid products being sold and transferred to the retailers or the actual consumer. The franchisee/ distributor was free to sell the prepaid products at any price below the price printed on the pack. The franchisee/distributor determined his profits/income.

29. The Revenue has highlighted that the prepaid SIM cards were not the property of franchisee/distribution and no right, title or interest was transferred to them. These were always to remain the property of the assessee. This is correct, but it is equally true that this is a mandate and requirement of the licence issued to the assessee by the DoT. In actual practice, the right to use the SIM card and its possession is handed over and given to the end-user, that is, the customer who installs the SIM card in his phone to avail the telecommunication services. Similarly, the franchisees/distributors are to ensure that the post-paid customers/end-users fill up the form as prescribed along with the documents which are given and submitted to the assessee. These are mandates prescribed by the licence issued by the DoT to the assessees. The contractual obligations of the distributors/ franchisees, do not reflect a fiduciary character of the relationship, or the business being done on the principal's account.

30. The franchisees/distributors earn their income when they sell the prepaid products to the retailer or the end-user/customer. Their profit consists of the difference between the sale price received by them from the retailer/end-user/customer and the discounted price at which they have 'acquired' the product. Though the discounted price is fixed or negotiated between the assessee and the franchisee/ distributor, the sale price received by the franchisee/ distributor is within the sole discretion of the franchisee/distributor. The assessee has no say in this matter.

31. It is not the case of the Revenue that the tax at source under Section 194-H of the Act is to be deducted on the difference between the

printed price and the discounted price. This cannot be the case as the Revenue cannot insist that the franchisee/distributor must sell the products at the printed price and not at a figure or price below the printed price. The obligation to deduct tax at source is fixed by the statute itself, that is, on the date of actual payment by any mode, or at the time when income is credited to the account of the franchisee/distributor, whichever is earlier. In the context of the present case, the income of the franchisee/distributor, being the difference between the sale price received by the franchisee/distributor and the discounted price, is paid or credited to the account of the franchisee/distributor when he sells the prepaid product to the retailer/end-user/customer. The sale price and accordingly the income of the franchisee/distributor is determined by the franchisee/distributor and the third parties. Accordingly, the assessee does not, at any stage, either pay or credit the account of the franchisee/distributor with the income by way of commission or brokerage on which tax at source under Section 194-H of the Act is to be deducted.

32. Faced with the above situation, the Revenue has relied upon the use of the expression "payment received or receivable directly or indirectly by a person acting on behalf of the other person", that is, 'the principal'. It is argued that even if the franchisee/distributor receives payment in the form of income from the retailer/end-user/customer, it would require deduction of tax at source as payment received or receivable, directly or indirectly, is to be subjected to deduction of tax. In support of the argument, reliance is placed upon decision in the case of ***Singapore Airlines Limited*** (supra).

33. The decision in ***Singapore Airlines Limited*** (supra) is required to be understood in the context of the contract in the said case, which was in terms of the rules/agreement set up by the International Airport Transport Association[24]. IATA would fix a ceiling price, and the price an airline could charge from its customers with a discretion to the airlines to sell their tickets at a net fare lower than the base fare but not higher. The air carriers were required to furnish a fare list to the Director General of Civil Aviation. The arrangement between the airlines and travel agents was covered

24 'IATA', for short.

by the Passenger Sales Agency Agreement[25], which would set out the conditions under which the travel agent carried out sale of tickets along with other ancillary services. The travel agents were entitled to 7% commission on sale of the tickets for its services as the standard commission based on the price bar set by the IATA. The airlines were deducting tax at source under Section 194-H of the Act on the 7% commission. In addition to the 7% commission, the travel agents were also entitled to additional/ supplementary commission on the tickets sold by them. The additional/supplementary commission and the amount at which the tickets were sold were computed by the travel agents and transmitted to the billing and settlement plan (BSP). The BSP, functioning under the aegis of the IATA, managed, *inter alia*, logistics vis-à-vis payments, and acted as a forum for agents and airlines to examine details pertaining to the sale of the flight tickets.

33.1 This Court examined the operation of the BSP where the financial data regarding sale of tickets was stored. The BSP agglomerated the data from multiple transactions. Thereupon, this data was transmitted either bimonthly or twice a month to the airlines. It is on the basis of this data that the airlines/air carriers were required to pay the additional commission to the travel agents. These are the striking distinguishing features in ***Singapore Airlines Limited*** (supra) case.

33.2 Having considered the aforesaid mechanism and the nature of relationship between a principal and an agent[26], this Court found considerable merit in the argument of the Revenue that the airlines/ air carriers utilised the BSP to discern the amount earned as additional/supplementary commission and accordingly arrive at the income earned by the agent to deduct tax at source, in accordance with the provisions of Section 194-H of the Act. If the aforesaid mechanism is understood, then it is not difficult to appreciate and understand the conclusion arrived at by this Court in the said case.

25 'PSA', for short.

26 As stated above the airlines were deducting tax at source under Section 194-H on the 7% commission (standard commission). The dispute only related to whether the airlines were liable to deduct tax at source on the additional commission (supplementary commission).

33.3 Thus, the question whether there was relationship of principal and agent was not in dispute, but nevertheless the assessees in the said case disputed liability to deduct tax at source on the additional/supplementary commission. However, the judgment does refer to the difference between the legal relationship of master and servant, principal and agent, and between principal and principal. In this context, reference is made to the statement of law in Halsbury's Law of England[27], which reads:

> "The difference between the relations of master and servant and of principal and agent may be said to be this: a principal has the right to direct what work the agent has to do: but a master has the further right to direct how the work is to be done."
>
> **XX XX XX**
>
> "An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work; an independent contractor, on the other hand, is entirely independent of any control or interference and merely undertakes to produce a specified result, employing his own means to produce that result. An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principal, is not subject in its exercise to the direct control or supervision of the principal. An agent, as such is not a servant, but a servant is generally for some purposes his master's implied agent, the extent of the agency depending upon the duties or position of the servant."

34. We have already expounded on the main provision of Section 194-H of the Act, which fixes the liability to deduct tax at source on the 'person responsible to pay' – an expression which is a term of art – as defined in Section 204 of the Act and the liability to deduct tax at source arises when the income is credited or paid by the person

27 Vol. 22, p. 113, ¶ 192 and Vol. 1, at p. 193, Article 345.

responsible for paying.[28] The expression "direct or indirect" used in Explanation (i) to Section 194-H of the Act is no doubt meant to ensure that "the person responsible for paying" does not dodge the obligation to deduct tax at source, even when the payment is indirectly made by the principal-payer to the agent-payee. However, deduction of tax at source in terms of Section 194-H of the Act is not to be extended and widened in ambit to apply to true/genuine business transactions, where the assessee is not the person responsible for paying or crediting income. In the present case, the assessees neither pay nor credit any income to the person with whom he has contracted. Explanation (i) to Section 194-H of the Act, by using the word "indirectly", does not regulate or curtail the manner in which the assessee can conduct business and enter into commercial relationships. Neither does the word "indirectly" create an obligation where the main provision does not apply. The tax legislation recognises diverse relationships and modes in which commerce and trade are conducted, *albeit* obligation to tax at source arises only if the conditions as mentioned in Section 194-H of the Act are met and not otherwise. This principle does not negate the compliance required by law.

35. Deduction of tax at source is a substantial source of the direct tax revenue. The ease of collection and recovery is obvious. Deduction and deposit of tax at source checks evasion and non-payment of tax. It expands the tax base. However, the assessee as a deductor is not paying tax on his/her income, and collects and pays tax otherwise payable by the third party. Liability of the third party to pay tax when not deducted remains unaffected. Failure to deduct tax at source has serious and quasi-penal consequences for an assessee. The deduction of tax provisions should be programmatically and realistically construed, and not as enmeshes or by adopting catch-as-catch-can approach. In case of a legal or factual doubt in a given case, the assessee can rely on the doctrine of presumption against doubtful penalisation.[29] Whether or not the said doctrine should

28 *See* ¶ 5 of the judgment.

29 *See Securities and Exchange Board of India* v. *Sunil Krishna Khaitan and Others*, [2022] 18 SCR 987 : (2023) 2 SCC 643. However, in the present case doctrine of presumption against doubtful penalisation is not applicable. The assessees were earlier deducting tax at source under Section 194-H of the Act, though the amount on which tax was being deducted is unclear. On legal opinion they stopped deducting tax at source.

be applied[30], will depend on facts and circumstances of the case, including the past practice followed by the assessee and accepted by the department. When there is apparent divergence of opinion, to avoid litigation and pitfalls associated, it may be advisable for the Central Board of Direct Taxes to clarify doubts by issuing appropriate instruction/circular after ascertaining view of the assesses and stakeholders.[31] In addition to enhancing revenue and ensuring tax compliance, an equally important aim/objective of the Revenue is to reduce litigation. The instructions/circular, if and when issued, should be clear, and when justified – require the obligation to be made prospective.

36. Notably, the Delhi High Court in ***Commissioner of Income Tax*** v. ***Singapore Airlines Ltd.***[32] had held that tax under Section 194-H of the Act is not required to be deducted on the discounted tickets sold by the airlines/air carriers through travel agents. Revenue did not challenge the decision of the Delhi High Court to this extent and therefore, this dictum attained finality. As noted, it is not the case of the Revenue that tax is to be deducted when payment is made by the distributors/franchisees to the mobile service providers. It is also not the case of the revenue that tax is to be deducted under Section 194-H of the Act on the difference between the maximum retail price income of the distributors/ franchisees and the price paid by the distributors/franchisees to the assessees. The assessees are not privy to the transactions between distributors/franchisees and third parties. It is, therefore, impossible for the assessees to deduct tax at source and comply with Section 194-H of the Act, on the difference between the total/sum consideration received by the istributors/ franchisees from third parties and the amount paid by the distributors/ franchisees to them.

37. The argument of the Revenue that assessees should periodically ask for this information/data and thereupon deduct tax at source should be rejected as far-fetched, imposing unfair obligation and inconveniencing the assesses, beyond the statutory mandate. Further, it will be willy-nilly impossible to deduct, as well as make payment

30 This would include the question of prospective or retrospective application.

31 We do acknowledge that the Central Board of Direct Taxes has on several occasions quelled doubts and issued instructions/circulars.

32 (2009) 319 ITR 29.

of the tax deducted, within the timelines prescribed by law, as these begin when the amount is credited in the account of the payee by the payer or when payment is received by the payee, whichever is earlier. The payee receives payment when the third party makes the payment. This payment is not the payment received or payable by the assessee as the principal. The distributor/franchisee is not the trustee who is to account for this payment to the assessee as the principal. The payment received is the gross income or profit earned by the distributor/franchisee. It is the income earned by distributor/franchisee as a result of its efforts and work, and not a remuneration paid by the assessee as a cellular mobile telephone service provider.

38. We must, therefore, reject the argument of the Revenue relying upon the decision of this Court in ***Singapore Airlines Limited*** (supra) that assessees would be liable to deduct tax at source even if the assessees are not making payment or crediting the income to the account of the franchisee/distributor. When the obligation, and the time and manner in which the tax is mandated by law to be deducted at source, is fixed by the statute, the same cannot be shifted/altered/modified or postponed on a concession in the court by the Revenue. The concession may be granted, when permissible, by way of a circular issued in accordance with Section 119 of the Act. We do not think that the decision in ***Singapore Airlines Limited*** (supra) can be read in the manner as suggested by the Revenue.

39. Coming back to the legal position of a distributor, it is to be generally regarded as different form that of an agent. The distributor buys goods on his account and sells them in his territory. The profit made is the margin of difference between the purchase price and the sale price. The reason is, that the distributor in such cases is an independent contractor. Unlike an agent, he does not act as a communicator or creator of a relationship between the principal and a third party. The distributor has rights of distribution and is akin to a franchisee. Franchise agreements are normally considered as *sui generis*, though they have been in existence for some time. Franchise agreements provide a mechanism whereby goods and services may be distributed. In franchise agreements, the supplier or the manufacture, i.e. a franchisor, appoints an independent enterprise as a franchisee through whom the franchisor supplies certain goods or services. There is a close relationship between a franchisor and a franchisee because a franchisee's operations

are closely regulated, and this possibly is a distinction between a franchise agreement and a distributorship agreement. Franchise agreements are extremely detailed and complex. They may relate to distribution franchises, service franchises and production franchises. Notwithstanding the strict restrictions placed on the franchisees – which may require the franchisee to sell only the franchised goods, operate in a specific location, maintain premises which are required to comply with certain requirements, and even sell according to specified prices – the relationship may in a given case be that of an independent contractor. Facts of each case and the authority given by 'principal' to the franchisees matter and are determinative.

40. An independent contractor is free from control on the part of his employer, and is only subject to the terms of his contract. But an agent is not completely free from control, and the relationship to the extent of tasks entrusted by the principal to the agent are fiduciary. As contract with an independent agent depends upon the terms of the contract, sometimes an independent contractor looks like an agent from the point of view of the control exercisable over him, but on an overview of the entire relationship the tests specified in clauses (a) to (d) in paragraph 8 may not be satisfied. The distinction is that independent contractors work for themselves, even when they are employed for the purpose of creating contractual relations with the third persons. An independent contractor is not required to render accounts of the business, as it belongs to him and not his employer.

41. Thus, the term 'agent' denotes a relationship that is very different from that existing between a master and his servant, or between a principal and principal, or between an employer and his independent contractor. Although servants and independent contractors are parties to relationships in which one person acts for another, and thereby possesses the capacity to involve them in liability, yet the nature of the relationship and the kind of acts in question are sufficiently different to justify the exclusion of servants and independent contractors from the law relating to agency. In other words, the term 'agent' should be restricted to one who has the power of affecting the legal position of his principal by the making of contracts, or the disposition of the principal's property; *viz*. an independent contractor who may, *incidentally*, also affect the legal position of his principal in other ways.

This can be ascertained by referring to and examining the indicia mentioned in clauses (a) to (d) in paragraph 8 of this judgment. It is in the restricted sense in which the term agent is used in Explanation (i) to Section 194-H of the Act.

42. In view of the aforesaid discussion, we hold that the assessees would not be under a legal obligation to deduct tax at source on the income/profit component in the payments received by the distributors/franchisees from the third parties/customers, or while selling/transferring the pre-paid coupons or starter-kits to the distributors. Section 194-H of the Act is not applicable to the facts and circumstances of this case. Accordingly, the appeals filed by the assessee – cellular mobile service providers, challenging the judgments of the High Courts of Delhi and Calcutta are allowed and these judgments are set aside. The appeals filed by the Revenue challenging the judgments of High Courts of Rajasthan, Karnataka and Bombay are dismissed. There would be no orders as to cost.

Pending applications, if any, shall stand disposed of.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeals filed by the assessees are allowed and that of the Revenue are dismissed.

[2024] 2 S.C.R. 1039 : 2024 INSC 154

State of Punjab
v.
Gurpreet Singh & Ors.

(Criminal Appeal Nos. 664-665 of 2024)

06 February 2024

[Surya Kant* and K.V. Viswanathan, JJ.]

Issue for Consideration

High Court, if justified in acquitting the main accused and the co-accused of the charges u/s. 302/34 IPC.

Headnotes

Penal Code, 1860 – s. 302 – Murder – Acquittal by High Court, if sustainable – Prosecution case that main accused armed with pistol shot his ex mother-in-law resulting in her death – Other co-accused accompanied the main accused – Motive behind the murder was that the main accused believed that his ex-mother-in-law was responsible for the divorce from his ex-wife, sabotaging his plan to settle abroad – Conviction and sentence of the main accused u/s. 302 and the co-accused u/ss. 302/34 by the trial court, on basis of the testimonies of the complainant-husband of the deceased and his daughter – However, acquittal by the High Court – Sustainability:

Held: Reasons assigned by the High Court for disbelieving the testimonies of the complainant-husband of the deceased and his daughter, cannot be concurred with – There is no suggestion to the complainant, and his daughter that they had some other reason to implicate the main accused falsely, who happens to be the former husband of the elder daughter – On the contrary, the prosecution successfully established that main accused had been nursing a grudge against the deceased, which stands proved – Presence of the complainant at the time of occurrence, his prompt reporting of the crime, and the swift action taken by the police immediately upon receipt of the said report, cumulatively and unequivocally established the prosecution case beyond any doubt – There could not be, in all probabilities, any meeting of the minds within a few minutes after the occurrence, so as

* Author

to create a false narrative only to implicate main accused – Unfiltered version of the complainant conclusively established the veracity of his subsequent deposition – Overwhelming evidence, to establish the recovery of weapon of crime-pistol along with live cartridges and one empty shell at the instance of the main accused – Submission that none of the neighbours came forward to witness the occurrence totally illogical and a misconceived notion – Thus, the reasons assigned by the High Court while granting acquittal to the main accused totally perverse and as a result of misreading of the evidence on record – Order of acquittal qua main accused u/s. 302 set aside, and that of the trial court convicting him and sentencing him to life imprisonment restored – However, the reasons assigned by the High Court in support of the acquittal of co-accused are possible and plausible – High Court seems right in extending the benefit of doubt qua them. [Paras 24-33, 35, 36]

Constitution of India – Art. 136 – Intervention in acquittal orders under:

Held: Once the appellate court acquits the accused, the presumption of innocence as it existed before conviction by the trial court, stands restored, and this Court, while scrutinizing the evidence, would proceed with great circumspect and would not routinely interfere with an order of acquittal, save when the impeccable prosecution evidence nails the accused beyond any doubt – Where on consideration of the material on record, even if two views are possible, yet this Court, while exercising powers Art. 136 would not tinker with an order of acquittal – An erroneous or perverse approach to the proven facts of a case and/or ignorance of some of the vital circumstances would amount to a grave and substantial miscarriage of justice – In such a case, this Court would be justified in exercising its extraordinary jurisdiction to undo the injustice mete out to the victims of a crime. [Paras 15, 18]

First Information Report – Prompt lodging of – Significance:

Held: Prompt lodging of an FIR helps dispel suspicions related to the potential exaggeration of the involvement of individuals and adds credibility to the prosecution's argument – Promptly lodged FIR reflects the first-hand account of what happened and who was responsible for the offence in question. [Para 30]

Witness – Natural witness, when – Evidentiary value:

Held: Incident, which transpires partly within the confines of the house, the family members and close relatives naturally become the witnesses – These individuals cannot be considered incidental witnesses; instead, they emerge as the most natural witnesses – Typically, a close relative is unlikely to shield the actual culprit and falsely implicate an innocent person – While it is acknowledged that emotions can run high and personal animosity may exist, merely being related does not provide a valid basis for criticism, instead, familial ties often serve as a reliable assurance of truth. [Para 29]

Case Law Cited

State of Karnataka v. J. Jayalalitha [2017] 5 SCR 525 **: (2017) 6 SCC 263;** *Rajesh Prasad v. State of Bihar,* [2022] 3 SCR 1046 **: (2022) 3 SCC 471;** *Thoti Manohar v. State Of Andhra Pradesh,* [2012] 5 SCR 1129 **: (2012) SCC 7 723;** *Nand Lal v. State of Chhattisgarh,* [2023] 2 SCR 276 **: (2023) 10 SCC 470;** *Thulia Kali v. State of Tamil Nadu,* [1972] 3 SCR 622 **: (1972) 3 SCC 393;** *State of Punjab v. Surja Ram,* [1995] Suppl. 2 SCR 590 **: (1995) Supp (3) SCC 419;** *Girish Yadav v. State of M.P.,* [1996] 3 SCR 1021 **: (1996) 8 SCC 186;** *Takdir Samsuddin Sheikh v. State of Gujarat,* **(2011) 10 SCC 158 – referred to.**

List of Acts

Penal Code, 1860; Constitution of India.

List of Keywords

Murder; Acquittal; Motive; Natural witnesses; Testimonies; False implication; Recovery of weapon; Travesty of justice; Benefit of doubt; Presumption of innocence; Extraordinary jurisdiction; First Information Report; Prompt lodging of FIR; Witness.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos.664-665 of 2024

From the Judgment and Order dated 05.12.2019 of the High Court of Punjab and Haryana at Chandigarh in CrA-D-1606-DB of 2015 (O&M) and CRR No. 2942 of 2015 (O&M)

Appearances for Parties

Gaurav Dhama, A.A.G., Ms. Rooh-e-hina Dua, Malivka Raghavan, Harshit Khanduja, Umang Mehta, Mohammad Salam, Advs. for the Appellant.

Miss Aanchal Jain, Karan Dewan, Kartik Yadav, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Surya Kant, J.

Delay condoned.

2. Leave granted.

3. These appeals are directed against the judgment dated 05.12.2019, passed by the High Court of Punjab and Haryana at Chandigarh **(hereinafter, 'High Court')**, allowing Criminal Appeal, CRA-D-1606-DB-2015 (O&M) filed by Gurpreet Singh, Kashmira Singh and Jagdeep Singh (Respondent Nos. 1-3) and Criminal Revision, CRR-2942-2015 (O&M) filed by Harpreet Singh against their conviction awarded by the Learned Additional Sessions Judge, Ludhiana **(hereinafter, 'Trial Court')** vide judgments dated 29.09.2015 and 02.07.2015 respectively. The High Court has, through the impugned judgment, acquitted all the four Respondents of the charges under Section 302 read with Section 34 of the Indian Penal Code, 1860 **(hereinafter, 'IPC')**.

Facts:

4. At this juncture, it is imperative to delve into the factual matrix to set out the context of the present proceedings.

5. FIR No. 100 dated 18.07.2012, was registered at Police Station City Jagraon, District Ludhiana Rural, under Sections 302 and 34 of IPC and Sections 25, 27, 54, and 59 of the Arms Act, 1959. The subject FIR was lodged on the statement of Gursewak Singh (P.W.2), the Complainant, who stated that his elder daughter, Kirandeep Kaur, was married to Gurpreet Singh **(main accused)** in the year 2009 and they got divorced in the year 2011. On 18.07.2012, at about 1.30 p.m., the Complainant was taking rest in his bedroom while

his wife, Amarjit Kaur, and their son and younger daughter were on the first floor. At the exact time of the incident, the Complainant received information from Amarjit Kaur, who was standing on the stairs, that someone was calling for him. The Complainant opened the drawing-room door to check the main gate, wherein he saw Gurpreet Singh, accompanied by an unidentified individual, who had entered the porch by jumping the compound wall. Gurpreet Singh was armed with a pistol, while the unidentified person held a hockey stick. No sooner did the Complainant open the drawing-room door Gurpreet Singh shot at the Complainant's wife, Amarjit Kaur, under the right ear from a close range. When the Complainant accessed the main gate, he saw brothers of Gurpreet Singh, namely, Harpreet Singh and Joga Singh (sons of Puran Singh r/o Bhodipura), standing there besides an Innova car. The Complainant shouted at them and tried to catch hold of the assailants, but they crossed the main gate and fled in the Innova car. The reason for enmity, according to the Complainant, was that the daughter of the Complainant, Kirandeep Kaur, had cleared the IELTS exam and had shifted to Australia. Gurpreet Singh also wanted to settle in Australia, but due to their divorce, his dreams were shattered, and he blamed Amarjit Kaur, the wife of the Complainant to be responsible for the divorce.

6. The prosecution examined as many as 10 witnesses to bring the guilt home, including Gursewak Singh, P.W.2 (the Complainant) and his daughter, Harmandeep Kaur (P.W.3), both eyewitnesses. The entire case of the prosecution is based upon the version of these two eyewitnesses, who claimed that the murder took place in the broad daylight in front of them.

7. The Trial Court, having found the version of the two eyewitnesses to be trustworthy, which was duly corroborated by the medical evidence and the recovery of the weapon, held Gurpreet Singh guilty of the offence under Section 302 IPC, whereas his co-accused were held guilty for the offence under Section 302/34 IPC. All of them were sentenced to undergo life imprisonment.

8. The High Court, vide the impugned judgment, disbelieved the version of Gursewak Singh (P.W.2, the Complainant) and his daughter, Harmandeep Kaur (P.W.3), primarily for the reasons that (i) Gursewak Singh (P.W.2) had gone for the medical checkup of

his son to a hospital in Jagraon. It was not possible for him to reach back Doraha at the time of occurrence, as the distance was of about 70 kms. (ii) Gursewak Singh (P.W.2) failed to disclose the names of the co-accused, Harpreet Singh and Kashmira Singh, in his first version, and he is stated to have re-collected their names after about five hours. (iii) It is doubtful that Harmandeep Kaur (P.W.3) would be attending her classes from her parental house rather than from her in-laws' house since she got married only a few months ago. (iv) No Test Identification Parade was conducted. (v) There is a great mystery about the nomination of Jagdeep Singh, Harpreet Singh S/o Veer Singh and Kashmira Singh because, as per the testimony of the eyewitnesses, they were never named before the police, and even the Investigating Officer has also not disclosed as to how these persons have been nominated as accused. (vi) These discrepancies, inconsistencies and unexplained circumstances go to the root of the case and severely dent the credibility of Gursewak Singh (P.W.2) and his daughter.

9. The High Court, thus, viewed that once the defence is able to cast a reasonable doubt on the story of the prosecution, the necessary consequence will be the acquittal of the accused.

10. Discontented with the acquittal of the accused persons, the State of Punjab is in appeal before us.

Contentions of Parties

11. Mr. Gaurav Dhama, learned Additional Advocate General for the State of Punjab, argued that the High Court erred in acquitting the accused, by setting aside the well-reasoned findings by the Trial Court, which categorically stated that based on the direct and unequivocal statements provided by both the witnesses (P.W.2 and P.W.3), it was conclusively proved that Gurpreet Singh fired shots at Amarjit Kaur. The Complainant and the eyewitness, having lost a close family member in the incident, had no motive to protect the real accused or falsely implicate the innocent persons of committing the crime. Mr. Dhama vehemently contended that Gurpreet Singh harboured suspicions that the deceased played a big role in his divorce. He kept holding a grudge against her, which served as the motive for the murder. Additionally, the testimonies of Gursewak Singh (P.W.2) and his daughter, Harmandeep Kaur (P.W.3), distinctly indicated that soon after Amarjit Kaur was shot, she was discovered to be dead,

prompting them to alert the authorities. Furthermore, P.W.3 provided a clear and unequivocal identification of the accused-Respondents as the assailants at the police station, which was substantiated by a proper identification in the court.

12. *Per contra*, Mr. Karan Dewan, learned counsel on behalf of the Respondents, urged that this Court, in exercise of the power under Article 136 of the Constitution, should be extremely cautious in interfering with an order of acquittal passed by the High Court. Further, the offence took place in the broad daylight, it is quite strange that none of the neighbours witnessed the occurrence. He maintains that the High Court has rightly cast doubt on the prosecution's case as the testimony of P.W.2 and P.W.3 does not inspire confidence. He also contended that P.W.3 was a married girl, and it was highly unlikely that she was attending classes from her paternal home despite getting married only a few months ago.

Analysis

13. Having heard the learned Counsel for the parties at a considerable length, we find that two questions fall for our consideration in the present appeal; (i) whether a case is made out for interference by this Court under Article 136; (ii) whether the acquittal of Respondents is sustainable, if the answer of the first question is in the affirmative.

Scope of Interference

14. Learned counsel for the Respondents very passionately contends that the case does not fall within such exceptional category where this Court, while exercising its power under Article 136 of the Constitution, should interfere in a well-reasoned order of acquittal passed by the High Court.

15. There is no gainsaying that once the appellate court acquits the accused, the presumption of innocence as it existed before conviction by the Trial Court, stands restored, and this Court, while scrutinizing the evidence, will proceed with great circumspect and will not routinely interfere with an order of acquittal, save when the impeccable prosecution evidence nails the accused beyond any doubt. In other words, where on consideration of the material on record, even if two views are possible, yet this Court, while exercising powers under Article 136 of the Constitution, will not tinker with an order of acquittal.

16. ***State of Karnataka v. J. Jayalalitha***[1] does acknowledge that a judgment of acquittal strengthens the presumption of innocence in favour of the accused. Nevertheless, the caveat is that the court must not shy away from its responsibility to prevent a miscarriage of justice and must intervene when necessary. If the acquittal is based on irrelevant grounds, if the High Court allows itself to be misled by distractions, if the High Court dismisses the evidence accepted by the Trial Court without proper consideration, or if the High Court's flawed approach leads to the neglect of vital evidence, this Court is obligated to intervene to uphold the interests of justice and address any concerns within the judicial conscience.

17. In ***Rajesh Prasad v. State of Bihar***[2], this Court has outlined the principles guiding its intervention in acquittal orders under Article 136. These are:

(i) An intervention is warranted when the High Court's approach or reasoning is deemed perverse. This occurs when the High Court, based on suspicion and surmises, rejects evidence or when the acquittal is primarily rooted in an exaggerated adherence to the rule of giving the benefit of doubt in favour of the accused.

(ii) Another circumstance for intervention arises when the acquittal would lead to a significant miscarriage of justice. This refers to situations where the High Court, through a cursory examination of evidence, severs the connection between the accused and the crime.

18. An erroneous or perverse approach to the proven facts of a case and/or ignorance of some of the vital circumstances would amount to a grave and substantial miscarriage of justice. In such a case, this Court will be justified in exercising its extraordinary jurisdiction to undo the injustice mete out to the victims of a crime.

19. Keeping these principles in mind, we proceed to analyse the legal evidence on record and how the High Court appears to have fallen in an error, at least partially, if not in entirety.

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1 [2017] 5 SCR 525 : (2017) 6 SCC 263.

2 [2022] 3 SCR 1046 : (2022) 3 SCC 471.

Acquittal Order qua Gurpreet Singh (Main Accused)

20. With a view to establish charges against Gurpreet Singh, the prosecution relied on the testimonies of Gursewak Singh (P.W.2), Harmandeep Kaur (P.W.3) and Hari Mittar (P.W.9). A brief summarization of their testimonies is necessitated hereunder.

21. P.W.2, Gursewak Singh, the deceased's husband, is the Complainant in FIR No. 100/2012. He provided a detailed account of the incident to the police, recounting that his wife, who was standing on the stairs, informed him of someone calling from outside the main gate. Upon opening the door of the drawing room, he witnessed Gurpreet Singh armed with a pistol. Gurpreet Singh and the unidentified person (Jagdeep Singh, named later on during the testimony) had entered the house by scaling the wall of the house. While P.W.2 was standing at the drawing-room door, Gurpreet Singh aimed the pistol at Amarjit Kaur, shot her under the right ear causing her to fall. P.W.2 raised the alarm, and upon reaching the main gate, he saw Gurpreet Singh, along with Harpreet Singh, Kashmira Singh, and Jagdeep Singh, making their escape in an Innova car. P.W.2 asserted that the motive behind the murder was related to his elder daughter, Kirandeep Kaur, who was earlier married to Gurpreet Singh and had relocated to Australia. Due to the divorce from Kirandeep, Gurpreet Singh's plans to settle in Australia were thwarted, and he held the deceased Amarjit Kaur responsible for the divorce.

22. P.W.3, Harmandeep Kaur, the younger daughter of the deceased, recounted that she, along with her brother and mother, was on the terrace of the house. Amarjit Kaur, hence deceased, while descending the stairs, informed Gursewak Singh P.W.2 of the call. P.W.2 opened the drawing room door to check the main gate. In the meantime, Gurpreet Singh, armed with a pistol, and Jagdeep Singh, wielding a hockey stick, entered the premises by scaling the boundary wall. Gurpreet Singh aimed the pistol at Amarjit Kaur, who was standing on the stairs, firing a shot that struck below her right ear. Subsequently, Gurpreet Singh and Jagdeep Singh fled in an Innova car. P.W.3 also detailed the motive, indicating that Gurpreet Singh believed Amarjit Kaur was responsible for the divorce from Kirandeep Kaur, sabotaging his plan to settle in Australia.

23. P.W.9, Hari Mittar, the Investigating Officer of the case, reported that upon reaching the scene of the incident, he documented the statement

of P.W.2 and compiled an inquest report concerning the deceased, Amarjit Kaur. Additionally, he mentioned that after the arrest, Gurpreet Singh was interrogated where he made a disclosure statement (Ex. PW9/F) revealing the concealment of a 12-bore country-made pistol along with two live cartridges in bushes opposite Gurudwara Bhaura Sahib. Acting on this disclosure statement, the police successfully recovered a 12-bore country-made pistol, one empty cartridge, and two live cartridges of the same calibre.

24. The Trial Court, deeming P.W.2 and P.W.3 as natural witnesses, based its findings on their testimonies to establish the involvement of Gurpreet Singh in the murder of Amarjit Kaur. Furthermore, the Trial Court noted that there was no apparent motive for P.W.2 and P.W.3 to protect the real culprits and falsely accuse innocent individuals in connection with the crime. The pertinent paragraph is outlined below:

> *"51. Thus, the presence of both the complainant and Harmandeep Kaur at the place of occurrence comes across as natural presence. From the direct and unequivocal testimonies of both theses witnesses the fact that accused Gurpreet Singh shot at Amarjit Kaur is duly established. The complainant and the eye witness lost their family member in the incident. There would be no reason for the complainant and Harmandeep Kaur to shield the actual culprits and to name the innocent as the perpetrators of the crime."*

25. The High Court, however, in the impugned judgment, stated that the defence has been able to cast a reasonable doubt on the prosecution's story. Consequently, High Court has disbelieved the testimonies of P.W.2 and P.W.3.

26. We have given our thoughtful consideration to the reasons assigned by the High Court, and we find it extremely difficult to concur with the same. We say so for the reason that the presence of Gursewak Singh (P.W.2) in his own house cannot indeed be doubted for the simple reason that the occurrence took place at 1.30 p.m. and he made a call to the Police Control Room at 1.40 p.m. The fact that in the very first version, Gursewak Singh disclosed the name of the Gurpreet Singh, as being the killer of his wife, leaves no room to doubt that he was physically present in the house and witnessed the occurrence.

27. Similarly, the reason assigned by the High Court to discard the version of Harmandeep Kaur (P.W.3) (daughter of the deceased) is wholly untenable. We cannot at all countenance that a daughter, after her marriage, would permanently stay at her in-laws' house and would not visit her parents after her marriage. Such a sweeping conclusion is neither traceable to Punjab's social culture nor it appeals to our common sense. It is on record that Harmandeep Kaur (P.W.3) was a student before and after her marriage. It is natural that even after her marriage, Harmandeep Kaur (P.W.3) wanted to continue her studies, and therefore was staying with her parents. We see no unnatural or unexpected circumstances in she being present in her paternal home on the fateful day.

28. There is no suggestion to Gursewak Singh, P.W.2 (Complainant), and his daughter Harmandeep Kaur (P.W.3) that they had some other reason to implicate Gurpreet Singh falsely, who happens to be the former husband of the daughter of P.W.2. There was no criminal or civil case filed by the Kirandeep Kaur (ex-wife of Gurpreet Singh), Gursewak Singh (P.W.2) or his family members against Gurpreet Singh. On the contrary, the prosecution has successfully established that Gurpreet Singh had been nursing a grudge against the deceased, whom he held responsible for the divorce from the elder daughter of the deceased. It has also come on record that the elder daughter, Kirandeep Kaur, with whom Gurpreet Singh was earlier married, had settled in Australia even before her marriage. Gurpreet Singh was keen to migrate from India and settle down in Australia. His plans could not materialise because of the divorce from his wife. In such circumstances, the attribution of motive by the prosecution stands proved.

29. We cannot be oblivious to the fact that when the wife of Gursewak Singh (P.W.2) or the mother of Harmandeep Kaur (P.W.3) is suddenly killed in their presence, they would not like the real accused to go scot-free. In the absence of any previous motive, it is not at all comprehensible that they would falsely implicate Gurpreet Singh. It was not a case where the Complainant had enmity with someone and he concocted a story to implicate Gurpreet Singh post the occurence. This Court, in ***Thoti Manohar v. State Of Andhra Pradesh***[3]**,** observed

3 [2012] 5 SCR 1129 : (2012) SCC 7 723.

that in the incident, which transpired partly within the confines of the house and extended slightly beyond the deceased's premises, the family members and close relatives naturally become the witnesses. These individuals cannot be considered incidental witnesses; instead, they emerge as the most natural witnesses in the given factual context. Typically, a close relative is unlikely to shield the actual culprit and falsely implicate an innocent person. While it is acknowledged that emotions can run high and personal animosity may exist, merely being related does not provide a valid basis for criticism; instead, familial ties often serve as a reliable assurance of truth.

30. Most importantly, Gursewak Singh (P.W.2) narrated the entire occurrence on a call made to the Police Control Room within ten minutes of the occurrence. There could not be, in all probabilities, any meeting of the minds within a few minutes after the occurence, so as to create a false narrative only to implicate Gurpreet Singh. The unfiltered version of the Complainant, in our considered opinion, conclusively establishes the veracity of his subsequent deposition. This Court, in ***Nand Lal v. State of Chhattisgarh***[4]**,** has categorically held that the prompt lodging of an FIR helps dispel suspicions related to the potential exaggeration of the involvement of individuals and adds credibility to the prosecution's argument. A promptly lodged FIR reflects the first-hand account of what happened and who was responsible for the offence in question. ***(See also: Thulia Kali v. State Of Tamil Nadu (1972) 3 SCC 393, State of Punjab v. Surja Ram 1995 Supp (3) SCC 419, Girish Yadav v. State of M.P (1996) 8 SCC 186 and Takdir Samsuddin Sheikh v. State of Gujarat (2011) 10 SCC 158).***

31. It is pertinent to refer to the endorsement of FIR No. 100, dated 18.07.2012, where it is clearly mentioned that as soon as the information was received through Police Control Room, a police party headed by Sub-Inspector Hari Mittar along with ASI Baldev Singh and four Head Constables reached the house of Gursewak Singh (Complainant) at Tower Colony, Jagraon where the dead body of Amarjit Kaur was lying near the stairs. The Complainant's statement was recorded, and an intimation to this effect was sent to the higher officers and the Control Room. This entire exercise got completed

4 [2023] 2 SCR 276 : (2023) 10 SCC 470.

by 3.15 p.m. A report to this effect had already been sent to the Ilaka Magistrate, and the dead body was brought for postmortem at about 6.35 p.m. The presence of Gursewak Singh at the time of occurrence, his prompt reporting of the crime, and the swift action taken by the police immediately upon receipt of the said report, have cumulatively and unequivocally established the prosecution case beyond any doubt.

32. This is also a matter of record that the weapon of crime, namely, the pistol, was recovered from Gurpreet Singh pursuant to his disclosure statement. There is overwhelming evidence, including the statement of S.I. Hari Mittar (P.W.9) to establish the recovery of country-made pistol at the instance of Gurpreet Singh. The recovery of the weapon of crime, along with live cartridges and one empty shell, has been elaborately explained by Hari Mittar (P.W.9) in his cross-examination, which inspires confidence. The statement of P.W.9, Hari Mittar has been duly corroborated by ASI Baldev Singh (P.W.8) besides Head Constable Sukhdev Singh (P.W.6).

33. The contention that none of the neighbours came forward to witness the occurrence is totally illogical and a misconceived notion. The prosecution case is that the occurrence took place inside the house. When the police reached the spot immediately after the occurrence, the dead body was found lying inside the house near the stairs. It is, thus, natural that the residents in the adjoining houses did not see the occurrence. The shot was fired at close range, and, the people in the neighbourhood obviously did not come to know about the incident. No adverse inference can be drawn against the prosecution on this count. The time of occurrence, i.e., 1.30 p.m., also indicates that most of the people in the neighbourhood were inside their houses and could not be expected outside in the streets keeping in view the hot and humid weather of July as it prevails in the State of Punjab. We are, therefore, of the considered opinion that the reasons assigned by the High Court while granting acquittal to Gurpreet Singh are totally perverse and as a result of misreading of the evidence on record. In this view of the matter, sustaining the acquittal of Gurpreet Singh, would amount to a travesty of justice and it, thus, warrants interference by this Court in the exercise of its jurisdiction, which we invoke sparingly. Consequently, the order of acquittal passed by the High Court *qua* Gurpreet Singh cannot be sustained and is set aside.

Acquittal Order qua the Co-Accused

34. Adverting to the prosecution case against Kashmira Singh and Jagdeep Singh (Respondent Nos. 2 and 3 herein) in the appeal arising out of CRA-D-1606-DB-2015 (O&M) and Harpreet Singh, who was the appellant before the High Court in CRR-2942-2015(O&M), we are satisfied that the reasons assigned by the High Court in support of their acquittal are possible and plausible. We say so in light of the fact that (i) Gursewak Singh (P.W.2 – Complainant) did not mention their names when he called the Police Control Room at 1.40 p.m. immediately after the occurrence. (ii) Gursewak Singh (P.W.2 – Complainant) merely stated that there were some unknown persons accompanying Gurpreet Singh (iii) In fact, P.W.2 and 3 both did not know the above-named three persons – who were nominated as co-accused of Gurpreet Singh. (iv) Gursewak Singh (P.W.2) is claimed to have recollected their names after about five hours of the occurrence. It is difficult to accept how he re-collected their names, more so when the prosecution did not lead any further evidence as to how he knew them prior to the occurrence. (v) The possibility of pointing out their names by someone else thus cannot be ruled out.

35. The Investigating Officer has also failed to disclose as to how he found these respondents to be connected with the crime during the course of investigation. There is no convincing explanation to implicate them as co-accused. There is also not an iota of evidence to suggest that the Respondents (Kashmira Singh, Jagdeep Singh and Harpreet Singh) had any meeting with Gurpreet Singh and/or they had conspired with him for the execution of the crime. There is no specific motive attributed to them. In such circumstances, the High Court seems right in extending the benefit of doubt *qua* them.

Conclusion and Directions

36. For the reasons aforestated, the Criminal Appeal No.664 of 2024 @ SLP(Crl.)No.1852/2024 is allowed in part; the judgment dated 05.12.2019, passed by the High Court of Punjab and Haryana at Chandigarh, acquitting Gurpreet Singh of the offence under Section 302 IPC is set aside, and that of the Trial Court convicting him and sentencing him to life imprisonment is restored. The bail bonds of Gurpreet Singh, if any, are hereby cancelled. He is directed to surrender and be taken into custody forthwith to serve the remainder

of the sentence. The appeal *qua* Kashmira Singh and Jagdeep Singh is dismissed.

37. Criminal appeal No.665 of 2024 @ SLP(Crl.)No.1853 of 2024 against acquittal of Harpreet Singh is dismissed.

38. The present appeals are disposed of in the above terms.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals disposed of.

[2024] 2 S.C.R. 1054 : 2024 INSC 177

M. Vijayakumar
v.
State of Tamil Nadu

(Criminal Appeal No. 1078 of 2024)

21 February 2024

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

Issue for Consideration

Prosecution, if succeeded in establishing that there was mens rea on the part of the appellant to commit the offence rather to push the victim to commit suicide and to attract the offence u/s. 306, IPC.

Headnotes

Penal Code, 1860 – s. 306 – Abetment of suicide – Conviction u/s. 306, when sustainable – Prosecution case that the appellant and others abducted and wrongful confined the victim for repayment of the balance amount and the inability to withstand the torment, he committed suicide – Conviction of the appellant u/ss. 306, 342 and 365 by the trial court, however, the High Court acquitted him for the offence u/ss. 342 and 365 but upheld conviction for the offence u/s. 306 – Sustainability:

Held: One has to consider the mens rea of the accused/convict to bring about suicide of the victim – It requires an active act or direct act which led the victim to commit suicide seeing no option; and the act must have been of such a degree intending to push the deceased into such a position that he/she committed suicide – Gravamen of the offence punishable u/s. 306, is abetting suicide – Abetment imposes a mental process of instigating a person or initially aiding a person in doing the offence – Evidence of the prosecution witness did not reveal existence of the element of mens rea on the part of the appellant abetting the deceased to commit suicide – There is nothing in their oral testimonies which would suggest that the appellant had instigated the deceased to commit suicide – Though the prosecution got a case that one person had witnessed the appellant taking the victim and wrongfully confining him in the said shop, the said person was not examined by the prosecution – At any rate, the fact is that the appellant was

* Author

already acquitted for the offence u/s. 342 and 365 IPC – s. 106 of the Evidence Act cannot be used to shift the burden of proving the offence from the prosecution to the accused – High Court erred in applying s. 106 – Thus, there is absolute absence of any basis for its application against the appellant in view of the evidence on record – Prosecution miserably failed to establish that the appellant had abetted the victim to commit suicide – Conviction of the appellant u/s. 306, IPC cannot be sustained – Appellants conviction u/s. 306 quashed and set aside and he is acquitted. [Paras 14, 17-22]

Criminal law – Mens rea – Meaning of:

Held: Mens rea means a guilty mind – As a general rule, every crime requires a mental element, the nature of which, will depend upon definition of the particular crime in question – Although it is impossible to ascribe any particular meaning to the term 'mens rea' as the circumstance to determine the existence of mens rea depends upon the ingredients constituting the particular offence and the expression used in the definition of the particular offence to constitute such offence. [Para 15]

Evidence Act, 1872 – s. 106 – Burden of proving fact especially within knowledge – Application of s. 106:

Held: Section 106 is an exception to the general rule laid down in s. 101 which casts burden of proving a fact on the party who substantially asserts the affirmative of the issue – s. 106 is not intended to relieve any person of that duty or burden – It says that when a fact to be proved, either affirmatively or negatively, is especially within the knowledge of a person, it is for him to prove it – s. 106 in its application to criminal cases, applies where the defence of the accused depends on his proving a fact especially within his knowledge and of nobody else – s.106 cannot be used to shift the burden of proving the offence from the prosecution to the accused – It can only when the prosecution led evidence, which, if believed, will sustain a conviction or which makes out a prima facie case, that the question of shifting the onus to prove such facts on the accused would arise. [Para 18]

Case Law Cited

M. Mohan v. State represented by the Deputy Superintendent of Police, [2011] 3 SCR 437 **: (2011) 3 SCC 626;** *Madan Mohan Singh v. State of Gujarat,* [2010]

10 SCR 351 : (2010) 8 SCC 628; *Sawal Das v. State of Bihar,* [1974] 3 SCR 74 : AIR 1974 SC 778 – **relied on.**

Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi), [2009] 13 SCR 230 : (2009) 16 SCC 605, *Director of Enforcement v. MCTM Corp. Pvt. Ltd. & Ors.,* [1996] 1 SCR 215 : AIR 1996 SC 1100 – **referred to.**

Books and Periodicals Cited

Halsbury's Laws of England (4th Edn., Vol-11, Para – 10) – referred to.

List of Acts

Penal Code, 1860; Evidence Act, 1872.

List of Keywords

Suicide; Abetment of suicide; Mens rea; Instigation; Burden of proof; Kidnapping; Wrongful confinement.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1078 of 2024

From the Judgment and Order dated 25.01.2019 of the High Court of Judicature at Madras in CRLA No. 667 of 2011

Appearances for Parties

G. Sivabalamurugan, Selvaraj Mahendran, C. Adhikesavan, S.B. Kamalanathan, P.V. Harikrishnan, Sunil Singh Rawat, Kartik Sandal, Advs. for the Appellant.

D. Kumanan, Mrs. Deepa. S, Sheikh F. Kalia, Veshal Tyagi, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

Leave granted.

1. This appeal is directed against the Judgment dated 25.01.2019 passed by the High Court of Judicature at Madras (for short the

"High Court") in Criminal Appeal No. 667 of 2011 whereunder the appellant's conviction under Sections 342 and 365 of the Indian Penal Code, 1860 (IPC for short) was reversed and he was acquitted therefrom, but his conviction for the offence under Section 306, IPC was confirmed. The sentence imposed for the said conviction was reduced to three years rigorous imprisonment from rigorous imprisonment for seven years.

2. As a matter of fact, the appellant stood trial along with the four others, including his father Muthu (A-3). The appellant and one Ravichandran (A-2) stood trial for the offences under Sections 306, 342 and 365, IPC whereas the others were charged only for offences under Sections 342 and 306 IPC. After the trial, the appellant was convicted for all the offences for which he stood the trial and at the same time all his co-accused were acquitted from all the charges. As noticed hereinbefore, in the appellant's appeal the High Court confirmed the conviction under Section 306, IPC and acquitted him only of the other two offences. Hence, this appeal.

3. Heard learned counsel for the appellant and also the learned Standing Counsel for the State of Tamil Nadu.

4. Before dealing with the contentions and the evidence on record which ultimately resulted in the confirmation of the conviction of the appellant under Section 306, IPC, certain relevant aspects of Section 306, IPC with reference to certain relevant decisions are to be looked into. There can be no doubt with respect to the position that to bring home a charge under Section 306, IPC it is incumbent upon the prosecution to establish :

a) That the victim of the offence committed suicide;

b) That the accused abetted the commission of suicide;

c) That the abetment attracts the ingredients under Section 107,IPC.

5. Section 107, IPC defines the offence of abetment and it is constituted by any of the following:-

a) instigation to commit the offence; or

b) engaging in conspiracy to commit it; or

c) intentionally aiding a person to commit it.

6. Now, bearing in mind the scope and ambit of Section 107, IPC and its co-relation with Section 306, IPC and the decision of this Court in ***M. Mohan v. State represented by the Deputy Superintendent of Police***[1] and in ***Madan Mohan Singh v. State of Gujarat***[2] we will proceed to consider the case. After referring to an earlier decision in ***Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)***[3], this Court in M. Mohan's case (supra) analysed the meaning of the word 'abetment' and held in paragraphs 44 and 45 thus:-

> *"44. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained.*
>
> *45. The intention of the legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide."*

7. In the decision in Madan Mohan Singh's case (supra) this Court was considering an appeal against dismissal of a petition filed under Section 482 Cr. PC to quash the FIR registered against the appellant therein under different Sections of IPC including Section 306, IPC. For the purpose of this case, it is only referred to paragraph 12 therein, insofar as it is relevant which reads thus:-

> *"In order to bring out an offence under Section 306 IPC specific abetment as contemplated by Section 107 IPC on the part of the accused with an intention to bring about the suicide of the person concerned as a result of that abetment is required. The intention of the accused to aid*

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1 [2011] 3 SCR 437 : (2011) 3 SCC 626

2 [2010] 10 SCR 351 : (2010) 8 SCC 628

3 [2009] 13 S.C.R. 230 : (2009) 16 SCC 605

or to instigate or to abet the deceased to commit suicide is a must for this particular offence under Section 306 IPC……"

8. Thus, an analysis of the provisions under Section 306, IPC with reference to abetment as contemplated under Section 107, IPC and the decisions in M. Mohan's case (supra) and Madan Mohan Singh's case (supra) would reveal that while considering the question as to whether a person can be convicted under Section 306, IPC or whether a conviction thereunder could be sustained, one has to consider the *mens rea* of the accused/convict to bring about suicide of the victim. Needless to say, that it requires an active act or direct act which led the victim to commit suicide seeing no option; and in other words, the act must have been of such a degree intending to push the deceased into such a position that he/she committed suicide. Bearing in mind the aforesaid position, we will analyse the case of the prosecution and the evidence on record to find out whether the prosecution had succeeded in bringing conviction to the appellant under Section 306, IPC.

9. A brief reference to the prosecution case is required in the above regard. As per the prosecution, the victim Senthil Kumar, while working as a supplier in Salem Hotel belonging to one Muthu (A-3), borrowed an amount of Rs. 2000/- from the appellant who is the son of A-3. It is the case that the latter arranged it as a loan on the request of the deceased, from one Kishore, Venkatachalpati Finance. The deceased failed to repay the borrowed amount and then the finance company pestered the appellant for repayment. Enraged by this, the appellant along with one Ravichandran (A-2) kidnapped the deceased and brought him to the shop of A-2 and from there took him and wrongfully confined him in the tailor shop of one Sampath Kumar (PW-3), on 06.12.2002 demanding repayment of the borrowed amount. For wrongfully confining him and thereby instigating him to commit suicide, accused Nos. 3 to 5 had played their role along with the appellant and A2. It is unable to withstand the torment that Senthil Kumar committed suicide by hanging in the tailoring shop of PW-3. Indisputably, this was the prosecution case. But the indisputable and the undisputed position is that the prosecution which is supposed to establish its case, as is put forth by it, failed to prove the same. No volume of argument is required to come to such a conclusion as the very acquittal of all

the co-accused of the appellant by the trial Court and the acquittal of the appellant of the conviction under Sections 342 and 365, IPC, by the High Court as per the impugned judgment, would speak for itself. It is also an undisputable position that despite the acquittal of the co-accused of the appellant and thereafter, the appellant, as above, no appeal was preferred against their acquittal. In the contextual situation it is also relevant to note that though the aforementioned Kishore was cited as a witness for the prosecution but was not examined. According to the prosecution one Alexander had witnessed the appellant taking the deceased and wrongfully confining him in the tailoring shop of PW-3, Smapath Kumar. However, he was also not examined. In view of the aforesaid facts and the judgments of the trial Court as also the High Court it can be indubitably said that the case of the prosecution put forth that the deceased Senthil Kumar was kidnapped and wrongfully confined in the tailoring shop of PW-3 Sampath Kumar was not attempted to be established by the prosecution by examining the aforesaid Kishore and Alexander and at any rate, case of kidnapping and wrongful confinement against the appellant was disbelieved by the High Court.

10. Bearing in mind the aforesaid circumstance that the contentions against the conviction under Section 306, IPC have to be appreciated.

11. Through PW-2, who claimed to be the wife of the deceased Senthil Kumar, the prosecution attempted to establish that one week prior to the occurrence the appellant along with three others went to the house of the deceased and created a ruckus and at that time PW-2 alone was there. According to her, when the deceased came back home, she divulged the entire episode to him. Further, she would depose that her husband had received Rs. 2000/- for interest and it was to be repaid in instalments. She would also depose that earlier, the deceased himself had deposited two installments of Rs. 400/- each, towards the loan amount directly to the aforementioned financial institution. She has also deposed that subsequent to the appellant's iniquitous visit as above, she asked him to come on Wednesday and then paid him an amount of Rs.800/-.

12. PW-2 further deposed that while leaving the house, after that first iniquitous visit, the appellant threatened that the deceased would

be lifted unless the balance amount is not returned. Going by the evidence of PW2 out of borrowed amount of Rs. 2,000/- an amount of Rs. 1,600/- was paid back. Hence, going by the prosecution case the kidnapping and consequential wrongful confinement was due to the failure on the part of the deceased to repay the balance amount. But then, as noticed above, the case of kidnapping and wrongful confinement was disbelieved by the High Court and consequently, the appellant's conviction under Sections 342 and 365, IPC was set aside and the conviction under Section 306, IPC alone was sustained. It is in the aforesaid context that we have referred to and analysed the provisions under Section 306, IPC and also referred to the decisions in M. Mohan's case (supra) and Madan Mohan Singh's case (supra). In the light of the provisions thus analysed with reference to the said decisions the question to be considered is whether the prosecution had succeeded in establishing that there was *mens rea* on the part of the appellant to commit the offence rather to push the victim to commit suicide and to attract the offence under Section 306, IPC.

13. While considering the said question it is relevant to take into account the fact that though the prosecution had attempted to establish the case that the appellant and the second accused herein had committed the offences under Sections 306, 342 and 365, IPC. With the acquittal of the appellant and the second accused under those offences there can be no case of kidnapping or wrongful confinement of the deceased Senthil Kumar, by the appellant. In paragraph 2.1 of the impugned judgment itself the High Court took note of the prosecution case. It is only apropos to extract paragraph 2.1 which reads thus:-

> *"2.1 It is the case of the prosecution that the deceased Senthil Kumar had borrowed Rs.2,000/- from Vijayakumar (A1), which Vijayakumar (A1) had borrowed from a Finance Company; when Senthil Kumar did not return the money, the Finance Company started mounting pressure on Vijayakumar (A1); therefore, it is alleged that Vijayakumar (A1) and Ravichandran (A2) abducted Senthil Kumar on 06.12.2002 and locked him up in the tailoring shop of Sampath Kumar (PW3) and thereby wrongfully restrained him demanding repayment of the amount; unable to withstand the torment Senthil Kumar committed suicide*

by hanging in the tailoring shop of Sampath Kumar (PW3) on 06.12.2002."

14. Thus, it is to be considered when the case put forth by the prosecution is abduction and wrongful confinement of the appellant for repayment of the balance amount and the inability to withstand the torment as the instances for accusing the appellant for commission of the offence of 'abetment of suicide', how conviction under Section 306, IPC can be sustained in the light of his acquittal under Sections 342 and 365, IPC.

15. In the contextual situation, in view of the analysis of the provisions under Section 306, IPC and the decisions referred to supra, we will also have to consider what is *mens rea*? *'Mens rea'* means a guilty mind. As a general rule, every crime requires a mental element, the nature of which, will depend upon definition of the particular crime in question. Although it is impossible to ascribe any particular meaning to the term *'mens rea'* as the circumstance to determine the existence of *mens rea* depends upon the ingredients constituting the particular offence and the expression used in the definition of the particular offence to constitute such offence. It is only appropriate to refer to Halsbury's Laws of England (4th Edn., Vol-11, Para-10), going by the same:

> *"…it is impossible to ascribe any particular meaning to the term 'mens rea', concepts such as those of intention, recklessness and knowledge which commonly used as the basis for criminal liability and in some respects, it may be said to be fundamental to it. Generally, subject to both qualification and exception, a person is not to be made criminally liable for serious crimes unless he intends to cause or foresees that he will probably cause or at the lowest he may cause the elements which constitute a crime in question."*

16. In the decision in ***Director of Enforcement v. MCTM Corp. Pvt. Ltd. & Ors.***[4], it was observed that *mens rea* is a state of mind and held that under the criminal law *mens rea* is considered as the "guilty intention" and unless it is found that the 'accused' had the

4 [1996] 1 S.C.R. 215 : AIR 1996 SC 1100

guilty intention to commit the crime, he could not be held guilty of committing the crime.

17. In the case on hand the question to be considered is whether the appellant had instigated as envisaged under Section 107, IPC, to commit the offence under Section 306, IPC. It is in the said circumstances that we have earlier referred to the ingredients to attract offence under Section 306, IPC. Essentially the gravamen of the offence punishable under Section 306, IPC, is abetting suicide. Abetment imposes a mental process of instigating a person or initially aiding a person in doing the offence. In the case on hand, the question is whether the appellant abetted the deceased Senthil Kumar to commit suicide. The evidence of the prosecution witness viz., PW-1 and PW-3 did not reveal existence of the element of *mens rea* on the part of the appellant. There is nothing in their oral testimonies which would suggest that the appellant had instigated the deceased Senthil Kumar to commit suicide. In this context, it is to be noted that the victim committed suicide inside the tailoring shop of PW-3 Sampath Kumar. He would submit that on 06.12.2002 at about 06.30 pm he locked his shop and left the key of the shop with A-3, father of the appellant. Sampath Kumar would further depose that he came to know about the commission of suicide by Senthil Kumar inside his tailoring shop only in the next morning by about 9 O'clock. We have already noted that though the prosecution got a case that one Alexander had witnessed the appellant taking the victim and wrongfully confining him in the said shop, the said Alexander was not examined by the prosecution. At any rate, the fact is that the appellant was already acquitted for the offence under Sections 342 and 365, IPC. It is also to be noted that though A-3, Muthu, (the father of the appellant) was the person to whom PW-3 said to have handed over the key of his shop, he was acquitted by the trial Court and no appeal was filed against his acquittal. The impugned judgment would reveal that even after acquitting the appellant for the offences under Sections 342 & 365, IPC, the High Court confirmed his conviction under Section 306, IPC, holding that the appellant had failed to offer explanation as to how the deceased Senthil Kumar entered into the tailoring Shop of PW-3 to commit suicide in terms of Section 106 of the Evidence Act.

18. We are at a loss to understand as to how Section 106 of the Evidence Act could be applied in the case on hand against the appellant in view with facts narrated above. This Section is an exception to the

general rule laid down in Section 101 which casts burden of proving a fact on the party who substantially asserts the affirmative of the issue. Section 106 is not intended to relieve any person of that duty or burden. On the contrary, it says that when a fact to be proved, either affirmatively or negatively, is especially within the knowledge of a person, it is for him to prove it. This Section, in its application to criminal cases, applies where the defence of the accused depends on his proving a fact especially within his knowledge and of nobody else. In short, Section 106 cannot be used to shift the burden of proving the offence from the prosecution to the accused. It can only when the prosecution led evidence, which, if believed, will sustain a conviction or which makes out a *prima facie* case, that the question of shifting the onus to prove such fact(s) on the accused would arise. (See the decision in ***Sawal Das v. State of Bihar***[5]*)*.

19. In view of the exposition of law as above and in the absence of anything to make Section 106 applicable to shift the onus on the appellant, the High Court had committed an error in applying Section 106 of the Evidence Act, in the instant case.

20. We have no hesitation, therefore, to hold that there is absolute absence of any basis for its application against the appellant in view of the evidence on record.

21. The upshot of the discussion is that the prosecution has miserably failed to establish that the appellant herein had abetted the victim to commit suicide. The conviction of the appellant under Section 306, IPC cannot be sustained.

22. Resultantly this appeal stands allowed. The appellants conviction under Section 306, IPC which was confirmed vide judgment dated 25.01.2019 passed by the High Court in Criminal Appeal No.667/2011 is quashed and set aside. Consequently, he stands acquitted of the offence under Section 306, IPC. The appellant is already on bail. His bail bonds are discharged.

23. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal allowed.

5 [1974] 3 SCR 74 : AIR 1974 SC 778

[2024] 2 S.C.R. 1065 : 2024 INSC 184

Najrul Seikh
v.
Dr. Sumit Banerjee & Anr.

(Civil Appeal No. 2877 of 2024)

22 February 2024

[Vikram Nath and Satish Chandra Sharma, JJ.]

Issue for Consideration

Whether the State Commission and the National Commission were justified in exonerating the respondents-doctors of all the charges of misconduct/medical negligence in performing the cataract surgery of complainant's son leading to complete loss of vision in his right eye.

Headnotes

Consumer Protection Act, 1986 – s. 12 – Deficiency in service – Medical negligence – Complainant's 13 year old son lost complete vision in his right eye following an allegedly negligent cataract surgery by the respondents-doctors – District forum allowed the claim for compensation – However, the State Commission and the National Commission set aside the order exonerating the respondents of all the charges of misconduct/ negligence – Correctness:

Held: While the report of the Medical Council can be relevant for determining deficiency of service before a consumer forum, it cannot be determinative, especially when it contradicts the evidentiary findings made by a consumer forum – Both the State Commission and the National Commission ought to have examined the evidence in totality, instead, they mechanically and exclusively relied upon the Medical Council report and reiterated its findings without any reference to the evidence of the doctor – Appellate forum was tasked with the duty of undertaking a more thorough examination of the evidence on record, which they failed – Specific findings made by the District forum regarding lapses in duty of care by respondent No.1 vis-a-vis both pre-operative and post-operative standards for conducting a traumatic cataract surgery – Through the expert evidence of the doctor, a nexus was established between the lapses in post-operative care and the development of loss of vision after the operation, which remained uncontroverted – Holding

of the District forum is strengthened not only by the report of the Medical Council but also by the admission of the respondent No. 1 itself that management and rehabilitation of traumatic cataract for a child is very difficult, unpredictable, and prone to complications – Furthermore, in cases of deficiency of medical services, duty of care does not end with surgery, thus, the finding of the District forum that there was a deficiency in the medical services provided by the respondents to the complainant's son affirmed – Order of the State Commission and the National Commission set aside. [Paras 12-16]

List of Acts

Consumer Protection Act, 1986.

List of Keywords

Deficiency in service; Medical negligence; Compensation; Exonerating of the charges of misconduct/negligence; Medical Council report; Duty of care; Lapses in pre-operative and post-operative standards; Cataract surgery; Loss of vision; Deficiency of medical services.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.2877 of 2024

From the Judgment and Order dated 09.06.2016 of the National Consumer Disputes Redressal Commission, New Delhi in RP No. 526 of 2016

Appearances for Parties

Rupesh Kumar, Sr. Adv., Ms. Pankhuri Shrivastava, Ms. Neelam Sharma, Advs. for the Appellant.

Partha Sil, Sanjiv Kr. Saxena, Chirag Joshi, Ms. Sayani Bhattacharya, Abhiraj Chaudhary, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Delay condoned.

2. Leave granted.

3. The Appellant before us, a BPL card holder, is the father of Master Irshad, a 13-year-old boy who lost complete vision in his right eye

following an allegedly negligent cataract surgery undertaken by the Respondents. The complaint preferred by the Appellant under Section 12 of the Consumer Protection Act, 1986 was allowed by the District Consumer Disputes Redressal Commission ('**DCDRC**') However, the order of the DCDRC was set aside by the West Bengal State Consumer Disputes Redressal Commission ('**SCDRC**') and thereafter, the revision petition preferred by the Appellant before the National Consumer Disputes Redressal Commission (the '**NCDRC**') was also dismissed *vide* order dated 09.06.2016, which is impugned before this Court.

Brief Facts:

4. The facts, to the extent relevant, are that on 14.11.2006, Master Irshad sustained an injury in his right eye. The next day, he was taken to Disha Eye Hospital and the examination report revealed that Irshad was suffering from traumatic cataract and required a minor surgery. Being unable to finance his son's treatment at Disha Eye Hospital, the Appellant approached Respondent No.1, a doctor and partner at Megha Eye Centre i.e., Respondent No. 2 on 18.11.2006.

5. Thereafter, Respondent No. 1 affirmed the previous medical opinion and accordingly, conducted the surgery on 24.11.2006. After the surgery, Irshad began experiencing irritation, pain, and blood clotting and despite visiting Respondent No. 1 multiple times, there was no improvement in his condition. Eventually, Respondent No.1 referred them to the Regional Institute of Ophthalmology ('**RIO**') and a month later, on 19.04.2007, the Appellant and his son visited the RIO and were informed that it was a case of Retinal detachment leading to permanent loss of vision in the right eye, caused due to the faulty operation conducted by Respondent No. 1.

6. *Vide* order dated 16.05.2013, the DCDRC found that there was deficiency in the medical services provided by the Respondents herein and *inter alia* directed payment of INR 9,00,000 as compensation, in favour of the Appellant within a period of one month, failing which, the amount would be subject to an interest @ 10% until the date of realisation. The DCDRC relied on the *uncontroverted* expert evidence provided by Dr. Anindya Gupta, RMO-cum-Clinical tutor from the Burdwan Medical College to hold that Irshad lost his vision due to the negligent and careless attitude of Respondent No. 1 manifesting through lapses in pre-operative and post-operative care and rehabilitation.

7. On the other hand, the SCDRC *vide* order dated 11.09.2015 held that the Appellant herein failed to establish deficiency of service/ negligence on part of the Respondents and dismissed the complaint of the Appellant. The SCDRC relied on the report of the West Bengal Medical Council (the '**Medical Council**') dated 18.05.2015 which exonerated Respondent No. 1 of all charges of misconduct/negligence and instead found contributory negligence on part of the Appellant as he visited the RIO only after a delay of 1 month, contrary to the advice of Respondent No. 1.

8. Similarly, the NCDRC also held that there was no negligence on part of the Respondents and concluded that the Appellant's delay of one month in approaching the RIO was fatal for his son.

Submissions & Analysis:

9. Learned Counsel for the Appellant vehemently contends that the NCDRC failed to consider that the SCDRC undertook a selective appreciation of evidence, completely disregarding the uncontroverted expert evidence provided by Dr. Gupta regarding the lapses in pre-operative and post-operative care provided by the Respondents.

10. *Per Contra*, Learned Counsel for the Respondents submits that both the NCDRC and the SCDRC have correctly placed reliance on the decision of the Medical Council to arrive at their conclusions regarding the absence of negligence on part of the Respondents.

11. This Court has heard the Learned Counsel for the parties and perused the record.

12. Upon perusal of the orders of the NCDRC and the SCDRC, we find significant merit in the contention of the Learned Counsel for the Appellant. At this stage, it would be appropriate to refer to the findings of the DCDRC regarding the negligence of the Respondents. The operative paragraph(s) of the order passed by the DCDRC read as under:

> *"So, we are very much affirmed that diagnosis of Disha Eye Hospital regarding "traumatic cataract" was known to the O.P. No.1 before the operation. This O.P. No.l has admitted in the last portion, of para-23 of the written version by saying that 'from medical point of view it is well established that management and rehabilitations of traumatic cataract,*

specially in a child, is very difficult, unpredictable and any complication may happen at any moment and it cannot be ascertained before hand. Unfortunately this type of complication happened to the son of the complainant.

If that be the position, why the doctor did not take any post-operative care of traumatic cataract. In this regard the expert doctor Anindya Gupta who is the RMO-cum-Clinical Tutor department of Ophthalmology, Burdwan Medical College and Hospital has specifically stated that "prior to operation skin test is done for determining any drug allergy if at all". But no test of drug allergy was advised in the prescriptions. Apart from that expert doctor has stated that OT date was on 24.11.2006 but the medical card of the patient does not reflect the treatment prior to 24.11.2006 except urine test pending and there is nothing mention of next date of review after 24.11.2006. It has further stated normally a patient is checked on the next date of operation if not discharged earlier. The expert doctor has further stated that theoretically speaking any check after 72 hours of the operation is sufficient in a normal case during post-operative period but the card shows that the next date of checking is 1.12.2006 after (24.11.2006, date of OT). The expert doctor further stated that on 6.12.2006 the vision rating, is not normal. It is pertinent to point that the expert doctor has specifically stated that "as a doctor one should take care of all risk factor of the patient before performing the operation". So, it is clear inspite of knowing the fact of seriousness of the treatment i.e. operation of traumatic cataract O.P. No.l doctor did nothing on the medical point of view. So, we are opined that it is not only the unfortunate of the patient but it is the unfortunate of the society at large that this type of unruly negligent doctor still performing operation in the medical field, particularly when he had no faith upon the medical science and medical ethics and regulations. In this regard the expert doctor has stoutly stated in the end of his deposition that a doctor must always be updated. If a doctor violates the code of medical ethics and regulations it can be said to be professional misconduct.

> *Apart from that, the expert did not stop of saying against the treatment of this O.P. No.I but stated "non-adherence to medical prescription, post-operative trauma etc. are the contributory factor for the loss of vision after operation. Extra Capsular Surgery is the modern level of surgery and risk factor may be less in case of Extra Capsular Surgery compared to other method of surgery which is available in all Eye Hospital. The O.P. No.I has admitted in para No.20 of written version that he is being a one of the partner of Megha Eye Centre, which is well equipped and (modernized institution with world class microscope for examination. If that be so, what prompted the O.P. No.1 not to induct surgery in the modern method i.e. Capsular Surgery?, particularly when he was well aware regarding the gravity of disease namely traumatic cataract and also aware that on medical point of view management and rehabilitation of traumatic cataract specially in a child is very difficult, unpredictable and any type of complication may happen at any point of time which cannot be ascertained before hand."*

It is evident that the DCDRC has made specific findings regarding lapses in duty of care by Respondent No.1 *vis a vis* both pre-operative and post-operative standards for conducting a traumatic cataract surgery. More pertinently, through the evidence of Dr. Gupta, a nexus was established between the lapses in post-operative care (the delay in review, the abnormal vision rating on 06.12.2006 which was left unchecked by Respondent No. 1, failure to undertake extra capsular method of surgery despite having the necessary equipment) and the development of loss of vision after the operation. It must be re-emphasized that the expert evidence of Dr. Gupta went entirely uncontroverted due to the absence of cross-examination and the failure of the Respondents to bring on record any other contradictory expert evidence.

13. Despite the presence of evidence pointing towards negligence of the Respondents, both the SCDRC and the NCDRC failed to consider it and relied only on the report of the Medical Council. On a perusal of the Medical Council report, it appears that the Medical Council did not delve into the nuances of pre-operative and post-operative care. Further, the finding of contributory negligence attributed to the Appellant is entirely unsubstantiated by expert opinion.

14. Under these circumstances, both the SCDRC and the NCDRC ought to have examined the evidence in totality, especially since this plea was urged by the Counsel for the Appellant in both the forums. Instead, both the forums have mechanically and exclusively relied upon the Medical Council report and reiterated its findings without any reference to the evidence of Dr. Gupta. While the report of the Medical Council can be relevant for determining deficiency of service before a consumer forum, it cannot be determinative, especially when it contradicts the evidentiary findings made by a consumer forum. In these circumstances, the appellate forum is tasked with the duty of undertaking a more thorough examination of the evidence on record. On this failing alone, the orders of the SCDRC and DCDRC deserve to be set aside.

15. As it stands today, the specific findings made by the DCDRC regarding lapses in post-operative care by the Respondents and the resultant development of Retinal detachment remains unchallenged by the other evidence on record. In fact, the holding of the DCDRC is strengthened not only by the report of the Medical Council which states that development of Retinal Detachment is not uncommon in cases of blunt trauma as in the case of Irshad, but also by the admission of the Respondent No. 1 itself that management and rehabilitation of traumatic cataract for a child is very difficult, unpredictable, and prone to complications. That being the case, and in view of the established principle of law that in cases of deficiency of medical services, duty of care does not end with surgery, we have no hesitation in affirming the finding of the DCDRC that there was a deficiency in the medical services provided by the Respondents to the Appellant's son.

16. In view of the aforesaid, the present appeal succeeds and the order of the NCDRC and the SCDRC are set aside. Accordingly, the Respondents are directed to comply with the order of the DCDRC within one month from the date of this order.

17. Resultantly, the appeal stands allowed.

18. Pending applications, if any, shall also stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal allowed.

[2024] 2 S.C.R. 1072 : 2024 INSC 134

Satender Kumar Antil
v.
Central Bureau of Investigation and Anr.

MA No. 2034 of 2022
In
MA No.1849 of 2021
In
SLP (Crl.) No.5191 of 2021

13 February 2024

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

Issue for Consideration

The Amicus submitted report dated 10.02.2024 indicating the directions that have been complied with by the parties in terms of the judgment passed by the Supreme Court in Satender Kumar Antil**. On basis of the said report, various directions are issued for due compliance by the States/Union Territories/CBI and High Courts.

Headnotes

Code of Criminal Procedure, 1973 – ss. 41, 41A, 438, 440, 88, 170, 204, 209, 436A – Supreme Court Directions – Compliance of directions by the States, Union Territories and CBI Requirement of:

Held: The directions contained in para 100.2, 100.4, 100.7 of Satender Kumar Antil and also the directions to public prosecutors in terms of order dated 21.03.2023 of the Supreme Court are required to be complied with by States, Union Territories and CBI as per the time schedule stipulated – So far as the directions in para 100.2, 100.3, 100.5, 100.6, 100.7, 100.8, 100.9, 100.10, 100.11 of Satender Kumar Antil; the direction dated 03.02.2023 for inclusion of the judgment in Siddharth v. State of UP and Satender Kumar Antil in the curriculum of judicial academies and the direction dated 21.03.2023 for application of the judgment in Satender Kumar Antil to s.438 of CrPC, by and large apply to High Courts. [Paras E and F]

Code of Criminal Procedure, 1973 – ss. 41, 41A, 438, 440, 88, 170, 204, 209, 436A – Supreme Court Directions – Details of directions to be complied with by the States, High Court, Union of India and CBI. [Para F, 1-38]

Directions by Supreme Court – Directions issued to NALSA:

Held: (i) In terms of the order dated 02.05.2023, NALSA shall supply updated information with regard to para 100.8 and 100.10 in Satender Kumar Antil; (ii) NALSA shall inform the follow-up action taken by NALSA and State Legal Services Authorities of the States and Union Territories as provided to NALSA by various authorities including the State governments and Union Territories; (iii) In order to provide to adequate updated information, all the States and Union Territories directed to cooperate with NALSA. [Para F, 39]

Directions by Supreme Court – Standard Operating Procedure (SOP) – Undertrial Prisoners – Convicted Prisoners:

Held: (i) A document titled "Guidelines and standard operating procedure for implementation of the scheme for support to poor prisoners" taken on record and made part of this Order; (ii) In furtherance of the subsequent orders passed by this Court on ancillary issues concerned with training public prosecutors and including judgments of this Court in the Curriculum of State Judicial Academies, a further direction on an SOP framed by Central Government need to be passed – The SOP if put in place by the Central Government, will indeed alleviate the situation of under trial prisoners by way of establishment of a dedicated empowered committee and funds etc.; (iii) For benefit of the under-trial prisoners, the SOP in its entirety is extracted in the present order. [Para I]

Directions by Supreme Court – E-mail ID:

Held: A dedicated email id to be created, so that the reports are saved or exchanged simultaneously – E-mail id to be used hereafter for serving and receiving affidavits/reports. [Para J]

Case Law Cited

Satender Kumar Antil v. Central Bureau of Investigation, [2022] 10 SCR 351 **: (2022) 10 SCC 51**;** *Siddharth v. State of UP,* **(2022) 1 SCC 676;** *Arnesh Kumar v. State of Bihar and Anr.,* [2014] 8 SCR 128 **: (2014) 8 SCC 273 – referred to.**

Books and Periodicals Cited

A document titled "Guidelines and standard operating procedure for implementation of the scheme for support to poor prisoners".

Digital Supreme Court Reports

List of Acts

Code of Criminal Procedure, 1973.

List of Keywords

Supreme Court directions; Compliance of directions in Satender Kumar Antil case; Standard Operating Procedure; Undertial prisoners; Convicted prisoners.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : MA No.2034 of 2022

In

MA No.1849 of 2021

In

Special Leave Petition (Criminal) No.5191 of 2021

With

MA No.2035 of 2022 In Slp (Crl.) No.5191 of 2021

From the Judgment and Order dated 01.07.2021 of the High Court of Judicature at Allahabad in CRMABA No.7598 of 2021

Appearances for Parties

Sidharth Luthra, Sr. Adv., Akbar Siddique, Ayush Agarwal, Rajneesh Sharma, Pankaj Singhal, Udbhav Sinha, Harsh Kumar Singh, Parv K Garg, Parwez Akhtar, Animesh Mishra, Javed Muzaffar, Advs. for the Petitioner.

Suryaprakash V Raju, Mrs. Aishwariya Bahti, A.S.Gs., Ms. Ankita Choudhary, Rajesh Mahajan, A.A.Gs., Gaurav Agrwal, R. Basant, Vikram Choudhary, Sr. Advs., Mukesh Kumar Maroria, Vineet Singh, Ms. Sairica S Raju, Ritwiz Rishabh, Annam Venkatesh, Ms. Priyanka Das, Udai Khanna, Mohd Akhil, Padmesh Mishra, Ms. Shradha Deshmukh, Tacho Eru, Vatsal Joshi, Kanu Agarwal, Varun Chugh, Bhuvan Kapoor, Krishna Kant Dubey, Piyush Beriwal, Ms. Indira Bhakar, Anil Hooda, Harish Pandey, Rajesh Singh Chauhan, Ms. Rashmi Nandakumar, T. G. Narayanan Nair, Ms. Swathi H. Prasad, Mahesh Agarwal, Ankur Saigal, Anshuman Srivastava, Shashwat Singh, E. C. Agrawala, Avijit Mani Tripathi, T.K. Nayak, Ms. Marbiang Khongwir, Mrs. Rekha Bakshi, R. Ayyam Perumal, Ms. Manisha

Chava, A. Renganath, Amit Sharma, Dipesh Sinha, Ms. Pallavi Barua, Ms. Aparna Singh, Ms. K. Enatoli Sema, Ms. Limayinla Jamir, Amit Kumar Singh, Ms. Chubalemla Chang, Prang Newmai, Gautam Narayan, Ms. Asmita Singh, Harshit Goel, K.V. Vibu Prasad, Praveen Swarup, Shishir Kumar Saxena, R.N. Pareek, Baij Nath Yadav, Ankur Parihar, Jagmohan Pareek, Ravi Kumar, Aman, Ms. Devina Sehgal, Mohd. Ashaab, Ankur Prakash, Ashutosh Kumar Sharma, Ms. Priyanka Singh, Amod Kumar Bidhuri, Alok Kumar Pandey, Sunny Choudhary, Kshitiz Singh, Aaditya Aniruddha Pande, Siddharth Dharmadhikari, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Pukhrambam Ramesh Kumar, Karun Sharma, Ms. Anupama Ngangom, Ms. Rajkumari Divyasana, Abhimanyu Tewari, Ms. Eliza Bar, Ms. Swati Ghildiyal, Ms. Deepanwita Priyanka, Ms. Devyani Bhatt, Amit Gupta, Shiv Verma, Ms. Muskan Nagpal, Aditya Jain, Ms. Bhavya Golecha, Arjun Garg, Aakash Nandolia, Ms. Sagun Srivastava, Ms. Nisha Pandey, P. I. Jose, Ravi Sagar, James P. Thomas, Remish Lakra, Hira Lal, Suvendu Suvasis Dash, Mrs. Swati Vaibhav, Mrs. Shruti Vaibhav, Malak Manish Bhatt, Tapesh Kumar Singh, Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Abraham Mathew, Kunal Chatterji, Nikhil Jain, V. N. Raghupathy, Manendra Pal Gupta, Prakash Jadhav, Ravichandra Jadhav, Gagan Gupta, Kumar Mihir, Sanjai Kumar Pathak, Arvind Kumar Tripathi, Mrs. Shashi Pathak, Purvish Jitendra Malkan, Ms. Dharita Purvish Malkan, Alok Kumar, Ms. Deepa Gorasia, Parth Awasthi, Pashupathi Nath Razdan, Astik Gupta, Abhay Anil Anturkar, Dhruv Tank, Aniruddha Awalgaonkar, Ms. Surbhi Kapoor, Sameer Abhyankar, Aakash Thakur, Ms. Vani Vandana Chhetri, Ms. Nishi Sangtani, Ms. Zinnea Mehta, Rahul Kumar, Mahfooz Ahsan Nazki, Polanki Gowtham, KV Girish Chowdary, T Vijaya Bhaskar Reddy, Ms. Rajeswari Mukherjee, Meeran Maqbool, Ms. Archita Nigam, Ms. Pallavi Langar, Ms. Pragya Baghel, Honey Khanna, Yashvaradhan, Apoorv Shukla, Prabhleen A. Shukla, Aman Panwar, Akash Panwar, Shivam Singh Baghel, Mudit Gupta, Karan Sharma, Ms. Jyoti Babbar, Ranjeeb Kamal Bora, Ramesh Babu M.R. Ashish Batra, Anupam Raina, Somesh Chandra Jha, Kaushik Choudhury, Debojit Borkakati, M/S. Arputham Aruna and Co, Varinder Kumar Sharma, Somanadri Goud Katam, Sirajuddin, Ms. Rooh-e-hina Dua, Shaurya Sahay, Pradeep Misra, Ajay Pal, Prashant Shrikant Kenjale, Manish Kumar, Maibam Nabaghanashyam Singh, Advs. for the Respondents.

By Courts Motion

Judgment / Order of the Supreme Court

Order

A. Heard learned Amicus, Mr. Siddharth Luthra, Senior Advocate Mr. Gaurav Agarwal for National Legal Services Authority (hereinafter referred to as "NALSA") and Additional Solicitor General of India, Ms. Aishwarya Bhati for the Union.

B. We have perused the compliance affidavits filed by the respective States, Union Territories, Central Bureau of Investigation and NALSA on the directions issued by this Court in the Judgment reported in Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51 and the periodical orders passed therein. The learned Amicus having gone through these compliance affidavits in great detail has submitted a tabular chart and report dated 10.02.2024 indicating the directions that have been complied with by the parties present before us in terms of the judgment passed by this Court in Satender Kumar Antil (Supra) case.

C. For the comprehensive implementation of the directions in Satender Kumar Antil (Supra) case, the Amicus upon thorough study and verification of the details forcefully argues that certain directions fall within the domain of States/Union Territories/CBI, and High Courts and a few directions fall within the domain of both the States and the High Courts. Therefore, for effective monitoring by this Court it is completely desirable to combine the stake holders for reporting in a convenient way and are heard on a particular day.

D. The directions contained in para 100.2, 100.4, 100.7 of Satender Kumar Antil (Supra) and also the directions to public prosecutors in terms of order dated 21.03.2023 of this Court need top most attention and are required to be complied with by States, Union Territories and CBI as per the time schedule stipulated.

E. So far as the directions in para 100.2, 100.3, 100.5, 100.6, 100.7, 100.8, 100.9, 100.10, 100.11 of Satender Kumar Antil (Supra); the direction dated 03.02.2023 for inclusion of the judgment in Siddharth v. State of UP, (2022) 1 SCC 676 and Satender Kumar Antil (Supra) in the curriculum of judicial academies and the direction dated 21.03.2023 for application of the judgment in Satender Kumar Antil (Supra) to Section 438 of Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"), by and large

apply to High Courts. From a larger perspective, direction in a few paragraphs is complied with by both i.e. the States/Union Territories and High Courts, in consultation with each other. The suggestion of Amicus informs that directions individually obligated are carried out independently and where mutual consultation in complying with the directions is necessary, such consultation is undertaken and responsibility is fixed on one authority for due compliance.

F. The report dated 10.02.2024 is accepted by us in its entirety and therefore, now we issue directions for due compliance by the States/Union Territories/CBI and High Courts. For the sake of convenience, the directions to various States and Union Territories are issued and we wish to verify and deal with the compliance in the manner suggested by this Order.

1. State of Andhra Pradesh -Directions to be complied with:

(i) In terms of the direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar v. State of Bihar and Anr., (2014) 8 SCC 273 has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the State to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in the case of Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in the case of Siddharth (Supra) and Satender Kumar Antil (Supra).

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

1.1 High Court of Andhra Pradesh -Directions to be complied with:

(i) In terms of directions contained in para 100.2, there is a contrary stand that conditions in relation to Sections 41 and 41-A of CrPC and Arnesh Kumar (Supra) have been complied with, yet bail has been granted, therefore the High Court is directed to inform about clear instances of the same.

(ii) In terms of directions contained in para 100.5, there is part non-compliance in so far as insistence of bail application under Section 88 of CrPC, therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.7, details as to the number of Special Courts created and the need for creation of more Special Courts shall be provided.

(iv) In terms of directions contained in para 100.8 and 100.9, the High Court should inform this Court as to the steps taken for a list of identified prisoners who are unable to comply with bail conditions and why sureties are not being produced in many cases though bail stands granted, and what steps have been taken to alleviate this situation.

(v) In terms of directions contained in para 100.11, there is no adequate compliance and complete information with respect to some Courts, therefore needful be done in this regard.

(vi) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vii) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

2. Union Territory of Andaman and Nicobar Islands -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions

that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the Union Territory shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the Union Territory to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

2.1 High Court of Calcutta (Refer to Serial No. 36.1)

3. State of Arunachal Pradesh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary action that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the State to ensure that the prosecutors are stating the correct

position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

3.1 High Court of Gauhati (Refer to Serial No. 4.1)

4. State of Assam -Directions to be complied with:

(i) In terms of directions contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) In terms of direction contained in para 100.9, it has been disclosed that bail applications under Section 440 of CrPC have not been received in relation to prisoners, therefore needful be done.

(iv) Compliance with order dated 21.03.2023 passed by this Court:

(a) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To train and update the prosecutors on a periodical basis and provide details of the same.

4.1 High Court of Gauhati -Directions to be complied with:

(i) In terms of directions contained in para 100.2 and 100.3, there is a contrary stand that conditions in relation to Sections 41 and 41-A of CrPC and Arnesh Kumar have been complied with, yet

bail has been granted, therefore the High Court is directed to inform about clear instances of the same. Specific emphasis shall be laid on the reports of district Barpeta, Biswanath and Dimahasao as per the affidavit filed.

(ii) In terms of directions contained in para 100.7, details as to the number of Special Courts created and the need for creation of more Special Courts shall be provided.

(iii) In terms of directions contained in para 100.8 and 100.9, the High Court should inform this Court as to the steps taken for a list of identified prisoners who are unable to comply with bail conditions and why sureties are not being produced in many cases though bail stands granted and what steps have been taken to alleviate this situation.

(iv) In terms of direction contained in para 100.9, it has been disclosed that bail applications under Section 440 of CrPC have not been received in relation to prisoners, therefore needful be done.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy, because it seems that there is no amendment to the curriculum of the State Judicial Academy.

5. State of Bihar -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it appears that there is 1 vacancy out of 74 in Bihar Prohibition and Excise Courts and 3 out of 14 in Schedule Castes and Scheduled Tribes Courts. However, no further information is provided for filling the said vacancies. Therefore, it is directed that the State

shall provide details of the same and also about the Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To train and update the prosecutors on a periodical basis and provide details of the same.

5.1 High Court of Patna -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) There is part compliance of the directions issued in para 100.3, 100.5, and 100.11 in districts such as Aurangabad, Aaria and Banka. Therefore, it is directed that a complete compliance shall be made in respect of these paragraphs and districts thereof.

(iii) So far as para 100.6 is concerned, it is reported that certain districts such as Bhagalpur, Munger, Patna, and Chappra are not in compliance. Therefore, it is directed that compliance for the same shall be made.

(iv) In terms of direction contained in para 100.7, it is directed that the High Court shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage. The High Court is also directed to inform about the steps being undertaken to fill the existing vacancies.

(v) As per the report, the directions contained in para 100.9 has been partly complied with. Therefore, it is directed that necessary steps shall be taken to ensure complete compliance of this direction.

(vi) The direction contained in para 100.10 is not complied with in District Bhagalpur, Munger, Gopalganj, Patna and Chappra. Therefore, necessary steps shall be taken to ensure complete compliance.

(vii) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(viii) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

6. Union Territory of Chandigarh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the Union Territory shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the Union Territory to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

6.1 High Court of Punjab and Haryana (Refer to Serial No. 28.1)

7. State of Chhattisgarh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41,

41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) The affidavit filed by the State has a tabular chart in which data provided does not divulge into whether adherence to the directions is being done as most columns are filled as 'N/A'. We expect that detailed information will be filed in respect of all columns to appreciate the implementation of the directions.

(iv) Compliance with order dated 21.03.2023 passed by this Court:

(a) It appears from the affidavit filed by State that there is no clarity as to whether any training has been carried out or not. Therefore, details of the same shall be provided and if no training programme has been conducted, then the same shall be done periodically.

7.1 High Court of Chhattisgarh -Directions to be complied with:

(i) In terms of the directions contained in para 100, it was directed that the compliance of these directions will be indicated by way of a detailed model tabular chart. However, that has not been done. Therefore, a detailed tabular chart shall be filed for those directions that fall within the domain of the High Court.

(ii) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

(iii) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(iv) In terms of direction contained in para 100.7, it is directed that the High Court shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage. The High Court is also directed to inform about the steps being undertaken to fill the existing vacancies.

8. Union Territory of Dadra and Nagar Haveli and Daman and Diu -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the Union Territory shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage. The Union Territory is also directed to inform about the steps being undertaken to fill the existing vacancies.

8.1 High Court of Bombay (Refer to Serial No. 21.1)

9. National Capital Territory of Delhi -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the Union Territory shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

9.1 High Court of Delhi -Directions to be complied with:

(i) In terms of directions contained in para 100.2 and 100.3, there is a contrary stand that conditions in relation to Sections 41 and 41-A of CrPC and Arnesh Kumar (Supra) have been complied with, yet bail has been granted. Therefore, the High Court is directed to inform about clear instances of the same.

(ii) In terms of directions contained in para 100.5, there is part compliance as per chart 'A', however certain Courts have not complied with the same. Therefore, it is directed that needful be done for complete compliance.

(iii) In terms of directions contained in para 100.6, there is part compliance in the districts as per the affidavit. Therefore, it is directed that needful be done for complete compliance.

(iv) In terms of directions contained in para 100.8 and 100.9, the High Court should inform this Court as to the steps taken for a list of identified prisoners who are unable to comply with bail conditions and what steps have been taken to alleviate this situation.

(v) In terms of direction contained in para 100.9, it has been disclosed that bail applications under Section 440 of CrPC have not been received in relation to prisoners. Therefore, needful be done.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

10. State of Goa -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted

and the necessary steps taken for creation of Additional Special Courts and its stage. The State is also directed to inform about the steps being undertaken to fill the existing vacancies.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the State to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

10.1 High Court of Bombay (Refer to Serial No. 21.1)

11. State of Gujarat -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction in para 100.7, the State is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) The State is directed to issue directions to the Prosecutors to place on record the correct legal position as per Siddharth (Supra) and Satender Kumar Antil vs. CBI (Supra).

(b) The State is directed to ensure the circulation of judgment of Siddharth (Supra) and Satender Kumar Antil (Supra) to Prosecutors, and

(c) The State is directed to train and update the Prosecutors on a periodical basis and provide details of the same.

11.1 High Court of Gujarat -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2, bail is being granted for non-compliance of Sections 41 and 41-A of CrPC in districts such as Botad, Chhotadeupur, Junagadh and Surat. However, it has been stated that the directions of Sections 41 and 41-A of CrPC are being complied with. As both situations cannot co-exist, the High Court is directed to provide details pertaining to the compliance of the aforesaid directions. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of the directions issued in Paras 100.5 and 100.6, it is found that the same have been complied with only partially. The High Court is directed to ensure complete and uniform compliance of the same and furnish information in this regard.

(iii) In terms of the directions issued in Para 100.7, the High Court is directed to furnish information regarding its compliance.

(iv) In terms of the directions issued in Para 100.8, the High Court is directed to provide detailed information regarding the measures taken for those prisoners who have not been able to furnish sureties despite grant of bail.

(v) In terms of the directions issued in Para 100.10, the High Court is directed to ensure compliance of the same and furnish information.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

(vii) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

12. State of Haryana -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable

and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in Para 100.7, the State is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court;

(a) The State is directed to issue directions to Prosecutors to place on record the correct legal position as per Siddharth (Supra) and Satender Kumar Antil (Supra),

(b) The State is directed to ensure circulation of judgment in Siddharth (Supra) and Satender Kumar Antil (Supra) to Prosecutors, and

(c) The State is directed to train and update Prosecutors on a periodical basis and provide details of the same.

12.1 High Court of Punjab and Haryana (Refer to Serial No. 28.1)

13. State of Himachal Pradesh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, the State is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Provide detailed Tabular chart (Part A) and steps taken to facilitate release of undertrial prisoners who continue to be in jail despite grant of bail.

13.1 High Court of Himachal Pradesh -Directions to be complied with:

(i) In terms of the directions issued under Para 100.7, the High Court is directed to furnish information regarding the requirement of Special Courts and the status of any proposals for the same.

(ii) In terms of directions issued under Para 100.8, the High Court is directed to ensure compliance and furnish information regarding steps taken to alleviate the conditions of the prisoners who have been identified as not being able to furnish sureties despite bail having been granted.

(iii) In terms of the directions issued under Para 100.9, the High Court is directed to ensure compliance as to the filing of bail applications on behalf of undertrial prisoners and to furnish information on the same.

(iv) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in curriculum of judicial academy.

14. Union Territory of Jammu and Kashmir -Directions to be complied with:

(i) In terms of direction contained in para 100.2, the Union Territory is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, the Union Territory is directed to give details of the number of Special Courts

constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

14.1 High Court of Jammu and Kashmir and Ladakh -Directions to be complied with:

(i) Regarding the directions in Para 100.2, discrepancy is noted in districts such as Jammu, Ramban and Bandipora, wherein it is stated that there is compliance of Sections 41 and 41-A of CrPC, yet bail is being granted for non-compliance of the same which is contradictory to each other. The High Court is directed to ensure proper compliance and furnish information on the same.

(ii) With regards to the directions issued in para 100.5, discrepancy is noted in the affidavits dated 09.03.2023, which shows "yes" under the relevant column, while the affidavit dated 11.04.2023 shows "N/A". The High Court is directed to ensure compliance of the aforementioned directions and furnish information on the same.

(iii) In terms of directions issued in Para 100.7, the High Court is directed to ensure compliance and furnish information regarding the constitution of Special Courts in consultation with the Union Territory.

(iv) In terms of the directions issued in paras 100.8 and 100.9, the High Court should inform this Court as to whether any steps have been taken to identify prisoners who are unable to comply with bail conditions and unable to furnish sureties in many cases, and what steps have been taken to alleviate this situation.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in curriculum of judicial academy.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

15. State of Jharkhand -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41,

41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, the State is directed to give details of the number of Special Courts Constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) The State is directed to issue directions to Prosecutors to place on record the correct legal position as per Siddharth (Supra) and Satender Kumar Antil (Supra),

(b) The State is directed to circulate the judgment in Siddharth (Supra) and Satender Kumar Antil (Supra) to Prosecutors.

(c) The State is directed to train and update the Prosecutors on a periodical basis and provide details of the same.

15.1 High Court of Jharkhand -Directions to be complied with:

(i) In terms of the directions issued in para 100.2, it is noted that in districts such as Godda and East Singhbhum, bail has been granted for non-compliance of Sections 41 and 41-A of CrPC, while it has been mentioned that the conditions as stipulated in the statutory provisions are being complied with which are contradictory to each other. The High Court is directed to furnish information regarding such discrepancy.

(ii) The directions in Para 100.5 have not been complied with in certain districts such as Bokaro, West Singhbhum, Godda, Chatra, Dumka. The High Court is directed to ensure compliance of the same and furnish information.

(iii) In terms of the directions issued in Para 100.7, the High Court is directed to ensure compliance and furnish information regarding the constitution of Special Courts and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iv) The High Court is directed to ensure compliance with the directions of para 100.8 and furnish information on the steps taken to alleviate the situations of prisoners who are not able to furnish sureties despite grant of bail.

(v) The High Court is directed to ensure compliance with the directions issued in Para 100.9, and furnish information on the same.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

16. State of Karnataka -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary action that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of the direction in para 100.7, the State is directed to give the details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

16.1 High Court of Karnataka -Directions to be complied with:

(i) To ensure uniform compliance of the directions issued in para 100.5 and furnish information on the same.

(ii) To ensure compliance of the directions issued in para 100.7 and furnish information in consultation with the State Government regarding constitution of any Additional Special Courts, as well as the steps taken to resolve the vacancy in the Special Courts already constituted.

(iii) To ensure compliance with the directions issued in para 100.9 and to furnish information on the same.

(iv) To ensure uniform compliance of the directions issued in para 100.10 as it has been noted that only a few districts

such as Chitradurg, Kolar and Raichur have complied with the same. The High Court is directed to ensure uniform compliance by all districts concerned and furnish information on the same.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

17. State of Kerala -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) The State is directed to give details of steps taken to ensure compliance of direction contained in Para 100.5 in the districts of Kollam, Pathanamthitta, Kalpetta and Kasargod, as it appears from the Additional compliance affidavit dated 14.04.2023 filed by the State that the aforementioned districts have not complied with the said direction.

(iii) In terms of the directions contained in para 100.7, the State is directed to give details of the number of Special Courts constituted and whether any steps are underway for the creation of Additional Special Courts and at what stage and whether the vacancies that existed then have been filled now.

(iv) State is directed to give details of steps taken to ensure release of undertrial prisoners who are unable to comply with bail conditions.

(v) Compliance with order dated 21.03.2023 passed by this Court:

(a) The State is directed to provide training to Prosecutors on a periodical basis and provide details of the same.

17.1 High Court of Kerala -Directions to be complied with:

(i) Directions issued in para 100.5 are shown to be only partly complied with. The High Court is directed to ensure complete compliance and furnish information on the same.

(ii) In terms of direction contained in para 100.7, the High Court is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) The High Court is directed to ensure compliance with the terms of para 100.8 and furnish information regarding the steps taken to alleviate the conditions of the prisoners.

(iv) To ensure compliance with the directions issued in para 100.9 and furnish information on the same.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

18. Union Territory of Ladakh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, the Union Territory is directed to provide the particulars of the First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary action that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, the Union Territory is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

18.1 High Court of Jammu and Kashmir and Ladakh (Refer to Serial No. 14.1)

19. Union Territory of Lakshadweep -Directions to be complied with:

(i) In terms of direction contained in para 100.2, the Union Territory is directed to provide the particulars of the First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, the Union Territory is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) The Union Territory is directed to issue directions to Prosecutors to place on record the correct legal position as per Siddharth (Supra) and Satender Kumar Antil (Supra),

(b) The Union Territory is directed to circulate the judgment in Siddharth (Supra) and Satender Kumar Antil (Supra) to Prosecutors.

(c) The Union Territory is directed to train and update the Prosecutors on a periodical basis and provide details of the same.

19.1 High Court of Kerala (Refer to Serial No. 17.1)

20. State of Madhya Pradesh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers.

(ii) In terms of the direction contained in para 100.7, the State is directed to give details of the number of Special Courts

constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) The State is directed to issue directions to Prosecutors to place on record the correct legal position as per Siddharth (Supra) and Satender Kumar Antil (Supra),

(b) The State is directed to ensure circulation of judgment in Siddharth (Supra) and Satender Kumar Antil (Supra) to Prosecutors,

(c) The State is directed to provide training and update Prosecutors on a periodical basis and provide details of the same

20.1 High Court of Madhya Pradesh -Directions to be complied with:

(i) In terms of the directions issued in para 100.2, it is noted that there is discrepancy insofar as bail is being granted on non-compliance of Sections 41 and 41-A, however, it is also stated that the statutory provisions are being complied with. Since the two situations cannot co-exist, the High Court is directed to ensure uniform compliance and furnish information on the same.

(ii) In terms of para 100.5, the High Court is directed to ensure uniform compliance and furnish information on the same

(iii) In terms of the direction contained in para 100.7, the State is directed to give details of the number of Special Courts constituted and whether any steps are underway for creation of Additional Special Courts and at what stage.

(iv) To ensure compliance with the directions issued in para 100.8, 100.9 and 100.10 and furnish information regarding the same.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of the judicial academy.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

21. State of Maharashtra -Directions to be complied with:

(i) From perusal of records, we find that the State of Maharashtra alone has not filed compliance affidavits as per the directions issued in Satender Kumar Antil (Supra) and subsequent orders passed by this Court. Therefore, the State is directed to file a detailed compliance affidavit as per Satender Kumar Antil (Supra) and subsequent orders passed by this court within a period of 8 weeks and the same shall also be circulated with learned amicus who upon perusal shall file a report within 2 weeks thereafter.

21.1 High Court of Bombay -Directions to be complied with:

(i) In terms of direction contained in para 100.2, as per report, compliance has been made. However, no details have been furnished on whether bail is being granted or not. Therefore, a detailed affidavit on this count shall be filed.

(ii) In terms of direction contained in para 100.3 and 100.5, there is part compliance of direction, since it is revealed that some District Courts such as Dhule, Nandurbar, Parbhani and Ratnagiri are asking for bail applications despite filing of chargesheet without arrest. Furthermore, in respect of South Goa and Dadra and Nagar Haveli there is non-compliance, therefore, it is directed that necessary steps shall be taken in respect of these districts and an affidavit indicating compliance shall be filed.

(iii) In terms of direction contained in para 100.7, the affidavit does not indicate anything on constitution of Special Courts and existing vacancies thereof except for a statement indicating details of Special Courts constituted under 7 different statutes.

(iv) In terms of direction contained in para 100.8, no information has been provided about identification of under trial prisoners and action taken in view of Section 440 of CrPC. Therefore, it is directed that immediate steps shall be taken in this regard.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vi) To inform on whether the judgment in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC.

22. State of Manipur -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of whether any steps are underway for creation of Special Courts and Additional Special Courts and if so, then at what stage. Furthermore, details of assessment as to the High Court's request for 3 Special Courts shall also be provided.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To train and update the prosecutors on a periodical basis and provide details of the same.

22.1 High Court of Manipur -Directions to be complied with:

(i) In terms of directions contained in para 100.2, it has come to our attention that there are certain Courts namely JMFC Imphal East, JMFC Jiribam and JMFC Thoubal where bail has been granted in non-compliance of Sections 41 & 41-A of CrPC. State affidavit is silent on the disciplinary or administrative action as indicated in the Standing Order. The same is mandated to be duly furnished.

(ii) In terms of directions contained in para 100.7, it has been stated that the High Court is pursuing with the State Government for constituting three Additional Special Courts. The latest status of the same needs to be duly updated.

(iii) In terms of directions contained in para 100.8 and 100.9, the High Court should inform this Court as to the steps taken for a list of identified prisoners who are unable to comply with

bail conditions and unable to furnish sureties in many cases, though bail stands granted and what steps have been taken to alleviate this situation.

(iv) In terms of directions contained in para 100.11, there is no adequate compliance and incomplete information with respect to some of the Courts has been provided. Therefore, needful be done in this regard. The relevant information should also be furnished.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vi) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

23. State of Meghalaya -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

23.1 High Court of Meghalaya -Directions to be complied with:

(i) In terms of directions contained in para 100.7, it has come to our attention that the affidavit of the High Court is silent over the constitution of Special Courts in consultation with the State Government. The latest status of the same needs to be duly updated and furnished.

(ii) In terms of directions contained in para 100.8 and 100.9, the High Court has identified nearly 42 prisoners who are not able

to furnish sureties despite bail. Detailed information and steps taken to alleviate the situation have however not been provided. Therefore, needful be done in this regard.

(iii) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(iv) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

24. State of Mizoram -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary action that has been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

24.1 High Court of Gauhati (Refer to Serial No: 4.1)

25. State of Nagaland -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the

necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(b) To train and update the prosecutors on a periodical basis and provide details of the same.

25.1 High Court of Gauhati (Refer to Serial No: 4.1)

26. State of Odisha -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To train and update the prosecutors on a periodical basis and provide details of the same.

26.1 High Court of Odisha -Directions to be complied with:

(i) In terms of directions contained in para 100.2, it has come to our attention that there is contradiction in the same inasmuch as if there is compliance of Arnesh Kumar (Supra) vis-à-vis compliance of Sections 41 and 41-A of CrPC., then bail ought not to have been granted due to non-compliance of the same. The position on the same is mandated to be clarified and duly furnished.

(ii) In terms of directions contained in para 100.5, there is partial non-compliance insofar as several districts are insisting for bail

application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.7, it has come to our attention that the affidavit of the High Court is silent over the constitution of Special Courts in consultation with the respective State Government. The latest status of the same needs to be duly updated and furnished.

(iv) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(v) In terms of directions contained in para 100.11, there is partial non-compliance in some districts as regular bail applications are not decided within two weeks. Therefore, needful be done in this regard and compliance of the same be ensured. The relevant information should also be furnished.

(vi) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vii) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

27. Union Territory of Puducherry -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary action that has been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the Union Territory shall provide details of Special Courts constituted and the necessary steps taken for the creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the Union Territory to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

27.1 High Court of Madras (Refer to Serial No: 31.1)

28. State of Punjab -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

28.1 High Court of Punjab and Haryana -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC, notably in districts such as Amritsar, Kapurthala and Mansa. On the basis of the compliance affidavit dated 10.11.2022, it is noted that bail has been granted for non-

compliance even though it has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.5, there is partial non-compliance insofar as several districts are insisting for bail application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.7, it has come to our attention that the affidavit of the High Court is silent over the constitution of Special Courts in consultation with the State Government. The latest status of the same needs to be duly updated and furnished.

(iv) In terms of directions contained in para 100.8, though the High Court has identified prisoners who are unable to furnish sureties despite bail, detailed information and steps taken to alleviate the situation has however not been provided. Therefore, needful be done in this regard.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

(vi) To furnish information on whether the directions in Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

29. State of Rajasthan -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41 and 41-A of CrPC has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To train and update the prosecutors on a periodical basis and provide details of the final outcome of the same.

29.1 High Court of Rajasthan -Directions to be complied with:

(i) In terms of directions contained in para 100.7, it has come to our attention that the affidavit of the High Court is silent over the constitution of Special Courts in consultation with the respective State Government. The latest status of the same needs to be duly updated and furnished.

(ii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC. However, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the judicial academy curriculum.

(iv) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

30. State of Sikkim -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently also provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

30.1 High Court of Sikkim -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC. On the basis of the compliance affidavit, it is noted that bail has been granted for non-compliance even though it has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.7, it has come to our attention that the affidavit of the High Court is silent over the constitution of Special Courts in consultation with the State Government. The latest status of the same needs to be duly updated and furnished.

(iii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iv) In terms of directions contained in para 100.11, there is partial non-compliance in some districts as regular bail applications are not decided within two weeks. Therefore, needful be done in this regard and compliance be ensured. It is also to be noted that most of the districts show the data as Nil and in some cases N/A against the Anticipatory Bail column. The relevant data needs to be furnished in detail.

31. State of Tamil Nadu -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed, and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To train and update the prosecutors on a periodical basis and provide details of the same.

31.1 High Court of Madras -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC. On the basis of the compliance affidavit, it is noted that bail has been granted for non-compliance even though it has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.5, there is partial non-compliance insofar as some district courts are insisting for bail application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iv) In terms of directions contained in para 100.11, there is partial non-compliance in some districts as regular bail applications are not decided within two weeks. Therefore, needful be done in this regard and compliance be ensured. The relevant information should also be furnished.

(v) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

32. State of Telangana -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

32.1 High Court of Telangana -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC. On the basis of the compliance affidavit, it is noted that bail has been granted for non-compliance even though it has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.5, there is partial non-compliance insofar as some district courts are insisting for bail application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iv) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

33. State of Tripura -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the State to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

31.1 High Court of Tripura -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC. On the basis of the compliance affidavit, it is noted that bail has been granted for non-compliance even though it

has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.5, there is non-compliance insofar as District courts are insisting for bail application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iv) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

(v) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

34. State of Uttarakhand -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

34.1 High Court of Uttarakhand -Directions to be complied with:

(i) In terms of the directions issued in Para 100.2 and 100.3, bail has been granted in non-compliance of Sections 41 and 41-A of CrPC. On the basis of the compliance affidavit, it is noted that bail has been granted for non-compliance even though it has been stated that there is compliance of the said directions. Since both situations cannot co-exist and are self-contradictory, the High Court is directed to report on the compliance of the aforementioned directions.

(ii) In terms of directions contained in para 100.5, there is non-compliance insofar as some District courts are insisting for bail application under Section 88 of CrPC. Therefore, the High Court is required to inform on its compliance alone.

(iii) In terms of directions contained in para 100.8 and 100.9, though the High Court has endeavoured to identify prisoners who are unable to comply with the bail conditions and is stated to have informed them about their rights under Section 440 of CrPC, however, subsequently no bail applications were received under Section 440 of CrPC in most districts. Therefore, the High Court is required to inform on its compliance alone.

(iv) In terms of directions contained in para 100.11, there is partial non-compliance in some districts as regular bail applications are not decided within two weeks. Therefore, the needful be done in this regard and compliance be ensured. The relevant information should also be furnished.

(v) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

35. State of Uttar Pradesh -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to

be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

(iii) Compliance with order dated 21.03.2023 passed by this Court:

(a) In terms of the above referred order, we direct the State to ensure that the prosecutors are stating the correct position of law as per the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(b) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra).

(c) To train and update the prosecutors on a periodical basis and provide details of the same.

35.1 High Court of Allahabad -Directions to be complied with:

(i) In terms of the compliance of the directions issued in Para 100.2, the affidavit submitted highlights discrepancy, wherein information highlights compliance of Sections 41 and 41-A of CrPC, however, bail is being granted due to non-compliance of the same in certain districts such as Barabanki, Farrukhabad, Kansiram Nagar, Lakhimpur Kheri, and Moradabad. Since the two conditions cannot co-exist, the High Court is directed to ensure uniform compliance and furnish information on the same.

(ii) In terms of the directions issued in Para 100.5, the High Court is directed to ensure compliance to the effect that bail applications should not be insisted upon in applications under Sections 88, 170, 204 and 209 of CrPC as they are being insisted upon in certain districts such Agra, Chitrakoot and Sambhal, and to furnish information on the same.

(iii) In terms of the directions issued in Para 100.6, the High Court is directed to ensure compliance of the same and furnish information.

(iv) In terms of the directions issued in Para 100.7, the High Court is directed to ensure compliance with respect to consultation

with the State Government for constitution of Special Courts and filling vacancies in the existing District Courts, and to furnish information on the steps taken to comply with the same.

(v) In terms of the directions issued in Paras 100.8 and 100.9, it is noted that despite the identification of undertrial prisoners, sufficient steps have not been taken to ensure compliance by filing applications on their behalf under Section 440 of CrPC, in most districts. The High Court is directed to ensure compliance and furnish information on the same.

(vi) In terms of the directions issued in Para 100.11, the High Court is directed to furnish complete information regarding the compliance of the directions in all districts and to take steps for compliance.

(vii) The High Court is directed to identify judicial officers passing orders in non-conformity with the directions issued by this Court in Satender Kumar Antil (Supra), in terms of the order dated 02.05.2023 of this Court, and to provide details as to the actions taken against erring officers.

(viii) To furnish information on whether the directions of Satender Kumar Antil (Supra) is being applied to petitions under Section 438 of CrPC or not.

36. State of West Bengal -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order is being complied with by Investigating Officers.

(ii) In terms of direction contained in para 100.7, it is directed that the State shall provide details of Special Courts constituted and the necessary steps taken for creation of Additional Special Courts and its stage.

36.1 High Court of Calcutta -Directions to be complied with:

(i) In terms of the compliance of the directions issued in Para 100.2, the affidavit submitted highlights discrepancy in districts such as Alipore and Birbhum, wherein information highlights compliance of Sections 41 and 41-A of CrPC, however, bail is being granted due to non-compliance of the same in districts such as Alipore and Birbhum and the Union Territory of Andaman and Nicobar. Since the two conditions cannot co-exist, the High Court is directed to ensure uniform compliance and furnish information on the same.

(ii) In terms of the directions issued in para 100.5, some districts have not complied with the same as per the information provided. The High Court is directed to ensure uniform compliance of the directions and furnish information on the same.

(iii) In terms of the directions issued in 100.7, the High Court is directed to take steps to ensure compliance of the same and furnish information.

(iv) The directions issued in Para 100.8 as well as 100.9 are noted to have been only partly complied with in most districts barring a few. The High Court is directed to take steps to ensure compliance of the directions issued in their entirety and furnish information on the same.

(v) The High Court is directed to provide complete information regarding the compliance of the directions issued in Para 100.11, and ensure compliance of the same.

(vi) In terms of direction contained in order dated 03.02.2023, the High Court should inform on compliance for inclusion of Siddharth (Supra) and Satender Kumar Antil (Supra) in the curriculum of judicial academy.

37. Union of India -Directions to be complied with:

(i) In terms of the direction contained in para 100.1, the Union is directed to inform the Court as to whether any Bail Law is in contemplation or under preparation.

(ii) To inform the Court as to whether any assessment has been done to ascertain the requirement of creating further Special

Courts (CBI) in districts with high pendency of cases, with requisite data.

(iii) To inform the Court as to whether or not the investigative agencies (other than CBI) under its ambit are following the directions of this Court as laid down in Satender Kumar Antil (Supra).

38. Central Bureau of Investigation -Directions to be complied with:

(i) In terms of direction contained in para 100.2, it is directed to provide the particulars of First Information Reports of cognizable and non-bailable cases in which the mandate of Sections 41, 41-A of CrPC and Arnesh Kumar (Supra) has not been followed and consequently to provide the details of necessary actions that have been taken against erring police officers. Also, in terms of direction contained in para 100.2, information has to be provided as to whether the Standing Order/Criminal Manual is being complied with by Investigating Officers.

(ii) Compliance with order dated 21.03.2023 passed by this Court:

(a) To circulate the judgment passed by this Court in Siddharth (Supra) and Satender Kumar Antil (Supra)

(b) To train and update the prosecutors on a periodical basis and provide details of the same.

39. NALSA -Directions to be complied with:

(i) In terms of the order dated 02.05.2023, NALSA shall supply updated information with regard to para 100.8 and 100.10 in Satender Kumar Antil (Supra)

(ii) NALSA shall inform the follow-up action taken by NALSA and State Legal Services Authorities of the States and Union Territories as provided to NALSA by various authorities including the State governments and Union Territories.

(iii) In order to provide to this Court adequate updated information, we deem it appropriate to direct all the States and Union Territories to cooperate with NALSA.

G. In view of the above referred report and affidavits, we direct all the States, Union Territories, High Courts, Union of India, CBI and NALSA to file their updated compliance affidavits on the above referred aspects within a period of 8 weeks from today,

and the learned Amicus upon perusal of the same shall file a report on these compliances in 2 weeks thereafter.

H. The matter will be listed on 07.05.2024, and we wish to take up this matter in a phased manner. The States and High Courts from serial numbers 1 to 10 will be taken up on 07.05.2024, and the monitoring as to due compliance by the remaining stake holders will be taken up subsequently in a staggered manner.

I. STANDARD OPERATING PROCEDURE (SOP)

(i) Ms. Aishwarya Bhati, learned Additional Solicitor General has invited our attention to a document titled as "Guidelines and standard operating procedure for implementation of the scheme for support to poor prisoners" and requested that the same may form part of record and the Order of this Court. The same shall be taken on record.

(ii) In furtherance of the subsequent orders passed by this Court on ancillary issues concerned with training public prosecutors and including judgments of this Court in the Curriculum of State Judicial Academies, we wish to further pass a direction on an SOP framed by Central Government. The SOP if put in place by the Central Government, will indeed alleviate the situation of under trial prisoners by way of establishment of a dedicated empowered committee and funds etc.

(iii) For the sake of convenience and for extending the benefit of this SOP to the under-trial prisoners, we wish to extract the SOP in its entirety in this Order so that all concerned parties act in tandem to ensure due compliance of this SOP and the compliance thereof is incorporated in the next report.

"**Guidelines and Standard Operating Procedure for implementation of the Scheme for support to poor prisoners**

i) Funds to the States/UTs will be provided through the Central Nodal Agency (CNA). The National Crime Records Bureau has been designated as the CNA for this scheme.

ii) States/UTs will draw the requisite amount from the CNA on case-to-case basis and reimburse

the same to the concerned competent authority (Court) for providing relief to the prisoner.

iii) An 'Empowered Committee' may be constituted in each District of the State/UT, comprising of i) District Collector (DC)/District Magistrate (DM), ii) Secretary, District Legal Services Authority, iii) Superintendent of Police, iv) Superintendent/ Dy. Supdt. of the concerned Prison and v) Judge incharge of the concerned Prison, as nominee of the District Judge.

Note: This Empowered Committee will assess the requirement of financial support in each case for securing bail or for payment of fine, etc. and based on the decision taken, the DC/ DM will draw money from the CNA account and take necessary action.

Note: The Committee may appoint a Nodal Officer and take assistance of any civil society representative/social worker/ District Probation Officer to assist them in processing cases of needy prisoners.

iv) An Oversight Committee may be constituted at the State Government level, comprising of i) Principal Secretary (Home/Jail), ii) Secretary (Law Deptt), iii) Secretary, State Legal Services Authority, iv) DG/IG (Prisons) and v) Registrar General of the High Court.

Note: The composition of the State level 'Empowered Committee' and 'Oversight Committee' are suggestive in nature. Prisons/persons detained therein being 'State-List" subject, it is proposed that the Committees may be constituted and notified by the concerned State Governments/UT Administrations.

Standard Operating Procedure

UNDERTRIAL PRISONERS

1. If the undertrial prisoner is not released from the jail within a period of 7 days of order of grant of bail,

then the jail authority would inform Secretary, District Legal Services Authority (DLSA).

2. Secretary, DLSA would inquire and examine whether the undertrial prisoner is not in a position to furnish financial surety for securing bail in terms of the bail conditions.

   For this, DLSA may take the assistance of Civil Society representatives, social workers/ NGOs, District Probation officers or revenue officer. This exercise would be completed in a time bound manner within a period of 10 days.

3. Secretary, DLSA will place all such cases before the District Level Empowered Committee every 2-3 weeks.

4. After examination of such cases, if the Empowered Committee recommends that the identified poor prisoner be extended the benefit of financial benefit under 'Support to poor prisoners Scheme", then the requisite amount upto Rs. 40,000/- per case for one prisoner, can be drawn and made available to the Hon'ble Court by way of Fixed Deposit or any other method, which the District Committee feels appropriate.

5. This benefit will not be available to persons who are accused of offences under Prevention of Corruption Act, Prevention of Money Laundering Act, NDPS or Unlawful Activities Prevention Act or any other Act or provisions, as may be specified later.

6. If the prisoner is acquitted/convicted, then appropriate orders may be passed by the trial Court so that the money comes back to the Government's account as this is only for the purposes of securing bail unless the accused is entitled to the benefit of bail U/s. 389 (3) Cr.P.C. in which event the amount can be utilised for bail by Trial Court to enable the accused to approach the Appellate Court and also if the Appellate Court grants bail U/s. 389 (1) of Cr.P.C.

7. If the bail amount is higher than Rs. 40,000/-, Secretary, DLSA may exercise discretion to pay such amount and make a recommendation to the Empowered Committee. Secretary, DLSA may also engage with legal aid advocate with a plea to have the surety amount reduced. For any amount over and above Rs. 40,000/-, the proposal may be approved by the State level Oversight Committee.

CONVICTED PRISONERS:

1. If a convicted person is unable to get released from the jail on account of non- payment of fine amount, the Superintendent of the Jail would immediately inform Secretary, DLSA (Time bound manner: 7 days).

2. Secretary, DLSA would enquire into the financial condition of the prisoner with the help of District Social Worker, NGOs, District Probation Officer, Revenue Officer who would be mandated to cooperate with the Secretary, DLSA. (Time bound manner: 7 days)

3. The Empowered Committee will sanction the release of the fine amount upto Rs. 25,000/- to be deposited in the Court for securing the release of the prisoner. For any amount over and above Rs. 25,000/-, the proposal may be approved by the State level Oversight Committee."

J. EMAIL ID

At last, the learned Amicus has suggested for creating a dedicated email id for the purpose of these proceedings pending before us so that the reports are saved or exchanged simultaneously. Considering the convenience of all parties present here, we accept the suggestion so made and accordingly give liberty to the learned amicus to create the email id, and circulate the same to all the counsel/parties. Email id shall be used hereafter for serving and receiving affidavits / reports.

Headnotes prepared by: Ankit Gyan

Result of the case:
Directions issued.

[2024] 2 S.C.R. 1121 : 2024 INSC 175

Vedanta Limited
v.
The State of Tamil Nadu & Ors

(Special Leave Petition (Civil) Nos. 10159-10168 of 2020)

29 February 2024

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

Issue for Consideration

Impugned orders passed by the High Court directing closure of the copper smelter operated by the petitioner at the industrial complex in Tamil Nadu for violations of numerous environmental norms, if justified.

Headnotes

Environmental Laws – Environmental pollution and degradation – Copper smelter operated by the petitioner at the industrial complex in Thoothukudi in Tamil Nadu – Closure of, for violations of numerous environmental norms by the High Court – Interference with:

Held: Industrial establishment was not exculpated of its liability for environmental violations – Closure of the industry is undoubtedly not a matter of first choice – Nature of the violations and the repeated nature of the breaches coupled with the severity of the breach of environmental norms left neither the statutory authorities nor the High Court with the option to take any other view unless they were to be oblivious of their plain duty – Unit, has been contributing to the productive assets of the nation and providing employment and revenue in the area – The Court has to be mindful of the principles of sustainable development, the polluter pays principle, and the public trust doctrine which underscore the importance of balancing economic interests with environmental and public welfare concerns – While the industry has played a role in economic growth, the health and welfare of the residents of the area is a matter of utmost concern – State Government is responsible for preserving and protecting their concerns – All persons have the right to breathe clean air, drink clean water, live a life free from disease and sickness, and for those who till the earth, have access to uncontaminated soil – These rights are not only recognized as essential components of human rights but are also enshrined in various international treaties and agreements – They must be protected and upheld by governments and institutions

– Without these basic rights, increased revenue and employment cease to have any real meaning – Thus, interference u/Art. 136 not warranted – High Court justified in making the observations in regard to the lack of alacrity on the part of the Pollution Control Board in discharging its duties, thus the observations not to be expunged or obliterated from the record. [Paras 22-25, 28, 29, 32]

Constitution of India – Art. 136 – Exercise of power u/Art.136, when:

Held: Is to be exercised sparingly and only when exceptional circumstances exist which justify the exercise of its discretion – On facts, as regards the challenge to the order passed by the High Court directing the closure of the copper smelter operated by the petitioner at the industrial complex in Tamil Nadu, this Court to apply the principles of judicial review bearing on whether the findings arrived at by the High Court are borne out from the record or conversely, are based on misappreciation of law and fact. [Para 18]

Doctrines/Principles – Polluter pays principle – Meaning of:

Held: Is a widely accepted norm in international and domestic environmental law – It asserts that those who pollute or degrade the environment should bear the costs of mitigation and restoration – Polluter pays principle serves as a reminder that economic activities should not come at the expense of environmental degradation or the health of the population. [Para 24]

Doctrines/Principles – Public trust doctrine – Meaning of:

Held: Public trust doctrine, recognized in various jurisdictions, including India, establishes that the state holds natural resources in trust for the benefit of the public – It reinforces the idea that the State must act as a steward of the environment, ensuring that the common resources necessary for the well-being of the populace are protected against exploitation or degradation. [Para 25]

Intergenerational equity – Concept of :

Held: It suggests that the "present residents of the earth hold the earth in trust for future generations and at the same time the present generation is entitled to reap benefits from it" – Planet and its invaluable resources must be conscientiously conserved and responsibly managed for the use and enjoyment of future generations, emphasising the enduring obligation to safeguard the environmental heritage for the well-being of all. [Para 27]

Vedanta Limited v. The State of Tamil Nadu & Ors

Case Law Cited

Tamil Nadu Pollution Control Board v. Sterlite Industries (India) Limited, [2019] 3 SCR 777 **: (2019) 19 SCC 479;** *Sterlite Industries (India) Limited v. Union of India,* **(2013) 4 SCC 575;** *Chandi Prasad Chokhani v. State of Bihar,* **AIR (1961) SC 1708;** *Pritam Singh v. State,* [1950] 1 SCR 453 **: (1950) SCC 189;** *Subhash Kumar v. State of Bihar,* [1991] 1 SCR 5 **: (1991) 1 SCC 598;** *Vellore Citizens' Welfare Forum v. Union of India,* [1996] Suppl. 5 SCR 241 **: (1996) 5 SCC 647;** *G. Sundarrajan v. Union of India,* [2013] 8 SCR 631 **: (2013) 6 SCC 620;** *D. Swamy v. Karnataka State Pollution Control Board,* [2022] 15 SCR 547 **: (2022) SCC OnLine SC 1278 – referred to.**

Books and Periodicals Cited

Werner Scholtz, 'Equity' in (Lavanya Rajamani and Jaqueline Peel, eds.) *The Oxford Handbook of International Environmental Law* (2nd edn., 2021) – referred to.

List of Acts

Constitution of India; Water (Prevention and Control of Pollution Act) 1974; Air (Prevention and Control of Pollution) Act 1981.

List of Keywords

Environmental pollution; Copper smelter; Environmental norms; Industrial establishment; Environmental violations; Judicial review; Statutory authorities and bodies; Principles of sustainable development; Polluter pays principle; Public trust doctrine; Balancing economic interests; Public welfare concerns; Economic growth; Health and welfare; Human rights; International treaties and agreements; Economic growth; Sustainable progress; Pollution Control Board; Environmental law; Environmental degradation; Natural resources; Intergenerational equity; Environmental heritage.

Case Arising From

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) Nos.10159-10168 of 2020

With

Special Leave Petition (Civil) Nos.10461-10462 of 2020 and Civil Appeal Nos.276-285 of 2021

From the Judgment and Order dated 18.08.2020 of the High Court of Judicature at Madras in WP Nos.5756, 5764, 5771, 5772, 5773, 5774, 5776, 5792, 5801 and 5793 of 2019

Appearances for Parties

Mrs. Aishwarya Bhati, A.S.G., C.S. Vaidyanathan, Gopal Sankaranarayanan, Pinaki Mishra, Shyam Divan, Krishnan Venugopal, Sanjay Upadhyay, Colin Gonsalves, Sr. Advs., Ms. Purnima Krishna, Siddhant Kohli, Vinayak Goel, Ms. Tanya Srivastava, Karamveer Singh Yadav, R. Gunaalan, Nitish Raj, Sachin S., Arunpandiyan S., P. S. Sudheer, Bharat Sood, Ms. Anne Mathew, Ms. Miranda Solaman, Sameer Parekh, Ms. Sonali Basu Parekh, D. P. Mohanty, Sumit Goel, Ms. Sreeparna Basak, Ishan Nagar, Jayant Bajaj, Ms. Aditi, Sudipto Sircar, Adith Deshmukh, Ms. Gitanjali Sanyal, Ms. Mansi Bachani, Ms. Meghna Sharma, M/s. Parekh & Co., M. Yogesh Kanna, G. Ananda Selvam, Ms. Msm Aasai Thambi, Mayilsamy. K, Dr. Kayathri, G. Muthu Kumaran, Sanchit Maheshwari, Ms. Lakshmi Ramamurthy, Mayank Pandey, Ms. Bani Dikshit, Padmesh Mishra, Ms. Shivika Mehra, Ms. Shagun Thakur, Ms. Srishti Mishra, Arvind Kumar Sharma, M.F. Philip, D. Kumanan, Mrs. Deepa. S, Sheikh F. Kalia, Veshal Tyago, A Yogeswaran, Ms. B Poonghkhullali, T. V. S. Raghavendra Sreyas, Siddharth Vasudev, Parijat Kishore, S. Beno Bencigar, Satya Mitra, Ms. Kawalpreet Kaur, Paul Kumar Kalai, A. Selvin Raja, Sabarish Subramanian, G. Sivabalamurugan, Selvaraj Mahendran, C. Adhikesavan, S. B. Kamalanathan, P.V. Harikrishnan, Sunil Singh Rawat, Kartik Sandal, Anshuman Ashok, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

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* Ed Note : Pagination as per original judgment.

A. SLP (C) Nos 10159-10168 and 10461-10462 of 2020

i. Background

1. The Special Leave Petitions arise from a judgment dated 18 August 2020 of a Division Bench of the High Court of Judicature at Madras in a batch of ten petitions under Article 226 of the Constitution of India.

2. A series of orders passed in April and May 2018 by the Tamil Nadu Pollution Control Board[1] and by the Government of Tamil Nadu and an order dated 29 March 2013 passed by the former form the subject of the challenge.

3. By the orders impugned, the copper smelter operated by the petitioner (Vedanta Limited) at the SIPCOT industrial complex in Thoothukudi in Tamil Nadu was directed to be closed for violations of numerous environmental norms.

4. Initially, there was a challenge before the National Green Tribunal. The order of the Tribunal was placed in issue before this Court by the TNPCB and became the subject matter of a judgment delivered by this Court on 18 February 2019, reported as **Tamil Nadu Pollution Control Board v. Sterlite Industries (India) Limited.**[2] While coming to the conclusion that there was an absence of jurisdiction on the part of the National Green Tribunal, this Court granted liberty to the operator of the unit to move the High Court in appropriate proceedings under Article 226 of the Constitution.

5. This resulted in the institution of the petitions before the High Court, as noticed above, and the judgment of the High Court which has been questioned in these proceedings.

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1 "TNPCB"

2 [2019] 3 SCR 777 : (2019) 19 SCC 479.

ii. The judgment of this Court in 2013

6. An earlier judgment of this Court, reported as **Sterlite Industries (India) Limited** v. **Union of India,**[3] concerned the same unit as in the present proceedings. Environmental clearances were granted to the unit in 1995 and it commenced production in 1997. Separate writ petitions were instituted before the High Court, *inter alia* for directions to cancel the environmental clearances; close the operation of the unit; and to the state to take action against the unit for its failure to take safety measures to remedy pollution and to protect against industrial accidents. By an order dated 28 September 2010, the High Court allowed the writ petitions and directed that the unit be closed. On appeal, a two-Judge Bench of this Court in **Sterlite Industries** (supra) adjudicated the validity of this order. This Court held that:

a. The High Court was not justified in interfering with the decision to grant environmental clearance on the ground of procedural impropriety;

b. The High Court was not justified in directing the closure of the plant on the ground that it was located in the SIPCOT industrial complex which was within a 25 km radius of four ecologically sensitive islands in the Gulf of Mannar. This is because one of the consent orders permitted the establishment of the plant at this location. However, the possibility of shifting the plant in the future was not precluded, if it became necessary for the purpose of conserving the environment;

c. The High Court ought not to have interfered with the exercise of power by the TNPCB, which reduced the width of the mandated green belt in the no-objection certificate;

d. Article 21 of the Constitution empowered the High Court to direct the plant to be closed if it was found to be polluting the environment, notwithstanding the fact that environmental clearances had been granted. This could be done if no other remedial measure was available; and

e. Inspections of the unit indicated that some emissions and effluents were beyond the permissible limit prescribed by

3 (2013) 4 SCC 575.

TNPCB. The unit was polluting the environment in violation of legal norms (detailed in the following paragraphs).

7. In terms of the directions of this Court, TNPCB issued directions for the removal of deficiencies. It was then claimed on behalf of the unit that the deficiencies had been removed. On the basis of a joint inspection by National Environmental Engineering Research Institute[4] and the Central Pollution Control Board,[5] this Court found that several suggestions towards remediation had been complied with. This Court was of the view that closure was therefore not the only remedy. Though there was a suppression of fact by the unit, the Court was not inclined to order closure at that stage and imposed instead a requirement of compensation quantified at Rs. 100 crores for non-compliance with environmental parameters and operating without consent in terms of the applicable environmental law:

> "47. … we are of the view that the appellant Company should be held liable for a compensation of Rs 100 crores for having polluted the environment in the vicinity of its plant and for having operated the plant without a renewal of the consents by the TNPCB for a fairly long period and according to us, any less amount, would not have the desired deterrent effect on the appellant Company."

8. While setting aside the order of closure, this Court nonetheless observed that its judgment would not prevent TNPCB from issuing directions to the unit including a direction for closure, if required.

iii. The decision in this case

a. Violations of environmental norms and consequent harm

9. Before assessing the submissions of the parties, it is necessary to understand the basis for the decision of the High Court as well of this Court in 2013. It is not possible for this Court to assess the merits of the submissions, shorn of the context in which the decision(s) were rendered. Both this Court in **Sterlite Industries** (supra) as well as the High Court in the impugned judgment found that the unit of the petitioner was guilty of serious violations of environmental and other laws.

4 "NEERI"

5 "CPCB"

10. In 2013, this Court in **Sterlite Industries** (supra) found that the unit had violated the law in more than one way:

    a. The unit had caused pollution between 1997 and 2012;

    b. The reports of NEERI indicated non-compliance with environmental standards;

    c. The unit had operated without a renewal of the consent to operate for a long period of time; and

    d. There was an act of suppression and misrepresentation on the part of the unit in the proceedings before this Court.

11. In the impugned judgment, the High Court *inter alia* found that:

    a. The unit had operated without consent from TNPCB for about sixteen years;

    b. The unit had operated without hazardous waste management authorisation for about ten years;

    c. The unit did not have appropriate systems in place for the disposal of hazardous waste;

    d. There was a substantial presence of Total Dissolved Solids (TDS) in the water;

    e. The unit dumped large amounts of copper slag, leading to air and water pollution. The dumped copper slag also caused the river in Thootukudi to flood. This was a violation of the conditions in terms of which the relevant authorities had granted consent;

    f. The unit failed to comply with the requirement of maintaining a green belt;

    g. The regulator, TNPCB, did not exercise its powers in a timely and effective fashion, as mandated by law; and

    h. TNPCB established that the unit flouted the law for over twenty-two years. There was no error in the decision of the authorities to direct the closure of the unit.

12. This Court must have due regard to these findings of fact and law while adjudicating whether grounds for interference with the impugned judgment are made out.

    b. The High Court did not commit an error of jurisdiction

13. Essentially, five grounds were urged in the orders for the closure of the unit. They are:

    a. The unit had failed to furnish ground water examination reports to ascertain the impact on ground water quality;

    b. An extensive amount of copper slag lying on third party land had not been removed. A physical barrier had not been constructed between the copper slag and the river to prevent the slag from reaching the river;

    c. The unit had applied for authorization to generate and dispose of hazardous waste but did not have an extant licence;

    d. There was a failure to measure emissions in terms of the National Air Quality Ambient Standards; and

    e. The requirement of a gypsum pond (mandated by guidelines issued by CPCB) had not been observed.

14. Apart from the merits, the principal submission which has been urged on behalf of the petitioner by Mr Shyam Divan, senior counsel (supported by Mr Krishnan Venugopal, senior counsel) is that since the closure was founded on the above five grounds, the High Court was not justified, while exercising its writ jurisdiction under Article 226 of the Constitution, in enquiring into other grounds of environmental violations.

15. The above submission has been opposed both by Mr CS Vaidyanathan, senior counsel appearing on behalf of the TNPCB and Mr Gopal Sankaranarayanan, senior counsel appearing on behalf of the Government of Tamil Nadu. They have submitted, on the basis of the reliefs which were sought in the writ proceedings, that the petitioners had not merely challenged the orders adverse to them but had, in addition, sought a mandamus for the issuance of renewal permissions. Hence, it was urged that in such an event, it was open to the High Court not only to enquire into the grounds on which closure had been directed but to determine whether the petitioner was entitled to a renewal of permissions.

16. From a reading of the judgment of the High Court, it has emerged that the petitioner had expressly consented to the High Court enquiring into all the facets of the matter so as to determine fully and finally as to whether the petitioner would be entitled to a renewal of the

permissions which were granted to it. Otherwise, even if the orders impugned were to be set aside, both the Board and the Government would have been justified in requesting the High Court to remand the proceedings back to the competent statutory authorities for re-determination afresh. This course of action was obviated on the petitioner submitting to the High Court that it was ready and willing to have the High Court evaluate the entirety of the matter in its full perspective.

17. The petitioner having agreed to this course of action, we are not inclined to entertain the submission that the High Court has committed an error of jurisdiction. The hearing before the High Court spanned forty-two days and the High Court has rendered a judgment on all factual and legal aspects, after considering as many as thirty-eight issues.

c. Interference under Article 136 is not warranted

18. In considering the merits of the challenge, this Court would have to apply settled principles of judicial review bearing on whether the findings which have been arrived at by the High Court are borne out from the record or conversely, are based on misappreciation of law and fact. This Court may exercise its power under Article 136 sparingly and only when exceptional circumstances exist which justify the exercise of its discretion.[6]

19. From the material which has emerged on the record and having considered the rival submissions, we are of the view that the areas which are matters of serious concern are:

a. The failure of the petitioner at the material time to remove the copper slag which was dumped indiscriminately at almost eleven sites in the vicinity including private land adjoining the river;

b. The failure to abide by the conditions in the 'consent to operate' governing the disposal of gypsum;

c. The failure to obtain authorisation for the disposal of hazardous waste; and

d. The failure of the petitioner to continue remediating the pollution

6 Chandi Prasad Chokhani v. State of Bihar, AIR 1961 SC 1708; Pritam Singh v. State, [1950] 1 SCR 453 : 1950 SCC 189.

caused by it despite findings and directions by multiple judicial fora at different points in time, including by this Court in 2013.

20. The judgment of this Court in **Sterlite Industries** (supra) afforded the petitioner sufficient opportunity to take remedial action. The consequence of the adjudication by this Court was not to obliterate the environmental violations which had preceded it. This Court came to the conclusion that there indeed were environmental violations, which were additionally compounded by a suppression of material facts. As the court held:

> "48. We now come to the submission of Mr Prakash that we should not grant relief to the appellants because of the misrepresentation and suppression of material facts made in the special leave petition that the appellants have always been running their plant with statutory consents and approvals and misrepresentation and suppression of material facts made in the special leave petition that the plant was closed at the time the special leave petition was moved and a stay order was obtained from this Court … **There is no doubt that there has been misrepresentation and suppression of material facts made in the special leave petition but to decline relief to the appellants in this case would mean closure of the plant of the appellants.** … For these considerations of public interest, we do not think it will be a proper exercise of our discretion under Article 136 of the Constitution to refuse relief on the grounds of misrepresentation and suppression of material facts in the special leave petition."
>
> (emphasis supplied)

21. The Court in the earlier round of litigation would conceivably have been justified in rejecting the challenge to the judgment of the High Court but nonetheless held that closure was a matter of last option and that an opportunity for remediation ought to be granted. At the same time, while imposing an environmental compensation quantified at Rs. 100 crores, this Court clarified that TNPCB would be acting within the scope of its statutory powers including in directing closure, in the future. As the Court held:

> "50. … we make it clear that this judgment will not stand in the way of the TNPCB issuing directions to the appellant

> Company, including a direction for closure of the plant, for the protection of environment in accordance with law.
>
> 51. We also make it clear that the award of damages of Rs 100 crores by this judgment against the appellant Company for the period from 1997 to 2012 will not stand in the way of any claim for damages for the aforesaid period or any other period in a civil court or any other forum in accordance with law."[7]

22. The tenor of the reasoning and the directions of this Court, therefore, leave no manner of doubt that the industrial establishment was not exculpated of its liability for environmental violations. The High Court has, in this backdrop, undertaken a copious analysis of the grounds on which action adverse to the unit has been taken both by the TNPCB and the State Government.

23. In the notes of submissions which have been tendered before this Court, an alternative perspective on facts has been sought to be established. We are not inclined in the exercise of the jurisdiction under Article 136 of the Constitution to re-appreciate the findings of facts which have been arrived at by the High Court. The High Court, it must be noted, was exercising its jurisdiction under Article 226 of the Constitution to judicially review the findings of statutory authorities and bodies entrusted with requisite powers under the Water (Prevention and Control of Pollution Act) 1974 and the Air (Prevention and Control of Pollution) Act 1981. Apart from the exercise of jurisdiction by the statutory authorities, the proceedings before this Court had been preceded by an evaluation by the High Court which is not shown to suffer from error that would warrant the invocation of the jurisdiction under Article 136 of the Constitution. No special circumstances exist which justify the exercise of discretion by this Court nor is the conscience of the Court shocked by the judgment of the High Court.

24. The closure of the industry is undoubtedly not a matter of first choice. The nature of the violations and the repeated nature of the breaches coupled with the severity of the breach of environmental norms would in the ultimate analysis have left neither the statutory

7 Sterlite Industries (supra).

authorities nor the High Court with the option to take any other view unless they were to be oblivious of their plain duty. We are conscious of the fact that the unit, as this Court observed in its decision in 2013, has been contributing to the productive assets of the nation and providing employment and revenue in the area. While these aspects have undoubted relevance, the Court has to be mindful of other well-settled principles including the principles of sustainable development, the polluter pays principle, and the public trust doctrine. The polluter pays principle, a widely accepted norm in international and domestic environmental law, asserts that those who pollute or degrade the environment should bear the costs of mitigation and restoration. This principle serves as a reminder that economic activities should not come at the expense of environmental degradation or the health of the population.

25. In addition, the public trust doctrine, recognized in various jurisdictions, including India, establishes that the state holds natural resources in trust for the benefit of the public. It reinforces the idea that the State must act as a steward of the environment, ensuring that the common resources necessary for the well-being of the populace are protected against exploitation or degradation. These principles underscore the importance of balancing economic interests with environmental and public welfare concerns. While the industry has played a role in economic growth, the health and welfare of the residents of the area is a matter of utmost concern. In the ultimate analysis, the State Government is responsible for preserving and protecting their concerns.

26. As consistently held in numerous decisions of this Court, the unequivocal right to a clean environment is an indispensable entitlement extended to all persons.[8] Air, which is polluted beyond the permissible limit, not only has a detrimental impact on all life forms including humans, but also triggers a cascade of ecological ramifications. The same is true for polluted water, where the pervasive contamination poses a profound threat to the delicate balance of ecosystems. The impact of environmental pollution and degradation is far reaching : it is often not only severe but also persists over

8 Subhash Kumar v. State of Bihar, [1991] 1 SCR 5 : (1991) 1 SCC 598; Vellore Citizens' Welfare Forum v. Union of India, [1996] Suppl. 5 SCR 241 : (1996) 5 SCC 647.

the long term. While some adverse effects may be immediately evident, the intensity of other kinds of harm reveals itself over time. Persons who live in surrounding areas may develop diseases which not only result in financial burdens but also impact the quality of life. The development and growth of children in these communities may become stunted, creating a tragic legacy of compromised potential. Basic necessities, such as access to potable water, may not be met, exacerbating the challenges faced by these already vulnerable populations. Undoubtedly, such adverse effects are felt more deeply by marginalised and poor communities, for whom it becomes increasingly difficult to escape the cycle of poverty.

27. This Court is also alive to the concept of intergenerational equity,[9] which suggests that "*present residents of the earth hold the earth in trust for future generations and at the same time the present generation is entitled to reap benefits from it.*"[10] The planet and its invaluable resources must be conscientiously conserved and responsibly managed for the use and enjoyment of future generations, emphasising the enduring obligation to safeguard the environmental heritage for the well-being of all.

28. It is an undeniable and fundamental truth that all persons have the right to breathe clean air, drink clean water, live a life free from disease and sickness, and for those who till the earth, have access to uncontaminated soil. These rights are not only recognized as essential components of human rights but are also enshrined in various international treaties and agreements, such as the Universal Declaration of Human Rights, the Convention on Biological Diversity, and the Paris Agreement. As such, they must be protected and upheld by governments and institutions worldwide, even as we generate employment and industry. The ultimate aim of all our endeavours is for all people to be able to live 'the good life.' Without these basic rights, increased revenue and employment cease to have any real meaning. It is not merely about economic growth but about ensuring the well-being and dignity of every individual. As we pursue development, we

9 This Court has previously recognized the importance of this principle including in G. Sundarrajan v. Union of India, [2013] 8 SCR 631 : (2013) 6 SCC 620 and D. Swamy v. Karnataka State Pollution Control Board, [2022] 15 SCR 547 : 2022 SCC OnLine SC 1278.

10 Werner Scholtz, 'Equity' in (Lavanya Rajamani and Jaqueline Peel, eds.) *The Oxford Handbook of International Environmental Law* (2nd edn., 2021).

must prioritize the protection of these rights, recognizing that they are essential for sustainable progress. Only by safeguarding these fundamental rights can we truly create a world where everyone has the opportunity to thrive and prosper.

29. We have heard these proceedings for several days and after a careful evaluation of the factual and legal material, we have come to the conclusion that the Special Leave Petitions do not warrant interference under Article 136 of the Constitution.

30. For the above reasons, the Special Leave Petitions shall stand dismissed.

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

B. Civil Appeal Nos. 276-285 of 2021

32. TNPCB is aggrieved by the observations contained in the impugned judgment of the High Court dated 18 August 2020 about its failure to exercise its regulatory functions in a timely and conscientious manner and has preferred appeals in this regard. We are of the view that the High Court was justified in making the observations in regard to the lack of alacrity on the part of the Pollution Control Board in discharging its duties. The observations of the High Court do not call to be either expunged or obliterated from the record.

33. The Civil Appeals are accordingly dismissed.

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

Headnotes prepared by: Nidhi Jain

Result of the case:
Special Leave Petitions and
Civil Appeals dismissed.

[2024] 2 S.C.R. 1136 : 2024 INSC 192

Dr Kavita Kamboj
v.
High Court of Punjab and Haryana & Ors

(Civil Appeal Nos 2179-2180 of 2024)

13 February 2024

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

Issue for Consideration

The issue for consideration was a challenge to a decision of the High Court of Punjab & Haryana directing the State of Haryana to take positive action to accept its recommendation *vide* communication dated 23.02.2023, whereby the names of thirteen in-service judicial officers were recommended for appointment by way of promotion as Additional District and Sessions Judge.

The challenge before the High Court was *inter alia* to a decision of the State of Haryana *vide* Letter dated 12.03.2023, whereby the State had decided not to accept the aforesaid High Court recommendation dated 23.02.2023, on the ground that the "settled procedure" under Article 233 read with Article 309 of the Constitution of India and the Haryana Superior Judicial Service Rules 2007 had not been followed.

Headnotes

Service Law – Promotion – Eligibility Criteria – Haryana Superior Judicial Service Rules 2007 – Rule 6(1)(a) r/w. Rule 8 – Recommendation of the High Court that for a candidate seeking promotion on the basis of merit-cum-seniority, an aggregate of 50% marks for both, i.e. in the written test and in the *viva voce,* would be required so as to render a candidate eligible for promotion – Challenge to:

Held: The High Court was correct in prescribing that recruitment by promotion to the Higher Judicial Service should have a minimum of 50% both in the written test as well as in the *viva voce* independently, for those in-service candidates who were drawn for promotion in the 65% promotion quota – This is because the candidate should not just demonstrate the ability to reproduce their knowledge by answering questions in the suitability test, but must also demonstrate

* Author

both practical knowledge and the application of the substantive law in the course of the interview – In-service candidates seeking recruitment through promotions cannot be considered at par with candidates seeking direct recruitment or with candidates seeking accelerated promotion through a limited competitive test – The three modes of recruitment have been reasonably classified and different requirements have been prescribed for each – As such, what may or may not have been held in respect of the *viva voce* in direct recruitments may not necessarily apply to the *viva voce* requirement in recruitments through promotions [Paras 65, 37, 41]

Eligibility criteria for Higher Judicial Services:

Held: The Higher Judicial Services require the selection of judicial officers of mature personality and requisite professional experience – In-service judicial officers are expected to have a greater familiarity with the law and the procedure based on their experience as judicial officers – While an objective written examination can be the best gauge of the legal knowledge of a candidate, the *viva voce* offers the best mode of assessing the overall personality of a candidate – The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge – Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the *viva voce* separately. [Paras 42, 44]

Administrative directions can fill up the gaps and supplement the Rules, when they are silent on a particular point:

Held: When the Rules under Article 309 hold the field, these Rules have to be implemented – Where specific provisions are made in the Rules framed under Article 309, it would not be open to the High Court to issue administrative directions either in the form of the Full Court Resolution or otherwise, that are at inconsistent with the mandate of the Rules – On the other hand, in cases such as the one at hand, where the Rules were silent, it is open to the High Court to issue a Full Court Resolution – The Rules being silent, it was clearly open to the High Court to prescribe such a criterion as it did in 2013, when the 50% cut-off was prescribed on aggregate scores and also, in 2021, when the 50% cut-off was prescribed on the written test scores and the *viva voce* separately. [Paras 50, 52 and 65]

Constitution of India - Articles 233, 234 and 235 – Appointments to the District Judiciary to be in consultation with the High Court and any other exercise *de hors* such consultation would not be in accordance with the scheme of the Constitution:

Held: In matters of appointment of judicial officers, the opinion of the High Court is not a mere formality because the High Court is in the best position to know about the suitability of the candidates to the post of District Judge – The Constitution, therefore, expects the Governor to engage in constructive constitutional dialogue with the High Court before appointing persons to the post of District Judges under Article 233. [Para 62]

The State Government travelled beyond the remit of the consultation with the High Court by referring the matter to the Union Government. Any issue between the High Court and the State Government should have been ironed out in the course of the consultative process within the two entities – The State Government was bound to consult only the High Court – Any other exercise de hors such consultation would not be in accordance with the scheme of the Constitution. [Para 66]

Doctrines – Doctrine of Legitimate Expectation – Twin Test:

Held: An individual who claims the benefit or entitlement based on the doctrine of legitimate expectation has to establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to a violation of Article 14. [Para 58]

Case Law Cited

All India Judges' Association v. Union of India, [2002] 2 SCR 712 : **(2002) 4 SCC 247**; *All India Judges' Association v. Union of India*, **(2010) 15 SCC 170**; *Dheeraj Mor v. High Court of Delhi*, [2020] 2 SCR 161 : **(2020) 7 SCC 401**; *Lila Dhar v. State of Rajasthan*, [1982] 1 SCR 320 : **(1981) 4 SCC 159**; *Taniya Malik v. Registrar General of the High Court of Delhi,* [2018] 10 SCR 348 : **(2018) 14 SCC 129** ; *B V Sivaiah v. K. Addanki Babu*, [1998] 3 SCR 782 : **(1998) 6 SCC 720** ; *P K Ramachandra Iyer v. Union of India*, [1984] 2 SCR 200 : **(1984) 2 SCC 141**; *Sant Ram Sharma v. State of Rajasthan,* [1968] 1 SCR 111 : **1967 SCC OnLine SC 16**; *State of Gujarat v Akhilesh C Bhargav*,

[1987] 3 SCR 1091 : (1987) 4 SCC 482; *State of Uttar Pradesh v. Chandra Mohan Nigam*, [1978] 1 SCR 521 : (1977) 4 SCC 345; *K H Siraj v. High Court of Kerala*, [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395; *Chandra Mohan v. State of Uttar Pradesh*, [1967] 1 SCR 77; *Chandramouleshwar Prasad v. Patna High Court*, [1970] 2 SCR 666 : (1969) 3 SCC 56; *State of Haryana v Inder Prakash Anand HCS*, [1976] Supp. 1 SCR 603 : (1976) 2 SCC 977; *State of Bihar v Bal Mukund Sah*, [2000] 2 SCR 299 : (2000) 4 SCC 640 – **relied on.**

Sivanandan C T v High Court of Kerala, [2023] 11 SCR 674, **2023 SCC Online SC 994 – distinguished.**

State of West Bengal v. Nripendra Nath Bagchi, [1966] 1 SCR 771 : **1965 SCC OnLine SC 22;** *High Court of Punjab and Haryana v. State of Haryana*, [1975] 3 SCR 365 : (1975) 1 SCC 843; *High Court of Judicature for Rajasthan v. PP Singh*, [2003] 1 SCR 593 : (2003) 4 SCC 239 – **referred to.**

Books and Periodicals Cited

First National Judicial Pay Commission, 1999 (Shetty Commission Report)

List of Acts

Haryana Superior Judicial Service Rules 2007; Constitution of India

List of Keywords

Promotion; Eligibility Criteria; Service Rules, Recruitment; District Judiciary.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.2179-2180 of 2024

With

Civil Appeal Nos.2181-82, 2183, 2184-85 and 2186 of 2024

From the Judgment and Order dated 20.12.2023 of the High Court of Punjab & Haryana at Chandigarh in CWP Nos.19775 and 26217 of 2023

Appearances for Parties

Tushar Mehta, Solicitor General, Vikramjit Banerjee, A.S.G., Lokesh Sinhal, Sr. A.A.G., B.K. Satija, A.A.G., Ms. Shristi Jain Goyal, D.A.G., P S Patwalia, Shyam Divan, Gopal Sankaranarayanan, Sr. Advs,, Samar Vijay Singh, Kanu Agrawal, Siddhartha Sinha, Bharat Sood, Ms. Sabarni Som, Nikunj Gupta, Udayaditya Arpith, Ms. Trisha Chandran, Nishant Singh, Udayaditya Banerjee, Arpith Jacob Varaprasad, Advs. for the Appellant.

Nidhesh Gupta, Rameshwar Singh Malik, Sr. Advs., Sidhant Awasthy, Mrs. Eliza Bar, Siddhant Saroha, Manav Bhalla, Abhimanyu Tewari, Jaspreet Singh Rai, Rohit Nagpal, Jitesh Malik, Jasdeep Singh Dhillon, Mrs. Sukhdeep Kaur Rai, Mrs. Vasudha Gupta, Mrs. Vasudha Nagpal, Linoy Varghese, Ravi Kumar, Ankur Singh, Shwetabh Kumar, Shyamal Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

Table of Contents*

1. Permission to file the Special Leave Petitions granted.

2. Leave granted.

3. This batch of appeals has arisen from a judgment delivered by a Division Bench of the High Court of Punjab and Haryana on 20

* Ed Note : Pagination as per original judgment.

December 2023. The controversy that arises before this Court pertains to the recommendations made by the High Court on its administrative side for the appointment of thirteen in-service candidates as Additional District and Sessions Judges. These candidates are seeking recruitment to the post through promotions from the post of Senior Civil Judges against the 65% promotional quota under the Haryana Superior Judicial Service Rules 2007.[1]

4. The Rules came into force on 10 January 2007 and regulate recruitment and service conditions of persons for appointment to the Haryana Superior Judicial Service. Part III of the Rules provides for the method of recruitment. Rule 2(b) defines "direct recruit" to mean a person who is appointed to the Service from the Bar. Likewise, "promoted officer" is defined under Rule 2(i) to mean a person who is appointed to the service by promotion from Haryana Civil Service (Judicial Branch). Rule 5 provides that recruitment to the Service shall be made by the Governor by:

   (i) promotion from amongst officers of the Haryana Civil Service (Judicial Branch) in consultation with the High Court; and

   (ii) direct recruitment from amongst eligible advocates on the recommendations of the High Court on the basis of a written and *viva voce* test conducted by the High Court.

5. In terms of Rule 6[2], recruitment to the service is to be made from three sources:

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1 "Rules"

2 "6 (1) Recruitment to the Service shall be made,-
(a) 65 percent by promotion from amongst the Civil Judges (Senior Division)/Chief Judicial Magistrates/ Additional Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;
Provided that no person shall be promoted to the Service who is less than thirty- five years of age;
(b) 10 percent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service as Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division); and who are not less than thirty five years of age on the last date fixed for submission of applications for taking up the limited competitive examinations:
Provided that if candidates are not available for 10 percent seats, or are not able to qualify in the examination then vacant posts shall to be filled up by regular promotion in accordance with clause (a); and
(c) 25 percent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test, conducted by the High Court.
(2) The first and second post would go to category (a) (by promotion on the basis of merit-cum-seniority), third post would go to category (c) (direct recruitment from the bar), and fourth post would go to category (b) (by limited competitive examination) of rule 6, and so on."

(i) 65% by promotion from amongst the Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) "on the basis of principle of merit-cum-seniority and passing a suitability test";

(ii) 10% by promotion "strictly on the basis of merit" through a limited competitive examination from amongst persons holding the feeder posts; and

(iii) 25% on the basis of direct recruitment from amongst eligible advocates on the basis of a written and *viva voce* test conducted by the High Court.

6. Rule 7 prescribes the procedure for conducting direct recruitment. Rule 8 provides for the procedure for promotion for assessing and testing the merit and suitability of the judicial officers. Rule 9 provides for a limited competitive examination for the promotion of members of the Haryana Civil Service (Judicial Branch) pursuant to Rule 6(b). Rules 7, 8 and 9 are set out below:

"**Procedure for direct recruitment.**

7. The High Court shall before making recommendations to the Governor invite applications by advertisement and may require the applicants to give such particulars as it may specify and may further hold written examination and viva voce test for recruitment in terms of rule 6(c) above and the maximum marks shall be in the following manner:-

(i) Written Test 750 marks

(ii) Viva Voce 250 marks

Procedure for promotion.

8. Procedure for promotion for assessing and testing the merit and the suitability of a member of the Haryana Civil Service (Judicial Branch) for promotion under clause (a) of sub-rule (1) of rule 6, the High Court may-

(i) hold a written objective test of 75 marks and viva voce of 25 marks in order to ascertain and examine the legal knowledge and efficiency in legal field;

(ii) take into consideration Annual Confidential Reports of the preceding five years of the officer concerned:

Provided that any officer having grading as C (integrity doubtful) in any year shall not be eligible to be considered for promotion.

Limited competitive examination.

9. The High Court shall hold a limited written competitive examination for promotion of members of the Haryana Civil Service (Judicial Branch) as per rule 6(b) and the maximum marks shall be in the following manner:

(i)	Written Examination	600 marks
(ii)	Assessment of Record	150 marks
(iii)	Viva Voce	250 marks

Provided that the High Court shall in addition to the above competitive examination take into consideration any of the criteria as specified in rule 8 above:

Provided further that any officer having grading as C (integrity doubtful) in any year, shall not be eligible to appear in the limited competitive examination."

7. In terms of Rule 8, the High Court is required to hold a written objective test comprising 75 marks and a *viva voce* comprising 25 marks to ascertain and examine the legal knowledge and efficiency of the candidates in the legal field. In addition, the High Court is required to take into consideration the Annual Confidential Reports[3] of the preceding five years of each officer under consideration.

A. Background of the present dispute

8. On 29 January 2013, the High Court, on its administrative side, resolved that an aggregate of 50% marks in the written test and in the *viva voce* would be required so as to render a candidate eligible for promotion. The relevant part of the resolution is extracted below:

"i) In terms of Rule 8(a) of the Haryana Superior Judicial Service Rules, 2007, the suitability test shall consist

3 "ACRs"

> of written objective test of 75 marks and viva voce of 25 marks so as to assess legal knowledge and the efficiency in legal field for discharging higher duties and responsibilities. Obtaining of 50% marks in aggregate of the written test and in viva voce would make a candidate eligible for promotion."

9. On 11 November 2021, a meeting of the Recruitment and Promotion Committee[4] overseeing the Superior Judicial Service was held. The Minutes of the Meeting adverted to Rules 6 and 8 of the Rules and a corresponding provision contained in the Punjab Superior Judicial Service Rules 2007. Both sets of Rules were amended by the States of Haryana and Punjab in order to bring uniformity in promotions to the Superior Judicial Service. In both the States, the Committee, *inter alia*, resolved that:

> "ii. In terms of Rule 7(3)(a) of the Punjab Superior Judicial Service Rules, 2007 and Rule 6(1)(a) of Haryana Superior Judicial Service Rules, 2007, the suitability test shall consist of written objective test of 75 marks and viva voce of 25 marks so as to assess legal knowledge and efficiency in legal field for discharging higher duties and responsibilities. Securing, 50% marks in the written test and 50% marks in Viva voce individually would make a candidate eligible for promotion."

10. As a result of the above Resolution, the Committee decided that in order to be eligible for promotion, a candidate must secure 50% marks in the written test and 50% marks in the *viva voce*. In other words, while under the earlier Resolution of the Full Court dated 29 January 2013, a candidate was required to obtain at least 50% marks in the written test and *viva voce* combined, the proposal of the Recruitment and Promotion Committee of 11 November 2021 stipulated that a candidate must obtain at least 50% marks in the written test and at least 50% in the *viva voce*. This Resolution of the Committee was approved by the Full Court at a meeting which was held on 30 November 2021.

11. At the same time, it must also be noted that the Committee had proposed certain modifications in the benchmark for assessing the

4 "Committee"

ACRs of candidates under Rule 8. The Full Court, while deliberating on the recommendations of the Committee, resolved that:

> "...the report dated 11.11.2021 of Hon'ble Recruitment and Promotion Committee (Superior Judicial Service) be accepted with modification in para No. iii of the "Benchmark of the ACRs as per Rule 8". After modification, the said para be read as under:-
>
> "(iii)(a) A candidate should have obtained at least four "B+Good" or above grading in the Annual Confidential Reports in the preceding five years and
>
> (b) The candidate should not be having grading as C (integrity doubtful) in any year.
>
> Provided that for the purpose of assessing the benchmark, the ACRs of a candidate, yet to be approved by the Hon'ble Full court, would also be considered but his result would be kept in a sealed cover, subject to the final decision of the Hon'ble Full Court."

12. The Full Court also resolved that in order to settle the issue in a comprehensive manner the necessity, if any, to amend the Rules should be examined by the Committee overseeing the Superior Judicial Service and the Rule Committee.

13. Following the above resolution, the two committees convened on 11 February 2022. The Minutes of the Meeting of the two committees reflect the following decision:

> "Re:- Consideration of matter qua amendment in Rule 8 of Punjab Superior Judicial Service Rules, 2007 and Rule 8 of Haryana Superior Judicial Service Rules, 2007 in view of the report dated 11.11.2021 of the Hon'ble Recruitment and Promotion Committee (Superior Judicial Service) as well as modification in para no. (iii) of the 'Benchmark of the ACRs as per Rule 8', by the Hon'ble Full Court.
>
> Meeting note perused. After deliberating upon the matter at length, this Committee recommends that the word 'and' be inserted at the end of sub-rule (I) and before sub-rule (ii) of Rule 8 of Haryana Superior Judicial Service Rules 2007. This Committee also recommends that existing proviso

> to Rule 8 of Punjab Superior Judicial Service Rules 2007 as well as to Rule 8 of Haryana Superior Judicial Service Rules 2007 be substituted as under:-
>
> "Provided that an officer with an entry of integrity doubtful in any year shall not be eligible to be considered for promotion."
>
> This Committee has also perused Rule 9 of Punjab Superior Judicial Service Rules 2007 and Rule 9 of Haryana Superior Judicial Service Rules 2007 and recommends that existing second proviso to Rule 9 of Punjab Superior Judicial Service Rules 2007 and to Rule 9 of Haryana Superior Judicial Services Rules 2007 be substituted as under:-
>
> "Provided further that an officer with an entry of Integrity doubtful in any year shall not be eligible to appear in the said examination.''
>
> The matter be referred to the Hon'ble Full Court for approval."

14. On 24 August 2022, the process of filling up vacancies for the post of Additional District and Sessions Judges from amongst Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) was initiated and a communication was accordingly addressed to thirty-nine candidates. The High Court conducted a written test which was followed by a *viva voce*. On 23 February 2023, the Registrar (Judicial) addressed a communication to the State Government recommending the names of thirteen judicial officers for appointment by way of promotion as Additional District and Sessions Judges.

15. On 2 March 2023, a communication was addressed by the Chief Secretary to the Government of Haryana to the Registrar (Judicial) seeking a "justification/clarification" in regard to certain judicial officers of the 2007, 2009 and 2010 batches on the ground that they appeared to be senior than the last of the thirteen recommended officers. The communication noted that in spite of seniority, these judicial officers were not recommended for promotions. The High Court was also called upon to clarify "the criteria of merit and suitability test, on the basis of which principle of merit-cum-seniority has been affected (sic) and names of officers senior to the recommended officers have not been recommended".

16. The High Court of Punjab and Haryana responded to the communication of the State Government on 22 March 2023, indicating that the appointment to the thirteen posts of Additional District and Sessions Judges which was initiated by way of promotion was sought to be made strictly in terms of Rule 6(1)(a) of the Rules which prescribes merit-cum-seniority read with the criteria laid down by the High Court for assessing the suitability of a candidate for appointment. The High Court further stated that all appointments and promotions concerning the judiciary fall under the control and supervision of the High Court and since the recommendations have been approved by the Full Court, they were binding on the State Government under Article 235 of the Constitution.

17. On 29 March 2023, an advocate by the name of Mr Prem Pal submitted a representation to the Chief Secretary of Haryana seeking the intervention of the State Government in order to either reject the recommendations of the High Court or to initiate a fresh process of consultation. The representation stated that the recommendations of the High Court were not binding since the requirement of obtaining 50% marks in the *viva voce* had not been communicated to the candidates and no minimum cut-off in the *viva voce* had been prescribed. It is also stated that no criteria had been adopted for conducting the suitability test.

18. Following the receipt of this representation, the State Government sought the opinion of the Union Ministry of Law and Justice. The Union Ministry of Law and Justice tendered its opinion on 26 July 2023, stating that Article 233 of the Constitution which deals with appointments, postings and promotions of District Judges envisages consultation between the State Government and the High Court. The opinion of the Union Ministry was that the modification of the suitability criteria in terms of the Resolution dated 30 November 2021 of the High Court lacked the element of consultation with the State Government and, therefore, did not have a binding effect.

19. A writ petition under Articles 226 and 227 was filed by certain candidates working as Civil Judges (Senior Division) and Chief Judicial Magistrates in the State of Haryana for seeking a mandamus to the State Government to conclude the process of selection and to notify the appointments by way of promotion of candidates selected to the posts of Additional District and Sessions Judge.

20. The State of Haryana addressed a communication on 12 September 2023 to the Registrar General of the High Court stating that the State Government had decided not to accept the recommendations for promoting thirteen judicial officers on the ground that the "settled procedure" under Article 233 read with Article 309 and the Rules of 2007 had not been followed. The State of Haryana sought to support its decision on the basis of the legal opinion which was tendered on 26 July 2023 by the Union Ministry of Law and Justice. The relevant extract of the communication reads as follows:

> "Therefore, keeping in view the position explained above, the State Government has decided not to accept the present recommendation for promotion of 13 Haryana Civil Service (Judicial Branch) Officers to the post of Additional District and Sessions Judges (ADSJ), as the State Government as well as the Central Government (Ministry of Law and Justice) have observed that the settled procedure under Article 233 read with Article 309 of the Constitution of India, i.e., Haryana Superior Judicial Service Rules, 2007 has not been followed while sending names to the Government for promotion. Hence, you are requested to send revised recommendations by following set procedures as per law."

21. The petition before the High Court was amended so as to challenge the letter dated 12 September 2023. Other writ petitions were filed before the High Court by unsuccessful candidates, *inter alia*, seeking an order restraining the State from accepting the recommendations made by the High Court and for quashing the Resolution of 30 November 2021, along with the recommendations for promotion of the petitioners. These candidates who had not been selected also sought a direction to the High Court, on its administrative side, to recommend candidates for promotion to the post of the District and Sessions Judges under Rule 6(1)(a) without observing the requirement of obtaining 50% marks each in the written examination and in the *viva voce*. The High Court, by its impugned judgment dated 20 December 2023, disposed of the batch of petitions. The High Court directed the State of Haryana to take positive action to accept its recommendations which were made on 23 February 2023.

22. In the batch of appeals which have arisen before this Court, we have heard Mr P S Patwalia, Mr Shyan Divan and Mr Gopal

Sankaranarayanan, senior counsel, who have appeared on behalf of the candidates who have not been recommended for appointment by the High Court. Mr Tushar Mehta, Solicitor General, has appeared on behalf of the State of Haryana in urging that the State Government was justified in rejecting the recommendations of the High Court. Mr Nidhesh Gupta, senior counsel, appears on behalf of the High Court. Mr Rameshwar Singh Malik, senior counsel, has supported the plea of the High Court, while appearing on behalf of the candidates who have been recommended for appointment.

B. Submissions

23. Mr P S Patwalia, senior counsel, has basically urged the following submissions:

(i) In terms of the judgment of this Court in **All India Judges' Association v. Union of India**[5], the suitability of candidates for promotion as District Judges from amongst in-service candidates is required to be adjudged. Apart from the requirement of conducting a suitability test and a *viva voce*, Rule 6(1)(b) read with Rule 8 requires the ACRs of the preceding five years to be taken into consideration. The proforma of the ACRs contains an exhaustive elaboration of the criteria which are to be borne in mind while assessing a candidate. In other words, the suitability of a candidate has to be assessed on the basis of the track record, as reflected in the ACRs;

(ii) In the above backdrop, the Resolution of the Full Court dated 30 November 2021 which prescribed the requirement of obtaining 50% as a condition of eligibility in the suitability test and in the *viva voce* separately, is an evident act of discrimination against candidates seeking promotions in the 65% quota, compared to those seeking in-service promotions in the 10% quota. There is no requirement of obtaining the minimum cut-off individually in the suitability test and in the *viva voce* when appointments are made of inservice candidates through the limited competitive examination. There is no rational justification for the High Court to lay down a minimum cut-off of the nature which has been prescribed by the resolution dated 30 November 2021

5 [2002] 2 SCR 712 : (2002) 4 SCC 247

only for candidates seeking promotion in the 65% quota while there is no such requirement in the 10% quota for the limited competitive examination;

(iii) The element of discrimination is evident from the fact that no such cut-off as a condition of eligibility is prescribed for candidates who seek direct recruitment as Additional District and Sessions Judges; and

(iv) The imposition of a cut-off as a condition of eligibility prescribing a minimum of 50% of marks in the *viva voce* was disclosed, for the first time, in a response to a query under the Right to Information Act 2005 on 28 March 2023. Consequently, candidates were completely in the dark about the imposition of such a requirement as a condition of eligibility before the disclosure. Consequently, the High Court has acted with arbitrariness in recommending the appointments.

24. Mr Shyam Divan, senior counsel, submitted that:

(i) Candidates drawn for promotion in the 65% promotion quota and 10% from the in-service candidates appearing for a limited competitive examination are from the same pool. Consequently, a minimum cut-off cannot be logically justified for the 65% promotion quota when there is no such norm for the 10%, which is filled up on the basis of the limited competitive examination;

(ii) Rule 19 empowers the State Government to make regulations not inconsistent with the Rules to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the Rules. In the present case, there was a longstanding practice, following the earlier resolution of the Full Court dated 29 January 2013 of requiring a cut-off of 50% overall on the basis of the combined marks which were obtained in the written test and in the interview. A departure from a practice which had held the field for such a long period of time could have only been made either by amending the Rules or by the exercise of power under Rule 19 by the State Government to make regulations;

(iii) The principles of fairness and good governance which have been laid down in the judgment of the Constitution Bench of

this Court in **Sivanandan C T v High Court of Kerala**[6] apply independent of prejudice. Where a breach of the principles of natural justice is alleged for a failure to provide a hearing, an additional layer has been provided in decisions of this Court to the effect that such a breach will not necessarily invalidate the action in the absence of prejudice to the candidates. While a violation of the principles of natural justice may not be fatal in the absence of prejudice, in the present case, the candidates who have failed to be selected rely on an independent principle of administrative law which requires fairness in governance;

(iv) In any event, this Court may scrutinize the marksheets, for the purpose of analyzing the marks which were awarded in the course of the *viva voce* to determine as to whether there is an element of prejudice in the award of marks; and

(v) Based on the longstanding practice in the present case, all candidates were under a legitimate expectation of the continuance of the norms which were prescribed in the Resolution of the Full Court dated 29 January 2013 and any alteration of the position without due notice to the candidates has resulted in substantial injustice.

25. Mr Gopal Sankaranarayanan, senior counsel urged that:

(i) The absence of notice to candidates about the alteration in the criteria of eligibility results in a failure to satisfy the norms of consistency and predictability;

(ii) The requirement of obtaining minimum qualifying marks in the *viva voce* was introduced for the first time by the Resolution dated 30 November 2021 of which candidates had no notice;

(iii) In paragraph 10.97 of its recommendations, the Shetty Commission had stated that in matters of direct recruitment, it was not inclined to impose a minimum cut-off in the *viva voce* in order to obviate arbitrariness in the process. Though the recommendation deals with direct recruitment, there is no rational reason to exclude it in respect of the process which is followed in promoting in-service candidates in the 65% promotion quota; and

6 [2023] 11 SCR 674 : 2023 SCC Online SC 994

(iv) On 28 February 2023, this Court was informed of there being 38 vacancies in the Superior Judicial Service in Haryana. The High Court has made recommendations for appointing 13 candidates. This indicates the existence of a substantial number of vacancies. Consequently, public interest would not necessarily be subserved by affirming the view which has been taken by the High Court, both on its administrative side and on the judicial side.

26. Mr Tushar Mehta, Solicitor General submitted that:

(i) Bearing in mind the principles which are incorporated in Articles 233, 234 and 235 of the Constitution, the criteria for selection of District Judges should be fixed in consultation with the State Government;

(ii) A collaborative exercise must be followed by the two organs of the State - the Judiciary and the Executive;

(iii) There is an element of subjectivity and arbitrariness implicit in laying down minimum marks for the interview process since a candidate who has otherwise obtained high marks in the suitability test may be excluded for failure to meet the cut-off in the *viva voce*;

(iv) Article 233 would encompass the criteria for selection, whether by a rule or by a resolution. Hence, the High Court, while making a modification to its own Resolution, ought to have consulted the State Government; and

(v) The Government was not informed by the High Court of the change in the criteria requiring a minimum of 50% marks in both the suitability test and in the *viva voce*. On the other hand, where an amendment of the Rules was sought to be effected, the High Court has moved the State Government.

27. Mr Nidhesh Gupta, senior counsel appearing on behalf of the High Court, in support of the decision which was taken on the administrative side and ultimately as affirmed in the impugned judgment of the Division Bench, submitted:

(i) Properly construed, Rule 8 of the Rules provides the modalities for testing the merit and suitability of the members of the Judicial Branch for promotion under clause (a) of Rule 6(1). The purpose

of conducting the written test and the *viva voce* is to ascertain and examine the knowledge and efficiency of the officer under consideration in law;

(ii) Where the Rules are silent in regard to the details in the implementation process, it is a settled principle of law that they can be supplemented by administrative instructions;

(iii) The Rules, in the present case, being silent on the minimum qualifying marks required to be obtained in the written test and the *viva voce*, the administrative instructions which were issued by the High Court do not involve any amendment of a rule;

(iv) As a matter of fact, the Full Court Resolution dated 29 January 2013 was issued in terms of the administrative power which is vested in the High Court in regard to the appointment of District Judges under Article 233 and in relation to the control of the High Court over the District Judiciary under Article 235 and the High Court has invoked the very same power while modifying the terms of the earlier resolution on 30 November 2021;

(v) The plea of discrimination as between the requirements for direct recruits, the in-service candidates in a limited departmental examination and the promotional quota for in-service candidates has no valid basis in law. All three categories are distinct and constitute valid classifications;

(vi) The decision of this Court in **All India Judges' Association** (supra) distinguishes between all the three categories for appointment to the Higher Judicial Service. This distinction is exemplified by the Rules in question. For the promotional quota of 65%, the written test consists only of multiplechoice questions totaling to 75 marks, each candidate being given four options for every question. In the matter of direct recruitment, the written test consists of five papers totaling 750 marks comprising of three papers in law, each of 200 marks, a language paper of 100 marks and a general knowledge paper of 50 marks. In the limited competitive examination, the written examination has a weightage of 600 marks. As opposed to the detailed examination which is expected of candidates for direct recruitment and in the limited competitive examination, the in-service candidates who avail of the promotional quota of 65% have to appear for a suitability test of a different nature and

character. Consequently, all the three avenues for appointment to the Higher Judicial service are distinct and the High court was justified in imposing a minimum eligibility requirement of 50% in the written test and the *viva voce* independently;

(vii) Interviews in the present case were conducted by six of the senior-most Judges of the High Court, including the Chief Justice and there is no allegation of *mala fides* or an attribution of illegality to the interview. Marks in the written examination were disclosed only after the final results were declared. A candidate cannot contend that they were casual in the course of the interview only because they expected to do well in the written examination;

(viii) In consequence, no prejudice has been caused to any candidate by the High Court not having disclosed the minimum eligibility cut-off of 50% prior to the date of the interview. No prejudice is caused to any candidate because it cannot be contended that a candidate would have prepared differently if they were made aware of the eligibility requirement;

(ix) On the aspect of consultation with the State Government within the ambit of Articles 233 and 235, the High Court has relied on settled precedent, including the decisions of the Constitution Benches of this Court which emphasize that in matters of appointments to the District Judiciary, the High Court remains the sole repository of power;

(x) The consistent view of this Court has been that the requirement of minimum marks for interviews in the appointments of District Judges is necessary since the selection has to be made on the basis of merit-cum-seniority;

(xi) In the present case, the appellants have sought a mandamus before the High Court for the enforcement of the Resolution of the Full Court of 2013. That being the position, it is not open to them to challenge the ability of the High Court to frame a resolution for modifying the terms of the earlier Resolution dated 29 January 2013; and

(xii) As regards the conduct of the State of Haryana, it is apparent that initially the only objection of the State Government was in regard to the non-recommendation of more senior persons in

the Service. It is thereafter when an objection was raised by an advocate in a representation to the effect that the cut-off of 50% had not been communicated to the candidates, that this issue has been raised by the State Government.

28. Mr Rameshwar Singh Malik, senior counsel, has urged that:

(i) The Rules being silent, the High Court had the power to fill in the gap by the issuance of administrative directions;

(ii) Since no amendment of the Rules was being brought about, there was no requirement of consultation with the State Government; and

(iii) The criterion which was fixed by the Resolution of the Full Court dated 29 January 2013 is not under challenge and, in fact, the relief which was sought before the High Court was for the restoration of the criteria under the Resolution. Consequently, where the same power has been used by the High Court to make a selection subsequently in 2021, such an alteration is beyond the purview of judicial review.

29. The rival submissions would now need to be analyzed.

C. Analysis

i. All India Judges' Association

30. The genesis of the recruitment to the judicial service, particularly, in the context of the controversy before this Court, traces back to the judgment in the **All India Judges' Association (supra)**. In the course of the judgment, this Court noted that at the time, the recruitment to the Higher Judicial Service was being made from two sources: first**,** by promotion from amongst the members of the Subordinate Judicial Service; and second**,** by direct recruitment. The decision was preceded by the recommendations of the Shetty Commission,[7] particularly regarding the revision of the pay scales and conditions of service of the District Judiciary. While accepting the recommendations of the Shetty Commission, which resulted in a favourable modification of the pay scales of the District Judiciary, this Court underscored the need to ensure certain minimum standards,

7 First National Judicial Pay Commission, 1999 (Shetty Commission Report)

objectively assessed or fulfilled, by judicial officers who enter the Higher Judicial Service. This Court accepted the recommendation of the Shetty Commission that direct recruitment to the cadre of District Judges from amongst advocates should be 25%, by way of a competitive examination consisting of a written test and a *viva voce*. The decision enunciated that in-service judicial officers must be provided with the incentive to compete with each other in the process of obtaining expedited promotions. The object of doing so was to improve the caliber of persons recruited to the Higher Judicial Service. Consequently, as regards appointment by promotion, this Court held that 50% of the total posts in the Higher Judicial Service should be filled up by promotion based on merit-cum-seniority, while the remaining 25% of the posts in the Service should be filled up strictly based on merit through a limited departmental competitive examination with a stipulated qualifying service in the cadre of Civil Judge (Senior Division). The conclusions of this Court were formulated in the following terms:

> "28. As a result of the aforesaid, to recapitulate, we direct that recruitment to the Higher Judicial Service i.e. the cadre of District Judges will be:
>
> (1)(a) 50 per cent by promotion from amongst the Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;
>
> (b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years' qualifying service; and
>
> (c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible advocates on the basis of the written and viva voce test conducted by respective High Courts.
>
> (2) Appropriate rules shall be framed as above by the High Courts as early as possible."

31. Following the decision in **All India Judges' Association** (supra), rules were framed in various States to comply with the directions. Subsequently, many High Courts found it difficult to fill up 25 percent posts through the limited departmental competitive examination.

Therefore, in **All India Judges' Association** v. **Union of India**,[8] this Court reduced the quota of judicial officers from the limited competitive examination from 25 percent to 10 percent. As a consequence, three sources of recruitment to the Higher Judicial Service have come into being:

(i) 65% of seats by promotion from the cadre of Civil Judges (Senior Division) on the basis of the principle of merit-cum-seniority;

(ii) 10% by promotion on the basis of merit through a limited competitive examination for Civil Judges (Senior Division) fulfilling stipulated qualifying service; and

(iii) 25% seats by direct recruitment from amongst advocates who fulfill the eligibility requirements.

32. It has been argued that since the Shetty Commission held that no minimum cutoffs should be fixed for the viva voce for the route of direct appointments (under Rule 6(1)(c)), and the findings of the Shetty Commission were upheld by the Court in **All India Judges' Association** (supra), it would be unreasonable to prescribe minimum cutoffs for viva voce for another method of recruitment to the same post.

33. The Rules under consideration preserve the three sources of recruitment, in the ratio of 65% by promotion based on merit-cum-seniority, 10% strictly on the basis of merit by a limited competitive examination; and 25% by direct recruitment from amongst eligible candidates based on the written and *viva voce* test. Each of the three sources of recruitment is distinct in itself. Recruitment by promotion under Rule 6(1)(a) is based on the principle of merit-cum-seniority and passing of a suitability test, while recruitment by promotion under Rule 6(1)(b) is strictly based on merit through a limited competitive examination and 5 years of minimum qualifying service as Civil Judges. The purpose of three sources of recruitment is similarly distinct. Advocates with the requisite experience are permitted to compete for direct recruitment to the Superior Judicial Service. In-service judicial officers have two avenues for entering the Superior Judicial Service: they can either appear for a limited competitive examination where selection would be strictly based on

8 (2010) 15 SCC 170

merit or they can seek a promotion through the normal channel of promotion based on the merit-cum-seniority criterion.

34. In order to appreciate the classification between the three categories of recruitment to the Higher Judicial Service, it would be necessary to dwell on the modalities or the procedure for recruitment. Direct recruitment, for which a 25% quota is set apart by Rule 6(1)(c), is made on the basis of a written examination consisting of 750 marks and a *viva voce* of 250 marks. While recording the submissions of Mr Nidhesh Gupta, senior counsel appearing on behalf of the High Court, we have already adverted to the manner in which the written test comprising of 750 marks is conducted, comprising of three law papers, a language paper and a paper in general knowledge. The procedure for direct recruitment is spelt out in Rule 7. The procedure for regular promotion, on the other hand, is provided in Rule 8 which contemplates the assessment and testing of the merit and suitability of a member of the Judicial Branch in Rule 6(1)(a). The purpose of the objective test of 75 marks and the *viva voce* carrying 25 marks is to ascertain and examine legal knowledge and efficiency in the legal field. Besides this, the ACRs of the preceding five years of the officer are taken into reckoning. Since the candidates who are evaluated for promotion under Rule 6(1)(a) read with Rule 8 are in-service candidates, the selection is based on a test (comprising of the written and the *viva voce*) and due consideration of the service records as borne out by the ACRs.

35. Recruitment by promotion under Rule 6(1)(b) is "strictly on the basis of merit through the limited competitive examination" and a 5-year qualifying service requirement. Under Rule 6(1)(b), the limited competitive exam is of a competitive nature where members of the Service compete *inter se*, as opposed to the direct recruitment exam, which is open in nature. The limited competitive exam under Rule 6(1)(b), according to Rule 9, comprises of a 600-mark written examination. In addition, 150 marks are assigned to the assessment of the records and 250 marks are assigned to the *viva voce*. The proviso to Rule 9 indicates that the High Court shall, in addition to the competitive examination, take into account any of the criteria specified in Rule 8 which apply to the normal procedure for promotion. The limited competitive examination under Rule 6(1)(b) read with Rule 9 cannot be equated with the procedure for promotion for assessing merit and suitability under Rule 6(1)(a) read with Rule 8.

36. The scope of recruitment through regular promotion under Rule 6(1)(a) read with Rule 8 is different from recruitment through promotion based on limited competitive examination under Rule 6(1)(b) read with Rule 9. As we have already noted, the purpose of a limited competitive examination, as set out in the judgment of this Court in **All India Judges' Association** (supra), was to provide an avenue for in-service officers to compete *inter se* for accelerated promotion on fulfilling a higher benchmark of competition based on merit. Moreover, this Court also recognised that the criteria and method of testing the suitability of judicial officers should be different:

> "27. [...] Furthermore, there should also be an incentive amongst the relatively junior and other officers to improve and to compete with each other so as to excel and get quicker promotion. In this way, we expect that the calibre of the members of the Higher Judicial Service will further improve. In order to achieve this, while the ratio of 75 per cent appointment by promotion and 25 per cent by direct recruitment to the Higher Judicial Service is maintained, **we are, however, of the opinion that there should be two methods as far as appointment by promotion is concerned : 50 per cent of the total posts in the Higher Judicial Service must be filled by promotion on the basis of principle of merit-cum-seniority. For this purpose, the High Courts should devise and evolve a test in order to ascertain and examine the legal knowledge of those candidates and to assess their continued efficiency with adequate knowledge of case-law. The remaining 25 per cent of the posts in the service shall be filled by promotion strictly on the basis of merit through the limited departmental competitive examination for which the qualifying service as a Civil Judge (Senior Division) should be not less than five years.** The High Courts will have to frame a rule in this regard."
>
> (emphasis supplied)

37. The submission of the unsuccessful officers, that there is no valid basis in law to impose a minimum eligibility cut-off of obtaining 50% marks individually in the written test and the *viva voce*, when

such a requirement is not imposed either for direct recruitment or for the limited competitive examination cannot hold substance. This argument is premised on the fact that the three different modes of recruitment are meant for the same post. It is argued that since the purpose of all the three sources is to recruit persons for the same post, a different requirement such as the 50% cut-off requirement for the viva voce in one of the three modes, is arbitrary. Though the recruitment is meant to fill vacancies in the same post in the higher judicial service, the candidates taking the three routes to reach that post are placed differently and thus must be tested differently. In-service candidates seeking recruitment through promotions cannot be considered on par with the candidates seeking direct recruitment or for that matter with candidates seeking accelerated promotion through a limited competitive test.[9]

38. Even among the candidates seeking promotion, there is a clear distinction between those who are recruited under Rule 6(1)(a) based on merit-cum-seniority and those who are recruited under Rule 6(1)(b) based strictly on merit, in order to avail of a quicker promotion. This Court in **All India Judges' Association** (supra) clearly noted that the rationale for accelerated promotions was to afford an incentive to those who were relatively junior but desirous of promotion.[10] Similarly, in **Dheeraj Mor v. High Court of Delhi**,[11] a three-Judge Bench of this Court held that the purpose of promotion through a limited competitive examination is to ensure that in-service candidates are able to "take march to hold the post of District Judges on the basis of their merit."

39. The Rules prescribe different criteria for assessing the in-service judicial officers eligible for promotion - while one is based on merit-cum-seniority,[12] the other is based strictly on merit *de hors* seniority.[13] This difference justifies the distinct methods of evaluation prescribed under Rules 8 and 9. A comparison of Rules 8 and 9 would show that the written examination under Rule 9 carries 600 marks and is much more elaborate and rigorous, as opposed to the 75 marks' objective

9 Dheeraj Mor v. High Court of Delhi, [2020] 2 SCR 161 : (2020) 7 SCC 401

10 All India Judges' Association (supra), [27].

11 [2020] 2 SCR 161 : (2020) 7 SCC 401

12 Rule 6(1)(a)

13 Rule 6(1)(b)

test under Rule 8. The first proviso to Rule 9[14] mandates that the High Court shall, in addition to competitive examination mentioned in Rule 9, consider any criteria as specified under Rule 8. As we shall advert to later in this judgment, the ultimate discretion vests with the High Court regarding how they conduct the examinations under the Rules. The proviso while recognising the power of the High Court to import "any of the criteria" specified in Rule 8 to Rule 9, retains the other differences about the manner in which the two processes of promotion under Rule 8 and Rule 9 would operate. Thus, even though candidates seeking promotions under Rules 6(1)(a) and 6(1)(b) are drawn from in-service judicial officers, there is a rational basis of treating them differently - while some candidates among the in-service officers can seek regular promotions based on their seniority, those relatively junior have an incentive to opt for accelerated promotion by taking a limited competitive examination by demonstrating their merit. Bearing in mind the distinct nature of the test under Rule 8, it cannot be gainsaid that there is a valid basis for imposing a distinct requirement, in this case, of an eligibility cut-off both in the written test and the *viva voce* independently. The fundamental point is that each of the three avenues for appointment to the Higher Judicial Service are distinct and are based on classifications having a nexus to the object and purpose sought to be achieved. Whether such a requirement is violative of Articles 233 and 235 of the Constitution is a separate matter which would have to be adjudicated independently, which we will do in the subsequent part of this judgment.

40. It is true, as has been submitted on behalf of the unsuccessful candidates, that the Shetty Commission had declined to impose a minimum cut-off in the *viva voce* conducted for appointments to the Service by direct recruitment. The Shetty Commission appears to have been impelled to do so to avoid an element of subjectivity.[15] Based on this, the unsuccessful candidates sought to urge that the same rationale must apply to the *viva voce* which was held in the normal process of promotion.

41. Now, it is true that certain recommendations of the Shetty Commission in regard to the improvement of the pay scales of the judicial officers

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14 *"Provided that the High Court shall in addition to the above competitive examination take into consideration any of the criteria as specified in Rule 8 above.."*

15 Shetty Commission Report, [10.97]

were accepted by this Court in the decision of this Court in **All India Judges' Association** (supra). However, there was no specific finding in paragraphs 27 and 28 of the **All India Judges' Association** (supra) in regard to whether a cut-off should be imposed for recruitment by way of regular promotion. The Court had merely remarked that "there should be an objective method of testing the suitability of the subordinate judiciary"[16], without making any observation about the desirability or otherwise of minimum cutoffs for *viva voce* generally. We do not read the decision of this Court in **All India Judges' Association** (supra) as precluding the High Court from doing so based on the exigencies of the Service in the State. In any case, based on the discussion above, the three modes of recruitment have been reasonably classified and different requirements have been prescribed for each. As such, what may or may not have been held in respect of the *viva voce* in direct recruitments may not necessarily apply to the *viva voce* requirement in recruitments through promotions.

42. It is important to bear in mind that the Higher Judicial Services require the selection of judicial officers of mature personality and requisite professional experience. In-service judicial officers are expected to have a greater familiarity with the law and the procedure based on their experience as judicial officers. While an objective written examination can be the best gauge of the legal knowledge of a candidate, the viva voce offers the best mode of assessing the overall personality of a candidate. In **Lila Dhar v. State of Rajasthan**,[17] this Court noted the importance of giving necessary weightage to the interview test in the following words:

> **"6.** Thus, the written examination assesses the *man's* intellect and the interview test the man himself and "the twain shall meet" for a proper selection. If both written examination and interview test are to be essential features of proper selection, the question may arise as to the weight to be attached respectively to them. In the case of admission to a college, for instance, where the candidate's personality is yet to develop and it is too early to identify the personal qualities for which greater importance may

16 All India Judges' Association (supra), [27].

17 [1982] 1 SCR 320 : (1981) 4 SCC 159

have to be attached in later life, greater weight has per force to be given to performance in the written examination. The importance to be attached to the interview-test must be minimal. That was what was decided by this Court in *Periakaruppan* v. *State of Tamil Nadu* [(1971) 1 SCC 38 : (1971) 2 SCR 430] , *Ajay Hasia* v. *Khalid Mujib Sehravardi* [(1981) 1 SCC 722; 1981 SCC (L&S) 258 : AIR 1981 SC 487] and other cases. **On the other hand, in the case of services to which recruitment has necessarily to be made from persons of mature personality, interview test may be the only way, subject to basic and essential academic and professional requirements being satisfied. To subject such persons to a written examination may yield unfruitful and negative results, apart from its being an act of cruelty to those persons.** There are, of course, many services to which recruitment is made from younger candidates whose personalities are on the threshold of development and who show signs of great promise, and the discerning may in an interview-test, catch a glimpse of the future personality. In the case of such services, where sound selection must combine academic ability with personality promise, some weight has to be given, though not much too great a weight, to the interview-test. There cannot be any rule of thumb regarding the precise weight to be given. It must vary from service to service according to the requirements of the service, the minimum qualifications prescribed, the age group from which the selection is to be made, the body to which the task of holding the interview-test is proposed to be entrusted and a host of other factors. It is a matter for determination by experts. It is a matter for research. It is not for courts to pronounce upon it unless exaggerated weight has been given with proven or obvious oblique motives. The Kothari Committee also suggested that in view of the obvious importance of the subject, it may be examined in detail by the Research Unit of the Union Public Service Commission."

43. In Taniya Malik v. Registrar General of the High Court of Delhi,[18] the petitioners challenged the prescription of minimum cut-off marks for the viva voce during the selection process of the Delhi Judicial Service Examination 2015. A two-Judge Bench of this Court declined to accept the challenge of the petitioners on the ground that "it is desirable to have the interview and it is necessary to prescribe minimum passing marks for the same when the appointment in the higher judiciary to the post of District Judge is involved." The court further observed that the interview is the best method of judging "the performance, overall personality and the actual working knowledge and capacity to perform otherwise the standard of judiciary is likely to be compromised."

44. In the present case, the High Court has come to the conclusion that apart from seeking proficiency in the substantive knowledge of law, based on the written test, in-service judicial officers must possess communication and other skills which would emerge in the course of an interview. We must be mindful of the fact that the interview in such cases is not being held at the very threshold of the service, while making recruitments at the junior-most level. Rather, the interview is being held to fill up a senior position in the District Judiciary, that of an Additional District and Sessions Judge. Such officers, based on their prior experience, must be expected to demonstrate a proficiency in judicial work borne from their long years of service. The purpose of the interview for officers in that class is to assess the officer in terms of the ability to meet the duties required for performing the role of an Additional District and Sessions Judge. Consequently, there would be a reasonable and valid basis, if the High Court were to do so, to impose a requirement of a minimum eligibility or cut-off both in the written test and in the *viva voce* separately.

ii. The Rules can be supplemented to fill in gaps

45. That leads us to the analysis of the provisions of Rule 6, on the one hand, and Rule 8, on the other. As we have already noticed, Rule 6(1)(a) provides for promotion to 65% of the posts to the Higher Judicial Service on the basis of the principle of merit- cum-seniority and the passing of a suitability test. The principle of merit-cum- seniority is an approved method of selection where merit

18 [2018] 10 SCR 348 : (2018) 14 SCC 129

is the determinative factor and seniority plays a less significant role.[19] Where the principle of 'merit-cum- seniority' is the basis, the emphasis is primarily on the comparative merit of the judicial officers being considered for promotion. Resultantly, even a junior officer who demonstrates greater merit than a senior officer will be considered for promotion.

46. Through their letter dated 02 March 2023, the State Government raised an objection to the recommendations made by the High Court. The State requested the High Court to "clarify the non-recommendation" of certain officers who were higher in seniority to the officers recommended by the High Court. While as an abstract proposition, promotion of judicial officers on the basis of seniority alone may impart objectivity to the entire process, this Court has also cautioned against using seniority as the sole criterion for promotion in such cases. The Higher or Superior Judicial Service is a gateway to eventual appointments to the High Court. Steps may legitimately be taken by the High Court to ensure that appointments to the higher echelons of the judiciary does not become a parade of mediocrity.

47. In **Sant Ram Sharma v. State of Rajasthan**,[20] a Constitution Bench of this Court held that consideration of merit along with seniority in the procedure of promotion is not violative of Article 14 and 16 of the Constitution. It was also observed:

> "9. [...] The question of proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. **But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones**; an official has nothing to win or lose provided he does not actually become so inefficient that the disciplinary action has to be taken against him.

19 B V Sivaiah v. K. Addanki Babu, [1998] 3 SCR 782 : (1998) 6 SCC 720

20 [1968] 1 SCR 111 : 1967 SCC OnLine SC 16

> But, though the system is fair to the officials concerns, it is a heavy burden on the public and a great strain on the efficient handling of public business. [.]"
>
> (emphasis supplied)

48. According to Rule 6(1)(a), the inter-se merit of the judicial officers plays a greater role in making promotions. The passing of a suitability test is a measure of assessment of the merit of the judicial officers under consideration for promotion. The passing of a suitability test, in other words, is complemented by the requirement of observing the principle of merit-cum-seniority. Rule 8 particularly provides for the procedure for promotion for "assessing and testing the merit and suitability" of the judicial officers. It states that the High Court "may" hold a written objective test of 75 marks and viva voce of 25 marks in order to ascertain and examine the legal knowledge and efficiency in the legal field of the judicial officers. It is important to note that the use of the word "may" in Rule 8 confers discretion on the High Court with respect to the conduct of the written objective test and viva voce. In comparison, Rule 9, which lays down the procedure for a limited competitive examination while implementing Rule 6(1)(b), uses the word "shall" in a mandatory sense. The use of the word "may" in Rule 8 indicates that the High Court has certain discretion in terms of the conduct of the written objective test and viva voce for promotion of judicial officers in terms of Rule 6(1)(a).

49. Moreover, the Rules in the present case are entirely silent in regard to the prescription of a minimum eligibility for clearing a competitive test, on the one hand, and the *viva voce*, on the other hand. If the Rules were to specifically provide in a given case that the criterion for eligibility would be on the combined marks of both the written test and the *viva voce*, the matter would have been entirely different.[21] Rule 6(1)(a) and Rule 8 being silent as regards the manner in which merit and suitability would be determined, administrative instructions can supplement the Rules in that regard. This is not a case where the Rules have made a specific provision in which event the administrative instructions cannot transgress a rule which is being made in pursuance of the power conferred under Article 309 of the Constitution. For instance, if the Rules were to provide that there

21 P K Ramachandra Iyer v. Union of India, [1984] 2 SCR 200 : (1984) 2 SCC 141, [44]

would be a minimum eligibility requirement only in the written test, conceivably, it may not be open to prescribe a minimum eligibility requirement in the *viva voce* by an administrative instruction. Similarly, if the Rules were to provide that the eligibility cut-off would be taken on the basis of the overall marks which are obtained in both the written test and the *viva voce*, conceivably, it would not be open to the administrative instructions to modify the terms.

50. The appropriate authority cannot amend or supersede statutory rules by administrative actions. However, it is open to it to issue instructions to fill up the gaps and supplement the rules where they are silent on any particular point.[22] Such instructions have a binding force provided they are subservient to the statutory provisions and have been issued to fill up the gaps between the statutory provisions.[23]

51. In **K H Siraj v. High Court of Kerala**,[24] this Court was called upon to determine the validity of the decision of the High Court of Kerala in prescribing minimum marks for the oral examination as a condition of eligibility for selection as Munsif Magistrate. The relevant provision, that is, Rule 7 of the Kerala Judicial Service Rules 1991, mandated the High Court to hold written and oral examinations and prepare a list of candidates considered suitable for appointment to Category 2 posts. This Court held that even though Rule 7 was silent on the question of minimum marks for oral examination, it was open to the High Court to supplement the Rule:

> "**62.** Thus it is seen that apart from the amplitude of the power under Rule 7 it is clearly open for the High Court to prescribe benchmarks for the written test and oral test in order to achieve the purpose of getting the best available talent. There is nothing in the Rules barring such a procedure from being adopted. It may also be mentioned that executive instructions can always supplement the Rules which may not deal with every aspect of a matter. Even assuming that Rule 7 did not prescribe any particular minimum, it was open to the High Court to supplement the

22 Sant Ram Sharma v. State of Rajasthan, [1968] 1 SCR 111 : 1967 SCC OnLine SC 16 [7]; State of Gujarat v Akhilesh C Bhargav, [1987] 3 SCR 1091 : (1987) 4 SCC 482, [7]

23 State of Uttar Pradesh v. Chandra Mohan Nigam, [1978] 1 SCR 521 : (1977) 4 SCC 345 [26];

24 [2006] Supp. 2 SCR 790 : (2006) 6 SCC 395

rule with a view to implement them by prescribing relevant standards in the advertisement for selection."

52. In the present case, the Rules are silent in regard to the manner in which the merit or suitability would be determined. In view of the silence of the Rules, it is open to the High Court in the exercise of its administrative authority to provide the modalities in which merit or suitability would be determined.

iii. Sivanandan C T

53. Next, it would become necessary to dwell on a recent decision of the Constitution Bench of this Court in **Sivanandan C T** (supra). The issue in that case pertained to the validity of the selection process to the Higher Judicial Services through direct recruitment conducted by the High Court of Kerala. The Kerala State Higher Judicial Services Rules 1961 stipulated that the direct recruitment from the Bar shall be "on the basis of aggregate marks/grade obtained in a competitive examination and viva voce conducted by the High Court." Thereafter in 2012, the High Court of Kerala published its Scheme for the examination for recruitment of members of the Bar to the Kerala Higher Judicial Service. The Scheme specifically provided that there shall be no cut-off of marks in the *viva voce*. Following this, the High Court issued a notification in 2015 inviting applications from qualified candidates for appointment as District and Sessions Judges by direct recruitment from bar. The notification of the High Court indicated that candidates who secured a minimum of 50% marks in the written test (relaxed to 40% for SC/ST candidates) would qualify for the *viva voce*. The notification also specified that the aggregate of marks in the written examination and the *viva voce* would form the basis of the ultimate merit list. In view of the notification, the High Court conducted the written examination and viva voce of the qualified candidates. When the process of selection had commenced, all candidates were put on notice of the fact that:

(i) The merit list would be drawn up on the basis of the aggregate marks obtained in the written examination and *viva voce*;

(ii) Candidates whose marks were at least at the prescribed minimum in the written examination would qualify for the *viva voce*; and

(iii) No cut-off was applicable in respect of the marks to be obtained in the *viva voce* while drawing up the merit list in the aggregate.

54. After the conduct of the viva voce, the High Court decided to apply a minimum cut-off in the viva voce as a qualifying criterion. Subsequently, the final merit list of successful candidates was published. The decision of the High Court to prescribe a minimum cut-off for the viva voce was challenged for being contrary to the statutory rules which prescribed that the merit list shall be drawn up on the basis of the aggregate marks obtained in the written examination and viva voce.

55. In the backdrop of these facts, this Court held:

> "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."

56. Moreover, this Court took note of the fact that subsequently the rules in the State of Kerala were amended in 2017 to prescribe a cut-off of 35% marks in the *viva voce* examination which was not the prevailing legal position when the process of selection was initiated in that case. The above extract from the decision of this Court in **Sivanandan C T** (supra) reveals that it was a cumulative set of factors set out in paragraph 14 which have led to the ultimate determination. The statutory rules had indicated in that case that the

merit list would be prepared on the basis of the aggregate marks in the written examination and the *viva voce*. The Scheme of the High Court had specified that there would be no separate cut-off for the *viva voce*. Moreover, the process of shortlisting, as prescribed, was to be on the basis of the length of the service. Finally, the decision to prescribe a cut-off in the *viva voce* was taken much after the test was conducted.

57. The facts as they stand in the present case are clearly in contrast to those contained in **Sivanandan C T** (supra). As opposed to the Rules having made a specific provision, the Rules were clearly silent in the present case. It is in this backdrop, in the face of the silence of the statutory rules that the High Court had, in its initial Full Court Resolution dated 29 January 2013, prescribed an overall cut-off of 50% of combined marks in the written test and in the *viva voce*. The High Court, while amending the text of its Full Court Resolution of 29 January 2013, had done so in the exercise of the same administrative capacity which it had wielded while formulating the original Resolution. Hence, the Resolution of the High Court dated 30 November 2021 cannot be faulted in that regard.

58. The unsuccessful candidates in the present case have further relied on **Sivanandan C T** (supra) to contend that the absence of notice to the candidates about the imposition of the minimum cut-off marks for the viva voce contravenes their legitimate expectation. In **Sivanandan C T** (supra), this Court held that an individual who claims a benefit or entitlement based on the doctrine of legitimate expectation has to establish: (i) the legitimacy of the expectation; and (ii) that the denial of the legitimate expectation led to a violation of Article 14. In **Sivanandan C T** (supra), the statutory rules coupled with the Scheme of the High Court generated a legitimate expectation that (i) the merit list would be drawn based on the aggregate of the total marks received in the written examination and viva voce; and (ii) there would be no minimum cut-off marks for the viva voce. However, in the present case neither the statutory Rules, nor the High Court committed that there would be no cut-off marks for the viva voce so as to give rise to such a legitimate expectation on behalf of the petitioners. Furthermore, the decision of the High Court to apply the minimum cut-off marks for the viva voce is grounded in legality, and therefore, cannot be faulted for contravening the established practice.

iv. Articles 233, 234 and 235 of the Constitution of India

59. That leads us to the analysis of the provisions of Articles 233, 234 and 235 of the Constitution. Clause (1) of Article 233 stipulates that appointment of persons to be District Judges in the State and their posting and promotion shall be made by the Governor in consultation with the High Court exercising jurisdiction in the State. According to Article 234, appointments of persons other than District Judges to the Judicial Service of a State are to be made by the Governor in accordance with the rules made in that behalf after consulting the State Public Service Commission and the High Court exercising jurisdiction in relation to the State. Control over the "Subordinate Courts" under Article 235 is vested in the High Court. Article 235 provides that:

> "The control over district courts and courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."

60. These provisions have been dealt with in several decisions of this Court, including in decisions of Constitution Benches. In the course of its judgment, the High Court has elaborately dealt with several of these judgments.

61. In **Chandra Mohan v. State of Uttar Pradesh**[25], a Constitution Bench of this Court, speaking through Chief Justice K Subba Rao, held that the constitutional mandate under Article 233 is that the exercise of the power of appointment by the Governor is conditioned by consultation with the High Court. The object of consultation is that the High Court is expected to know better than the Governor the suitability of a person belonging either to the Judicial Service or

25 [1967] 1 SCR 77 : (1967) 1 SCR 77

to the Bar for appointment as a District Judge. The Court held that the mandate would stand disobeyed if the Governor either did not consult the High Court at all or if it were to consult the High Court or any other person in a manner not contemplated. The Court held that in case the Governor consults an authority other than the High Court, it would amount to indirect infringement of the mandate of the Constitution. In situations where the Constitution sought to provide for more than one consultant, it did so (for e.g. Articles 124 (2), 217(1)). Impliedly, this Court held that the duty of consultation is intertwined with the exercise of power itself, and such power can be exercised only in consultation with the person or persons designated under the relevant provisions of the Constitution. Hence, it was held that if the Rules empowered the Governor to appoint a person as District Judge in consultation with a person or authority other than the High Court, the appointment would not be in accordance with the provisions of Article 233. The Court observed as follows:

> "We are assuming for the purpose of these appeals that the "Governor" under Art. 233 shall act on the advice of the Ministers. So, the expression "Governor" used in the judgment means Governor acting on the advice of the Ministers. The constitutional mandate is clear. The exercise of the power of appointment by the Governor is conditioned by his consultation with the High Court, that is to say, he can only appoint a person to the post of district judge in consultation with the High Court. The object of consultation is apparent the High Court is expected to know better than the Governor in regard to the suitability or otherwise of a person, belonging either to the "judicial service" or to the Bar, to be appointed as a district judge. Therefore, a duty is enjoined on the Governor to make the appointment in consultation with a body which is the appropriate authority to give advice to him. This mandate can be disobeyed by the Governor in two ways, namely, (i) by not consulting the High Court at all, and (ii) by consulting the High Court and also other persons. In one case he directly infringes the mandate of the Constitution and in the other he indirectly does so, for his mind may be influenced by other persons not entitled to advise him. That this constitutional mandate has both a negative and

> positive significance is made clear by the other provisions of the Constitution. **Wherever the Constitution intended to provide more than one consultant, it has said so: see Arts. 124(2) and 217(1). Wherever the Constitution provided for consultation of a single body or individual it said so: see Art. 222. Art. 124(2) goes further and makes a distinction between persons who shall be consulted and persons who may be consulted. These provisions indicate that the duty to consult is so integrated with the exercise of the power that the power can be exercised only in consultation with the person or persons designated therein.** To state it differently, if A is empowered to appoint B in consultation with C, he will not be exercising the power in the manner prescribed if he appoints B in consultation with C and D."
>
> (emphasis added)

62. In matters of appointment of judicial officers, the opinion of the High Court is not a mere formality because the High Court is in the best position to know about the suitability of candidates to the post of District Judge.[26] The Constitution therefore expects the Governor to engage in constructive constitutional dialogue with the High Court before appointing persons to the post of District Judges under Article 233. In **State of Haryana v Inder Prakash Anand HCS**[27], a Constitution Bench of this Court speaking through Chief Justice AN Ray observed that the High Court is acquainted with the capacity of work of the members already in service. Underlining the significance of the High Court's 'control' over the appointments under Article 235, it was held that the High Court's opinion will have a binding effect on the Governor according to the constitutional scheme. This Court noted as follows:

> "18. The control vested in the High Court is that if the High Court is of opinion that a particular judicial officer is not fit to be retained in service, the High Court will communicate that to the Governor because the Governor is the authority to dismiss, remove, reduce in rank or terminate the

26 Chandramouleshwar Prasad v. Patna High Court, [1970] 2 SCR 666 : (1969) 3 SCC 56

27 [1976] Supp. 1 SCR 603 : (1976) 2 SCC 977

> appointment. **In such cases it is the contemplation in the Constitution that the Governor as the head of the State will act in harmony with the recommendation of the High Court. If the recommendation of the High Court is not held to be binding on the State consequences will be unfortunate**. It is in public interest that the State will accept the recommendation of the High Court. **The vesting of complete control over the subordinate Judiciary in the High Court leads to this that the decision of the High Court in matters within its jurisdiction will bind the State.** "The Government will act on the recommendation of the High Court. That is the broad basis of Article 235.""
>
> (emphasis added)

63. In **State of Bihar v Bal Mukund Sah**[28], another Constitution Bench held that the constitutional scheme guaranteeing the independence of the Judiciary and the separation of power between the Executive and the Judiciary as basic features of the Constitution must be borne in mind. It was held that while Article 309 of the Constitution creates a permissible field of regulation by the Legislature, regarding conditions of service of already recruited judicial officers, it does not mean that the High Court's opinion can be overlooked. The process of appointments to the District Judiciary was held to be insulated from interference by way of the 'complete code' for the purpose laid down under Articles 233 and 234. This intention to insulate the process, the Court observed, is clear from the fact that these provisions are not subject to any other law enacted by the Legislature.[29] The Constitution intended to create a complete and insulated scheme of recruitment to the District Judiciary. Speaking in the context of the rules under Articles 234, 235 and 309 specifically, this Court observed that consultation with the High Court was indispensable.

64. The Court observed:

> "58... It is now time for us to take stock of the situation. In the light of the constitutional scheme guaranteeing independence of the Judiciary and separation of powers

28 [2000] 2 SCR. 299 : (2000) 4 SCC 640

29 ibid at para 35.

between the Executive and the Judiciary, the Constitution-makers have taken care to see by enacting relevant provisions for the recruitment of eligible persons to discharge judicial functions from the grass-root level of the Judiciary up to the apex level of the District Judiciary, **that rules made by the Governor in consultation with the High Court in case of recruitment at grass-root level and the recommendation of the High Court for appointments at the apex level of the District Judiciary under Article 233, remain the sole repository of power to effect such recruitments and appointments.** ...For judicial appointments the real and efficacious advice contemplated to be given to the Governor while framing rules under Article 234 or for making appointments on the recommendations of the High Court under Article 233 emanates only from the High Court which forms the bedrock and very soul of these exercises. **It is axiomatic that the High Court, which is the real expert body in the field in which vests the control over the Subordinate Judiciary, has a pivotal role to play in the recruitments of judicial officers whose working has to be thereafter controlled by it under Article 235 once they join the Judicial Service after undergoing filtering process at the relevant entry points. It is easy to visualise that when control over the District Judiciary under Article 235 is solely vested in the High Court, then the High Court must have a say as to what type of material should be made available to it both at the grass-root level of the District Judiciary as well as the apex level thereof so as to effectively ensure the dispensation of justice through such agencies with the ultimate object of securing efficient administration of justice for the suffering litigating humanity.** Under these circumstances, it is impossible to countenance bypassing of the High Court either at the level of appointment at the grass-root level or at the apex level of the District Judiciary. **The rules framed by the Governor as per Article 234 after following due procedure and the appointments to be made by him under Article 233 by way of direct recruitment**

> **to the District Judiciary solely on the basis of the recommendation of the High Court clearly project a complete and insulated scheme of recruitment to the Subordinate Judiciary.** This completely insulated scheme as envisaged by the Founders of the Constitution cannot be tinkered with by any outside agency dehors the permissible exercise envisaged by the twin Articles 233 and 234.
>
> (emphasis added)

65. In numerous decisions, this Court has emphasized the importance of the control which is wielded by the High Courts over the District Judiciary.[30] Undoubtedly, it is equally well-settled that when the Rules under Article 309 hold the field, these Rules have to be implemented. Where specific provisions are made in the Rules framed under Article 309, it would not be open to the High Court to issue administrative directions either in the form of the Full Court Resolution or otherwise, that are at inconsistent with the mandate of the Rules. On the other hand, in cases such as the one at hand, where the Rules were silent, it is open to the High Court to issue a Full Court Resolution. The High Court did so initially on 29 January 2013, but modified the Resolution on 30 November 2021 by prescribing that candidates for appointment to the Higher Judicial Service should have a minimum of 50% both in the written test as well as in the *viva voce* independently. The wisdom of the prescription is clear. A candidate should not just demonstrate the ability to reproduce their knowledge by answering questions in the suitability test, but must also demonstrate both practical knowledge and the application of the substantive law in the course of the interview. The Rules being silent, it was clearly open to the High Court to prescribe such a criterion as it did in 2013, when the 50% cutoff was prescribed on aggregate scores and also, in 2021, when the 50% cutoff was prescribed on the written test scores and the viva voce separately.

66. We are in agreement with the High Court that the State Government travelled beyond the remit of the consultation with the High Court by referring the matter to the Union Government. Any issue between the High Court and the State Government should have been ironed

30 State of West Bengal v. Nripendra Nath Bagchi, [1966] 1 SCR 771 : 1965 SCC OnLine SC 22; High Court of Punjab and Haryana v. State of Haryana, [1975] 3 SCR. 365 : (1975) 1 SCC 843, High Court of Judicature for Rajasthan v. PP Singh, [2003] 1 SCR 593 : (2003) 4 SCC 239.

out in the course of the consultative process within the two entities. The State Government was bound to consult only the High Court in the manner elaborated by the abovementioned judgements. Any other exercise *de hors* such consultation would not be in accordance with the scheme of the Constitution.

D. Conclusion

67. We have, therefore, come to the conclusion that the State Government was plainly in error in finding fault with the process which is being followed by the High Court and in concluding that the decision of the High Court amounted to an arbitrary exercise of power. Though the Solicitor General pointed out that the expressions "arbitrary" and "betrayal of trust" were used in the communication of the State Government placing reliance on an earlier judgment of this Court, we would leave the matter at that while affirming the conclusion of the High Court.

68. For the above reasons, we hold that the impugned judgment and order of the High Court dated 20 December 2023 does not suffer from any legal or other infirmity. The appeals shall accordingly stand dismissed.

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

Headnotes prepared by:
Prastut Mahesh Dalvi, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeals dismissed.

[2024] 2 S.C.R. 1178 : 2024 INSC 198

Thakore Umedsing Nathusing
v.
State of Gujarat

(Criminal Appeal No. 250 of 2016)

22 February 2024

[B.R. Gavai and Sandeep Mehta,* JJ.]

Issue for Consideration

Scope of interference by High Court in an appeal challenging acquittal of the accused by the trial Court; standard of proof required to bring home charges in a case based purely on circumstantial evidence.

Headnotes

Code of Criminal Procedure, 1973 – s.378(1)(b) – Appeal in case of acquittal – Interference by High Court – Scope – Prosecution's case that the accused persons took the jeep of the victim-deceased on hire and thereafter they murdered the victim and looted the jeep – Appellants-accused were convicted and sentenced for offence punishable u/s.392, IPC however, were acquitted u/s.302 r/w s.34 and ss.396 and 397, IPC – High Court reversed the acquittal and convicted them for offences punishable u/ss.302, 396, IPC and sentenced accordingly – Correctness:

Held: No direct evidence was led to bring home the charges against the accused and the entire case of prosecution was based on circumstantial evidence – Prosecution miserably failed to lead reliable, tangible and convincing links forming a complete chain of incriminating circumstances so as to bring home the guilt of the accused for the charge of murder punishable u/s.302 – Further, while reversing the acquittal of the accused recorded by the trial Court for the charges u/s.302 r/w s.34 and ss.396, 397, the High Court did not record any such finding that the view taken by the trial Court based on appreciation of evidence was either perverse or it was not one of the permissible views favouring the acquittal of the accused – Thus, the impugned judgment falls short of the satisfaction mandatorily required to be recorded for reversing a judgment of acquittal and converting it to one of conviction –

* Author

Judgment of the High Court is based on conjectures and surmises rather than on any substantive or reliable circumstantial evidence pointing exclusively to the guilt of the accused – Judgment of the trial Court, convicting and sentencing the accused for offence u/s.392 is also based on the same set of inadmissible and unreliable links of circumstantial evidence, and the impugned judgment of the High Court are quashed and set aside – Appellants acquitted. [Paras 22, 37, 38-41]

Evidence – Circumstantial evidence – Standard of proof – Prosecution case that the accused persons had taken the jeep of the victim-deceased on hire and thereafter they murdered the victim and looted the jeep – Case of prosecution based entirely on circumstantial evidence:

Held: Prosecution relied upon the circumstantial evidence comprising of disclosures, recoveries and discoveries for bringing home the guilt of the accused – The most important recovery was allegedly of the jeep – The said recovery was attributed to A1, who was allegedly apprehended by PSI (PW-22) – He forwarded a report/communication (Exhibit-96) to the officer in-charge of the Sardarnagar Police Station wherein, the confession made by A1 implicating himself and the other accused was recorded – So called disclosure statement made by A1 (Exhibit-96) on which the prosecution banked upon and the High Court relied upon by treating it to be an incriminating circumstance against the accused persons was inadmissible, unworthy of reliance and doubtful and cannot be read in evidence against the other accused i.e. A2, A3 and A5 – Exhibit-96 being hit by s.25, Evidence Act cannot be read in evidence for any purpose whatsoever – The prosecution pinned the identity of A2, A3, and A5 as the assailants on the basis of the disclosure statement (Exhibit-96) of A1 – They were primarily convicted on the basis of the recoveries of knives and clothes – These so called incriminating articles allegedly recovered at the instance of the accused were never sent to the Serology expert for comparison of the blood groups existing thereupon with the blood group of the deceased – Evidence of the concerned police officials associated with the recoveries and their testimonies were highly doubtful – The knife which was recovered at the instance of A3 was found from a nala which is a place open and accessible to all – The knife attributed to A4 cannot be linked to him – Recoveries were highly doubtful and tainted – These

recoveries in no manner can be treated to be incriminating in nature – Even if it is assumed that such recoveries were effected, the same did not lead to any conclusive circumstance in form of Serological report establishing the presence of the same blood group as that of the deceased and hence they do not further the cause of prosecution – Prosecution failed to lead the link evidence mandatorily required to establish the factum of safe keeping of the muddamal articles and hence, the recoveries became irrelevant. [Paras 26-28, 30, 34-36]

Evidence – Confession of one co-accused against the other – Evidentiary value – Such statement not a substantive piece of evidence. [Para 36]

Case Law Cited

Sharad Birdhichand Sarda v. State of Maharashtra, [1985] 1 SCR 88 **: (1984) 4 SCC 116;** *H.D. Sundara and Others v. State of Karnataka,* [2023] 14 SCR 47 **: (2023) 9 SCC 581;** *Mustkeem alias Sirajudeen v. State of Rajasthan,* [2011] 9 SCR 101 **: (2011) 11 SCC 724;** *Haricharan Kurmi v. State of Bihar*, [1964] 6 SCR 623 **: AIR 1964 SC 1184 – relied on.**

List of Acts

Code of Criminal Procedure, 1973; Evidence Act, 1872; Penal Code, 1860.

List of Keywords

Appeal against acquittal; Circumstantial evidence; Disclosure statement; Confession of co-accused; Confession of an accused in custody; Recoveries doubtful; Recoveries not incriminating.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.250 of 2016

With

Criminal Appeal Nos. 218-219 of 2016 and Criminal Appeal No. 1102 of 2024

From the Judgment and Order dated 11.12.2015 of the High Court of Gujarat at Ahmedabad in CRLA No. 1012 of 1993

Appearances for Parties

Rauf Rahim, Sr. Adv., Nachiketa Joshi, Mohd. Asad Khan, Ms. Sucheta Joshi, Himadri Haksar, Narayan Dev Parashar, Ali Asghar Rahim, Shekhar Kumar, Advs. for the Appellant.

Ms. Archana Pathak Dave, Sr. Adv., Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. These appeals take exception to the common judgment dated 11th December, 2015 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal Nos. 949 of 1994 and 1012 of 1993.

2. The appellants being the original accused Nos. 1, 2, 3 and 5 namely Thakore Laxmansing Halsing (hereinafter being referred to as A1), Thakore Pravinsing Rajsing(hereinafter being referred to as A2), Thakore Umedsing Nathusing (hereinafter being referred to as A3), Thakore Khemsing Halsing(hereinafter being referred to as A5) alongwith original accused No.4, namely, Thakore Prabhatsing Kapursing(hereinafter being referred to as A4), were tried in Sessions Case Nos. 107 and 143 of 1990 respectively by the learned Additional Sessions Judge, District Banaskantha at Palanpur (hereinafter being referred to as 'trial Court'). The accused appellants were convicted by the trial Court for the offence punishable under Section 392 of the Indian Penal Code, 1860 (for short 'IPC') and were sentenced to undergo 10 years' rigorous imprisonment with fine of Rs. 5,000/- and in default, to undergo further three months simple imprisonment. The learned trial Court acquitted accused appellants of the charges under Sections 302 read with Section 34 and Sections 396 and 397 IPC vide the judgment and final order dated 21st August, 1993. The original accused No.4 was acquitted of all the charges.

3. Being aggrieved, the accused appellants preferred Criminal Appeal No. 1012 of 1993 against the judgment and order dated 21st August, 1993 and craving acquittal whereas, the State preferred Criminal Appeal No. 949 of 1994 seeking to assail the acquittal of the accused appellants for the charged offences, i.e. Sections 302 read with Section 34 and Sections 396 and 397 of IPC.

Brief Case of Prosecution:-

4. One Vithalbhai Kachrabhai Barot PW-1 lodged a complaint dated 1st March, 1990 [Exhibit-21] at Gadh Police Station, Taluka Palanpur, Gujarat alleging *inter alia* that his son Bharatbhai (deceased) who used to drive a Jeep bearing registration No.GJ-08-114 had been murdered and his dead body was found lying in the field of one Nizamkhan at village Dangiya on Dantiwada Road. Based on the said complaint, Criminal Case (FIR) No. 2914 of 1990 came to be registered at Gadh Police Station, Taluka Palanpur, Gujarat and the investigation was commenced.

5. In the early hours of 2nd March, 1990, PSI J.N. Chaudhary (PW-22) of Sardarnagar Police Station saw a jeep being rapidly driven near Charannagar, Ahmedabad. The PSI tried to stop the jeep which was being driven away at a high speed and the same was stopped at some distance. Four persons alighted from the jeep and tried to run away. One of these persons was chased down and was apprehended and he divulged his name to be Laxmansing(A1).

6. It is alleged that A1, upon interrogation by the police disclosed the names of four co-accused (A2, A3, A4 and A5) and stated that they were the ones who were travelling with him in the jeep.

7. During interrogation, A1 also confessed to the murder of the owner of the jeep and also that the vehicle was looted in the course of the said transaction. He also stated that the persons who had escaped from the spot were also privy to the murder. Since the jeep bore blood stains, it was seized and A1 was taken into custody.

8. The usual investigation was conducted; *panchnama* was prepared; the remaining four accused were apprehended. At the instance of A2, a blood stained knife was recovered which was alleged to be the weapon of offence. This recovery was alleged to be from a nala. A3 and A4 were arrested. Blood stained clothes of A3 were recovered. A4 was arrested on 4th April, 1990 and a knife was produced on his information by one Shobhnaben wife of Kanji Chhara. The Investigating Officer concluded that the accused persons had taken the jeep taxi of Bharatbhai (deceased) on hire and thereafter they murdered the victim and looted the jeep.

9. Two separate charge-sheets came to be filed against the accused in the Court of Judicial Magistrate Ist Class (JMFC) concerned for the offences punishable under Sections 302 read with Section 34 and Sections 396 and 397 of the IPC. The offences being exclusively triable by the Court of Sessions, both sets of charge-sheeted accused were committed to the Sessions Court, Banaskantha, at Palanpur from where the cases were made over to the Court of Additional Sessions Judge, Banaskantha at Palanpur for trial. Charges were framed against A1, A2, A3 and A4 in Sessions Case No. 107 of 1990 for the offences punishable under Section 302 read with Section 34 of the IPC and Sections 396 and 397 of the IPC. Identical charges came to be framed against A5 in Sessions Case No. 143 of 1990. The accused pleaded not guilty and claimed to be tried. Though charges were framed separately, the trial of both sets of accused was conducted jointly.

10. Twenty five (25) witnesses were examined and twenty three(23) documents were exhibited by the prosecution in order to prove its case. Upon being questioned under Section 313 of Code of Criminal Procedure, 1973 (hereinafter being referred to as 'CrPC') and when confronted with the circumstances portrayed by the prosecution against the accused, they denied the same and claimed to be innocent.

11. After hearing the arguments advanced by the learned Public Prosecutor and the defence counsel and upon appreciating the evidence available on record, the learned trial Court, proceeded to acquit accused No. 4 in entirety. While recording acquittal of A1, A2, A3 and A5 from the charges for the offences punishable under Section 302 read with Section 34 and Sections 396 and 397 of the IPC, they were held guilty and convicted for the offence punishable under Section 392 of the IPC and were sentenced to undergo 10 years' rigorous imprisonment and a fine of Rs. 5,000/-, in default to further undergo 3 months simple imprisonment. Being aggrieved by their conviction, the accused A1, A2, A3 and A5 preferred Criminal Appeal No. 1012 of 1993 whereas the State preferred Criminal Appeal No. 949 of 1994 for assailing acquittal of A1, A2, A3 and A5 before the Gujarat High Court.

12. The appeal preferred by the State being Criminal Appeal No. 949 of 1994 was allowed by the Division Bench of the High Court of Gujarat vide judgment dated 11th December, 2015 whereas the appeal

preferred by the accused appellants was dismissed. The High Court reversed the acquittal of the accused and convicted them for the offences punishable under Sections 302 and 396 IPC and sentenced them to undergo life imprisonment and the fine and default sentence imposed by learned trial Court was maintained.

13. The aforesaid judgment dated 11th December, 2015 is assailed in these appeals preferred on behalf of the accused appellants.

Submissions on behalf of accused appellants:-

14. Learned counsel for the accused appellants contended that the prosecution did not prove any document whatsoever to establish that the jeep bearing registration No.GJ-08-114 was owned by or was in possession of the deceased. The incriminating articles allegedly recovered at the instance of the accused were never got examined through the Forensic Sciences Laboratories (FSL). Only the blood samples of two accused were sent to the FSL for serological examination.

15. The prosecution miserably failed to prove the fact that A1 was found present in the Jeep bearing registration No.GJ-08-114, when the same was stopped by the PSI J.N. Chaudhary (PW-22) of the Kubernagar Police Station. In this regard, attention of the Court was drawn to the communication i.e. Exhibit-96 forwarded by PSI J.N. Chaudhary (PW-22) to the officer in-charge of the Sardarnagar Police Station wherein the registration number of the jeep is not mentioned. Learned counsel urged that this omission is fatal to the prosecution case.

16. It was thus urged that there is no reliable and tangible evidence establishing guilt of the accused beyond reasonable doubt so as to justify conviction of the accused-appellants as directed by the Division Bench of the Gujarat High Court while reversing the findings of acquittal recorded by the trial Court.

17. It was further contended that A2, A3 and A5 have been convicted solely on the basis of the confessional statement of A1 recorded by the Police Inspector PW-22. Learned counsel submitted that the said disclosure being in the form of a confession recorded by the Police Officer, is totally inadmissible in evidence as being hit by Sections 25 and 26 of the Indian Evidence Act, 1872(hereinafter being referred to as 'Evidence Act').

18. It was further submitted that the High Court, while reversing the acquittal of the accused as recorded by the trial Court, has not recorded any such finding that the view taken by the trial Court was perverse or two views i.e. one favouring the accused and the other favouring the prosecution were not possible from the evidence as available on record. It was contended that the findings recorded by the High Court in the impugned judgments are not based on any tangible evidence and are drawn sheerly on conjectures and surmises. They, therefore, submitted that the accused are entitled to an acquittal and the impugned judgment deserves to be set aside.

Submissions on behalf of Respondent-State:-

19. *Per contra*, Ms. Archana Pathak Dave, learned senior counsel appearing for the respondent-State vehemently opposed the submissions advanced by the learned counsel representing the accused-appellants. She submitted that the High Court, after thorough and apropos appreciation of the substantial and convincing circumstantial evidence led by the prosecution has recorded unimpeachable findings holding the accused guilty of the offences. She thus implored the Court to dismiss the appeals and affirm the judgment of the High Court.

Discussion:-

20. We have given our thoughtful consideration to the submissions advanced at bar and thoroughly perused the impugned judgment minutely and the evidence available on record.

21. Two fundamental issues are presented for adjudication in these appeals:-

    (i) The scope of interference by High Court in an appeal challenging acquittal of the accused by the trial Court;

    (ii) The standard of proof required to bring home charges in a case based purely on circumstantial evidence.

22. It is not in dispute that the prosecution did not lead any direct evidence so as to bring home the charges against the accused and the entire case of prosecution is based on circumstantial evidence.

23. The principles required to bring home the charges in a case based purely on circumstantial evidence have been crystalized by this Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra*, (1984) 4 SCC 116**. The following five golden rules were laid down in the above judgment: -

> *"(1) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be", fully established.*
>
> *(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."*

24. The principles that govern the scope of interference by the High Court in exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378(1)(b) CrPC were reiterated by this Court recently in the case of ***H.D. Sundara and Others v. State of Karnataka*, (2023) 9 SCC 581** as follows:

> *"(a) The acquittal of the accused further strengthens the presumption of innocence;*
>
> *(b) The appellate Court, while hearing an appeal against acquittal, is entitled to re-appreciate the oral and documentary evidence;*
>
> *(c) The appellate Court, while deciding an appeal against acquittal, after re-appreciating the evidence, is required to consider whether the view taken by the Trial Court is a possible view which could have been taken on the basis of the evidence on record;*

(d) If the view taken is a possible view, the appellate Court cannot overturn the order of acquittal on the ground that another view was also possible; and

(e) The appellate Court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

25. Viewed in the light of these well settled legal principles, we now proceed to evaluate the impugned judgment whereby the conviction of the accused has been recorded reversing the acquittal by trial Court. Relevant findings from the impugned judgment dated 11th December 2015 are reproduced hereinbelow for the sake of ready reference: -

"[6.1]. At the outset it is required to be noted and it is not in dispute that the dead body of the deceased Bharatbhai was found on 01.03.1990 in the agricultural field of one Nizamkhan at village Dangiya on Dantiwada road within the jurisdiction of the Gadh Police Station, Taluka Palanpur. It is not in dispute that that original accused No. 1 Laxmansingh was apprehended by the PSI Shri. Chaudhary of Sardarnagar Police Station on 02.03.1990 in the early morning. That on 02.03.1990, in early morning at Ahmedabad near Chharanagar, PSI of Sardarnagar Police station saw one jeep (muddamal jeep) coming in speed and he tried to stop the same. That four persons other than the original accused No. 1 were successful in running away from jeep, however the original accused No. 1 was arrested and interrogated. That the original accused No. 1 tried to explain his presence in the jeep in his further statement recorded under section 313 of the CrPC. According to original accused No. 1, as he wanted to go to Palanpur from Gitamandir Bus stand and one jeep was taking passengers to Palanpur, he was offered to sit in the same on payment of charges and therefore, he along with other passengers sat in the jeep and on the road near Sardarnagar Police tried to stop the jeep which was stopped at some distance and therefore, the

passengers and the driver ran away and when he alighted from the jeep, the police arrested him. However, by giving cogent reasons the learned trial Court has not accepted the defence of the original accused No. 1. It is required to be noted that to go to Palanpur from Gitamandir Bus stand, Chharanagar from where the original accused No. 1 was apprehended from jeep, was not the route at all. To got to Palanpur from Gitamandir Bus stand, one was not required to go to Chharanagar/Sardarnagar at all. Under the circumstances, as such the original accused No. 1 gave the false explanation/defence in his further statement recorded under section 313 of the CrPC. At this stage it is required to be noted that the design of the tyres of the jeep tallies with the tyre marks found at the place of incident from where the dead body of the deceased Bharatbhai was found. Even the design of the slippers of the original accused No. 1 tallies with the design of slipper found at the place of incident.

[6.2] In the present case there is recovery of the knife used in committing the offence, at the instance of original accused No. 2 Pravinsingh which was recovered from the place which could have been known to the said accused alone i.e. from Nala near Palanpur-Siddhpur Highway road. The recovery of the knife at the instance of the original accused No. 2 has been established and proved by examining the panch witnesses.

[6.3] In the present case even there is a recovery of the knife at the instance of the original accused Nos. 3 and 5 and the knife used in committing the offence was recovered from the place which was known to the said accused alone. Even the trousers/pant of the original accused Nos. 3 and 5 were recovered at their instance from the house of one Kanjibhai - friend of the said accused. The said pants were having blood stains. The original accused Nos. 3 and 5 have failed to explain the blood stains on their trousers. The recovery of the trouser/pants and the knife at the instance of original accused Nos. 3 and 5 have been established and proved by examining Kanjibhai at Exh.77 and his wife Shobhnaben.

[6.4]. It is further submitted that therefore when there are recoveries of the weapons used in committing the offence and even recovery of trousers/pants of original accused Nos. 3 and 5 having blood stains, at the instance of the original accused Nos. 2, 3 and 5 and when original accused No. 1 was as such found/apprehended/arrested with the muddamal jeep and his defence/explanation is found to be false and when the prosecution has been successful in establishing and/or proving the complete chain of events with respect to the involvement of the jeep which was driven by the original accused No. 1, it cannot be said that the trial Court has committed any error in convicting the accused Nos. 1, 2, 3 and 5 for the offence punishable under section 392 of the IPC. It is required to be noted that even the blood stains were found on the hood of the jeep and even on the knife.

[6.5]. Now, that takes us to the appeal preferred by the State against the impugned judgment and order of acquittal passed by the learned trial Court acquitting the original accused for the offences punishable under sections 302 and 396 of the IPC.

So far as the impugned judgment and order of acquittal passed by the learned trial Court acquitting the accused for the offence punishable under section 396 of the IPC is concerned, it appears that by the impugned judgment and order, the learned trial Court has acquitted the accused for the offence punishable under section 306 of the IPC on the ground that as original accused No. 4 has been acquitted and the number of remaining convicted accused would be only four, the learned trial Court has acquitted the remaining accused for the offence punishable under section 396 of the IPC. However, it is required to be noted that from the very beginning there were allegations of involvement of five persons in committing the offence. It is true that out of five accused, original accused No. 4 has been acquitted for want of sufficient evidence. However, on that ground alone the remaining accused could not have been acquitted for the offence punishable under section 396 of the IPC. As observed by the Hon'ble

Supreme Court in the case of Manoj Giri (Supra), in a given case it may happen that there can be five or more persons and the factum of five or more persons either is not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them and order their acquittal, observing that thereafter identity is not established, or that otherwise there is insufficient evidence to convict them, in such case there can be a conviction of less than five persons or even one for dacoity. Similar is the view taken by the Hon'ble Supreme Court in the case of Saktu (Supra). Under the circumstances and in the facts and circumstances of the case, learned trial Court has materially erred in acquitting the remaining original accused Nos. 1, 2, 3 and 5 for the offences punishable under section 396 of the IPC.

[6.6] Similarly, the learned trial Court has committed grave error in acquitting the original accused for the offence punishable under section 302 of the IPC. From the findings recorded by the learned trial Court as such the learned trial Court has specifically observed and given a finding that original accused Nos. 1, 2, 3 and 5 have committed the murder/loot and dacoity and there is ample material / evidence against them connecting them with respect to the murder of the deceased Bharatbhai. Therefore, as such the learned trial Court has already convicted the accused for the offence punishable under section 392 of the IPC. As observed hereinabove, original accused Nos. 1, 2, 3 and 5 are also held to be guilty for the offence punishable under section 396 of the IPC. Once the accused are convicted for the offence punishable under section 396 of the IPC i.e. dacoity with murder and the death of the deceased Bharatbhai was homicidal death, the learned trial Court ought to have convicted the accused for the offence punishable under section 302 of the IPC also. As observed hereinabove, the prosecution has been successful in proving and establishing the complete chain of events by leading cogent evidence and therefore, accused persons

were liable to be convicted for the offence punishable under section 302 of the IPC.

[6.7]. Now, so far as the reliance placed upon the decisions of the Hon'ble Supreme Court in the cases of Rakesh (Supra); Vijay Kumar (Supra) and Kanhaiyalal (Supra) relied upon by the learned advocate appearing on behalf of the original accused is concerned, it is required to be noted that on facts and the findings recorded by this Court, none of the aforesaid decisions shall be applicable and/ or of any assistance to the accused.

[6.8]. Now, so far as the reliance placed upon the decision of the Hon'ble Supreme Court in the case of Rakesh (Supra) by the learned advocate appearing on behalf of the accused is concerned, it is required to be noted that in the present case there is recovery of knife/s at the instance of original accused No. 2 and original accused Nos. 3 and 5 and that there is discovery of clothes of original accused Nos. 3 and 4 with blood stains which are not explained by the original accused Nos. 2, 3 and 5. Similarly, in the case before the Hon'ble Supreme Court in the case of Kanhaiyalal (Supra), except last seen together, there was no other evidence connecting the accused. Under the circumstances, none of the aforesaid decisions shall be applicable to the facts of the case on hand and/or shall be of any assistance to the accused.

[7.0]. In view of the above and for the reasons stated above, Criminal Appeal No. 1012/1993 preferred by the original accused against their conviction for the offence punishable under section 392 of the IPC is hereby dismissed."

26. On going through the record, we find that the prosecution relied upon the circumstantial evidence comprising of disclosures, recoveries and discoveries for bringing home the guilt of the accused.

27. The most important recovery is alleged to be of the jeep bearing registration No.GJ-08-114.

28. We may note that the said recovery is attributed to A1, who was allegedly apprehended by PSI J.N. Chaudhary (PW-22) on 02nd March, 1990. He forwarded a report/communication (Exhibit-96)

dated 2nd March, 1990 to the officer in-charge of the Sardarnagar Police Station wherein, the confession made by the A1 implicating himself and the other accused is recorded.

29. It is trite that confession of an accused in custody recorded by a police officer is inadmissible in evidence as the same would be hit by Section 25 of the Evidence Act. Thus, that part of the statement of A1 as recorded in the report/communication (Exhibit-96), wherein he allegedly confessed to the crime of murder of the jeep driver and looting the jeep and named the other accused persons as particeps criminis is totally inadmissible and cannot be read in evidence except to the extent provided under Section 27 of the Evidence Act.

30. After A1 had been apprehended, PSI J.N. Chaudhary (PW-22) prepared two panchnamas i.e. Exhibit-88 and Exhibit-89. The panchnama (Exhibit-89) was prepared at 08:30 hours on 2nd March, 1990 wherein, there is no mention that A1 had disclosed the names of the other accused. This omission is very striking and goes to the root of the matter. It creates a grave doubt on the truthfulness of the evidence of PSI J.N. Choudhary (PW-22). As a consequence, the so called disclosure statement made by A1(Exhibit-96) on which the prosecution banked upon and the High Court relied upon by treating it to be an incriminating circumstance against the accused persons is totally inadmissible and unworthy of reliance.

31. One of the panch witnesses Pratap Tolaram Makhija was examined as PW-21 and in his deposition, he did not utter a single word regarding the accused having made any confessional/disclosure statement to PSI J.N. Choudhary(PW-22) when the memos (Exhibits-88 and 89) were prepared.

32. When PSI J.N. Chaudhary (PW-22) was examined, the prosecution did not even make an attempt to prove the confessional part of the communication (Exhibit-96) and rightly so in our opinion.

33. Even if it is assumed for the sake of arguments that A1 was present in the jeep owned by Bharatbhai (deceased), this fact in isolation cannot lead to an inference about culpability of the said accused for the offences of murder and dacoity. As per the admitted case of the prosecution, more than one person was present in the jeep, when the same was flagged down by PSI J.N. Chaudhary (PW-22). Thus, the possibility of the A1 (Laxmansing) travelling in the jeep as

an innocent passenger cannot be ruled out. No other circumstance except for presence in the jeep was portrayed in the prosecution case so as to bring home the guilt of A1.

34. The prosecution pinned the identity of A2, A3, and A5 as the assailants on the basis of the disclosure statement (Exhibit-96) of A1. They were primarily convicted on the basis of the recoveries of knives and clothes. On going through the entire record, we find that these so called incriminating articles allegedly recovered at the instance of the accused were never sent to the Serology expert for comparison of the blood groups existing thereupon with the blood group of the deceased.

35. We have gone through the evidence of the concerned police officials associated with the recoveries and find their testimonies to be highly doubtful. The knife which was recovered at the instance of A3 was found from a nala which is a place open and accessible to all. The knife attributed to A4 was presented by one Shobhnaben wife of Kanji Chhara and thus it cannot be linked to A4. Thus, these recoveries in no manner can be treated to be incriminating in nature. In the case of ***Mustkeem alias Sirajudeen v. State of Rajasthan***, reported in **(2011) 11 SCC 724**, this Court held that the solitary circumstance of recovery of blood-stained weapons cannot constitute such evidence which can be considered sufficient to convict an accused for the charge of murder. We thus find the recoveries to be highly doubtful and tainted. Even if it is assumed for a moment that such recoveries were effected, the same did not lead to any conclusive circumstance in form of Serological report establishing the presence of the same blood group as that of the deceased and hence they do not further the cause of prosecution. In addition thereto, we find that the prosecution failed to lead the link evidence mandatorily required to establish the factum of safe keeping of the *muddamal* articles and hence, the recoveries became irrelevant.

36. At the cost of repetition, it may be noted that the veracity of disclosure statement of A1 as recorded by PW-22 has already been doubted by us. In addition thereto, it is manifest that the disclosure statement of A1 cannot be read in evidence against the other accused i.e. A2, A3 and A5. The evidentiary value of the confession of one co-accused against the other was considered by this Court in the case of ***Haricharan Kurmi v. State of Bihar*** reported in **AIR 1964 SC**

1184 and it was held that such statement is not a substantive piece of evidence. The said case dealt with a judicial confession made by an accused and it was held that even such confession cannot be treated as a substantive evidence against other co-accused persons. In the case at hand, the situation is even worse because the High Court has relied upon the interrogation note of A1 (Exhibit-96) so as to hold A2, A3 and A5 guilty of the offence. The interrogation note of A1 being hit by Section 25 of the Evidence Act cannot be read in evidence for any purpose whatsoever.

37. From a thorough appreciation of the evidence available on record, we find that the prosecution miserably failed to lead reliable, tangible and convincing links forming a complete chain of incriminating circumstances so as to bring home the guilt of the accused for the charge of murder punishable under Section 302 IPC.

38. We may note from the quoted portions of the impugned judgment that while reversing the acquittal of the accused recorded by the trial Court for the charges under Sections 302 read with Section 34 and Sections 396 and 397 IPC, the High Court did not record any such finding that the view taken by the trial Court, based on appreciation of evidence was either perverse or it was not one of the permissible views favouring the acquittal of the accused. In this background, the impugned judgment rendered by the High Court falls short of the satisfaction mandatorily required to be recorded for reversing a judgment of acquittal and converting it to one of conviction.

39. We are rather compelled to hold that the judgment of the High Court is based sheerly on conjectures and surmises rather than being based on any substantive or reliable circumstantial evidence pointing exclusively to the guilt of the accused. Insofar as the conviction of the accused as recorded by the trial Court for the offence under Section 392 is concerned, the same is also based on the same set of inadmissible and unreliable links of circumstantial evidence which we have discarded in the preceding discussion.

Conclusion: -

40. As a consequence of the above discussion, the impugned judgment dated 11th December, 2015 passed by the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1012 of 1993 and Criminal Appeal No. 949 of 1994 does not stand to scrutiny and is hereby

quashed and set aside. Further, the judgment dated 21st August, 1993 passed by the trial Court convicting and sentencing the accused for the offences punishable under Section 392 IPC is also unsustainable on the face of the record. Both the judgments are thus, quashed and set aside.

41. Resultantly, the appeals are allowed. The appellants are acquitted of the charges and are directed to be set at liberty forthwith, if not required in any other case.

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

Headnotes prepared by: Divya Pandey

Result of the case: Appeals allowed.

[2024] 2 S.C.R. 1196 : 2024 INSC 188

Anil Kishore Pandit
v.
The State of Bihar and Others

(Civil Appeal No. 1566 of 2024)

02 February 2024

[Hima Kohli and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Matter pertains to permissibility of an employer to change the qualifications prescribed in the advertisement midstream, during the course of the ongoing selection process.

Headnotes

Service law – Appointment to the post – Change in the qualifications prescribed in the advertisement midstream, during the course of the ongoing selection process – Permissibility:

Held: Employer cannot change the qualifications prescribed in the advertisement midstream, during the course of the ongoing selection process – Any such action would be arbitrary as it would tantamount to denial of an opportunity to those candidates who are eligible in terms of the advertisement but would stand disqualified on the basis of a change in the eligibility criteria after the same is announced by the employer – Having applied for appointment in accordance with the terms prescribed in the advertisement, a candidate acquires a vested right to be considered in accordance with the said advertisement – This consideration may not necessarily fructify into an appointment but certainly entitles the candidate to be considered for selection in accordance with the rules as they existed on the date of the advertisement – Any subsequent amendment to the advertisement during the course of the selection process unless retrospective, cannot be a ground to disqualify a candidate from consideration – Division Bench erred in setting aside the order of the Single Judge of the High Court and cancelling appellant's appointment to the post of Amin on the ground of his being overage on basis of the change in criteria/qualification in the selection process during midstream – Impugned judgement quashed and set aside – Earlier order

passed by respondents appointing the appellant to the post by reckoning the age of the candidate in EBC category as 40 years, as on 01.01.2011 upheld. [Paras 8, 12, 13]

Case Law Cited

N.T. Devin Katti and Others v. Karnataka Public Service Commission and Others, **(1990) 3 SCC 157;** *Mohd. Sohrab Khan v. Aligarh Muslim University and Others,* **[2009] 2 SCR 907 : (2009) 4 SCC 555;** *Zonal Manager, Bank of India, Zonal Office, Kochi and Others v. Aarya K. Babu and Another,* **[2019] 11 SCR 627 : (2019) 8 SCC 587 – referred to.**

List of Keywords

Change the qualifications prescribed in the advertisement midstream; Selection process; Appointment; Arbitrariness; Change in the eligibility criteria/qualification; Right of candidate.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1566 of 2024

From the Judgment and Order dated 24.01.2017 of the High Court of Judicature at Patna in LPA No.1892 of 2015

Appearances for Parties

Subhro Sanyal, Sagar Roy, Sandeep Lamba, Amber Shehbaz Ansari, Dr. Nilakshi Choudhury, Kaushal Kishore, Mr./Ms. Avni Singh, Sanjay Kumar, Ms. Aakanksa Tiwari, Advs. for the Appellant.

Samir Ali Khan, Pranjal Sharma, Kashif Irshad Khan, Neeraj Shekhar, Kartik Kumar, Mrs. Kshama Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Leave granted.

2. The appellant is aggrieved by an order dated 24th January, 2017, passed by the Division Bench of the High Court of Judicature at Patna whereunder, an intra-Court Appeal[1] filed by the respondent

1 LPA No. 1892 of 2015

no.8 herein against an order dated 07th March, 2013, passed by the learned Single Judge in a writ petition[2] filed by the appellant herein was allowed and as a result thereof, the order passed by the respondent no.1-State Government in compliance of the order passed by the learned Single Judge to appoint the appellant, if his date of birth was found to be within the permissible range as on 01st January, 2011, was set aside.

3. A reference to the brief facts of the case is considered necessary. Vide memo dated 13th October, 2011, the District Employment Officer, West Champaran, Bettiah published an advertisement inviting applications from suitable candidates for appointment to the post of Amins on contractual basis. The cut off date of the age as per the District level vacancy was fixed as 40 years as on 01st January, 2011, for the Economic Backward Class[3] category, both males and females. The appellant applied for selection to the said post pursuant to the advertisement dated 13th October, 2011. It is not in dispute that as on 01st January, 2011, the appellant's age was 39 years 11 months and 27 days. In other words, the appellant qualified the age criteria in terms of the subject advertisement. The records reveal that in pursuance to a letter[4] subsequently issued by the Principal Secretary Revenue and L.R. Department, Government of Bihar, another notice was displayed on the Notice Board of the Collectorate, West Champaran on 15th November, 2011, stating that interested parties could apply till 30th November, 2011.

4. The appellant appeared for the written examination on 22nd January, 2012. Thereafter, a merit list was prepared for counselling in which his name was placed at Serial No.2. The District establishment prepared a selection list on 04th December, 2012, where his name was placed at Serial No.9, whereas that of the respondent No.8 was at Serial No.11. The remarks column noted that the appellant's candidature was cancelled on the ground of his being overage.

5. Aggrieved by the aforesaid, the appellant submitted a representation before the District Magistrate for rectification of the results, but to no avail. The appellant then filed a writ petition before the High Court on

2 CWJC No. 15685 of 2012

3 For short the 'EBC'

4 No. 446(4)/Revenue (dated 04th November, 2011)

28th August, 2012, which was disposed of vide order dated 07th March, 2013, with a direction issued to the Collector, West Champaran to examine his grievance and pass necessary orders of appointment, in the event the date of birth of the appellant was found to be correct, i.e. 05th January, 1971, in terms of his Matriculation Certificate. On 27th June, 2015, the appellant was appointed to the post of Amin by the District Magistrate West Champaran, Bettiah.

6. Aggrieved by the said appointment, the respondent no.8 filed an intra-Court appeal before the Division Bench stating inter alia that he was not made a party by the appellant in the writ petition and assailing his appointment on the ground that the appellant was overaged in terms of the press communication dated 01st November, 2011. Agreeing with the stand of the respondent No.8, the Division Bench has passed the impugned judgement. The Division Bench was of the opinion that the entire selection process had been carried out on the basis of treating the cut off date as 01st November, 2011. It was observed that though the advertisement at the District level did officially fix the cut off date as 01st January, 2011, it was not considered sacrosanct since uniformity was required to be maintained across the State with regard to the cut off date fixed.

7. Learned counsel for the appellant assails the impugned order on the ground that the Division Bench erred in ignoring the date of the public advertisement that mentioned the cut off date as 01st January, 2011, for reckoning the age of a candidate, which in the case of the appellant herein who belongs to the extremely backward category, was 40 years. He states that the subsequent communication issued by the respondents changing the cut off date from 01st January, 2011 to 01st November, 2011, was not placed in public domain through any advertisement, as had been done earlier. Instead, it was displayed only on the Notice Board in the office of the Collectorate, which was not the correct procedure to be adopted and could not have been treated as overwriting the initial advertisement issued on 01st January, 2011.

8. It is settled law that it is not open for an employer to change the qualifications prescribed in the advertisement midstream, during the course of the ongoing selection process. Any such action would be hit by the vice of arbitrariness as it would tantamount to denial of an opportunity to those candidates who are eligible in terms of

the advertisement but would stand disqualified on the basis of a change in the eligibility criteria after the same is announced by the employer. Having applied for appointment in accordance with the terms prescribed in the advertisement, a candidate acquires a vested right to be considered in accordance with the said advertisement. This consideration may not necessarily fructify into an appointment but certainly entitles the candidate to be considered for selection in accordance with the rules as they existed on the date of the advertisement. To put it differently, the right of a candidate for being considered in terms of the advertisement stands crystalized on the date of the publication of the advertisement. Any subsequent amendment to the advertisement during the course of the selection process unless retrospective, cannot be a ground to disqualify a candidate from the zone of consideration.

9. In the above context, this Court in **N.T. Devin Katti and Others v. Karnataka Public Service Commission and Others**[5] has held as under :

> "11. ….. Lest there be any confusion, we would like to make it clear that a candidate on making application for a post pursuant to an advertisement does not acquire any vested right of selection, but if he is eligible and is otherwise qualified in accordance with the relevant rules and the terms contained in the advertisement, he does acquire a vested right of being considered for selection is accordance with the rules as they existed on the date of advertisement. He cannot be deprived of that limited right on the amendment of rules during the pendency of selection unless the amended rules are retrospective in nature".

10. A similar view has been expressed in **Mohd. Sohrab Khan v. Aligarh Muslim University and Others**[6], where this Court did not approve the change of the criteria/qualification in the selection process by the Selection Committee constituted for filling up the post Lecturer in Chemistry in the respondent-University and observed as follows :

5 (1990) 3 SCC 157

6 [2009] 2 SCR 907 : (2009) 4 SCC 555

> "25. We are not disputing the fact that in the matter of selection of candidates, opinion of the Selection Committee should be final, but at the same time, the Selection Committee cannot act arbitrarily and cannot change the criteria/qualification in the selection process during its midstream. Merajuddin Ahmad did not possess a degree in Pure Chemistry and therefore, it was rightly held by the High Court that he did not possess the minimum qualification required for filling up the post of Lecturer in Chemistry, for Pure Chemistry and Industrial Chemistry are two different subjects.
>
> xxx xxx xxx
>
> 27. The Selection Committee during the stage of selection, which is midway could not have changed the essential qualification laid down in the advertisement and at that stage held that a Master's degree-holder in Industrial Chemistry would be better suited for manning the said post without there being any specific advertisement in that regard. The very fact that the University is now manning the said post by having a person from the discipline of Pure Chemistry also leads to the conclusion that the said post at that stage when it was advertised was meant to be filled up by a person belonging to Pure Chemistry stream.

11. Quoting the aforesaid decision in **Zonal Manager, Bank of India, Zonal Office, Kochi and Others v. Aarya K. Babu and Another**[7], this Court made the following pertinent observations :

> "14. If the above decision in Mohd. Sohrab Khan case [Mohd. Sohrab Khan v. Aligarh Muslim University], is kept in perspective it is clear that while examining the correctness of the action of the employer what would be sacrosanct will be the qualification criteria published in the notification, since if any change made to the qualification criteria midstream is accepted by the Court so as to benefit only the petitioners before it, without making it open to

7 [2019] 11 SCR 627 : (2019) 8 SCC 587

> all the qualified persons, it would amount to causing injustice to the others who possess such qualification but had not applied being honest to themselves as knowingly they did not possess the qualification sought for in the notification though they otherwise held another degree. Therefore, if there is any change in qualification/criteria after the notification is issued but before the completion of the selection process and the employer/recruiting agency seeks to adopt the change it will be incumbent on the employer to issue a corrigendum incorporating the changes to the notification and invite applications from those qualified as per the changed criteria and consider the same along with the applications received in response to the initial notification. The same principle will hold good when a consideration is made by the Court."

12. Coming back to the case at hand, we are inclined to agree with the submissions made by learned counsel for the appellant. In the first instance, the respondents ought not to have issued a subsequent communication after having issued a public advertisement fixing the cut off date for reckoning the age of candidates, as on 01st January, 2011. The initial decision taken by the respondents was sought to be overturned later on, merely on the basis of an internal discussion within the department and it was decided that a fresh notice be issued changing the date that was initially fixed as 01st January, 2011 to 1st November, 2011. This was done without following the due process as prescribed, of issuing a pubic advertisement, etc. Nor was the earlier advertisement recalled. In the meantime, going by the earlier advertisement issued by the respondent, the appellant had already applied. As per the said advertisement, his age was within the permissible range. Not only that, he was high up in the selection list and was even appointed to the post of Amin on 27th June, 2015.

13. Having regard to the aforesaid facts and circumstances of the case, the impugned judgement is quashed and set aside. It is deemed appropriate to set the clock back and uphold the earlier order passed by the respondents appointing the appellant to the post of Amin by reckoning the age of the candidates in the EBC category as 40 years, as on 01st January, 2011.

14. The appointment of the appellant to the post of Amin is restored w.e.f 27th June, 2015, the date of his initial appointment, without any break in service. The appellant would be entitled to all the notional benefits except for the actual wages, having not discharged his duties on the said post in all these years. A letter reappointing the appellant to the subject post shall be issued by the respondents on the above terms within two weeks from today. The appointment of the respondent No.8 cannot be sustained and stands revoked in the light of the aforesaid orders.

15. The present appeal is allowed on the above terms.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal allowed.

[2024] 2 S.C.R. 1204 : 2024 INSC 361

Balveer Batra
v.
The New India Assurance Company & Anr.

(Civil Appeal No. 1842 of 2024)

08 February 2024

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

Issue for Consideration

The question of territorial jurisdiction was decided by the Tribunal after about 4 years since the filing of the claim petition and the appeal filed in 2010 was dismissed, confirming the dismissal of the claim petition after about 6 years.

Headnotes

Motor Vehicles Act, 1988 – Code of Civil Procedure, 1908 – Victim (son of appellant) died in an motor vehicle accident – Appellant filed an application u/s. 166 of the MV before the tribunal – Issues framed – Both sides examined witnesses – Tribunal held that the mere fact that the insurance company got an office within the jurisdictional limits of the Tribunal could not confer jurisdiction on it – Based on negative finding on question of territorial jurisdiction, Tribunal decided all the other six issues against the claimant and in favour of the opposite parties – Claim petition was dismissed – High Court confirmed the view of the tribunal – Correctness:

Held: The words 'at the option of the claimant' employed in s.166(2) assumes relevance – Indubitably, the statute indicates that option lies with the claimant – Merely because the claimant made the application for compensation not to the Claims Tribunal having jurisdiction over the area in which the accident occurred or not to the Claims Tribunal within the local limits of whose jurisdiction he resides or carries on business, is no reason to dismiss the application provided it is filed before a Claims Tribunal where it is otherwise maintainable – The branch of the insurance company lied within the limits of the Tribunal where the subject claim petition was filed – Further, for the purpose of deciding the issue of territorial jurisdiction, the Tribunal permitted the parties to adduce evidence for it – In terms of Or. XIV, Rule 2 CPC, the issues regarding territorial jurisdiction ought to be tried as primary issues but when

* Author

it is evident that the issue could not be decided solely based on the pleadings in the plaint (here claim petition) and when parties are permitted to adduce evidence upon finding that it is a mixed question of law and facts there was absolutely no justification for not pronouncing an award on all the issues framed besides the one pertaining to its territorial jurisdiction – In the case on hand a great illegality or error was committed by the Tribunal even after observing that it got no occasion to examine the other six issues but then deciding those six issues against the claimant and in favour of the opposite parties – The said other six issues were examined without going into the merits – The very purpose of the benevolent legislation providing for grant of compensation under Section 166 of the M.V. Act was defeated – The claim petition was kept for 4 years and it was dismissed only on the ground of lack of jurisdiction – The High Court has fallen in error in not picking up the illegalities resulting in failure of justice and to resolve them appropriately – Considering the circumstances, the matter remanded back to the Tribunal, to proceed further and to decide the claim petition on merits. [Paras 17, 26, 28, 32]

Code of Civil Procedure, 1908 – s.21 – Objection as to lack of territorial jurisdiction would not make a judgment/decree nullity:

Held: A bare perusal of Section 21, CPC would reveal that objection as to the place of suing is not to be entertained by any Appellate or Revisional Court if it was not taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice – While looking into the object and reasons for the aforesaid provision it is very clear as to why lack of territorial jurisdiction by itself was not recognized under it as a reason to make a judgment/decree a nullity – It is to be noted that it is quite different and distinct from inherent lack of jurisdiction which would strike at the very authority of the Court to try a case and pass a judgment/decree and would make it a nullity – On a careful consideration of the provisions under Section 21, CPC, it would make it clear though taking of an objection as to the lack of territorial jurisdiction before the Court of first instance at the earliest opportunity is a condition required to raise that objection before an appellate or revisional Court satisfaction of such condition by itself would not make an award granting compensation a nullity inasmuch as in such cases there would not be inherent lack of

jurisdiction in Court in regard to the subject matter – Therefore, in such cases, correction by a Court is open, only if it occasions in failure of justice – The provision thus, reflects the legislative intention that all possible care should be taken to ensure that the time, energy and labour spent by a Court did not go in vain unless there has been a consequent failure of justice. [Para 13]

Case Law Cited

Malati Sardar v. National Insurance Company Ltd. [2016] 1 SCR 601 **: (2016) 3 SCC 43***; Kiran Singh v. Chaman Paswan* [1955] 1 SCR 117 **: AIR 1954 SC 340;** *Mantoo Sarkar v. Oriental Insurance Company Ltd.* [2008] 17 SCR 753 **: (2009) 2 SCC 244;** *United India Insurance Co. Ltd. v. Shila Datta* [2011] 14 SCR 763 **: (2011) 10 SCC 509;** *Sharanamma and Others v. M.D., Divisional Contr. Nekrtc* **(2013) 11 SCC 517;** *Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.* [2006] Supp. 10 SCR 1022 **: (2006) 12 SCC 642 – referred to.**

List of Acts

Motor Vehicles Act, 1988; Code of Civil Procedure, 1908.

List of Keywords

Motor Vehicle Accident; Claim; Settlement of issues; Examination of witnesses; Jurisdiction; Lack of territorial jurisdiction; Inherent lack of jurisdiction; Non-examination of other issues after deciding issue of lack of territorial jurisdiction; Section 166 of the Motor Vehicles Act, 1988; Section 21 of Code of Civil Procedure, 1908; Or. XIV, Rule 2 of Code Civil Procedure, 1908; Failure of Justice.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1842 of 2024

From the Judgment and Order dated 28.11.2016 of the High Court of Uttarakhand at Nainital in AFO No. 414 of 2010

Appearances for Parties

Ravindra S. Garia, Shashank Singh, Madan Chandra Karnataka, Advs. for the Appellant.

J.P.N. Shahi, Rameshwar Prasad Goyal, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

C.T. Ravikumar, J.

Leave granted.

1. This appeal by Special Leave is directed against the judgment and order dated 28.11.2016 passed by the High Court of Uttarakhand at Nainital in Appeal from Order No. 414 of 2010.

2. The appellant is the father of the victim of a motor vehicle accident. His son, the victim, met with the unfortunate accident causing his death while underway on his motorcycle from Dineshpur to Gadarpur and stopped it in the midway to urinate. A tractor bearing number UP-02A-2213 being driven recklessly and negligently by the first respondent hit him and his motorcycle and he died instantaneously. The incident occurred on 07.03.2006 at about 07.30 pm. The appellant filed an application under Section 166 of the Motor Vehicles Act, 1988 (for short 'MV Act' only) for compensation before the Motor Accident Claims Tribunal at Nainital as MACP No.137/2006. The Tribunal dismissed the application for lack of territorial jurisdiction. Aggrieved by the same, the appellant herein preferred an appeal before the High Court and the same also met with the same fate. Hence, this appeal.

3. Heard learned counsel appearing for the appellant and the counsel appearing for the respondent-insurance company.

4. A brief reference to the facts which led to the concurrent, adverse decisions, as mentioned above, is required for an appropriate disposal of this appeal. As a matter of fact, respondent Nos. 2 and 3 herein / opposite parties 1 and 2 in the claim petition, filed a joint written statement, inter alia, raising the question of maintainability on the ground of lack of territorial jurisdiction. The averments therein, taken note of the Claims Tribunal in its award, would reveal that even while raising such objection they would admit the death of the appellant's son in the accident involving the aforementioned tractor though they disputed the nature of its occurrence. In paragraph 3 of the award of the Tribunal such averments are noted down thus:-

> *"that on the day of alleged accident, the driver of Tractor was being driven the tractor in its side, but deceased himself hit by driving motorcycle rash and negligently,*

consequently he received injuries; that on the day of accident, they opposite party No.1 was driving the tractor with valid driving licence; that the Tractor in question is insured with O.P. No.3, the New India Insurance Company."

5. The first-respondent viz., the opposite party No.3 too, raised the objection of lack of territorial jurisdiction to adjudicate the claim petition and over and above in the written statement respondent No.1 herein stated thus, as can be seen from paragraph 4 of the award of the Tribunal:-

"that the sole cause of accident is rash and negligent driving of the motor vehicle bearing registration No. UA06(A)-9229, which was also involved in the accident, that in case of involvement of two motor vehicles in the alleged accident, the tribunal has to determine the composite/contributory negligence of each driver thereof and its effects; that the answering party has not been given any information as provided under Section 158 (6) of the Motor Vehicle Act and the petition is bad for non-joinder of the party."

6. It is based on such pleadings that the Tribunal had framed seven issues as hereunder:-

"1. Whether on 07.03.2006 at around 7.30 when deceased Rohit Batra on his Motorcycle No.UA06A9229 was going from Dineshpur to Gadarpur then near Village Varkheda, PS Gadarpur, District Udham Singh Nagar, Tractor No. UP2A-2213, being driven recklessly and negligently by the driver hit his motorcycle from behind, due to which the deceased suffered serious injuries and his death was caused due to such injuries, as has been stated in the claim petition?

2. Whether the said accident was caused by the deceased himself driving his motorcycle No.UA6A 9229 recklessly and negligently, as has been stated by the Defendant No.1, 2 & 3 in their Written Statements?

3. Whether the said accident was caused due to contributory negligence of both the drivers as has been stated by Defendant No.3 in his written statement?

4. Whether the claim is effective due to not making insurance company of the motorcycle No.UA06A-9229, which is a necessary party, a party in the case?

5. Whether this Tribunal does not have the territorial jurisdiction to entertain the claim as has been stated by the Defendant No.1, 2 & 3 in their written statement?

6. Whether the tractor in question at the time of accident was insured with the defendant No.3, insurance company and whether it was being run in accordance with the terms and condition of the insurance policy?

7. Whether the claimants are entitled to any compensation and if yes, then how much and who is liable to be paid?"

7. After framing issues as above, the Tribunal firstly considered issue No.5, pertaining to the territorial jurisdiction, assigning the reason that the rest of the issues are dependent on the decision on issue No.5. Nonetheless, the indisputable position is that by that time four years, since filing of the claim petition, had lapsed and in the meanwhile both sides had also examined witnesses. While being examined as PW-1, the appellant deposed that at the time of accident in question he was a resident of Haldwani, District Nainital, and the accident had occurred within the limits of the adjoining district of Udham Singh Nagar. True that at the time of filing the claim petition he was not residing in Haldwani. The Tribunal, based on the said factual position of evidence, came to the conclusion that the claimant is not residing within its territorial jurisdiction. It also took note of the fact that the opposite party Nos. 1 and 2 are also not residing within its jurisdiction and proceeded to consider its territorial jurisdiction. In that regard, the Tribunal has also held that the mere fact that the insurance company got an office within the jurisdictional limits of the Tribunal could not confer jurisdiction on it. Based on such conclusions and findings, answered issue No.5 to the effect that it lacks territorial jurisdiction. Thereupon, as relates the other issues it was held thus:-

"21. ISSUES NO.1, 2, 3, 4, 6 & 7:

At the main issue (issue no.5) for territorial jurisdiction of this tribunal has been decided against the claimants, hence

there is no occasion to examine the other issues on merits. In view of above issue No.1, 2, 3, 4, 6 and 7 are also decided against the claimants and in favour of the opposite parties."

(Underline supplied)

8. After answering the issues as above, the claim petition was dismissed. As noted above, the High Court confirmed the judgment/ award solely considering the question of territorial jurisdiction of the Tribunal.

9. The core contention of the appellant revolves around the decision of this Court in ***Malati Sardar v. National Insurance Company Ltd.***[1] Though the same was relied on by the Appellant before the High Court, it distinguished the decision on facts and held it inapplicable. A bare perusal of the said decision would reveal the very question formulated and answered by this Court in ***Malati Sardar's*** case (supra). The same assumes relevance in the context of the rival contentions and it reads as follows:-

"The question raised in this appeal is whether the High Court was justified in setting aside the award of the Motor Accident Claims Tribunal, Kolkata only on the ground that the Tribunal did not have the territorial jurisdiction".

10. Paragraph 10 of the decision in ***Malati Sardar's*** case is also relevant for the purpose of knowing the factual position under which such a question was formulated and answered. It reads thus-

"The question for consideration thus is whether the Tribunal at Kolkata had the jurisdiction to decide the claim application under Section 166 of the Act when the accident took place outside Kolkata jurisdiction and the claimant also resided outside Kolkata jurisdiction, but the respondent being a juristic person carried on business at Kolkata. Further the question is whether in absence of failure of justice, the High Court could set aside the award of the Tribunal on the ground of lack of territorial jurisdiction."

(underline supplied)

1 [2016] 1 SCR 601 : (2016) 3 SCC 43

11. Noticeably, in that case the Tribunal entertained the claim petition and awarded compensation and the High Court, at the instance of the insurance company, considered and reversed the decision on the question of territorial jurisdiction. Consequently, the appeal of the insurance company was allowed and the party was directed to refund of the amount deposited / paid, if any, to the appellant insurance company. After framing the said question in the above factual backdrop, it was answered in ***Malati Sardar's*** case by placing reliance on the earlier decision of this Court in ***Kiran Singh v. Chaman Paswan***[2]. This Court held that the provision in question is a benevolent provision for the victims of accidents of negligent driving and in such circumstances, it has to be interpreted with the object of facilitating remedies for the victims of accidents. Furthermore, it was held in paragraph 16 thereof, thus:-

> *"……Hyper technical approach in such matters can hardly be appreciated. There is no bar to a claim petition being filed at a place where the insurance company, which is the main contesting party in such cases, has its business. In such cases, there is no prejudice to any party. There is no failure of justice".*
>
> *(underline supplied)*

12. ***Malati Sardar's*** case was decided after referring to the decisions in ***Mantoo Sarkar v. Oriental Insurance Company Ltd.***[3] and in ***Kiran Singh's*** case (supra), as mentioned above. A bare perusal of the decisions in ***Mantoo Sarkar's*** case (supra), ***Kiran Singh's*** case (supra) and ***Malati Sardar's*** case (supra) would reveal that in all those decisions the objection regarding territorial jurisdiction was overruled by the Tribunal concerned and thereafter compensation was awarded. It is only at the appellate stage that the respondents' objection as to the territorial jurisdiction was upheld and the award was upturned. Evidently, in all those cases this Court referred to Section 21 of the Code of Civil Procedure (for short the 'CPC' only) and it reads thus:-

> *"21. Objections to jurisdiction.— [(1)] No objection as to the place of suing shall be allowed by any Appellate or*

2 [1955] 1 SCR 117 : AIR 1954 SC 340

3 [2008] 17 SCR 753 : (2009) 2 SCC 244

Revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice."

13. A bare perusal of Section 21, CPC would reveal that objection as to the place of suing is not to be entertained by any Appellate or Revisional Court if it was not taken in the Court of first instance at the earliest possible opportunity and unless there has been a consequent failure of justice. While looking into the object and reasons for the aforesaid provision it is very clear as to why lack of territorial jurisdiction by itself was not recognized under it as a reason to make a judgment/decree a nullity. It is to be noted that it is quite different and distinct from inherent lack of jurisdiction which would strike at the very authority of the Court to try a case and pass a judgment/decree and would make it a nullity. On a careful consideration of the provisions under Section 21, CPC, we are of the considered view that the provisions would undoubtedly make it clear though taking of an objection as to the lack of territorial jurisdiction before the Court of first instance at the earliest opportunity is a condition required to raise that objection before an appellate or revisional Court satisfaction of such condition by itself would not make an award granting compensation a nullity inasmuch as in such cases there would not be inherent lack of jurisdiction in Court in regard to the subject matter. Therefore, in such cases, correction by a Court is open, only if it occasions in failure of justice. The provision thus, reflects the legislative intention that all possible care should be taken to ensure that the time, energy and labour spent by a Court did not go in vain unless there has been a consequent failure of justice.

14. In the above view of the matter the decision in ***Mantoo Sarkar's*** case (supra) and ***Malati Sardar's*** case (supra) that objection of lack of territorial jurisdiction in an appeal against an award granting compensation could not be entertained in the absence of consequent failure of justice, according to us, should be followed with alacrity and promptitude.

15. The question in the instant case is, however, slightly different inasmuch as, here the Tribunal's decision itself is to the effect that

it lacks territorial jurisdiction and it was that finding which obtained conformance under the impugned judgment of the High Court. A glance at the factual matrix is profitable for considering the moot point involved in the case on hand. Firstly, it is to be noted that the claim petition under Section 166 of the M.V. Act filed in the year 2006 was dismissed on the ground of lack of territorial jurisdiction only on 06.10.2010. Thus, it is evident that the Tribunal which was obliged to decide the question of jurisdiction at the threshold, finding it difficult to decide the same without letting the parties to adduce evidence permitted parties to adduce their evidence. The materials on record would reveal that before the Tribunal, on behalf of the claimants PW1 to PW3 were examined and on behalf of opposite party Nos. 1 and 2 viz., respondents 2 and 3 herein, opposite Party No. 1 Mr. Tula Singh was examined as DW1. Paragraph 7 of the Tribunal's judgment would further reveal that the first respondent herein viz., the insurance company which was opposite party No. 3 therein, did not examine any witness in support of its pleadings, but cross-examined prosecution witnesses. Add to it, it is a fact that the first respondent-Insurance Company got its branch within the limits of the Tribunal where the subject claim petition was filed.

16. In the context of the question emerging for consideration it is apposite to refer to the relevant provisions prescribing the forum for adjudication of compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 of the M.V. Act and also the provision prescribing the options available to a claimant in regard to place(s) for suing for such compensation viz., sub-section (1) of Section 165 and sub-section (2) of Section 166 of the M.V. Act. They read thus:-

> *"165. Claims Tribunals.—(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.*
>
> *** *** *** ***

166. (1).....

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant."

17. The words 'at the option of the claimant' employed in Section 166(2) and the options available to a claimant in regard to places for suing for such compensation under Section 166 (2), assume relevance for consideration of the moot question. Indubitably, the statute indicates that option lies with the claimant to make application for compensation either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides. There can be no doubt with respect to the position that if more than one Court has jurisdiction to adjudicate a dispute it will be open to the party concerned to choose one of the competent Courts to decide his dispute. Thus, it is obvious that merely because the claimant made the application for compensation not to the Claims Tribunal having jurisdiction over the area in which the accident occurred or not to the Claims Tribunal within the local limits of whose jurisdiction he resides or carries on business, is no reason to dismiss the application provided it is filed before a Claims Tribunal where it is otherwise maintainable. This aspect calls for consideration not solely confining to strict construction of the rest of the provision under Section 166 (2) of the M.V. Act, but by looking into various other authorities, as well.

18. In the aforementioned context, it is not inappropriate to refer to the decision of this Court in ***United India Insurance Co. Ltd. v. Shila***

Datta[4], wherein it was held that an award by Tribunal could not be seen as adversarial adjudication between litigating parties to a dispute and in troth, it is a statutory determination of compensation on the occurrence of an accident, after due enquiry.

19. In the decision in ***Mantoo Sarkar's*** case (supra) after extracting sub-section (2) of Section 166, M.V. Act, in paragraph 11 thereof, this Court held that M.V. Act is a special statute and the jurisdiction of the Claims Tribunal having regard to the terminologies used therein must be held to be wider than the civil Court.

20. In the contextual situation it is relevant to note that in ***Mantoo Sarkar's*** case (supra) while considering predominantly the scope of appellate interference in view of Section 21, CPC, even after referring to Section 166 (2) of the M.V. Act, this Court made certain observations which could be, rather, should be attuned to the situation obtained in the case on hand. This Court held that a distinction must be made between the jurisdiction with regard to the subject matter of the suit and that of territorial and pecuniary jurisdiction and further that in the case falling within the former category the judgement would be in nullity and in the latter category it would not be. In paragraph 18 thereof, this Court held thus:-

> *"18. The Tribunal is a court subordinate to the High Court. An appeal against the Tribunal lies before the High Court. The High Court, while exercising its appellate power, would follow the provisions contained in the Code of Civil Procedure or akin thereto. In view of sub-section (1) of Section 21 of the Code of Civil Procedure, it was, therefore, obligatory on the part of the appellate court to pose unto itself the right question viz. whether the first respondent has been able to show sufferance of any prejudice. If it has not suffered any prejudice or otherwise no failure of justice had occurred, the High Court should not have entertained the appeal on that ground alone."*

21. Section 173 of the M.V. Act provides for filing appeal by any person aggrieved by an award by a Claims Tribunal. In the decision in ***Sharanamma and Others v. M.D., Divisional Contr. Nekrtc***[5]***,*** this

4 [2011] 14 SCR 763 : (2011) 10 SCC 509

5 (2013) 11 SCC 517

Court held that a bare reading of Section 173 shows that there is no curtailment or limitations on the powers of the appellate court to consider the entire case on facts and law. When that be the position, indubitably, it could be said that consideration of the question of sufferance or prejudice in regard to a finding on territorial jurisdiction besides its correctness is required in appeals against awards declining compensation upholding the objection on territorial jurisdiction of the opposite parties. Since the provisions for grant of compensation under Section 166 is one of benevolence if an illegality resulting in failure of justice is discernable from the materials on record, even if in respect of which no specific pleading is taken, the Court is bound to take it into consideration.

22. The further support of the above view can be taken from paragraph 16 of the decision in ***Malati Sardar's*** case (supra), extracted hereinbefore, wherein this Court held that provision under Section 166 for grant of compensation in respect of an accident of the nature specified in Sub-section (1) of Section 165 being a benevolent provision for the victims of accidents of negligent driving, the provision for territorial jurisdiction has to be interpreted consistent with the object of facilitating remedies for the victims of accident. Furthermore, it was held in the said decision that hyper technical approach in such matters could hardly be appreciated and there would be no bar to a claim petition being filed at a place where the insurance company, which is the main contesting party in such cases, has its business.

23. In the aforementioned context, it is worthwhile to note the prejudice rather, failure of justice caused to the applicant in the case on hand, is evident from the very award of the Claims Tribunal though it escaped the attention of the High Court. The claim petition filed in the year 2006 was dismissed on the ground of lack of territorial jurisdiction not at the threshold, but only on 06.10.2010. Dismissal, simpliciter of a claim petition on the ground of lack of territorial jurisdiction would not and could not disable the claimant concerned to initiate another proceeding before the Claims Tribunal of competence. However, a bare perusal of the award passed by the Tribunal, to be precise paragraph 21 would reveal that after returning an adverse finding on the question of territorial jurisdiction against the claimant, the Tribunal proceeded further and decided all other issues framed for the consideration viz., issues No.1 to 4, 6 and 7 (extracted hereinbefore) against the claimant and in favour of the opposite parties, that too,

after making it clear that it had no occasion to examine such issues on merits. Paragraph 21 of the award reads thus:-

> *"21. ISSUES NO.1, 2, 3, 4, 6 & 7:*
>
> *At the main issue (issue no.5) for territorial jurisdiction of this tribunal has been decided against the claimants, hence there is no occasion to examine the other issues on merits. In view of above issue No.1, 2, 3, 4, 6 and 7 are also decided against the claimants and in favour of the opposite parties."*

24. There cannot be any dispute with respect to the fact that when such a finding is entered in respect of those issues framed, may be after making an observation that the Tribunal got no occasion to examine such issues on merits, the claimant would not be in a position to initiate another proceeding before another Claims Tribunal having territorial jurisdiction. In this regard it is to be noted that lacking territorial jurisdiction cannot be a reason, in view of Section 165 (1), M.V. Act, to say that Claims Tribunal was not having competence to adjudicate the subject-matter of the claim petition. Since issues were framed and decided against the claimant and in favour of the opposite parties, whether or not such findings were returned after examining such issues on merits it would cause legal trammel in view of the principle of *res judicata*. We have already found that a decree dismissing a suit on the ground of lack of territorial jurisdiction is not a nullity. Though Section 168, M.V. Act, carrying the caption 'Award of the Claims Tribunal' on perusal, at the first blush may appear to mean only a decision of the Claims Tribunal granting compensation to the claimant concerned. However, that certainly is not the correct construction of the said provision. Section 169(2), M.V. Act, clothes a Claims Tribunal with all the powers of a Civil Court. In the decision in ***Morgan Securities & Credit (P) Ltd. v. Modi Rubber Ltd.***[6] this Court observed and held that the expression 'award' has a distinct connotation and it envisages a binding decision of a judicial or a quasi-judicial authority. That apart, Section 173, M.V. Act, provides an appeal against an award of a Claims Tribunal to the High Court subject to sub-Section (2) thereof, and it entitles any person aggrieved by an award of a Claims Tribunal to prefer it to the High Court.

6 [2006] Supp. 10 SCR 1022 : (2006) 12 SCC 642

25. We have already referred to the error, rather an illegality committed by the Claims Tribunal in deciding issues 1 to 4, 6 and 7 against the claimant and in favour of the opposite parties viz., the respondents herein even after making it clear it had no occasion to examine them on merits and solely because it returned a negative finding on the question of its territorial jurisdiction to maintain the subject claim petition. This error or mistake that resulted in great prejudice escaped the attention of the High Court while exercising the power under Section 173, M.V. Act, in the appeal filed by an appellant herein against the award of the Tribunal.

26. In this context, it is to be noted that the materials on record and the discussions of the evidence by the Claims Tribunal would reveal that there was no serious dispute regarding the occurrence of accident in question in which the appellant's son lost his life and also of the fact that in the said accident involving the vehicle insured with the first respondent-the insurance company. It is true that respondent Nos. 1 and 2 have disputed the nature of its occurrence. There seems to be no dispute regarding the fact that the deceased sustained injuries and succumbed to it instantaneously. We have already noted that it was after keeping the claim petition filed in 2006 for about 4 years i.e. only on 06.10.2010 that it was dismissed on the ground of lacking territorial jurisdiction and that the appeal filed against the same in the year 2010 was dismissed, confirming the award passed by the Tribunal, after about 6 years viz. on 28.11.2016. We have no hesitation to hold that in the totality of the circumstances, revealed from the indisputable factual position there was absolutely no justification for the High Court to confine its consideration only on the question of correctness of the finding on territorial jurisdiction and at the same time, to hold all the other issues against the claimant(s) and in favour of the opposite parties.

27. In the above context, it is to be noted that for the purpose of deciding the issue of territorial jurisdiction, the Tribunal permitted the parties to adduce evidence before it. The position obtained in the case would reveal that the Tribunal had actually proceeded with the claim petition despite holding the view that it got no territorial jurisdiction. In such indisputable position, it is only apposite to refer to Order XIV, Rule 2 of CPC which mandates a Court to pronounce a judgment on all the issues. The said provision reads thus:-

> ***"2. Court to pronounce judgment on all issues**.—(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*
>
> *(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if the issue relates to—*
>
> *(a) the jurisdiction of the Court, or*
>
> *(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."*

28. True that in terms of the said provision, the issues regarding territorial jurisdiction ought to be tried as primary issues but when it is evident that the issue could not be decided solely based on the pleadings in the plaint (here claim petition) and when parties are permitted to adduce evidence upon finding that it is a mixed question of law and facts there was absolutely no justification for not pronouncing an award on all the issues framed besides the one pertaining to its territorial jurisdiction. There cannot be any doubt with respect to the fact that when evidence was permitted to be let in, may be for such issues the possibility of re-appreciation and consequent reversal of finding(s) of the Tribunal cannot be ruled out. But then, if the award was pronounced not at threshold, but after a very long lapse of time and confining consideration only on the issue of territorial jurisdiction and then, answering the other issues as well against the claimant without examining them on their own merits, but solely because of the negative finding on the issue of territorial jurisdiction, as occurred in the case on hand, it would defeat the very purpose of the benevolent legislation providing for grant of compensation under Section 166 of the M.V. Act. As noticed hereinbefore in this case, the question of territorial jurisdiction was decided by the Tribunal after about 4 years since the filing of the claim petition and the appeal filed in 2010 was dismissed, confirming the dismissal of the claim petition after about 6 years. We have also already noted that in the case on

hand a great illegality or error has been committed by the Tribunal even after observing that it got no occasion to examine the other six issues but then deciding those six issues against the claimant and in favour of the opposite parties. Since a Claims Tribunal constituted under Section 165, M.V. Act even when lacking territorial jurisdiction cannot be said to be lacking jurisdiction on the subject matter in a claim petition and the award would not be a nullity and therefore, the findings on other issues would be binding on the parties. Hence, in the first instance, failure of justice occurred as the award of the Tribunal virtually rendered the claimant remediless. In cases of this nature, sometimes a remand may also be a futility as passage of such long period may make witnesses unavailable for examination or re-examination for various reasons. Such reasons may also include death of the witness(s). Since the present imbroglio is created because of a mistake or error on the part of the Tribunal, either in proceeding further after returning a negative finding on the question of territorial jurisdiction or in not pronouncing award on all issues, we are of the considered view that the said mistake not entering on merits and into a findings on issues No.1 to 4, 6 and 7 at paragraph 21 against the claimant and in favour of the opposite parties without examining them on merits and hence, they are liable to be set aside in the light of the salutary maxim '*Actus Curiae neminem gravabit*', as no party shall be put to suffer for the mistake of a Court.

29. We have already referred to the provision under Order XIV, Rule 2, CPC, observed and held while in certain circumstances it would be inevitable to pronounce judgment/award on all issues as mandated thereunder. We are not oblivious of the provision under Section 169 of the M.V. Act. In this regard, it is apt to refer to paragraph 15 of the decision in ***Mantoo Sarkar's*** case (supra) where this Court held as under:-

> *"15. No doubt the Tribunal must exercise jurisdiction having regard to the ingredients laid down under sub-section (2) of Section 166 of the Act. We are not unmindful of the fact that in terms of Section 169 of the Act, the Tribunal, subject to any rules, may follow a summary procedure and the provisions of the Code of Civil Procedure under the Act have a limited application but in terms of the rules "save and except" any specific provision made in that behalf, the provisions of the Code of Civil Procedure*

would apply. Even otherwise the principles laid down in the Code of Civil Procedure may be held to be applicable in a case of this nature."

30. Since, there is no specific provision to deal with a situation akin to the situation in the case on hand, the said observation in ***Mantoo Sarkar's*** case (supra) would apply to the case on hand with all its force.

31. In view of the nature of this case, as observed in ***Mantoo Sarkar's*** case (supra), we would have even exercised our extraordinary jurisdiction under Article 142 of the Constitution of India to do complete justice between the parties by determining the question of compensation as the accident in question occurred on 07.03.2006. Despite the death of the son of the appellant in the said accident the fact is that the claimant did not get compensation despite the passage of more than 18 years. We have already noted that all relevant issues were framed by the Tribunal for the purpose of determination of compensation. However, even after deciding to permit the parties to adduce evidence the Tribunal in the instant case, appears to have confined it for the purpose of deciding the only question of territorial jurisdiction and therefore, in the absence of evidence on necessary ingredients for determination of compensation payable, we are not in a position to determine the compensation as in view of the factual position obtained in the instant case sufficient to apply the decisions in ***Mantoo Sarkar's*** case (supra) as also ***Malati Sardar's*** case (supra) to reverse the finding on territorial jurisdiction. The High Court has fallen in error in not picking up the illegalities resulting in failure of justice and to resolve them appropriately. For the purpose of determining the compensation in respect of a case of this nature the relevant factors and dates necessary for computing ultimately the quantum of compensation, are not available on record, before us. Though, we are pained and peeved, we have no option, but to remand the matter after a long period of 18 years, which could have been avoided had the Tribunal followed Order XIV, Rule 2, CPC. Taking note of such circumstances and the prejudice already caused to the claimant(s) and further that directing the Motor Accident Claims Tribunal at Nainital to restore MACP No.137/2006 and fix a date for the appearance of the parties and then proceed to consider the question of grant of compensation, ignoring its finding on territorial jurisdiction would have no prejudice to the parties as they had already

examined witnesses before the Claims Tribunal, we are inclined to remand the matter to the Motor Accident Claims Tribunal at Nainital. We hold that it would not cause any prejudice to the opposite parties as they have already filed the written statements before the Tribunal despite objecting to the territorial jurisdiction and even thereafter have chosen to adduce oral evidence before the Tribunal, to some extent. It is also a fact that the first respondent-insurance company got its office in Nainital or in other words it is conducting its business within the limits of Motor Accident Claims Tribunal at Nainital and the fact is that cross-examination of witnesses were done on its behalf as well. There cannot be any doubt with respect to the fact that the subject matter of claim is within jurisdiction of the Claims Tribunal, at Nainital.

32. For all these reasons, we set aside the impugned judgment and order dated 28.11.2016 passed by the High Court of Uttarakhand at Nainital in appeal from order No.414 of 2010 arising from the Award in MACP No.137/2006 and also the award dated 06.10.2010 passed by the Motor Accident Claims Tribunal at Nainital. To enable the Tribunal to proceed further and to decide the claim petition on merits, MACP No.137/2006 is restored into its file and in view of the long lapse of time there will be a further direction that the Tribunal shall conclude the entire exercise after permitting parties to adduce further evidence, if any, within a period of six months from the date of receipt of a copy of this judgment.

33. The parties shall appear before the Tribunal either in person or through counsel on 20.05.2024 and thereupon, the Tribunal shall conclude the proceedings within the above stipulated time. In the peculiar circumstances to comply with the direction, the Registry shall forward copies of this judgment to all the parties. The appeal is disposed of as above.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeal disposed of.

[2024] 2 S.C.R. 1223 : 2024 INSC 261

Vikas Chandra
v.
State of Uttar Pradesh & Anr.

(Criminal Appeal No. 1101 of 2024)

22 February 2024

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

Issue for Consideration

Respondent No.2 was summoned to face the trial for the offence under Section 306 of the Penal Code, 1860. High Court whether justified in quashing the summons.

Headnotes

Penal Code, 1860 – ss.306, 107 – Abetment of suicide – When not – Code of Criminal Procedure, 1973 – ss.482, 204 – Case of the appellant was that his father committed suicide by consuming poison in the office of Sub-Mandi, Alhaganj where he was working, leaving a suicide note attributing responsibility for the same on respondent No.2 – Deceased was earlier working in Mandi Samiti, Puwaya as Security Guard and the respondent No.2 was the then Secretary of the Mandi Samiti – Complaint stated that the salary of the deceased for few months was unpaid and when he requested for its release on 12.10.2004, respondent No.2 uttered instigative words abetting him to commit suicide – High Court quashed the summons issued to respondent No.2 to face the trial u/s.306, IPC – Correctness:

Held: There was no explicit or implicit reference in the so-called suicide note dated 23.10.2004 about any occurrence on 12.10.2004 involving the deceased and the respondent No.2 as alleged by the complainant – There was no proximity between the alleged occurrence of utterance of the so-called instigative words on 12.10.2004 and the commission of suicide by the deceased inasmuch as it was committed only on 23.10.2004 – It is also undisputed that at the time of the commission of suicide, the deceased was not working in the office of Mandi Samiti, Puwaya where the respondent No.2 was working as Secretary and when the former committed the suicide he was attached to the office of the Mandi Samiti, Jalalabad and was working in Sub-Mandi, Alhaganj – High Court rightly held that the so-called suicide note

* Author

did not reveal and reflect that the victim was disturbed on account of non-receipt of salary and for that reason, he was bent upon to commit suicide – Though it stated that the respondent No.2 was responsible for his suicide however, there was absolute absence of any material or even a case in the complaint and in the so-called suicide note that the respondent No.2 abetted the late deceased in a manner that will attract the provisions u/s.107, IPC – There is absolute absence of any allegation of continued course of conduct on the part of the respondent No.2 with a view to create circumstances leaving the deceased with no other option except to commit suicide – In such circumstances, the mere statement in suicide note dated 23.10.2004, that respondent No.2, Secretary, Mandi Samiti, Puwaya will be responsible for his suicide would not be a ground at all to issue summons to the respondent No.2 to face the trial for the offence u/s.306, IPC – Issuance of summons is a serious matter and shall not be done mechanically – It shall be done only upon satisfaction on the ground for proceeding further in the matter against a person concerned based on the materials collected during the inquiry – Impugned judgment of High Court does not suffer from any legal infirmity, illegality or perversity, warranting any interference. [Paras 13, 21, 24, 25, 29 and 30]

Code of Criminal Procedure, 1973 – ss.482, 204 – Summons issued by Magistrate, interference with in exercise of power u/s.482:

Held: *Sine qua non* for exercise of the power u/s.204, to issue process is the subjective satisfaction regarding the existence of sufficient ground for proceeding – Issuance of summons is a serious matter and, therefore, shall not be done mechanically – It shall be done only upon satisfaction on the ground for proceeding further in the matter against a person concerned based on the materials collected during the inquiry – A petition filed u/s.482, for quashing an order summoning the accused is maintainable – Once it is held that *sine qua non* for exercise of the power to issue summons is the subjective satisfaction "on the ground for proceeding further" while exercising the power to consider the legality of a summons issued by a Magistrate, it is the duty of the Court to look into the question as to whether the Magistrate applied his mind to form an opinion as to the existence of sufficient ground for proceeding further and in that regard to issue summons to face the trial for the offence concerned. [Paras 10, 13 and 14]

Vikas Chandra v. State of Uttar Pradesh & Anr.

Code of Criminal Procedure, 1973 – ss.173(2), 204 – FIR was registered u/s.306, IPC based on the orders of the High Court – Closure report was filed u/s.173(2) – Magistrate did not accept the closure report – In the protest petition filed by the appellant, Magistrate made an inquiry u/s.202, CrPC, and issued summons to respondent No.2 – Plea on behalf of respondent No.2 that though the Magistrate has the power to issue summons despite the fact that the Final Report filed u/s.173 (2) is a closure report in the case on hand, it was issued against respondent No.2 without satisfying the ground for proceeding further in the manner required under law:

Held: Magistrate is not duty bound to accept the Final Report filed u/s.173 (2) and is jurisdictionally competent to take cognizance and issue summons despite the receipt of closure report following the prescribed procedure – Further, while conducting an inquiry, the Magistrate could go into the merits of the evidence collected by the investigating agency to determine whether there are sufficient grounds for proceeding. [Paras 8-10]

Case Law Cited

Union of India v. Prakash P. Hinduja & Anr. [2003] Suppl. 1 SCR 307 **: (2003) 6 SCC 195;** *Bhagwant Singh v. Commissioner of Police & Anr.* [1985] 3 SCR 942 **: (1985) 2 SCC 537;** *M/s Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors.* [1997] Suppl. 5 SCR 12 **: (1998) 5 SCC 749;** *D.N. Bhattacharjee & Ors. v. State of West Bengal & Anr.* [1972] 3 SCR 973 **: (1972) 3 SCC 414;** *Mehmood Ul Rehman & Ors. v. Khazir Mohammad Tunda and Ors.* [2015] 4 SCR 841 **: (2015) 12 SCC 420;** *Bhushan Kumar & Anr. v. State (NCT of Delhi) & Anr.* [2012] 2 SCR 696 **: (2012) 5 SCC 424;** *Sunil Bharti Mittal v. C.B.I.* [2015] 1 SCR 377 **: (2015) 4 SCC 609;** *S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.* [2005] Suppl. 3 SCR 371 **: (2005) 8 SCC 89;** *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.* [1976] Suppl. SCR 123 **: (1976) 3 SCC 736;** *M. Vijayakumar v. State of Tamil Nadu* [2024] 2 SCR 1054 **: 2024 SCC OnLine SC 238;** *M. Mohan v. State represented by the Deputy Superintendent of Police* [2011] 3 SCR 437 **: (2011) 3 SCC 626;** *Madan Mohan Singh v. State of Gujarat & Anr.* [2010] 10 SCR 351 **:**

(2010) 8 SCC 628; *Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)* [2009] 13 SCR 230 **: (2009) 16 SCC 605;** *Ramesh Kumar v. State of Chhattisgarh* [2001] Suppl. 4 SCR 247 **: (2001) 9 SCC 618;** *Netai Dutta v. State of West Bengal* **(2005) 2 SCC 659 – relied on.**

List of Acts

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

List of Keywords

Section 306 of Penal Code, 1860; Section 482 of Code of Criminal Procedure, 1973; Suicide; Abetment of suicide; Suicide note; Summoning order; Quashing; Instigative words; Commission of suicide; Leaving deceased with no other option except to commit suicide; Mere statement in suicide note; Closure report; Protest petition; Issuance of summons; Application of mind by Magistrate; Legality of a summons issued by Magistrate; Sufficient ground for proceeding further.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1101 of 2024

From the Judgment and Order dated 10.10.2017 of the High Court of Judicature at Allahabad in AN No. 5961 of 2013

Appearances for Parties

Raj Kamal, Maheen Pradhan, Aseem Atwal, Kartavya Batra, Anurag Chandra, Ms. Nupur Kaushik, Ms. Aprajita Tyagi, Ms. Muskan Sidana, Advs. for the Appellant.

Ms. Sakshi Kakkar, Ajay Singh, R Karthik, Praveen Chaturvedi, Shashidhar Tripathi, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

C. T. Ravikumar, J.

Leave granted.

1. The captioned appeal is directed against the judgment and order dated 10.10.2017 passed by the High Court of Judicature at Allahabad

in Application under Section 482 No.5961 of 2013. As per the impugned order, in invocation of the power under Section 482 of the Code of Criminal Procedure, 1973 (for short "the Cr.PC"), the High Court quashed the order dated 05.04.2012 passed by the Court of Chief Judicial Magistrate, Shahjahanpur in Criminal Case No.1478 of 2012, summoning the respondent No. 2 herein in the appeal to face the trial for the offence under Section 306 of the Indian Penal Code, 1860 (for short "the IPC").

2. Heard learned counsel appearing for the appellant, learned counsel appearing for the respondent No.1–State of Uttar Pradesh and the learned counsel appearing for respondent No.2.

3. It is a matter where, initially, the complainant approached the Court of jurisdictional Magistrate with a complaint and on being refused to forward the complaint for investigation under Section 156 (3), Cr.PC, the matter was taken up in revision and upon its dismissal before the High Court in Criminal Miscellaneous Writ Petition No.9134/2005. Consequently, based on the orders of the High Court thereon, F.I.R. No.107/2005 was registered at Alhaganj Police Station under Section 306, IPC. The final report filed under Section 173(2), Cr.PC, would reveal that after the investigation, virtually, a closure report was filed by the investigating agency. The learned Magistrate did not accept the closure report. In the protest petition filed by the appellant herein the learned Magistrate made an inquiry as contemplated under Section 202, Cr.PC, and based on all the materials collected issued summons to respondent No.2 herein as per order dated 05.04.2012 and it is the challenge against the same that culminated in the impugned order.

4. Compendiously stated, the case of the appellant is that respondent No.2 committed abetment of suicide inasmuch as his father Shri Brijesh Chandra, committed suicide, by consuming poison, in the office of Sub-Mandi, Alhaganj, where he was working, after leaving a suicide note attributing responsibility for the same on respondent No.2. The appellant's father was earlier working in Mandi Samiti, Puwaya as Security Guard and the respondent No.2 was the then Secretary of the Mandi Samiti. The complaint is to the effect that the salary of the deceased from March, 2004 to August, 2004 and September, 2004 onwards was not paid by Mandi Samiti, Jalalabad and on 12.10.2004, when he requested for its release, respondent No.2 told: -

"I will see that how will you get your salary and who will help you in getting your salary, I will bring out your military-man-ship and either you die or your children, but I do not care, get out of here, why you do not take poison".

5. According to the appellant, the deceased was a retired military man and subsequent to the events on 12.10.2004 he returned home in moony mood and on 23.10.2004 at around 10.00 a.m. went to attend duty at Sub-Mandi, Alhaganj from Warikhas and committed suicide thereafter leaving a suicide note noting down such incident as well.

6. We have given our anxious consideration to the rival contentions and also have gone through the detailed discussion made by the High Court to come to the conclusion to invoke the power under Section 482, Cr.PC, to quash the order dated 05.04.2012. The bifold contentions of the appellant raised, based on law, against the impugned judgment are as under :-

(i) The High Court has committed grave error in law in quashing the summons issued against respondent No.2;

(ii) The High Court has stepped beyond the settled guidelines and parameters ordained by this Court in catena of decisions with respect to exercise of power under Section 482, Cr.PC, and in view of such guidelines and parameters, the High Court was not justified in interfering with the summons issued by the Trial Court.

7. *Per contra*, the learned counsel appearing for respondent No.2 would submit that though the Magistrate is having the power to issue summons despite the fact that the Final Report filed under Section 173 (2), Cr.PC, is a closure report in the case on hand, it was issued against the respondent No.2 without satisfying on the ground for proceeding further in the manner required under law. At any rate, the summoning order did not reflect application of mind to form the opinion regarding sufficient basis for proceeding against him. The learned counsel for the State, the first respondent, would submit that there occurred no legal error in the matter of exercise of power by the High Court and hence, the order of the High Court did not suffer from any infirmity requiring interference.

8. There cannot be any doubt with respect to the power of the Magistrate to issue summons even after filing of a negative report by the police.

In other words, the Magistrate is not duty bound to accept the Final Report filed under Section 173 (2), Cr.PC. The power not to accept the Final Report and to issue summons to the accused is recognized by this Court in the decision in ***Union of India v. Prakash P. Hinduja & Anr.***[1]. In this context, it is to be noted that this Court in the decision in ***Bhagwant Singh v. Commissioner of Police & Anr.***[2] held that when a Final Report under Section 173 (2), Cr.PC, is filed before the Magistrate, which happens to be a negative report, usually called a *"closure report"*, he gets the following four choices to be adopted, taking into account the position obtained in the case concerned:

(1) to accept the report and drop the Court proceedings (2) to direct further investigation to be made by the police (3) to investigate himself or refer for the investigation to be made by another Magistrate under Section 159, Cr.PC, (4) to take cognizance of the offence under Section 200, Cr.PC, as a private complaint when the materials are sufficient in his opinion and if the complainant is prepared for that course.

9. Now, there can be no two views that *"existence of power"* and *"exercise of power"* are different and distinct. Having found that a Magistrate is jurisdictionally competent to take cognizance and issue summons despite the receipt of closure report following the prescribed procedure, we will have to consider the sustainability of the exercise of such power, in view of the legal and factual position obtained, in this case. In the decision in ***M/s Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors.***[3], this Court laid down the golden standard for summoning an accused after holding that summoning an accused is a serious matter involving interference with life and liberty of a person. Paragraph 28 therein is noteworthy and it reads thus: -

> "28. *Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. it is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The*

1 [2003] Supp. 1 SCR 307 : (2003) 6 SCC 195

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

3 [1997] Supp. 5 SCR 12 : (1998) 5 SCC 749

order of the magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. Magistrate has to carefully scrutinize the evidence brought on record and may even himself put questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused."

10. In the contextual situation, it is also relevant to refer to the decision of this Court in ***D.N. Bhattacharjee & Ors v. State of West Bengal & Anr.***[4]**,** wherein this Court observed that while conducting an inquiry, the Magistrate could go into the merits of the evidence collected by the investigating agency to determine whether there are sufficient grounds for proceeding.

It is relevant to note, in this context, that the *sine qua non* for exercise of the power under Section 204, Cr.PC, to issue process is the subjective satisfaction regarding the existence of sufficient ground for proceeding.

11. Paragraph 7 in ***D.N. Bhattacharjee's*** case (supra), in so far as it is relevant, reads thus: -

"7…… It is true that the Magistrate is not debarred, at this stage, from going into the merits of the evidence produced by the complainant. But, the object of such consideration of the merits of the case, at this stage, could only be to determine whether there are sufficient grounds for proceeding further or not".

12. In ***Mehmood Ul Rehman & Ors. v. Khazir Mohammad Tunda and Ors.***[5] this Court held thus: -

4 [1972] 3 SCR 973 : (1972) 3 SCC 414

5 [2015] 4 SCR 841 : (2015) 12 SCC 420

> *"22…..The satisfaction on the ground for proceeding would mean that the facts alleged in the complaint would constitute an offence, and when considered along with the statements recorded, would, prima facie, make the accused answerable before the court…….In other words, the Magistrate is not to act as a post office in taking cognizance of each and every complaint filed before him and issue process as a matter of course. There must be sufficient indication in the order passed by the Magistrate that he is satisfied that the allegations in the complaint constitute an offence and when considered along with the statements recorded and the result of inquiry or report of investigation under Section 202 of CrPC, if any, the accused is answerable before the criminal court, there is ground for proceeding against the accused under Section 204 of CrPC, by issuing process for appearance. Application of mind is best demonstrated by disclosure of mind on the satisfaction……..To be called to appear before criminal court as an accused is serious matter affecting one's dignity, self respect and image in society. Hence, the process of criminal court shall not be made a weapon of harassment."*

13. A close scrutiny of the position of law revealed from the aforesaid decisions, which are constantly and consistently being followed by this Court, would reveal that issuance of summons is a serious matter and, therefore, shall not be done mechanically and it shall be done only upon satisfaction on the ground for proceeding further in the matter against a person concerned based on the materials collected during the inquiry.

14. In the aforesaid circumstances, the next question to be considered is whether a summons issued by a Magistrate can be interfered with in exercise of the power under Section 482, Cr.PC. In the decisions in ***Bhushan Kumar & Anr. v. State (NCT of Delhi) & Anr.***[6] and ***M/s Pepsi Foods Ltd.'s*** case (supra) this Court held that a petition filed under Section 482, Cr.PC, for quashing an order summoning the accused is maintainable. There cannot be any doubt that once it is held that *sine qua non* for exercise of the power to issue summons is

6 [2012] 2 SCR 696 : (2012) 5 SCC 424

the subjective satisfaction *"on the ground for proceeding further"* while exercising the power to consider the legality of a summons issued by a Magistrate, certainly it is the duty of the Court to look into the question as to whether the learned Magistrate had applied his mind to form an opinion as to the existence of sufficient ground for proceeding further and in that regard to issue summons to face the trial for the offence concerned. In this context, we think it appropriate to state that one should understand that 'taking cognizance', empowered under Section 190, Cr.PC, and 'issuing process', empowered under Section 204, Cr.PC, are different and distinct. (See the decision in ***Sunil Bharti Mittal v. C.B.I.***[7]***).***

15. In ***Sunil Bharti Mittal's*** case (supra), this Court interpreted the expression *"sufficient grounds for proceeding"* and held that there should be sufficiency of materials against the accused concerned before proceeding under Section 204, Cr.PC. It was held thus:-

> ***"53.*** *However, the words "sufficient ground for proceeding" appearing in Section 204 are of immense importance. It is these words which amply suggest that an opinion is to be formed only after due application of mind that there is sufficient basis for proceeding against the said accused and formation of such an opinion is to be stated in the order itself. The order is liable to be set aside if no reason is given therein while coming to the conclusion that there is prima facie case against the accused, though the order need not contain detailed reasons. A fortiori, the order would be bad in law if the reason given turns out to be ex facie incorrect."*

16. In the decision in ***S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla & Anr.***[8], this Court held that the settled position for summoning of an accused is that the Court has to see the *prima facie* evidence. This Court went on to hold that the *'prima facie evidence'* means the evidence sufficient for summoning the accused and not the evidence sufficient to warrant conviction. The inquiry under Section 202, Cr.PC, is limited only to ascertain whether on the material placed by the complainant a *prima facie* case was made out for summoning the accused or not.

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7 [2015] 1 SCR 377 : (2015) 4 SCC 609

8 [2005] Supp. 3 SCR 371 : (2005) 8 SCC 89

17. In an earlier decision in ***Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi & Ors.***[9], this Court laid down certain conditions whereunder a complaint can be quashed invoking the power under Section 482, Cr.PC, thus: -

> *"(1) where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;*
>
> *(2) where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused;*
>
> *(3) where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and*
>
> *(4) where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."*

18. Having understood the scope of interference with issuance of summons in exercise of power under Section 482, Cr.PC, we will move on to consider the question whether the impugned order justifies such interference or in other words, whether impugned order invites interference? We have briefly narrated the case revealed from the complaint and also taken note of the fact(s) that the High Court under the impugned judgment arrived at the finding that no material is available, suggesting instigation by the respondent No.2 in the suicide note and nothing indicative of occurrence of an incidence and utterance of words as mentioned by the complainant, were vividly stated or even alluded, therein. In view of the fact that summons was issued to the respondent No.2 to stand the trial for the offence under Section 306, IPC it is only apt to analyse the said Section to

9 [1976] Supp. 1 SCR 123 : (1976) 3 SCC 736

find out the ingredients to attract the same and also whether the complaint and the evidence collected during the inquiry and also during the investigation which resulted in the filing of the closure report *prima facie* discloses sufficient ground for proceeding and to issue summons to the respondent No.2 to face the trial for the offence under Section 306, IPC.

19. In the decision in ***M. Vijayakumar v. State of Tamil Nadu***[10], this Court considered Section 306, IPC and its co-relation with Section 107, IPC after referring to the decisions in ***M. Mohan v. State represented by the Deputy Superintendent of Police***[11]**,** ***Madan Mohan Singh v. State of Gujarat & Anr.***[12]**,** and ***Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)***[13]**.** After analysing the provisions under Section 306, IPC with reference to 'abetment', as defined under Section 107, IPC and the decisions in ***M. Mohan's*** case (supra), ***Madan Mohan Singh's*** case (supra) and ***Chitresh Kumar Chopra's*** case (supra) it was held that "in order to bring out an offence under Section 306, IPC specific abetment as contemplated by Section 107, IPC on the part of the accused with an intention to bring about the suicide of the person concerned as a result of that abetment is required. The intention of the accused to aid or to instigate or to abet the deceased to commit suicide is a must for this particular offence under Section 306, IPC,…" Thus, in view of the decision, it is clear that what matters in deciding the question whether there is ground for proceeding against a particular person and to issue summons to him to face the trial for the offence under Section 306, IPC is whether the complaint and the materials collected during the inquiry/investigation *prima facie* disclose *mens rea* on the part of the accused to bring about suicide of the victim. This position of law and condition Nos. 1 and 2 in ***Smt. Nagawwa's*** case (supra), extracted in paragraph 17 above, are to be borne in mind while considering the question whether a *prima facie* case of 'abetment of suicide' is made out against the respondent No.2. Obviously, the High Court held it in the negative under the impugned judgment. As per the complainant, who was examined before the

10 [2024] 2 SCR 1054 : 2024 SCC OnLine SC 238

11 [2011] 3 SCR 437 : (2011) 3 SCC 626

12 [2010] 10 SCR 351 : (2010) 8 SCC 628

13 [2009] 13 SCR 230 : (2009) 16 SCC 605

learned Magistrate in the inquiry, the respondent No.2 by uttering the instigative words on 12.10.2004 (extracted hereinbefore) abetted his father to commit suicide. However, the impugned judgment would reveal that the High Court upon careful perusal of the suicide note found conspicuous absence of any reference, either explicitly or implicitly, in the suicide note regarding any such occurrence, as alleged by the complainant, on 12.10.2004 or anything suggesting that the respondent No.2 was conscious of the fact that the victim was bent upon to commit suicide in case of non-disbursement of salary and despite such knowledge he desisted disbursal of salary and instigated the victim to commit suicide.

20. As per the impugned judgment the High Court went on to consider and held thus:-

> *"As per mandate of this Section, there must be explicit or implicit abetment or some overt act indicative or suggestive of fact that some instigation was given for committing suicide and the applicant was having an interest in it. Nothing has surfaced, which may reflect on the mindset of the applicant that he ever intended the consequence that the deceased would commit suicide and with that view in mind, he stopped payment of salary. Had it been the actual position then obviously the suicide note must have whispered about that particular aspect or it would have at least alluded to that situation, but on careful perusal of the suicide note it explicit that the deceased himself was bent upon committing suicide in case the salary was not drawn in his favour. But under circumstances, there is nothing to suggest that the applicant was conscious of that position and knowing the same situation he insisted that he would not pay the salary in question. The trial court, however, ignoring all these legal aspects took cognizance of the offence by rejecting the final report submitted by the Investigating Officer and issued process against the applicant by way of summoning. Resultantly, this application is allowed. Criminal proceedings of impugned order dated 05.04.2012 passed by Chief Judicial Magistrate, Shahjahanpur in Criminal Case No.1478 of 2012, Vikas Vs. Ram Babu, Case Crime No.C-2 of 2005, under Section 306 IPC,*

Police Station- Alhaganj, District Shahjahanpur by which the applicant has been summoned to face the trial is hereby quashed."

21. Certain relevant and indisputable aspects revealed from the material on record are also to be noted, with reference to the relevant decisions, as under:

(i) There is no explicit or implicit reference about any occurrence on 12.10.2004 involving the deceased and the respondent No.2, as alleged in the complaint and as stated by the complainant in the inquiry, is made in the so-called suicide note dated 23.10.2004;

(ii) There is no proximity between the alleged occurrence of utterance of the so-called instigative words on 12.10.2004 and the commission of suicide by Brijesh Chander inasmuch as it was committed only on 23.10.2004. The so-called suicide note did not refer to any such occurrence. If any such incident had, in troth, occurred and if that was the reason which pushed him to commit suicide it would have been mentioned, explicitly or implicitly in the so-called suicide note, as rightly observed and held by the High Court. What makes it dubious and unfit for being formative foundation for prosecution for an offence under Section 306, IPC, will be dealt with a little later.

22. It is to be noted that apart from the above mentioned alleged incident, there is no allegation of continued course of conduct (against the respondent No.2) creating circumstances compelling the victim to or leaving the victim with no other option but to, commit suicide. In this contextual situation from the decision of this Court in ***Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi)***[14]**,** paragraphs 16 and 17 therein dealing with the expression 'instigation' are worthy for reference and they read thus:-

"16…instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of "instigation", though it is not necessary that actual words must be used to that effect or what constitutes "instigation" must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the

14 [2009] 13 SCR 230 : (2009) 16 SCC 605

consequence must be capable of being spelt out. Where the accused had, by his acts or omission or by a continued course of conduct, created such circumstances that the deceased was left with no other option except to commit suicide, in which case, an "instigation" may have to be inferred. A word uttered in a fit of anger or emotion without intending the consequences to actually follow, cannot be said to be instigation."

> *"17.Thus, to constitute "instigation", a person who instigates another has to provoke, incite, urge or encourage the doing of an act by the other by "goading" or "urging forward". The dictionary meaning of the word "goad" is "a thing that stimulates someone into action; provoke to action or reaction" (see Concise Oxford English Dictionary); "to keep irritating or annoying somebody until he reacts…"*
>
> *(emphasis in original)*

23. In the decision in ***Ramesh Kumar v. State of Chhattisgarh***[15]**,** this Court held that where the accused by his acts or continued course of conduct creates such circumstances that the deceased was left with no other option except to commit suicide, an instigation may be inferred.

24. Now, reverting to the so-called suicide note, we do not find any reason to interfere with its evaluation by the High Court, for reasons more than one. We have already noted the conspicuous absence of any reference about the alleged incident on 12.10.2004 involving the deceased and the respondent No.2, either explicitly or implicitly, therein. Before looking into and applying the principles enunciated for appreciation of a suicide note in the decisions of this Court in ***Netai Dutta v. State of West Bengal***[16] and ***Madan Mohan Singh's*** case (supra), we will have a glance at the tenor of the suicide note. As observed and held by the High Court, the so-called suicide note would not reveal and reflect that the victim was disturbed on account of non-receipt of salary and for that reason, he was bent upon to

15 [2001] Supp. 4 SCR 247 : [(2001) 9 SCC 618]

16 (2005) 2 SCC 659

commit suicide. Though it is stated that the respondent No.2 is responsible for his suicide however, there is absolute absence of any material or even a case in the complaint and in the so-called suicide note that the respondent No.2 has abetted late Brijesh Chandra in a manner that will attract the provisions under Section 107, IPC. There is absolute absence of any allegation of continued course of conduct on the part of the respondent No.2 with a view to create circumstances leaving the deceased with no other option except to commit suicide. In such circumstances, the mere statement in suicide note dated 23.10.2004, 'Shri Ram Babu Sharma, Secretary, Mandi Samiti, Puwaya will be responsible for his suicide' would not be a ground at all to issue summons to the respondent No.2 to face the trial for the offence under Section 306, IPC. The principles enunciated in ***Madan Mohan Singh's*** case (supra) and ***Netai Dutta's*** case (supra), on application to the facts obtained in this case would also justify the interference by the High Court with the subject summons.

25. In the case on hand, the undisputable position is that at the time of the commission of suicide, the deceased was not working in the office of Mandi Samiti, Puwaya where the respondent No.2 was working as Secretary and when the former committed the suicide he was attached to the office of the Mandi Samiti, Jalalabad and was working in Sub-Mandi, Alhaganj.

26. In ***Madan Mohan Singh's*** case (supra), the salary of the deceased, who was allegedly abetted to commit suicide, for 15 days was deducted by the accused. That apart, in that case also a suicide note was left by the deceased, which in so far as it is relevant was quoted in paragraph 7 of the said decision thus: -

> *"I am going to commit suicide due to his functioning style. Alone M.M. Singh, DET Microwave Project is responsible for my death. I pray humbly to the officers of the Department that you should not cooperate as human being to defend M.M. Singh. M.M. Singh has acted in breach of discipline disregarding the norms of discipline. I humbly request the enquiry officer that my wife and son may not be harassed. My life has been ruined by M.M. Singh".*

27. Paragraph 13 and 14 of the said judgment, in so far as they are relevant are also worthy to be extracted. They read thus: -

"13…… In fact, there is no nexus between the so-called suicide (if at all it is one for which also there is no material on record) and any of the alleged acts on the part of the appellant. There is no proximity either. In the prosecution under Section 306 IPC, much more material is required. The courts have to be extremely careful as the main person is not available for cross-examination by the appellant-accused. Unless, therefore, there is specific allegation and material of definite nature (not imaginary or inferential one), it would be hazardous to ask the appellant-accused to face the trial. A criminal trial is not exactly a pleasant experience. The person like the appellant in the present case who is serving in a responsible post would certainly suffer great prejudice, were he to face prosecution on absurd allegations of irrelevant nature…

14. As regards the suicide note, which is a document of about 15 pages, all that we can say is that it is an anguish expressed by the driver who felt that his boss (the accused) had wronged him. The suicide note and the FIR do not impress us at all. They cannot be depicted as expressing anything intentional on the part of the accused that the deceased might commit suicide. If the prosecutions are allowed to continue on such basis, it will be difficult for every superior officer even to work."

28. In ***Netai Dutta's*** case (supra) from the dead body a suicide note was recovered and on its basis the police registered a case against the appellant under Section 306, IPC. Paragraphs 5, in so far as it is relevant, and 6 of the said decision read thus: -

"5. …An offence under Section 306 IPC would stand only if there is an abetment for the commission of the crime. The parameters of "abetment" have been stated in Section 107 of the Penal Code, 1860. Section 107 says that a person abets the doing of a thing, who instigates any person to do that thing; or engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, or the person should have intentionally aided any act or illegal omission. The Explanation to Section 107

says that any wilful misrepresentation or wilful concealment of a material fact which he is bound to disclose, may also come within the contours of "abetment".

6. In the suicide note, except referring to the name of the appellant at two places, there is no reference of any act or incidence whereby the appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag."

29. In short, applying the principles of the decisions referred above to the facts of the case on hand would reveal that the impugned judgment of the High Court did not suffer from any legal infirmity, illegality or perversity and the conclusions are arrived at after a rightful appreciation of the complaint and the other materials on record, within the permissible parameters.

30. Considering the facts and circumstances of the case, we do not find anything warranting any interference by this Court. The appeal is, therefore, dismissed.

Headnotes prepared by: Divya Pandey

Result of the case: Appeal dismissed.