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Rajesh Monga
v.
Housing Development Finance Corporation Limited & Ors.

(Civil Appeal No. 1495 of 2023)

04 March 2024

[A.S. Bopanna* and M.M. Sundresh JJ.]

Issue for Consideration

Whether an adjustable rate of interest on home loan would apply based only on the rate of interest being fixed/altered by RBI or the rate of interest fixed/ altered by respondent No.1-Bank.

Headnotes

Consumer Protection Act, 1986 – Rate of interest to be charged on home loan – Home buyer filed loan application, opting an adjustable rate of interest – Manager of the Bank assured that the rate of interest would be charged based on the Prime Lending Rate of RBI – Loan amount disbursed, and thereafter, the rate of interest was revised from 7.25% pa to 8.25% pa despite RBI not having changed the Prime Lending Rate and was further increased to 10.5% pa though no change made by RBI – Consumer complaint – National Consumer held that home buyer was bound by the terms and conditions of the agreement while the bank was bound by various instructions of RBI at the time of signing the agreement – Interference with:

Held: Respondent No.1 being a NBFC and as a corporate body would be bound by its policies and procedures with regard to lending and recovery – Applicability of the rate of interest to be charged is a policy matter and cannot be case-specific unless the individual agreement entered into between the parties indicate otherwise – When the parties have signed the agreement, the terms agreed therein would bind the parties and the email exchanged between the parties cannot override the policy decisions of the institution – Having executed the agreement; having agreed to the terms and conditions; having received the loan amount, the appellant-home buyer cannot raise any objection for the first time

* Author

when the rate of interest was increased after having acquiesced by signing the agreement – Further, the appellant having repaid the loan amount with interest as per the terms of agreement cannot make out a grievance in hindsight and seek refund of the amount paid – In view thereof, no error has been committed so as to call for interference. [Para 10 – 16]

Case Law Cited

Texco Marketing (P) Ltd. v. TATA AIG General Insurance Co. Ltd. [2022] 9 SCR 1031 **: (2023) 1 SCC 428;** *Debashis Sinha v. R.N.R. Enterprise* **(2023) 3 SCC 195;** *Pradeep Kumar v. Postmaster General* [2022] 19 SCR 583 **: (2022) 6 SCC 351;** *Board of Trustees of Chennai Port Trust v. Chennai Container Terminal Private Ltd.* **(2014) 1 CTC 573 – referred to.**

List of Acts

Consumer Protection Act, 1986.

List of Keywords

Adjustable rate of interest; Home loan; Rate of interest being fixed/altered by RBI; Prime Lending Rate of RBI; Policies and procedures with regard to lending and recovery; Agreement; Acquiesced; Unfair trade practice; Policy decisions; Compensation; Financial institution.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.1495 of 2023

From the Judgment and Order dated 10.11.2022 of the National Consumers Disputes Redressal Commission, New Delhi in CC No. 2367 of 2018

Appearances for Parties

Vikas Singh, Sr. Adv., Varun Singh, Akshay Dev, Mohammad Atif Ahmad, Nitin Saluja, Ms. Deepika Kalia, Ms. Vaishnavi, Keshav Khandelwal, Ms. Pranya Madan, Pankaj Kumar Modi, Advs. for the Appellant.

Aniruddha Choudhury, Ms. Mandira Mitra, Ms. Tushita Ghosh, Rohit, Advs. for the Respondents.

Rajesh Monga v. Housing Development Finance Corporation Limited & Ors.

Judgment / Order of the Supreme Court

Judgment

A.S. Bopanna, J.

1. The appellant is before this Court in this appeal claiming to be aggrieved by the order dated 10.11.2022 passed by the National Consumer Disputes Redressal Commission, New Delhi ('NCDRC' for short) in Consumer Complaint No. 2367 of 2018. By the said order the NCDRC has concluded that the appellant is bound by the terms and conditions of the agreement dated 11.01.2006, while the respondent was bound by various instructions of the Reserve Bank of India ('RBI' for short), at the time of signing the agreement dated 11.01.2006. Hence the complaint filed by the appellant was dismissed. The appellant is therefore before this Court.

2. The brief facts are that the appellant was in need of home loan. The respondents No. 2 and 3 being the employees of respondent No. 1 approached the appellant during August 2005. The appellant was exploring the option of securing loan from other financial institutions as well. The case of the appellant is that respondents No. 2 and 3 being the direct sales agent and the resident manager of respondent No. 1 - HDFC convinced the appellant that the rate of interest charged by the respondent No. 1 on home loan was lesser than what was being charged by ICICI Bank. In this regard, the appellant relied on an email dated 05.10.2005 from respondent No. 2 to contend that a comparison was provided in the said email to the appellant that the rate of interest offered by respondent No.1 was cheaper.

3. It is contended that the respondent No. 2, on behalf of respondent No. 1 had assured that the rate of interest would be charged based on the Prime Lending Rate of RBI. Based on such representations the appellant is stated to have applied for home loan of Rs.3,50,00,000/- (Rupees Three Crores and Fifty Lakhs) from respondent No.1, which was sanctioned and the loan agreement dated 11.01.2006 was entered into. The loan amount was disbursed to DLF Universal Ltd., in instalments between January 2006 to December 2007. As per the loan agreement, interest at 7.25% p.a and margin of 3.5 % per annum was provided. Though this was the position, the grievance of

the appellant is that the respondent No. 1 revised the rate of interest to 8.25 %, despite RBI not having changed the Prime Lending Rate during 11.01.2006 to 01.05.2006.

4. In spite of the complainant contacting the respondent No. 2 and other officers, there was no relief, instead, the respondent No. 1 raised the rate of interest to 8.75 %, to 9.25% and again to 10.5% though there was no change made by RBI with regard to the Prime Lending Rate. The appellant therefore got issued a legal notice dated 27.09.2007 demanding to return the interest amount which was charged over and above 7.5% p. a. The respondent No.1 vide their reply to the notice dated 09.10.2007 contended that the appellant through the agreement opted for 'Adjustable Rate of interest', as such rate of interest was varying as per the retail prime lending rate of respondent No. 1. It is in that background the appellant approached the Consumer Forum.

5. We have heard Sri. Vikas Singh, learned senior counsel for the appellant, Sri. Aniruddha Choudhary for the respondents and perused the appeal papers.

6. The thrust of the contention is that the respondent No. 2 on behalf of respondent No.1 had assured that the interest charged by respondent No.1 is as per the retail prime lending rate to be notified by RBI. As such the interest which was indicated at 7.25% p.a. can be altered only if the RBI had altered the rate of interest and not otherwise. Though, in the agreement it is contained that the rate of interest would be as per the prime lending rate of interest of respondent No.1, the same is contrary to the assurance that was held out to the appellant that such adjustable rate of interest agreed is only when the rate of interest is varied by the RBI and not as per the interest to be varied by respondent No.1. The learned senior counsel for the appellant in that regard has placed strong reliance on the email dated 05.10.2005, to contend that such assurance was made to the appellant.

7. The learned senior counsel for the appellant has relied on ***Texco Marketing (P) Ltd. v. TATA AIG General Insurance Co. Ltd.***, (2023) 1 SCC 428, wherein the issue considered was with regard to an exclusion clause in an insurance policy which materially altered the nature of the contract. It was observed in this regard that insurance contracts are standard form contracts wherein the

insurer being the dominant party dictates its own terms and the consumer has weak bargaining power and as such the contracts are one sided. The concept of freedom of contract loses some significance in a contract of insurance. Such contracts demand a very high degree of prudence, good faith, disclosure and notice on the part of the insurer, being different facets of the doctrine of fairness. The bench consisting of two Hon'ble judges was of the opinion that one cannot give a restrictive or narrow interpretation to the provisions relating to unfair trade practices as given under the Consumer Protection Act, 1986. The Court's finding against one of the parties qua the existence of unfair trade practice has to be transformed into an adequate relief in favour of the other, particularly in light of Section 14 of the 1986 Act. Once, the State Commission or the NCDRC, as the case may be, comes to the conclusion that the term of a contract is unfair, particularly by adopting an unfair trade practice, the aggrieved party has to be extended the resultant relief which is further strengthened by Sections 47 and 49 of the 2019 Act. It was also observed that under sub-section (2) of Sections 49 and 59 of the Consumer Protection Act, 2019 the State Commission and the NCDRC, respectively, may declare any terms of the contract being unfair to any consumer to be null and void and there exists ample power to declare any terms of the contract as unfair, if in its opinion, its introduction by the insurer has certain elements of unfairness.

In ***Debashis Sinha v. R.N.R. Enterprise*** (2023) 3 SCC 195, the dispute was regarding amenities promised by the real estate developers in their brochures/advertisement which were not delivered by them. It was noted that once the NCDRC arrived at a finding that the respondents therein were casual in their approach and had even resorted to unfair trade practice, it was its obligation to consider the appellants' grievance objectively and upon application of mind and thereafter give its reasoned decision. If at all, the appellants had not forfeited any right by registration of the sale deeds and if indeed the respondents were remiss in providing any of the facilities/amenities as promised in the brochure/advertisement, it was the duty of NCDRC to set things right.

8. In ***Pradeep Kumar v. Postmaster General*** (2022) 6 SCC 351, in those facts and circumstances it was found by this Court that fraud was committed by an officer and employee of the post office. It was

held that the Post Office, as an abstract entity, functions through its employees. Employees, as individuals, are capable of being dishonest and committing acts of fraud or wrongs themselves or in collusion with others. Such acts of bank/post office employees, when done during their course of employment, are binding on the bank/post office at the instance of the person who is damnified by the fraud and wrongful acts of the officers of the bank/post office and such acts within their course of employment will give a right to the appellants to legally proceed for injury, as this is their only remedy against the post office. Thus, the post office, like a bank, can and is entitled to proceed against the officers for the loss caused due to the fraud, etc. but this would not absolve them from their liability if the employee involved was acting in the course of his employment and duties.

9. From a perusal of the above noted cases, it would disclose that they are circumstances where certain aspects were contained in the agreements in question, but a contention was raised contrary to the same and this Court had rejected such contention. The learned senior counsel would however contend that though the parties may have agreed on certain aspects in the agreement, what is important is the intention of the parties and any correspondence exchanged between the parties as a prelude to the transaction before executing the agreement will be relevant to know the intention of the parties. It is in that regard contended that the email dated 05.10.2005 was prior to the agreement dated 11.01.2006 and as such the said intention should be gathered and given effect to. In order to persuade us to accept this contention, the learned senior counsel for the appellant has relied on the decision in ***Board of Trustees of Chennai Port Trust v. Chennai Container Terminal Private Ltd.*** (2014) 1 CTC 573 wherein it was contended that the petitioner therein had granted licence to Respondent No. 1 therein for the development and maintenance of Chennai Container Terminal in terms of Licence Agreement entered into between parties in 2001. Contentions were raised that pre-contractual correspondence cannot be relied upon as the correspondence fructified into a contract. It was held that while English jurisprudence is clear on the aspect of pre-contractual correspondence losing its significance once the contract comes into existence, a straightjacket formula cannot be applied in India as there may be people from different states and different languages as

their mother tongue whose wishes culminate into a contract which is drafted and concluded in a foreign language.

10. Having perused the precedents on which reliance was placed, we are of the opinion that the same does not come to the aid of the appellant. In the instant case, at the outset, it is to be noted that the respondent No.1 being a NBFC and as a corporate body would be bound by its policies and procedures with regard to lending and recovery. In that regard, the applicability of the rate of interest to be charged is also a matter of policy and cannot be case-specific unless the individual agreement entered into between the parties indicate otherwise.

11. In that backdrop, a perusal of the fact situation in the instant case will disclose that the appellant filed the loan application on 16.09.2005. It was indicated therein that the 'Rate option' is 'Adjustable', which discloses that, what was opted is an Adjustable Rate of Interest, which will depend on the increase or decrease of the rate of interest. The issue however is as to whether such an Adjustable Rate of Interest will apply based only on the rate of interest being fixed/ altered by RBI or as to whether the Rate of Interest fixed/ altered by Respondent No.1 - HDFC will apply in respect of the loan transaction. It is in that regard contended that respondent No.2, representing respondent No. 1 - HDFC had made a tabulation comparing the rate of interest to represent that it is beneficial to the appellant and had explicitly indicated in the email dated 05.10.2005 that- "PLR is decided by RBI, whereas FRR is decided by the individual Bank, HDFC is the only Institution working on PLR". It also indicated that in other banks like ICICI there is a clause that the change in FRR is on sole discretion of the bank.

12. The agreement dated 01.11.2006 executed between the parties inter alia provides as follows;

> "1.1 (e). The expression 'rate of interest' means the
>
> Rate of interest referred to in Article 2.2 of this Agreement and as varied from time to time in terms of this Agreement.
>
> (h) The expression 'Adjustable Interest Rate' or "AIR" means the interest rate announced by HDFC from time to time as its retail prime lending rate and applied by HDFC with spread, if any, as may be decided by HDFC, on the loan of the borrower pursuant to this Agreement.

(i) The expression "Retail Prime Lending Rate" or 'RPLR' means the interest rate announced by HDFC from time to time as its retail prime lending rate.

2.2 (a). Until and as varied by HDFC in terms of this Agreement the AIR applicable to the said loan as at the date of execution of this agreement is as stated in the Schedule. is as stated in the Schedule.

3(f). HDFC may vary its retail crime lending rate from time to time in such manner including as to the loan amounts as HDFC may deem fit in its own discretion."

13. At the threshold, it can be noted that the appellant is not an illiterate person to take the benefit of the precedents relied upon. On the other hand, when it is contended that the appellant had the option of securing loan from other banks and that being misled by the email had entered into the transaction, would by itself indicate that the appellant was worldly wise. In such circumstance when the parties have signed the agreement dated 01.11.2006, the terms agreed therein would bind the parties and the email exchanged between the parties cannot override the policy decisions of the respondent No.1 institution. In order to contend that the appellant has been misled or that the earlier representation will constitute unfair trade practice, the appellant ought to have raised such contention when the agreement was to be signed.

14. Having executed the agreement; having agreed to the terms and conditions; having received the loan amount, the appellant cannot raise any objection for the first time when the rate of interest was increased after having acquiesced by signing the agreement. Further, the appellant having repaid the loan amount with interest as per the terms of agreement cannot make out a grievance in hindsight and seek refund of the amount paid.

15. That apart, though it is contended that the appellant had the option of securing financial assistance from other institutions but was lured by respondent No.2 through the email and therefore amounts to unfair trade practice causing loss to the appellant, due to which he is entitled to be compensated, there is no material on record or evidence tendered to establish that the appellant had in fact approached any other financial institution which had agreed to sanction loan or to

demonstrate that it was a better bargain and if taken from such institution the appellant was in a better position.

16. Therefore, if all these aspects of the matter are kept in perspective and the order passed by the NCDRC is perused, we are of the view that no error has been committed so as to call for interference. Accordingly, the appeal is dismissed with no order as to costs.

17. Pending application, if any, stands disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal dismissed.

[2024] 3 S.C.R. 10 : 2024 INSC 163

Shazia Aman Khan and Another
v.
The State of Orissa and Others

(Criminal Appeal No.1345 of 2024)

04 March 2024

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

Issue for Consideration

Custody of a minor child in *parens patriae* jurisdiction.

Headnotes

Child and Family Welfare – Custody of minor child – Custody of one of the twin daughters born to respondent No.2 and his wife is in question, who had undisputedly been living with appellant No.2 (real sister of respondent No. 2) ever since she was 3-4 month old and thereafter with the family:

Held: Stability and security of the child is an essential ingredient for full development of child's talent and personality – Welfare of the children is of paramount consideration and not personal law and statute – Child's welfare is to be seen and not the rights of the parties – Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of – Presently, the child is about 14 years of age – She was called in Court and interacted with individually in chamber – She is quite intelligent and could understand her welfare – She categorically stated that she was happy with the family where she had been brought up – She has other brother and sister and is having cordial relations with them and she does not wish to be destabilized – The fact that appellant No.1 was un-married when custody of the child was handed over to her and is now married having two children will also not be a deterrent for this Court to come to the conclusion that best interest of the child still remains with the appellant No.2 as the child is living with her ever since she was 3-4 months old and is now about 14 years of age having no doubt in her mind that she wishes to live with them – Welfare of the child lies with her custody with the appellants and respondent No.10 – This is coupled with the fact that even she also wishes to live there – She cannot be treated as a chattel at the age of 14 years to hand over her custody to the respondent No.2, where she has not lived

* Author

ever since her birth – Stability of the child is also of paramount consideration – Impugned order passed by the High Court inter alia directing the recovery of the child from the custody of appellant No. 2 and respondent No. 10, particularly from appellant No.1 and respondent No. 10 and to hand over to respondent No.2 is set aside – Writ petition filed by respondent No. 2 in the High Court dismissed. [Paras 12-14, 16, 17, 19-21]

Case Law Cited

Tejaswani Gaud v. Shekhar Jagdish Prasad Tewari, [2019] 7 SCR 335 **: AIR 2019 SC 2318 – held inapplicable.**

Athar Hussain v. Syed Siraj Ahmed and others, [2010] 1 SCR 49 **: (2010) 2 SCC 654;** *Rohith Thammana Gowda v. State of Karnataka and others*, [2022] 4 SCR 784 : **AIR 2022 SC 3511;** *Mausami Moitra Ganguli v. Jayant Ganguli*, [2008] 8 SCR 260 **: (2008) 7 SCC 673;** *Nil Ratan Kundu and another v. Abhijit Kundu*, [2008] 11 SCR 1111 **: (2008) 9 SCC 413;** *Ashish Ranjan v. Anupam Tandon and another*, [2010] 14 SCR 961 **: (2010) 14 SCC 274;** *Roxann Sharma v. Arun Sharma,* [2015] 2 SCR 572 **: (2015) 8 SCC 318 – relied on.**

List of Keywords

Custody of minor child; *Parens patriae* jurisdiction; Stability and security of the child; Welfare of the child; Wish of the child; Mohammaden law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1345 of 2024

From the Judgment and Order dated 03.04.2023 of the High Court of Orissa at Cuttack in WPCRL No.160 of 2021

Appearances for Parties

Amit Pawan, Anand Nandan, Abhishek Amritanshu, Aakarsh, Hassan Zubar Waris, S.S. Rawat, Ms. Shivangi, Advs. for the Appellants.

Shovan Mishra, Ms. Bipasa Tripathy, Ms. Sagarika Sahoo, Anam Charan Panda, Hitendra Nath Rath, Akshat Srivastava, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

Leave granted.

2. This Court has been called upon to decide about the issue regarding custody of a minor child in parens patriae jurisdiction.

3. The child at present is 14 years of age, living since birth with the appellants and respondent No.10.

4. Aggrieved against the order[1] passed by the High Court[2] in a Writ Petition[3] filed by respondent No.2, who is biological father of the child, for restoration of her custody, namely, Sumaiya Khanam in his favour, the present appeal has been filed.

5. The High Court directed the Registrar (Judicial) of the Court to recover the child from the custody of appellant No. 2 and respondent No. 10, particularly from appellant No. 1 and respondent No. 10 and to hand over to respondent No.2. The authorities of the State Government were also directed to execute the writ of Habeas Corpus and hand over the child to respondent No. 2.

6. Learned counsel for the appellants submitted that twin daughters were born to respondent No. 2 and his wife on 20.03.2010. The respondent No. 2 at that time was living at Rourkela. The children were born at Ranchi where their maternal grand mother was residing. As he was unable to take care of twins, on his request, one was left at Ranchi. Appellant No. 2 is the real sister of respondent No. 2. As the maternal grand mother could not take care of the small child, she was handed over to the appellant No. 2. This happened when the child was merely 2-3 months old. Ever since then, she is living with her. No issue was raised by respondent No. 2 at any time. It was only in the year 2015, a complaint was filed by respondent No. 2 with the police regarding kidnapping of the child against the appellants and respondents No. 7 and 9. As it was not a case of kidnapping,

1 Order dated 03.04.2023

2 High Court of Orissa at Cuttack

3 WPCRLNo. 160 of 2021

as alleged, closure report was filed by the police on 31.08.2016, which was accepted by the Court, *vide* order dated 11.02.2017. No objection was raised by respondent No. 2 to the acceptance of the closure report. However, a private complaint[4] dated 27.03.2017 was filed by respondent No. 2 under Sections 363, 346, 120-B IPC with reference to the custody of the child by taking a different stand. The aforesaid complaint is stated to be still pending. In a petition[5] filed by the appellants and respondents No. 7 and 9 before the High Court seeking quashing of the complaint, further proceedings in the complaint have been stayed.

6.1 Immediately after filing of the aforesaid complaint by the respondent No. 2, wife of respondent No.2, namely, biological mother of the child, filed petition[6] in the High Court of Judicature at Patna praying for issuance of directions to the official respondents to recover the child from the wrongful confinement of the private respondents therein. However, when no case could be made out, the aforesaid petition was dismissed as withdrawn with liberty to avail remedy in accordance with law. The fact remains that thereafter the mother of the child did not avail any other remedy for seeking custody of the child. In fact, they were not interested at all. It was the litigation only for the sake of it. The child was left by respondent No. 2 with her maternal grand mother on account of the financial difficulty faced by him at that time.

6.2 More than four years thereafter, respondent No. 2 filed a Writ Petition in the High Court praying for custody of the child. While entertaining the Writ Petition, the High Court, vide order dated 11.02.2022, noticed the issues need to be examined in the Writ Petition. However, at the time of hearing the matter, the High Court framed different issues, as have been noticed in paragraph No. 57 of the impugned judgement.

6.3 He further submitted that number of documents were placed by the appellants before the High Court which clearly establish that the child ever since is living with the appellants and respondent

4 ICC CaseNo.120 of2017

5 CRLMC NO. 549 of2019

6 Criminal Writ Jurisdiction Case No. 1232 of 2017

No. 10. At the time of her birth, her name was Sumaiya Khanam, which was later on changed to Dania Aman Khan. A Petition[7] has been filed under the Guardianship and Wards Act, 1890 by appellant No.1 and respondent No.10, which is stated to be pending. However, he submitted that in the present proceedings, the appellants are only raising the issue regarding custody of the child and not guardianship. He fairly submitted that there is no system of adoption of child in Mohammaden law. It is only Kafalah, in terms of which only custody can be given to another person, however, the child does not sever relations with biological parents.

6.4 Learned counsel for the appellants on instructions categorically stated that appellant No. 1 and respondent No. 10 have two more children. The child, of which they have the custody ever since her birth will have equal rights along with two other children. She will not be discriminated in any manner whatsoever.

6.5 Further raising the issue regarding the conduct of respondent No. 2, he submitted that firstly a petition for Habeas Corpus was filed by the wife of respondent No. 2 before the High Court of Judicature at Patna five years after the child had been living with appellant No. 1 and respondent No. 10. The same was dismissed as withdrawn. Four years thereafter, similar petition was filed by respondent No. 2 before the High Court of Orissa. Time gap shows that the respondent No. 2 is not interested in custody of the child.

6.6 He further submitted that to show their bonafide, appellant No. 1 and respondent No. 10 are ready and willing to deposit a sum of ₹ 10,00,000/- in FDR in bank in her name and also transfer property having market value of about ₹ 50,00,000/-. At present, the child is grown up. She is 14 years of age. She is capable of forming an opinion about her best interest. The welfare of the child is of paramount consideration and not the rights of the parties. Stability is most important factor as any order passed by this Court may dislodge the child from the family where she is settled for the last 14 years. Her transplantation at this stage may not be in her best interest. It is the welfare

7 Guardianship Case No. 23 of 2016 before the Court of Principal Judge, Family Court, Patna

of the child and not the personal law or the statute which has paramount consideration, when the parties are fighting. In support of his argument that it is only the best interest of the child which is to be considered in such matters and also the difference between custody and guardianship, reliance was placed upon the judgment of this Court in **Athar Hussain v. Syed Siraj Ahmed and others**[8]**.**

7. In response, learned counsel for respondent No. 2 submitted that it is not the case of abandonment of a child, as is sought to be projected by the appellants now. No parents will ever think of that, what to talk of actually doing it. The child was left with her maternal grand mother and thereafter handed over to appellant No.2 for her initial upbringing when she was 3-4 months old. She further submitted that when repeated requests for returning back the child were not acceded to, respondent No. 2 did not have any choice but to lodge an FIR in which a closure report was filed and accepted also. She further submitted that even during this period of five years, the child had been coming to her parents off and on. It was further submitted that after the closure report in the aforesaid FIR was accepted, respondent No. 2 filed a complaint dated 27.03.2017 under Sections 363, 346, 120-B IPC with reference to the custody of the child. The aforesaid complaint is stated to be still pending. In a petition[9] filed by the appellants and respondents No. 7 and 9 seeking quashing of the complaint, further proceedings in the complaint have been stayed by the High Court of Orissa. Immediately after filing of the aforesaid complaint by respondent No. 2, his wife, i.e., biological mother of the child, filed the petition in the High Court of Judicature at Patna praying for issuance of directions to the official respondents to recover the child from the wrongful confinement of the private respondents therein. The aforesaid petition was dismissed as withdrawn with liberty to avail any other remedy in accordance with law.

7.1 Explaining the delay in filing the petition before the High Court, learned counsel for respondent No. 2 submitted that it is was because of COVID pandemic. She further submitted that since

8 (2010) 2 SCC 654

9 CRLMC N0. 549 of 2019

2015, the biological parents of the child have not even been able to meet her. Respondent No. 2 was and is able to take care of all the needs of the child and provide her best education, as is being provided to the sister of the child as twins were born. It was further argued that appellant No. 1 got married with respondent No. 10, who is a stranger to the family. In terms of Mohammedan law, custody of the child cannot be given to the stranger, who is beyond prohibitory degree for marriage but she fairly submitted that they all are living in a joint family.

7.2 It was further argued that one of the prayers made by the appellants before this Court is that appellant No. 2 be permitted to stay for some time with the child in case custody is handed over to respondent No. 2 so that the child settles in new atmosphere. Respondent No. 2 does not have any objection to the fair offer made by the appellants. In fact, when the child was handed over to appellant No.1, she was un-married. However, thereafter she got married and is having two children. The child may be discriminated. If the custody of the child is handed over to respondent No. 2, the distance between Patna and Rourkela being not much, the appellants are always welcome to visit the child. The question is also of the identity of the child which has been lost in the process. If she comes back, she will also have love, affection and company of her twin sister. In support, reliance was placed upon **Tejaswani Gaud v. Shekhar Jagdish Prasad Tewari**[10] and **Rohith Thammana Gowda v. State of Karnataka and others**[11]. The Prayer is for dismissal of the appeal.

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

9. The undisputed facts on record are that twins were born to respondent No. 2 and his wife on 20.03.2010. One of them, the custody of whom is in question, has undisputedly been living with appellant No. 2 ever since she was 3-4 month old and thereafter with the family. Presently, she is about 14 years of age. It is not a case in which any of the parties is claiming adoption which otherwise is not permissible under

10 [2019] 7 SCR 335 : AIR 2019 SC 2318

11 [2022] 4 SCR 784 : AIR 2022 SC 3511

Mohammedan law. Guardianship is also not being claimed. It is only the dispute regarding custody of the child.

10. Before we deal with the issue on merits, we deem it appropriate to refer to the legal position on the issues.

11. This Court in **Athar Hussain v. Syed Siraj Ahmed and others' case (supra)** had elaborated the concept of custody, guardianship and stability of child, while holding as under:

> "31. We are mindful of the fact that, as far as the matter of guardianship is concerned, the prima facie case lies in favour of the father as under Section 19 of the GWC Act, unless the father is not fit to be a guardian, the Court has no jurisdiction to appoint another guardian. It is also true that the respondents, despite the voluminous allegations leveled against the appellant have not been able to prove that he is not fit to take care of the minor children, nor has the Family Court or the High Court found him so. However, the question of custody is different from the question of guardianship. Father can continue to be the natural guardian of the children; however, the considerations pertaining to the welfare of the child may indicate lawful custody with another friend or relative as serving his/her interest better.
>
> xx xx xx
>
> 37. Stability and consistency in the affairs and routines of children is also an important consideration as was held by this Court in another decision cited by the learned counsel for the appellant in **Mausami Moitra Ganguli v. Jayant Ganguli**, (2008)7 SCC 673. This Court held:
>
> > "24.....We are convinced that the dislocation of Satyajeet, at this stage, from Allahabad, where he has grown up in sufficiently good surroundings, would not only impede his schooling, it may also cause emotional strain and depression to him."

After taking note of the marked reluctance on the part of the boy to live with his mother, the Court further observed:

> "26. Under these circumstances and bearing in mind the paramount consideration of the welfare of the child, we are convinced that child's interest and welfare will be best served if he continues to be in the custody of the father. *In our opinion, for the present, it is not desirable to disturb the custody of Master Satyajeet* and, therefore, the order of the High Court giving his exclusive custody to the father with visitation rights to the mother deserves to be maintained."
>
> *[Emphasis supplied]*

xx xx xx

41. However, the High Court of Rajasthan held that in the light of Section 19 which bars the Court from appointing a guardian when the father of the minor is alive and not unfit, the Court could not appoint any maternal relative as a guardian, even though the personal law of the minor might give preferential custody in her favour. As is evident, the aforementioned decision concerned appointment of a guardian. No doubt, unless the father is proven to be unfit, the application for guardianship filed by another person cannot be entertained. However, we have already seen that the question of custody was distinct from that of guardianship. As far as matters of custody are concerned, the Court is not bound by the bar envisaged under Section 19 of the Act."

[Emphasis supplied]

12. This Court in **Mausami Moitra Ganguli v. Jayant Ganguli**[12], opined that the stability and security of the child is an essential ingredient for full development of child's talent and personality. Relevant paragraph thereof is extracted below:

> "23. Having bestowed our anxious consideration to the material on record and the observations made by the

12 [2008] 8 SCR 260 : (2008) 7 SCC 673

> courts below, we are of the view that in the present case there is no ground to upset the judgment and order of the High Court. There is nothing on record to suggest that the welfare of the child is in any way in peril in the hands of the father. In our opinion, the stability and security of the child is also an essential ingredient for a full development of child's talent and personality. As noted above, the appellant is a teacher, now employed in a school at Panipat, where she had shifted from Chandigarh some time back. Earlier she was teaching in some school at Calcutta. Admittedly, she is living all alone. Except for a very short duration when he was with the appellant, Master Satyajeet has been living and studying in Allahabad in a good school and stated to have his small group of friends there. At Panipat, it would be an entirely new environment for him as compared to Allahabad.
>
> *[Emphasis supplied]*

13. In **Nil Ratan Kundu and another v. Abhijit Kundu**[13], this Court laid down the principles governing custody of minor children and held that welfare of the children is to be seen and not the rights of the parties by observing as under:

> "Principles governing custody of minor children
>
> 53. In our judgment, the law relating to custody of a child is fairly well-settled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising parens patriae jurisdiction and is expected,

13 [2008] 11 SCR 1111 : (2008) 9 SCC 413

> nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.
>
> xx xx xx
>
> 55. We are unable to appreciate the approach of the Courts below. This Court in catena of decisions has held that the controlling consideration governing the custody of children is the welfare of children and not the right of their parents."
>
> *[Emphasis supplied]*

14. This Court has consistently held that welfare of the child is of paramount consideration and not personal law and statute. In **Ashish Ranjan v. Anupam Tandon and another**[14], this Court held as under:

> "19. The statutory provisions dealing with the custody of the child under any personal law cannot and must not supersede the paramount consideration as to what is conducive to the welfare of the minor. In fact, no statute on the subject, can ignore, eschew or obliterate the vital factor of the welfare of the minor.

15. This Court in **Roxann Sharma v. Arun Sharma**[15], opined that the child is not a chattel or ball that it is bounced to and fro. Welfare of the child is the focal point. Relevant lines from para-No. 18 are reproduced hereunder:

> "18.....There can be no cavil that when a court is confronted by conflicting claims of custody there are no rights of the parents which have to be enforced; the child

14 [2010] 14 SCR 961 : (2010) 14 SCC 274

15 [2015] 2 SCR 572 : (2015) 8 SCC 318

> is not a chattel or a ball that is bounced to and fro the parents. It is only the child's welfare which is the focal point for consideration. Parliament rightly thinks that the custody of a child less than five years of age should ordinarily be with the Mother and this expectation can be deviated from only for strong reasons"

16. Another principle of law which is settled with reference to custody of the child is the wish of the child, if she is capable of. Reference can be made to **Rohith Thammana Gowda v. State of Karnataka and others' case (supra).** It was held as under:

> "13. We have stated earlier that the question 'what is the wish/desire of the child' can be ascertained through interaction, but then, the question as to 'what would be the best interest of the child' is a matter to be decided by the court taking into account all the relevant circumstances. A careful scrutiny of the impugned judgment would, however, reveal that even after identifying the said question rightly the High Court had swayed away from the said point and entered into consideration of certain aspects not relevant for the said purpose. We will explain the raison d'etre for the said remark."

17. In the case in hand, *vide* order dated 12.12.2023, we had called the child in Court. We had interacted with the child, the appellants and respondent No. 2 individually in chamber. We found the child to be quite intelligent, who could understand her welfare. She categorically stated that she is happy with the family where she has been brought up. She has other brother and sister. She is having cordial relations with them. She does not wish to be destabilized.

18. The judgment in **Tejaswani Gaud v. Shekhar Jagdish Prasad Tewari's case (supra)**, relied upon by learned counsel for respondent No. 2 does not come to her rescue for the reason that age of the child in that case was merely five years. It is a case which lays down guidelines as to how custody of the child is to be handed over.

19. The fact that appellant No. 1, when custody of the child was handed over to her, was un-married and is now married having two children will also not be a deterrent for this Court to come to the conclusion that best interest of the child still remains with the appellant No. 2

as the child is living with her ever since she was 3-4 months old and is now about 14 years of age having no doubt in her mind that she wishes to live with them.

20. In view of our aforesaid discussions, we find that the welfare of the child lies with her custody with the appellants and respondent No. 10. This is coupled with the fact that even she also wishes to live there. Keeping in view her age at present, she is capable of forming an opinion in that regard. She was quite categoric in that regard when we interacted with her. She cannot be treated as a chattel at the age of 14 years to hand over her custody to the respondent No.2, where she has not lived ever since her birth. Stability of the child is also of paramount consideration.

21. The appeal is accordingly allowed. The impugned order passed by the High Court is set aside, as a result of which the writ petition filed by respondent No. 2 in the High Court is dismissed. We expect the appellants to adhere to the stand taken by them during the course of arguments, as noticed above.

Headnotes prepared by: Divya Pandey

Result of the Case:
Appeal allowed.

[2024] 3 S.C.R. 23 : 2024 INSC 158

Mohammed Khalid and Another
v.
The State of Telangana

(Criminal Appeal No(s). 1610 of 2023)

01 March 2024

[B.R. Gavai and Sandeep Mehta,* JJ.]

Issue for Consideration

Whether the High Court was justified in affirming the judgment of the trial court convicting and sentencing the accused appellants for the charge u/s. 8(c) r/w. s.20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985.

Headnotes

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.8(c) r/w. s.20(b)(ii)(c) – Prosecution case that PW-1-Inspector and team members intercepted a vehicle and A-1 and A-2 were present in the vehicle – It was alleged that three bundles of ganja weighing around 80 kgs found lying in the vehicle were seized in the presence of PW-1 and the panchas – A-1 and A-2 were arrested on the spot and interrogated – Acting on their interrogation/confession, A-3 and A-4 were arrested – Propriety:

Held: A perusal of the evidence of the Seizure Officer (Inspector PW1) and the confession-cum-seizure panchnama (Exhibit P-3) would reveal that the prosecution claims to have recovered the contraband from three bags wherein the ganja as well as green chillies were present – Seizure Officer(Inspector PW-1) made no effort whatsoever to conduct a separate weighment of the contraband by segregating the chillies – Rather, the panchnama is totally silent about presence of chillies with the bundles of ganja – When PW-5-Investigating officer appeared for deposition, he produced the muddamal ganja in the Court and it was seen that the same was packed in seven new bags as against the three bags referred to in the seizure memo (Exhibit P-3) – Neither any proceedings were conducted nor any memo was prepared by the police officers for repacking the seized ganja bundles in new packaging – Two independent panchas were not examined – LW-10, who prepared three samples of ganja as per PW-5 was also not examined – In addition thereto, the prosecution neither

* Author

examined any witness nor produced any document to satisfy the Court regarding safe keeping of the samples right from the time of the seizure till the same reached the FSL – No proceedings u/s. 52A were undertaken by the Investigating officer for preparing inventory and obtaining samples in presence of jurisdictional Magistrate – As far as A-3 and A-4 are concerned, it is not the case of the prosecution that the accused A-3 and A-4 were found in possession of ganja – The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2 – It is trite that confession of an accused recorded by a Police Officer is not admissible in evidence as the same is hit by Section 25 of the Evidence Act – The evidence of the police witnesses is full of contradictions and is thoroughly unconvincing – The conviction of the accused appellants as recorded by the trial Court and affirmed by the High Court is illegal on the face of record and suffers from highest degree of perversity. [Paras 19-24]

List of Acts

Narcotic Drugs and Psychotropic Substances Act, 1985; Evidence Act, 1872.

List of Keywords

Recovery of narcotics; Confession-cum-seizure panchnama; Power of seizure and arrest in public place; Power to stop and search conveyance; Independent panch witnesses; Safe keeping of samples; Preparation of inventory; Obtaining samples in presence of jurisdictional Magistrate; Confession recorded by Police.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1610 of 2023

From the Judgment and Order dated 10.11.2022 of the High Court for the State of Telangana at Hyderabad in CRLA No. 594 of 2011

Appearances for Parties

C. Nageswara Rao, Sr. Adv., Vikram Hegde, Chitwan Sharma, Ms. Chinmayi Shrivastava, Shreeyash Uday Lalit, Tushar Singh, Praseena Elizabeth Joseph, Advs. for the Appellants.

Kumar Vaibhaw, Ms. Devina Sehgal, Mohd. Ashaab, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. These appeals take exception to the final impugned judgment dated 10th November, 2022 passed by the High Court for the State of Telangana at Hyderabad rejecting the Criminal Appeal No. 594 of 2011 preferred by the appellants assailing the judgment dated 30th May, 2011 passed by the Metropolitan Sessions Judge, Hyderabad(hereinafter being referred to as 'trial Court') in Sessions Case No. 563 of 2010.

2. By the aforesaid judgment, the learned trial Court, convicted the appellants for the offence punishable under Section 8(c) read with Section 20(b)(ii)(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter being referred to as the 'NDPS Act') and sentenced each of them to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- each, in default, to suffer simple imprisonment for a period of six months.

3. During the pendency of the appeal before the High Court, A-1 (Mohd. Ishaq Ansari) expired and, therefore, the proceedings qua him stood abated before the High Court.

4. For the sake of convenience, the accused will be referred to as A-1(Md. Ishaq Ansari)(expired), A-2(S.A. Shafiullah), A-3(Mohd. Khalid) and A-4(Md. Afsar).

Brief Facts :

5. Mr. M. Srinivasa Rao, Inspector of Police(PW-1), West Zone Task Force (hereinafter being referred to as 'Inspector PW-1') claims to have received credible information on 8th May, 2009 regarding transportation of *ganja* by two persons from Sangareddy to Hyderabad in a 'Toyota Qualis' vehicle. PW-1 apprised his superior officers about such source information and after obtaining permission, secured the presence of two *panchas*, namely, Shareef Shah and Mithun Jana, to associate as *panchas* and proceeded to the spot along with his team. The Inspector PW-1 and the team members intercepted a Toyota Qualis vehicle bearing registration no. AP 09

AL 6323 near Galaxy Theatre at 15:00 hours. A-1 and A-2 were allegedly found present in the vehicle. The Inspector PW-1 served them a notice under Section 50 of the NDPS Act. On the request of the accused, a Gazetted Officer i.e., Inspector PW-4(V. Shambabu) was called to the spot to associate in the proceedings. The accused were again given a notice under Section 50 of the NDPS Act by PW-4(V. Shyambabu) who also participated in the search proceedings and it is alleged that three bundles of *ganja* weighing around 80 kgs found lying in the vehicle were seized in presence of Inspector PW-1 and the *panchas*.

6. A-1 and A-2 were arrested and interrogated at the spot. Three samples weighing about 50 grams were drawn from each bundle contraband and remaining *muddamal ganja* was seized vide confession-cum-seizure *panchnama* (Exhibit P-3). One part of the sample was handed over to A-1 and A-2.

7. Inspector PW-1 thereafter proceeded to hand over the accused along with the seized articles to LW-10(G. Naresh Kumar, Sub-Inspector of Police, Golkonda Police Station)(hereinafter being referred to as 'Sub-Inspector LW-10') for further action. Based on these proceedings, a complaint came to be lodged at the Golkonda Police Station and Criminal Case No. 181 of 2009 was registered and investigation was commenced.

8. One part of sample collected from the recovered contraband was forwarded to the Forensic Science Laboratory (FSL) from where a report (Exhibit P-11) was received concluding that the sample was of *ganja* as defined under Section 2(b) of the NDPS Act. Acting on the confession/interrogation of the two occupants of the car, i.e. A-1 and A-2, the Investigating Officer (PW-5 K. Chandrasekhar Reddy)(hereinafter being referred to as 'Investigating Officer PW-5') apprehended the accused A-3 and A-4. After concluding the investigation, a charge-sheet was filed against the four accused in the trial Court.

9. Upon being charged for the offence punishable under Section 8 read with Section 20(b)(ii)(c) of the NDPS Act, the accused pleaded not guilty and claimed trial. The prosecution examined five witnesses and exhibited 13 documents to prove its case as per the following table:-

PW1	M. Srinivasa Rao, complainant-cum-investigating officer
PW2	Mohd. Illiyas Akber, *panch* witness
PW3	Sk. Shamshuddin Ahmed, *panch*
PW4	V. Shyambabu, Gazetted Officer
PW5	K. Chandrasekhar Reddy, Investigating Officer

Exhibit P1	Notice to accused
Exhibit P2	Complaint
Exhibit P3	Confession-cum-seizure *panchnama* of A1 and A2
Exhibit P4	Bunch of (2) photographs
Exhibit P5	Signature of PW2 on *panchnama* of A3
Exhibit P6	Signature of PW2 on *panchnama* of A4
Exhibit P7	Signature of PW3 on *panchnama* of A3
Exhibit P8	Signature of PW3 on *panchnama* of A4
Exhibit P9	Notice to accused No. 1 and 2
Exhibit P10	First Information Report
Exhibit P11	FSL Report
Exhibit P12	Seizure *panchnama* of A3
Exhibit P13	Seizure *panchnama* of A4

10. The accused, upon being questioned under Section 313 of Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC') denied the prosecution allegations but chose not to lead any evidence in defence. The trial Court proceeded to convict and sentence the accused in the above terms by the judgment dated 30th May, 2011.

11. Being aggrieved by their conviction and the sentence awarded by the trial Court, the accused preferred an appeal under Section 374(2) CrPC in the High Court for the State of Telangana at Hyderabad which stood rejected vide the judgment dated 10th November, 2022.

12. A-3 and A-4 have preferred Criminal Appeal No. 1610 of 2023 and A-2 has preferred Criminal appeal No. 1611 of 2023 for assailing the impugned judgment dated 10th November, 2022 of High Court whereby the conviction recorded and sentences awarded to the accused by the trial Court have been affirmed.

Submissions on behalf of the accused appellants :

13. Learned counsel representing A-2(S.A. Shafiullah) advanced the following submissions to assail the impugned judgment and seeking acquittal for the accused:-

(i) That the independent *panch* witnesses associated with the search and seizure were not examined in evidence and hence the entire search and seizure proceedings become doubtful and are vitiated;

(ii) That it is admitted that the contraband *ganja* was seized from three bags which were also having green chillies therein. However, the Seizure Officer made no effort whatsoever to segregate the chillies and the alleged contraband and hence it cannot be held with any degree of certainty that the recovered contraband *ganja* fell within the category of commercial quantity;

(iii) That the prosecution failed to ensure compliance of the requirements of Section 52A of the NDPS Act inasmuch as, no sampling procedure was undertaken before the Magistrate;

(iv) That the Seizure Officer (Inspector PW-1) claims to have collected a total of three samples (one from each bundle of *ganja*) and handed over one part of the sample to the accused. However, when the articles were received at the FSL, three distinct sample packages were found which upon testing gave the presence of 'cannabis sativa'. It was thus submitted that only two samples remained with the Investigation Officer and hence there is a grave contradiction and doubt regarding the sanctity of the samples collected by the Seizure Officer (Inspector PW-1) at the time of seizure.

(v) Attention of the Court was also drawn to the evidence of PW-5 who stated that three samples of *ganja* were taken by Sub-Inspector LW-10, who handed over these sample packets to witness. However, this fact is contradicted by the evidence of the Seizure Officer(Inspector PW-1)), who stated that it was he who collected three samples from the contraband(three bundles of *ganja*) and handed one over to the accused under proper acknowledgment. Thus, as per the learned counsel, the FSL report is honest in the eyes of law as the sampling procedure is totally flawed;

(vi) That three bundles/packets of *ganja* were allegedly seized from the vehicle 'Toyota Qualis' in possession of A-1(Mohd. Ishaq Ansari) and A-2(S.A. Shafiullah) but when Investigating Officer PW-5 appeared in the witness box, he produced seven packets wherein the contraband was packed. These packets were not having any seals or identifying marks, i.e., signature of the accused and the *panchas*. Thus, it is apparent that the original *muddamal* seized at the spot was never produced and exhibited in the Court;

(vii) That Sub-Inspector LW-10 who allegedly handed over the sample packets to Investigating Officer PW-5 was not examined in evidence. Furthermore, the carrier Constable who transmitted the samples to the FSL was also not examined by the prosecution;

(viii) No document pertaining to deposit of the samples at the Police Station and the transmission thereof to the FSL was exhibited on record. The samples were forwarded to the FSL after a gross delay of more than two months and hence, the FSL report cannot be read in evidence because the required link evidence is missing.

14. Learned counsel representing A-3 and A-4 urged that these accused were not found present at the spot at the time of seizure. They were arrested on 30th May, 2009 merely on the basis of the interrogation notes of A-1 and A-2 and were charged for offence under Section 8 read with Section 20(b)(ii)(c) of NDPS Act. As the prosecution never came out with a case that the contraband was recovered from the possession of these two accused, their conviction for the offence under Section 8 read with Section 20(b)(ii)(C) of the NDPS Act is ex facie illegal and unsustainable on the face of the record.

Arguments on behalf of State :

15. *Per contra*, learned counsel representing the State, vehemently and fervently opposed the submissions advanced by learned counsel for the appellants. He urged that two Courts, i.e., the trial Court as well as the High Court, have recorded concurrent findings of facts for convicting the appellants and for affirming their conviction and hence, this Court in exercise of the jurisdiction under Article 136 of the Constitution of India should be slow to interfere in such concurrent findings of facts. He thus implored the Court to dismiss the appeals.

Discussion and Conclusion :

16. We have given our thoughtful consideration to the submissions advanced at the Bar and have gone through the impugned judgment and the evidence available on record.

17. Before discussing the prosecution evidence, we would like to note that the case as set up by the prosecution is regarding recovery of narcotics from a vehicle which was stopped during transit. Thus, the procedure of search and seizure would be governed by Section 43 read with Section 49 of the NDPS Act which are reproduced below:-

> **"43. Power of seizure and arrest in public place.**—Any officer of any of the departments mentioned in Section 42 may—
>
> *(a)* seize in any public place or in transit, any narcotic drug or psychotropic substance or controlled substance in respect of which he has reason to believe an offence punishable under this Act has been committed, and, along with such drug or substance, any animal or conveyance or article liable to confiscation under this Act, any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter V-A of this Act;
>
> *(b)* detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug or psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him and any other person in his company.
>
> *Explanation*.—For the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

> **49. Power to stop and search conveyance.**—Any officer authorised under Section 42, may, if he has reason to suspect that any animal or conveyance is, or is about to be, used for the transport of any narcotic drug or psychotropic substance [or controlled substance], in respect of which he suspects that any provision of this Act has been, or is being, or is about to be, contravened at any time, stop such animal or conveyance, or, in the case of an aircraft, compel it to land and—
>
> *(a)* rummage and search the conveyance or part thereof;
>
> *(b)* examine and search any goods on the animal or in the conveyance;
>
> *(c)* if it becomes necessary to stop the animal or the conveyance, he may use all lawful means for stopping it, and where such means fail, the animal or the conveyance may be fired upon."

18. We now proceed to some important excerpts from the prosecution evidence:-

(a) Complaint dated 8th May, 2009(Exhibit P-2)

> "Then I recorded the confession-cum-seizure panchnama of the accused persons A-1 and seized three bundles containing *Ganja* in it from their possession. On weighing the three bundles it was found about 80 kgs of *Ganja* in it. Out of the seized *Ganja* we have taken three samples and marked as S-1 and S-3 each sample packet containing 50 grams of *Ganja* and affixed panch chits. Also seized Maroon, colour Qualis vehicle bearing No. AP 09AL 6323 Engine No. 2L9722612, Chassis No. LF50-104863512/01 from the possession of the accused persons. Out of the seized *Ganja* drawn three samples containing 50 grams marked S-1 to S-3, each packed in polythene covers and attached panch chits to them. The sample is supplied to the accused Mohd Ishaq Ansari and S.A. Ashafiullah."

(b) Exhibit P-11(FSL Report) –

> "Received one sealed cloth parcel sealed with six seals, which are intact and tallying with the sample seal labelled as

"Cr. No. 181/2009" containing a cardboard box containing three closed polythene packets each labelled as "S-1, S-2 & S-3" respectively described below through Sri K. Narsimulu, PC 7770 on 14/07/2009."

(C) PW-1

"I collected three samples weighing about 50 gms each and given one sample to the accused under proper acknowledgement."

"M.O.I is the *ganja* packed in seven bags."

"There are no panch chits right now on M.O.I bags."

"It is true that the bags, deposited before the court are not having, seals. I, have weighed the *Ganja* only and it is weighing 80 Kgs, but I have not weighed the chillies. The total weight of the *Ganja* bundles as mentioned in the panchnama includes the weight, of chillies. I have not mentioned about sealing of samples in my panchnama. I have not mentioned in panchnama in what containers. I have taken, the samples."

"As per the panchnama one sample was given to the accused. I have taken 3 samples and out of them I have given one sample to both the accused and two samples I handed over in police station."

(d) PW-4

"PW1 seized 3 *ganja* bundles weighing around 80 kgs and collected samples of 50 grams from the bundles."

(e) PW-5

"Originally three bundles of *ganja* was seized from the accused and as the *Ganja* was becoming dry and turning into dust, and due to the holes of the bags it is coming out, and therefore we transferred the *Ganja* into 7 new bags, which was already marked as M.O.1."

"Three samples of *Ganja* have been taken by LW 10 and handed over the samples to me. We have forwarded the three samples to FSL through A.C.P., and submitted FSL report Ex. P.11."

> "The samples were taken on 8.5.2009 and they were forwarded to FSL on 7.7.2009 i.e. after two months of taking of samples. The samples were not deposited in the court."
>
> "I did not file any document to show that where the property was kept in Maalkhana. I did not produce any Maalkhana register in this case. The property was sent to FSL after two months of its seizure. The FSL report, does not disclose about the panch chits and seals and quantity of samples. The property deposited in court is not having any official seals."
>
> "I did not report to the court till today that the *ganja* was getting dried up and becoming dust, I converted them from three bundles to 7 bags for safe custody."

19. A perusal of the evidence of the Seizure Officer (Inspector PW-1) and the confession-cum-seizure *panchnama* (Exhibit P-3) would reveal that the prosecution claims to have recovered the contraband from three bags wherein the *ganja* as well as green chillies were present. Seizure Officer(Inspector PW-1) made no effort whatsoever to conduct a separate weighment of the contraband by segregating the chillies. Rather, the *panchnama* is totally silent about presence of chillies with the bundles of *ganja*. Thus, it cannot be said with any degree of certainty that the recovered *ganja* actually weighed 80 kgs. Seizure Officer(Inspector PW-1) also stated that he collected three samples of *ganja* at the spot and handed over one sample to accused. If this was true, apparently only two sample packets remained for being sent to the FSL. Contrary to the evidence of PW-1, PW-5 stated that three samples of *ganja* were taken by LW-10 who handed the same over to him. Thereafter, these samples were forwarded to the FSL through the ACP and a FSL report (Exhibit P-11) was received. When PW-5 appeared for deposition, he produced the *muddamal ganja* in the Court and it was seen that the same was packed in seven new bags as against the three bags referred to in the seizure memo (Exhibit P-3). Neither any proceedings were conducted nor any memo was prepared by the police officers for repacking the seized *ganja* bundles in new packaging.

20. The two independent *panch* witnesses i.e. Shareef Shah and Mithun Jana who were associated in the recovery proceedings, were

not examined in evidence and no explanation was given by the prosecution as to why they were not being examined.

21. Sub-Inspector LW-10, who prepared three samples of *ganja*, as per the testimony of PW-5, was not examined in evidence. In addition thereto, the prosecution neither examined any witness nor produced any document to satisfy the Court regarding safe keeping of the samples right from the time of the seizure till the same reached the FSL. The official who collected the samples from the police station and carried the same to the FSL was not examined at the trial. From the quoted portion of the evidence of Seizure Officer(Inspector PW-1), it is clear as day light that he handed over one of the three samples to the accused. The witness also admitted that he did not mention about sealing of the samples in the *panchnama*. Contrary to the evidence of PW-1, PW-5 stated that three samples of *ganja* were taken out by Sub-Inspector LW-10 and were handed over to the witness who forwarded the same to the ACP for sending it to FSL. In cross-examination, the witness admitted that he did not file any document to show that the property was kept in *malkhana*. The *malkhana* register was not produced in the Court. The FSL report (Exhibit P-11) does not disclose about the *panch* chits and seals and signature of the accused on samples. The property deposited in the Court*(muddamal)* was not having any official seals. The witness also admitted that he did not take any permission from the Court for changing the original three packets of *muddamal ganja* to seven new bags for safe keeping. These glaring loopholes in the prosecution case give rise to an inescapable inference that the prosecution has miserably failed to prove the required link evidence to satisfy the Court regarding the safe custody of the sample packets from the time of the seizure till the same reached the FSL. Rather, the very possibility of three samples being sent to FSL is negated by the fact that the Seizure Officer handed over one of the three collected samples to the accused. Thus, their remained only two samples whereas three samples reached the FSL. This discrepancy completely shatters the prosecution case.

22. Admittedly, no proceedings under Section 52A of the NDPS Act were undertaken by the Investigating Officer PW-5 for preparing an inventory and obtaining samples in presence of the jurisdictional Magistrate. In this view of the matter, the FSL report(Exhibit P-11) is nothing but a waste paper and cannot be read in evidence. The

accused A-3 and A-4 were not arrested at the spot. The offence under Section 20(b)(ii)(c) deals with production, manufacture, possession, sale, purchase, transport, import or export of cannabis. It is not the case of the prosecution that the accused A-3 and A-4 were found in possession of *ganja*. The highest case of the prosecution which too is not substantiated by any admissible or tangible evidence is that these two accused had conspired sale/purchase of *ganja* with A-1 and A-2. The entire case of the prosecution as against these two accused is based on the interrogation notes of A-1 and A-2.

23. It is trite that confession of an accused recorded by a Police Officer is not admissible in evidence as the same is hit by Section 25 of the Evidence Act. Neither the trial Court nor the High Court adverted to this fatal flaw in the prosecution case and proceeded to convict A-3 and A-4 in a sheerly mechanical manner without there being on *iota* of evidence on record of the case so as to hold them guilty.

24. As a consequence of the above discussion, we are of the firm opinion that the prosecution has miserably failed to prove the charges against the accused. The evidence of the police witnesses is full of contradictions and is thoroughly unconvincing. The conviction of the accused appellants as recorded by the trial Court and affirmed by the High Court is illegal on the face of record and suffers from highest degree of perversity.

25. Resultantly, the judgment dated 10th November, 2022 passed by the High Court affirming the judgment of the trial Court convicting and sentencing the accused appellants for the charge under Section 8(c) read with 20(b)(ii)(c) of the NDPS Act is hereby quashed and set aside. The appellants are acquitted of all the charges. They are in custody and shall be released forthwith, if not wanted in any other case.

26. The appeals are accordingly allowed.

27. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Ankit Gyan

Result of the case: Appeals allowed.

[2024] 3 S.C.R. 36 : 2024 INSC 169

Naeem
v.
State of Uttar Pradesh

(Criminal Appeal No. 1978 of 2022)

05 March 2024

[B.R. Gavai* and Sandeep Mehta, JJ.]

Issue for Consideration

Conviction of the appellants-accused for offences punishable u/ss.302 and 34, Penal Code, 1860 based solely on the dying declaration, if justified.

Headnotes

Evidence – Dying declaration, sole basis of conviction – Appellants convicted for offences punishable u/ss.302 and 34, Penal Code, 1860 – Correctness:

Held: Dying declaration can be the sole basis of the conviction if it inspires the full confidence of the court – Court is required to satisfy itself that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination – There cannot be an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless corroborated – Rule requiring corroboration is merely a rule of prudence – Where the Court is satisfied that the dying declaration is true, voluntary, free from any effort to induce the deceased to make a false statement and it is coherent and consistent, it can base its conviction without any further corroboration– Material placed on record revealed that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination – Dying declaration (Ext. Ka-6) was cogent, consistent, trustworthy and reliable to base the conviction on the same – No reason to interfere with the concurrent findings of fact that the dying declaration was true and free from any effort to induce the deceased to make a false statement – No legal impediment to make it the basis of conviction without there being any independent corroboration – However, in the

* Author

dying declaration, the motive attributed by the deceased was to accused No.1-deceased's devar who she had a quarrel over partition of the house and the role of pouring kerosene on the victim and setting her ablaze was also attributed to him – Insofar as accused No.2 (wife of accused No.1) and her brother-accused No.3 are concerned, the statement of the victim only states that they aided accused No.1 however, no specific role of how they assisted him could be found in the dying declaration – Thus, the said dying declaration can be the sole basis of maintaining the conviction of accused No.1 – Accused No. 2 and accused No. 3 entitled to the benefit of doubt and are acquitted – Impugned judgment upholding the conviction and sentence in respect of the said appellants is quashed and set aside – Appeal qua accused No.1 is dismissed. [Paras 7, 11, 14-16]

Case Law Cited

Atbir v. Government of NCT of Delhi, **[2010] 9 SCR 993 : (2010) 9 SCC 1 : 2010 INSC 491 – relied on.**

List of Acts

Penal Code, 1860.

List of Keywords

Dying declaration; Sole basis of the conviction; Corroboration rule of prudence; Voluntary dying declaration.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1978 of 2022

From the Judgment and Order dated 17.12.2019 of the High Court of Judicature at Allahabad in CRLA No.7393 of 2017

Appearances for Parties

Sharan Thakur, AAG, Dr. Sushil Balwada, Kaushal Yadav, Nandlal Kumar Mishra, Srilok Nath Rath, Ms. Reena Rao, Mohd Adeel Siddiqui, Bipin Kumar Jha, Ms. Komal Jha, Ms. Nandani Gupta, Dr. Mrs. Vipin Gupta, Sudeep Kumar, Mustafa Sajad, Ms. Rupali, Ms. Keerti Jaya, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. These appeals challenge the judgment and order dated 17th December 2019, passed by the Division Bench of the High Court of Judicature at Allahabad in Criminal Appeal Nos. 1589 of 2018 and 7393 of 2017, whereby the Division Bench dismissed both the criminal appeals preferred by the appellants, namely, Pappi @ Mashkoor (accused No.1), Naeema (accused No.2) and Naeem (accused No.3) and upheld the order of conviction and sentence dated 24th October 2017 as recorded by the learned Sessions Judge, Moradabad (hereinafter referred to as the 'trial court') in Sessions Trial No. 260 of 2017.

2. Shorn of details, the facts leading to the present appeals are as under:

2.1. On 1st December 2016, the Police Station Katghar, District Moradabad received a written report at 08:15 pm which was a transcription of the complaint made by Shahin Parveen (deceased) who had been admitted in the District Hospital, Moradabad on 1st December 2016, at 02:20 pm with 80% deep thermal and facial burns. In her complaint, the deceased had alleged that she had been set ablaze by the accused/appellants who had been pressuring her into entering the profession of immoral trafficking and prostitution. On the basis of the written report (Ext. Ka-3), a First Information Report ("FIR" for short) was registered at Police Station Katghar, District Moradabad vide Case Crime Number 1332 of 2016 for the offence punishable under Section 307 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC"). On the same day, Raj Kumar Bhaskar (PW-5), the then Naib Tehsildar, Sadar, Moradabad was telephonically summoned by the Tehsildar to record the statement of Shahin Parveen (deceased), after she was admitted in the hospital. Between the hours of 08:48 pm and 09:15 pm, dying declaration of Shahin Parveen (deceased) (Ext. Ka-6) came to be recorded by PW-5. Subsequently, the victim was admitted in Safdarjang Hospital, New Delhi on 2nd December 2016, where she eventually succumbed to her injuries at 07:55 pm. Consequently, the Case Crime No. 1332 of 2016 was altered to the offence punishable under Section 302 of IPC.

According to the Post-Mortem Report (Ext. Ka-11), the cause of death was shock as a result of ante-mortem burn injuries.

2.2. After the death of the husband of the deceased two years prior to the incident, she had been residing at her matrimonial house with her two children along with Pappi @ Mashkoor (accused No. 1) who was her brother-in-law (*devar*) and his wife Naeema (accused No.2). Naeem (accused No.3) is Naeema's brother. The prosecution case is that, after the death of the husband of the deceased, the accused/appellants started pressuring her into entering the profession of immoral trafficking and prostitution. As the deceased did not concede to the same, she was physically and sexually assaulted and asked to vacate the house. On the day of the incident at about 01:30 pm, the accused/appellants caught hold of the deceased and poured kerosene on her. Pappi @ Mashkoor (accused No.1) and Naeema (accused No.2) ignited the matchstick and threw it at her. Thereafter, the accused/appellants surrounded her so that she could not escape. On being set ablaze, the deceased ran out of the house whereafter her neighbours put out the fire and informed her mother and brother namely, Islam @ Babli (PW-2) who took her to the hospital. This version of events was brought out in the complaint made by the deceased which was transcribed by Faisal Zamal (PW-3). On the basis of PW-3's written report, bearing the thumb impression of the deceased, the FIR came to be registered at 08:15 pm on 1st December 2016. Thereafter, on the same day, between 08:48 pm and 09:15 pm, PW-5 recorded the dying declaration of the deceased (Ext. Ka-6) wherein she stated that there was an outstanding dispute between her and Pappi @ Mashkoor (accused No.1) with regards to the partition of their shared residence. On the date of the incident at about 12:30 pm, another quarrel broke out between the deceased and the accused/appellants, during which accused No.1 poured kerosene on the deceased and set her ablaze. He was accompanied and assisted by his wife Naeema (accused No.2) and Naeem, brother of Naeema (accused No.3). She was taken to the District Hospital, Moradabad by her brother Islam @ Babli (PW-2) and thereafter shifted to Safdarjang Hospital, New Delhi, where she eventually succumbed to her injuries.

2.3. After completion of the investigation, a charge-sheet came to be filed before the Court of Chief Judicial Magistrate, Moradabad. Since the case was exclusively triable by the Sessions Court, the same came to be committed to the learned Sessions Judge.

2.4. Charges came to be framed by the learned Sessions Judge for the offences punishable under Sections 302 and 34 of the IPC. The accused pleaded not guilty and claimed to be tried.

2.5. The prosecution examined 8 witnesses to bring home the guilt of the accused persons. While Papi @ Mashkoor (accused No.1) took the defence that he was absent from the spot of the incident at the relevant time and that the deceased had committed suicide since she was depressed after the death of her husband, Naeema (accused No.2) and Naeem (accused No.3) set up the defence of bare denial. The defence did not lead any evidence.

2.6. At the conclusion of the trial, the trial court found that the prosecution had proved the case against the accused/appellants beyond reasonable doubt and accordingly convicted them for offences punishable under Sections 302 and 34 of the IPC and sentenced them to undergo imprisonment for life along with fine.

2.7. Being aggrieved thereby, the accused/appellants preferred appeals before the High Court. The High Court by the impugned judgment dismissed the same and affirmed the order of conviction and sentence awarded by the trial court. Being aggrieved thereby, the present appeals.

3. We have heard Shri Mohd. Adeel Siddiqui, learned counsel appearing on behalf of the appellants and Shri Sharan Thakur, learned Additional Advocate General (AAG) appearing on behalf of the respondent-State.

4. Shri Mohd. Siddiqui submits that the conviction is based only on the dying declaration of the deceased (Ex. Ka-6). He submits that the dying declaration (Ext. Ka-6) is not free from doubt. It is submitted that the Discharge Slip (Ext. Ka-7) would show that the deceased was discharged from the District Hospital, Moradabad on 1st December 2016 at 05:00 pm. It is therefore impossible that the dying declaration (Ext. Ka-6) could have been recorded between 08:48 pm and 09:15 pm. The learned counsel therefore submits that the said dying declaration (Ext. Ka-6) cannot be said to be

trustworthy, reliable and cogent so as to base the conviction solely on the basis of the same.

5. Per contra, Shri Thakur submits that, both the trial court and the High Court, on the correct appreciation of evidence, rightly convicted the accused/appellants and as such, no interference would be warranted with the concurrent findings of the trial court and the High Court. The learned AAG submits that Raj Kumar Bhaskar (PW-5), the then Naib Tehsildar, has deposed about the dying declaration (Ext. Ka-6). Shri Thakur submits that the dying declaration (Ext. Ka-6) also contains the certification by Dr. A.K. Singh, Emergency Medical Officer, District Hospital, Moradabad regarding the medical fitness of the victim both prior to and after recording the dying declaration (Ext. Ka-6).

6. Undisputedly, in the present case, the conviction is based solely on the dying declaration (Ext. Ka-6). The law with regard to conviction on the sole basis of dying declaration has been considered by this Court in a catena of judgments. After considering the earlier judgments, this Court, in the case of ***Atbir v. Government of NCT of Delhi***[1], has laid down certain factors to be taken into consideration while resting the conviction on the basis of dying declaration. It will be apposite to refer to para (22) of the said judgment, which reads thus:

> "**22.** The analysis of the above decisions clearly shows that:
>
> *(i)* Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.
>
> *(ii)* The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.
>
> *(iii)* Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.
>
> *(iv)* It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

1 **(2010) 9 SCC 1 : 2010 INSC 491**

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

7. It can thus be seen that this Court has clearly held that dying declaration can be the sole basis of the conviction if it inspires the full confidence of the court. The Court is required to satisfy itself that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination. It has further been held that, where the Court is satisfied about the dying declaration being true and voluntary, it can base its conviction without any further corroboration. It has further been held that there cannot be an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. It has been held that the rule requiring corroboration is merely a rule of prudence. The Court has observed that if after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration.

8. A perusal of the material placed on record would reveal that Raj Kumar Bhaskar (PW-5), the then Naib Tehsildar has deposed that

he was directed by the Tehsildar on phone to record the statement of the victim Shahin Parveen at the District Hospital, Moradabad. He came to the hospital and asked the Chief Medical Officer of the hospital about the condition of the victim Shahin Parveen, who informed that Shahin Parveen was in a sound condition and was also fit to give her statement. He further deposed about the certificate issued by the doctor. He also deposed that, after recording the statement, the deceased put her thumb impression. He has further deposed that the deceased answered in full sense and she was understanding the questions. The deposition of PW-5 would also reveal that he had taken care to ensure that none of the relatives of the deceased were present when the dying declaration (Ext. Ka-6) was being recorded.

9. Insofar as the contention of the learned counsel for the appellants that the dying declaration (Ext. Ka-6) was recorded between 08:48 pm and 09:15 pm and the Discharge Slip (Ext. Ka-7) was issued at 05:00 pm is concerned, no question was put to that effect in the cross-examination of Raj Kumar Bhaskar (PW-5), the then Naib Tehsildar. As such, his testimony, in spite of cross-examination, has gone unchallenged on the material aspect of recording of the dying declaration.

10. A perusal of the dying declaration (Ext. Ka-6) would reveal that before recording the dying declaration (Ext. Ka-6), the victim was examined by Dr. A.K. Singh, Emergency Medical Officer at District Hospital, Moradabad on 1st December 2016 at 08:45 pm, who has certified her to be fully conscious and fit to give the statement. After the dying declaration (Ext. Ka-6) was recorded, a certification by Dr. A.K. Singh, Emergency Medical Officer at District Hospital, Moradabad is recorded once again to the effect that the deceased was fully conscious while giving the statement (Ext. Ka-6). It can thus clearly be seen that the material placed on record would reveal that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

11. We have no reason to interfere with the concurrent findings of fact that the dying declaration (Ext. Ka-6) is true and free from any effort to induce the deceased to make a false statement. The dying declaration (Ext. Ka-6) is coherent and consistent and as such, there

should be no legal impediment to make it the basis of conviction without there being any independent corroboration. We find that the dying declaration (Ext. Ka-6) is cogent, trustworthy and reliable to base the conviction on the same.

12. That leaves us with the question as to whether the conviction of all the three accused is tenable or not.

13. It will be apposite to refer to the relevant part of the dying declaration (Ext. Ka-6), which reads thus:

> "Answer: I had been into a dispute with my *devar* (husband's younger brother) Mashkoor Hussain s/o Maqdoom Hussain over partition of the house for many days. Today i.e. 01.12.2016 at 12:30 O'clock I had a quarrel with my *devar* over partition of the house, during which he poured kerosene on me and set me ablaze. In commission of the act, my *devrani* (husband's younger brother's wife) Naeema Parveen and her brother Naeem aided my *devar* (husband's younger brother). When they set my body ablaze, I ran outside the house. People from the neighbourhood doused fire engulfing my body and saved me. Residents of the locality informed my mother and brother, thereafter, my brother and mother brought and admitted me to the hospital."

14. The statement of the victim would therefore reveal that the motive attributed by the deceased is to accused No. 1 Pappi @ Mashkoor. She stated that she had a quarrel with her *devar* Pappi @ Mashkoor over partition of the house. It can further be seen that the role of pouring kerosene on the victim and setting her ablaze is also attributed to accused No. 1 Pappi @ Mashkoor.

15. Insofar as other two accused i.e. Naeema (wife of accused No.1 Pappi @ Mashkoor) and her brother Naeem are concerned, the statement of the victim only states that they aided her *devar* Pappi @ Mashkoor. However, no specific role of how they assisted accused No. 1 Pappi @ Mashkoor could be found in the dying declaration (Ext. Ka-6). We therefore find that, though the said dying declaration can be the sole basis of maintaining the conviction of accused No. 1 Pappi @ Mashkoor, in the absence of any specific role attributed to accused No. 2 Naeema and accused No. 3 Naeem, they are entitled to the benefit of doubt.

16. In the result, we pass the following order:

(i) Criminal Appeal No. 1978 of 2022 qua appellant Naeem and Criminal Appeal No. 1979 of 2022 qua appellant Naeema are allowed. The order of conviction and sentence dated 24th October 2017 passed by the trial court and maintained by the High Court vide impugned judgment and order dated 17th December 2019 in respect of the aforesaid appellants is quashed and set aside. They are acquitted of all the charges charged with and are directed to be released forthwith if not required in any other case

(ii) Criminal Appeal No. 1979 of 2022 qua appellant Pappi @ Mashkoor is dismissed.

17. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Divya Pandey

Result of the case:
Criminal Appeal No. 1978 of 2022 qua accused No.3 and Criminal Appeal No. 1979 of 2022 qua accused No.2 are allowed. Criminal Appeal No. 1979 of 2022 qua accused No.1 is dismissed.

[2024] 3 S.C.R. 46 : 2024 INSC 165

Srinivas Raghavendrarao Desai (Dead) By Lrs.
v.
V. Kumar Vamanrao @ Alok and Ors.

(Civil Appeal Nos. 7293-7294 of 2010)

04 March 2024

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

Issue for Consideration

A suit was filed by the plaintiff claiming share in the suit schedule properties. The Judgment of the High Court placed reliance upon 1965 partition which was not the pleaded case in the plaint initially filed. Whether the High Court committed a grave error in placing reliance upon the partition allegedly effected in the year 1965; whether evidence could be led beyond pleadings.

Headnotes

Pleadings – Evidence beyond pleadings – Appellants submitted that the judgment of the High Court deserves to be set aside for the reason that reliance has been placed upon 1965 partition which was not the pleaded case in the plaint initially filed – Propriety:

Held: The High Court committed a grave error in placing reliance upon the partition allegedly effected in the year 1965, in terms of which Schedule 'A' properties were allotted exclusively to the share of defendant No.1 – The fact remains that it is not even the pleaded case of the plaintiffs in the suit that there was any partition of the family properties in the year 1965 – The suit was filed on 26.05.1999 – Even the pleaded case of the defendants, especially defendant No. 1 who is the husband of plaintiff No. 3 and father of plaintiffs No. 1 and 2, in the written statement filed by him was not that there was any partition in the year 1965 – The plaintiffs sought to amend the plaint seeking to raise pleadings regarding 1965 partition – The Trial Court, vide order dated 11.10.2006 rejected the application for amendment of the plaint – The aforesaid order was not challenged any further – Meaning thereby, the same attained finality as far as the case

* Author

sought to be set up by the plaintiffs based on 1965 partition – There is no quarrel with the proposition of law that no evidence could be led beyond pleadings – It is not a case in which there was any error in the pleadings and the parties knowing their case fully well had led evidence to enable the Court to deal with that evidence – In the case in hand, specific amendment in the pleadings was sought by the plaintiffs with reference to 1965 partition but the same was rejected – In such a situation, the evidence with reference to 1965 partition cannot be considered. [Paras 14 and 15]

Case Law Cited

Jehal Tanti and others v. Nageshwar Singh (dead) through LRs., **2013 (14) SCC 689;** *Ghanshyam Sarda v. Sashikant Jha, Director, M/s J. K. Jute Mills Company Limited and others,* **(2017) 1 SCC 599;** *Bhagwati Prasad v. Chandramaul,* **[1966] 2 SCR 286 : AIR 1966 SC 735 – referred to.**

List of Keywords

Pleadings; Partition of family properties; Evidence beyond pleadings.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos.7293-7294 of 2010

From the Judgment and Order dated 19.12.2008 of the High Court of Karnataka at Bangalore in RFA Nos.1463 and 1782 of 2007

Appearances for Parties

M. Gireesh Kumar, S. K. Kulkarni, Ankur S. Kulkarni, Ms. Uditha Chakravarthy, Ms. Shalaka Srivastava, Ms. Priya S. Bhalerao, Varun Kanwal, Advs. for the Appellants.

Basava Prabhu S Patil, V. Chitambresh, Sr. Advs., Ankolekar Gurudatta, Korada Pramod Kumar, Amith J, Purushottam Sharma Tripathi, Amit, Mrs. Vani Vyas, E. C. Vidya Sagar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. The appeals[1] filed by the plaintiffs having been partly allowed by the High Court[2], the defendant No. 7 has challenged the judgment and decree[3] of the High Court before this Court.

Facts of the case

2. A suit[4] was filed by Kumar Vamanrao alias Alok son of Sudheendra Desai(plaintiff No.1), Kumar Vyas alias Prateek Sudheendra Desai (plaintiff No. 2) and Aruna wife of Sudheendra Desai (plaintiff No.3), sons and wife of Sudheendra (defendant No. 1) respectively, impleading the parents of defendant No.1 and great grant mother of the plaintiffs No.1 and 2. Kumari Arundhati (defendant No. 5) was daughter of Ramarao (defendant No.2 and sister of defendant No.1. Martandappa (defendant No.6) was said to be proposed purchaser of the part of the land. Srinivas Raghavendrarao Desai (defendant No.7) was impleaded in the suit vide order dated 02.01.2001.

   2.1 Defendant No.7 is in appeal before this Court against the judgment and decree of the High Court. He having died during the pendency of the Special Leave Petitions, his legal representatives have been brought on record vide order dated 23.03.2015. Prahlad (defendant No.8) brother of defendant No. 7 was impleaded in the suit vide order dated 11.07.2003. Whereas Administrative Officer-Murugharajendra Vidyapeeth (defendant No. 9) was impleaded vide order dated 08.06.2005, as defendant No. 7 had sold Regular Survey No.106/2 in favour of defendant No. 9 by executing sale deed dated 25.07.2001.

3. The suit was filed by the plaintiffs claiming 5/9th share in the suit schedule properties. Further prayer was made for grant of mesne profits. Along with the plaint, the following schedule of the properties was attached of which partition was sought:

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1 R.F.A. No. 1463 of 2007 and R.F.A. No. 1782 of 2007

2 High Court of Karnataka, Circuit Bench at Dharwad

3 Judgement and decree dated 19.12.2008

4 O.S.No.60 of 1999

"SCHEDULE- 'A'

The properties standing in the name of defendant No. 1

S. No.	TALUKA	VILLAGE	R.S.NO. BLOCK NO.	AREA A-G	ASST. Rs.PS.	VALUATION
1.	Dharwad	Dhandikoppa	50/1	4-6-1/2	11-49	Rs. 50,000/-
2.	Dharwad	Saptapur	106/2	3-14	9-28	Rs. 50,000/-
3.	Dharwad	Lakamanahalli	86/2B	7-32	26-32	Rs. 80,000/-
4.	Dharwad	Kelgeri	69	6-10	6-53	Rs. 50,000/-
5.	Dharwad	Kelgeri	152/4	7-01	20-82	Rs. 70,000/-

SCHEDULE- 'B'

The properties standing in the name of D.2

S. No.	TALUKA	VILLAGE	R.S.NO. BLOCK NO.	AREA A-G	ASST. Rs.PS.	VALUATION
1.	Dharwad	Saptapur	120	3-20	5-36	Rs. 40,000/-
2.	Dharwad	Kanavi Honnapur	87A	2-06	0-51	Rs. 10,000/-
3.	Hubli	Sutagatti	9A/2	2-01	1-11	Rs. 10,000 [1/2 share in this property to RV Desai D-1]
4.	Dharwad city R.S. No. 55A flat in plot No. F-2 Lakamanahalli village in ground floor VCidyagiri, the House in Century Park bearing Municipal No. 14184/A//0B2					Rs 2,00,000/-
5.	Dharwad	Nuggikeri Village	R.S. No. 44/4	7-00	1-12	Rs. 70,000/-

SCHEDULE – 'C'

Standing in the name of defendant No.4's husband V. H. Desai

S. No.	TALUKA	VILLAGE	R.S.NO. BLOCK NO.	AREA A-G	ASST. Rs.PS.	VALUATION
1.	Hubli Taluka	Suttagatti	9A/9	1-18	1-53	Rs. 10,000/-

SCHEDULE- 'D'

Standing in the name of defendant No.4's husband V. H.Desai

S. No.	TALUKA	VILLAGE	R.S.NO. BLOCK NO.	AREA A-G	ASST. Rs.PS.	VALUATION
1.	Dharwad	Dhandikoppa	Block No. 9	5-33	20-81	Rs. 50,000/- standing in the name of D2 and D4]
2.	Dharwad	Hosayallapur	Block No. 170	16-32	46-37	Rs. 60,000/- [1/2 share in the land standing in the name of D2 and D4]
3.	Dharwad	Murakatti	Block No. 69	13-10	22-99	Rs. 70,000/- [standing in the name of D1 and D3]
4.	HOUSE PROPERTIES					
a)	Desai	Galli House	CTS No. 1292	32 Sq. yard		Rs. 50,000/- Standing in the name of D2 and D4
b)	Desai	Galli House	CTS No. 1295	676 Sq. yard		Rs. 1,00,000/- Standing in the name of D2 and D4

4. Vide judgment and decree[5], the Trial Court[6] held the plaintiffs No.1 and 2 and defendants No.1 to 3 and 5 entitled to 1/6th share in the following property:

> "A schedule: Survey No.50/1, 86/2B, 69, 152/4
>
> B schedule: 87/A, 9A/2
>
> D schedule: Block No.9, B.No.170(8 Acres gunthas), CTS No.1292, CTS No.1295
>
> Defendant no.2 was held entitled to Item 4 in Schedule-B.
>
> Defendant no.1 was held entitled to Item 3 in the Schedule-D."

5 Judgement and decree dated 21.04.2007

6 The III Additional Civil Judge (Senior Division) & CJM, Dharwad

The suit pertaining to Regular Survey Nos.106/2, 120 and 9A/9 was dismissed. No mesne profits were granted. The suit was also dismissed against defendants No.6 to 9.

5. Aggrieved against the judgment and decree of the Trial Court, two appeals were preferred before the High Court. R.F.A. No.1463 of 2007 was filed by the plaintiffs raising a grievance of rejection of their part claim. R.F.A. No.1782 of 2007 was filed by defendants No.1 to 3 and 5, aggrieved against grant of 1/6th share each to the plaintiffs being excessive. Findings of the Trial Court with regard to the property at Sr.No.5 in Schedule-B (Regular Survey No.44/4) was also challenged. The High Court disposed of both the appeals by a common judgment holding that:

   * Schedule-A properties (Regular Survey No(s).50/1, 106/2, 86/2B, 69 & 152/4) are exclusive properties of defendant No.1 as these were allotted to him in the partition in the year 1965. Hence, the plaintiffs as well as the defendant No.1 will have 1/4th share each in the aforesaid properties.

   * The claim of the plaintiffs, for share in Schedule-B (Regular Survey No(s).120, 87A, 9A/2, 44/4) and Schedule-C properties (Regular Survey No.9A/9) and Item no.1 (Block No.9) and Item No.2 (Block No.170) of Schedule-D, was rejected.

   * Sale of Item No.2 (Regular Survey No.106/2) of Schedule-A property by defendant No.7 in favour of defendant No.9 was held to be *null and void* and not binding on the plaintiffs and defendant no.1.

   * Property at Item no.4 (CTS No(s).1292 & 1295) in Schedule-D was to be shared equally by the plaintiffs and the defendant No.1 (1/12th share).

   * The matter regarding half share in Item No.3 (Block No.69) of Schedule-D was remitted to the Trial Court to allow the plaintiffs to adduce the evidence to prove that the same was purchased by the defendant No.1 out of the joint family funds.

   * The matter regarding Item no.5 (Regular Survey No.44/4) of Schedule-B was also remitted to the Trial Court. The plaintiffs were held entitled to mesne profits from defendant No.1 of the properties in which they have been granted share.

6. Aggrieved by the aforesaid judgment and decree of the High Court, the defendant No.7 (Srinivas Raghavendrarao Desai) filed two Special Leave Petitions. Leave was granted. As he expired during the pendency of the matters before this Court, his legal representatives have been brought on record. The issue raised in the present appeals is only pertaining to Regular Survey No. 44/4 and Regular Survey No.106/2, which was sold to defendant No.9 by defendant No.7 vide sale deed dated 25.07.2001.

Arguments

7. Learned counsel for the appellants submitted that the judgment of the High Court deserves to be set side for the reason that reliance has been placed upon 1965 partition which was not the pleaded case in the plaint initially filed. No evidence led, which was beyond pleadings could be considered. An application seeking amendment of the plaint was filed to take up that plea, however, the same was declined by the Trial Court *vide* order dated 11.10.2006 and the order was not challenged any further. Even the pleadings to that effect sought to be taken in the replication filed by the plaintiffs were struck off by the Trial Court. The pleaded case of the defendants before the Trial Court was that there was a partition amongst the family members on 30.08.1984. The aforesaid partition deed was subject matter of litigation in Civil Suit No. 80 of 1995 filed by the defendant No. 2 wherein the same has been noticed and an order passed thereon.

   7.1 The High Court had totally gone wrong in setting aside the decree dated 23.06.1995 without there being any challenge to the same by any of the parties. That issue did not arise out of the judgment of the lower Appellate Court. It was further submitted that the appellant/defendant No. 7 had not violated any interim order passed by the Trial Court as on the date such an order was passed, he was not even party to the litigation. He was impleaded only on 02.01.2001.

8. On the other hand, learned counsel for the respondents No. 1 to 3/ plaintiffs submitted that the entire effort of the appellants is just to deprive respondents No. 1 to 3 of their rightful share in the family property. The partition of 1965 was rightly relied upon by the High Court as against the partition of 1984, the genuineness of which is quite doubtful. In fact, all the family members had connived to deny rightful claim of the plaintiffs. It was further submitted that the

sale deed which was executed by the appellant-defendant No. 7 in favour of defendant No. 9 in violation of the interim order passed by the Trial Court is *non-est* and deserves to be ignored. In support, reliance was placed upon the judgments of this Court in **Jehal Tanti and others v. Nageshwar Singh (dead) through LRs,**[7] and **Ghanshyam Sarda v. Sashikant Jha, Director, M/s J. K. Jute Mills Company Limoited and others**[8]. He further argued that once the parties go to trial knowing the issues involved, the evidence led even without pleadings can very well be appreciated. In support, reliance was placed upon the judgment of this Court in **Bhagwati Prasad v. Chandramaul**[9].

8.1 The property bearing Regular Survey No. 106/2 was sold by defendant No. 7 to defendant No. 9 to protect his interest. Even though the sale was held to be bad by the High Court, no appeal has been preferred by defendant No. 9. Only defendant No. 7 has challenged the same. No doubt, the application for amendment of plaint to raise the pleading regarding 1965 partition was rejected, however, the High Court had made observations that defendant No. 7 is entitled to argue on the basis of the pleadings and documentary evidence to vindicate his right and also that the Trial Court is not barred to mould the relief and allot shares in accordance with law in a suit of partition.

8.2 Learned counsel for defendant No. 9 adopted the arguments which were raised by learned counsel for the appellants as their interest is common and he is the bonafide purchaser of the property, which is a public institution, from defendant No. 7 on payment of consideration.

9. In response to the submissions made by learned counsel for respondents No. 1 to 3, learned counsel for the appellant submitted that the stand taken by defendant No. 1 before the High Court was a clear somersault as his counsel sought to argue relying upon the proceedings before the Land Tribunal which was not even his pleaded case before the Trial Court. The sale deed was executed

7 2013(14) SCC 689

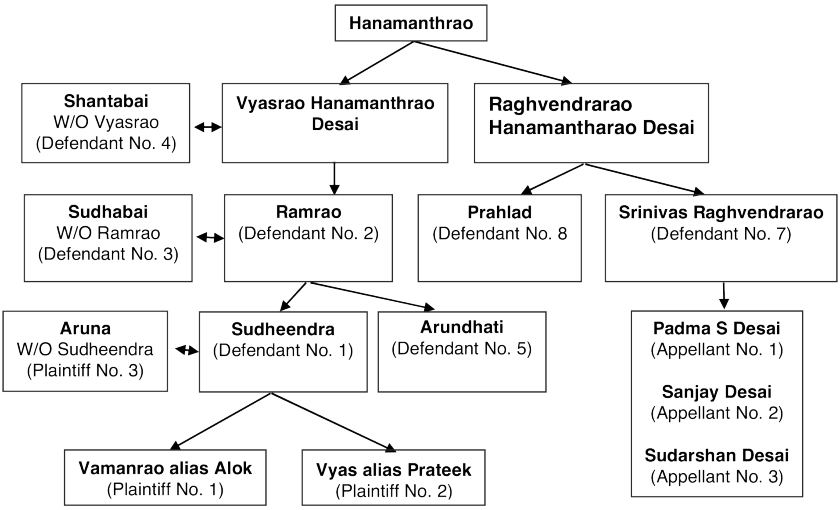
8 (2017) 1 SCC 599

9 AIR 1966 SC 735

by defendant No. 7 on 25.07.2001. The same was well within the knowledge of defendant No. 1, however, he did not challenge the same during his life time, in case there was any error committed by defendant No.7. It was for the reason that the property had come to the share of defendant No. 7.

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

11. To understand the relations between the parties, we deem it appropriate to frame the family tree, as is evident from the material on record:



12. The High Court finally found that the properties forming part of Schedule 'A' are exclusive properties of defendant No. 1 allotted in the partition in the year 1965. The plaintiffs and defendant No. 1 will have 1/4th equal shares each.

12.1 The claim of the plaintiffs for share in Schedule 'B', 'C' and item Nos. 1 and 2 of Schedule 'D' properties was rejected.

12.2 Sale of Item No. 2 of Schedule 'A' property by defendant No. 7 to defendant No. 9 was declared to be null and *void*, hence not binding on the plaintiffs and defendant No. 1.

12.3 The plaintiffs and defendant No. 1 were held entitled to 1/4th share in item No. 4 of Schedule 'D'. Meaning thereby 1/12th share each.

12.4 With regard to ½ share of item No. 3 of Schedule 'D' properties, the matter was remitted to the Trial Court to allow plaintiff No. 1 to adduce evidence to prove that ½ share in item No. 3 was purchased by defendant No. 1 out of joint family funds.

12.5 In respect of item No. 5 of 'B' Schedule also, the matter was remitted to the Trial Court to allow defendants No. 2 and 7 to adduce necessary evidence as to extent of land allotted to the share of defendant No. 7 in the partition. In other words, it was to be decided whether it is 4 acres in Sy. No. 44/4 of Nuggikere village is allotted to the share of defendant No. 7 or entire extent of 7 acres is allotted. The defendant No. 7 and defendant No. 2 were permitted to file additional pleadings and adduce evidence available with them to prove their respective cases.

13. In the written statement filed by defendants No. 1 to 3 (father and grand parents of plaintiffs No. 1 and 2) to the suit filed by the plaintiffs, the definite stand taken is that the property bearing Regular Survey No. 106/2 does not belong to the joint family of the answering defendants, rather it had gone to the branch of Raghvendrarao, hence cannot be made subject-matter of partition.

14. As is evident from the judgment of the High Court, much reliance was placed upon the oral partition effected between the parties in the year 1965. In our opinion, the High Court committed a grave error in placing reliance upon the partition allegedly effected in the year 1965, in terms of which Schedule 'A' properties were allotted exclusively to the share of defendant No.1. The fact remains that it is not even the pleaded case of the plaintiffs in the suit that there was any partition of the family properties in the year 1965. The suit was filed on 26.05.1999. Even the pleaded case of the defendants, especially defendant No. 1 who is the husband of plaintiff No. 3 and father of plaintiffs No. 1 and 2, in the written statement filed by him was not that there was any partition in the year 1965. Quite late, the plaintiffs sought to amend the plaint seeking to raise pleadings regarding 1965 partition. The Trial Court, *vide* order dated 11.10.2006 rejected the application for amendment of the plaint. The aforesaid order was not challenged any further. Meaning thereby, the same attained finality as far as the case sought to be set up by the plaintiffs based on 1965 partition.

15. There is no quarrel with the proposition of law that no evidence could be led beyond pleadings. It is not a case in which there was any error in the pleadings and the parties knowing their case fully well had led evidence to enable the Court to deal with that evidence. In the case in hand, specific amendment in the pleadings was sought by the plaintiffs with reference to 1965 partition but the same was rejected. In such a situation, the evidence with reference to 1965 partition cannot be considered.

16. The plea sought to be taken by the plaintiffs regarding 1965 partition in the replication filed by them would not come to their rescue for the reason that the amendment application filed to raise that plea was specifically rejected. The Trial Court had rightly ignored the plea taken in the replication by the plaintiffs regarding oral partition of 1965, as amendment sought to that effect had already been declined. What was not permitted to be done directly cannot be permitted to be done indirectly.

17. In the written statement filed by defendant No. 7, a specific plea was raised regarding 1984 partition and the property bearing Regular Survey No. 106/2 coming to his share. In the additional written statement filed by defendant No. 7 before the Trial Court, a specific plea was raised that the property bearing Regular Survey No. 44/4 had exclusively fallen to his share in the family partition effected on 30.08.1984. This gets credence from a decree passed by the Civil Court in Civil Suit No. 80 of 1995, titled as "**Sri Ramarao Vyasarao Desai v. Dr. Shriramarao Raghavendrarao Desi and another**", decided on 23.06.1995, which notices the partition of 1984. In the aforesaid suit, father of defendant No. 1, who was the only son of Vyasrao and two sons of Raghvendrarao, namely, Prahlad and Srinivas Raghvendrarao were parties. The High Court had gone wrong in holding the aforesaid compromise decree to be bad without there being any challenge to the same by the parties. It is not even the case set up before the Trial Court.

18. As a consequence, the finding recorded by the High Court that all Schedule 'A' properties were allotted to defendant No. 1 is liable to be set aside. Ordered accordingly.

19. Strangely enough, there is somersault in the stand taken by defendant No. 1. It is for the reason that earlier the plaintiffs and defendant No. 1 were stated to be at loggerheads as lot of allegations had been made by the plaintiffs in the plaint, such as playing cards, drinking

etc. It is for that reason that the suit for partition was filed during the life time of the defendant No. 1. However, now they have joined hands. As a result, defendant No. 1 before this Court is now seeking to support the case of the plaintiffs. Such conduct of the parties, like a pendulum in the clock in fact puts the Court on trial.

20. If the contents of partition dated 30.08.1984 are perused, the property bearing Regular Survey No. 106/2 goes to the share of the appellant. Even otherwise, the property in question, namely, Regular Survey No. 106/2, on which the plaintiffs and defendant No. 1 are now staking claim was sold by defendant No. 7 to defendant No. 9 vide registered sale deed dated 25.07.2001. It was well within the knowledge of defendant No. 1. The Trial Court categorically recorded that even if the signatures on the sale deed were effected by defendant No. 7, stated to be executed on behalf of defendant No. 1, but still defendant No. 1 did not object to the same and in fact supported the stand of defendant No. 7 as the property in question had gone to his share in the family partition. Further, if defendant No. 1 was the true owner of the property in question and had any objection to the aforesaid sale transaction, during his life time he never challenged the same despite being in knowledge thereof. This also establishes that in fact in 1984 partition, the property had gone to the share of defendant No. 7. The partition deed dated 30.08.1984 between Vyasrao Hanamanthrao Desai and Raghavendrarao Hanamanthrao Desai, whose descendants are litigating with reference to their respective shares is extracted below:

> "The portion of the property belonging to Sri Vyasrao Hanamanthrao Desai and Late Capt. Raghavendrarao Hanamanthrao Desai was discussed in detail and the following agreements were agreed to by me. People who attended on Thursday 30th August, 1984.
>
> The persons attended are as follows:
>
> 1. Sri R.V. Desai (Son of Sri V.H. Desai)
> 2. Major P.R. Desai
> 3. Dr. R. S. Desai
>
> (Sons of Late Capt. R. H. Desai)
>
> in attendance and according to the advise of Sri V.H. Desai.

The partition has been agreed to and done in the following manner:

SRI V.H. DESAI			LATE CAPT. R.H. DESAI		
Village	AG	S.No./ Bl No.	Village	AG	S.No./ Bl.No.
1) Kelgeri	4-18	69	1) Saptapur	3-00	108/2
2) -do-	4-10	152/2	2) -do-	3-14	106/2
3) Nuggikeri	5-03	37	3) Nuggikeri	13-37	31
4) Lakamanahalli	7-37	86/2B	4) -do-	07-00	44
5) Dondikoppa	5-35	9	5) Lakamanahalli	06-08	3/2
6) Sutagatti	3-37	13	6) Narayanpur	5-19	7+14B/2
7) Hosayallapur	8-16	126/1	7) Hosayallapur	8-16	126/2
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	48-30			48-10	
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Survey No. 109 of Saptapur has not been shown but, it has been included equally among the both the parties and consists of Guava garden.

Following lands have not been divided as they are not in physical position and cases regarding them are pending and they will be equally distributed after the settlement of cases. The above mentioned are as under:

Village	A-G	Sl-No-/Bl.No.
1) Nuggikeri	3-34	129
2) Nuggikeri	1-00	31
3) Nuggikeri	1-00	37
4) Kanavihonnapur	2-09	87/A
5) Kanavihonnapur	1-38	81”

21. Even with reference to property bearing Regular Survey No. 44/4, also we do not find that the matter needs to be remanded back for the reason that in the family partition held in the year 1984 clearly the aforesaid Regular Survey No. was assigned to the share of late

Raghavendrarao Hanamanthrao Desai, who was the predecessor-in-interest of the appellants. The area clearly mentioned therein was seven acres, hence there is no dispute.

22. So far as the argument raised by learned counsel for the respondents regarding sale conducted by defendant No. 7 in favour of defendant No. 9 to be in violation of the interim order passed by the Trial Court is concerned, suffice it to state that the interim order restraining defendants No.1 to 4 from alienating the property in question was passed by the Trial Court on 31.05.1999. As on that date, defendant No. 7 was not party to the suit as he was impleaded only on 02.01.2001. There is no order passed by the Trial Court thereafter directing that the interim order was further extended qua the newly impleaded defendant also, hence it cannot be said to be a case of wilful violation of the order passed by the Trial Court.

23. The order passed by High Court in Writ Petition No. 11431 of 1977 filed by Sudheendra, decided on 25.03.1983, does not come to the rescue of the respondents for the reason that the same was passed before the partition was effected between the parties on 30.08.1984. Secondly, it was a Writ Petition filed by defendant No. 1 through his grand father as he was minor at that time. The Writ Petition was filed against the State seeking quashing of order dated 21.05.1976 passed by Special Land Tribunal, Dharwad. Without there being any material and the parties affected or beneficiary of 1965 partition being party, the Court recorded that there is no dispute that there was such a partition.

24. For the reasons mentioned above, the appeals are allowed. The findings of the High Court with reference to Regular Survey Nos. 106/2 and 44/4 are set aside. The same are held to be the properties coming to the share of the appellants. The sale deed executed by the appellant (since deceased) in favour of defendant No. 9 regarding Survey No. 106/2 is upheld.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals allowed.

[2024] 3 S.C.R. 60 : 2024 INSC 173

District Appropriate Authority under the PNDT Act and Chief District Health Officer
v.
Jashmina Dilip Devda & Anr.

(Civil Appeal No. 3831 of 2024)

04 March 2024

[J.K. Maheshwari* and K.V. Viswanathan, JJ.]

Issue for Consideration

The interpretation of power of Section 20(1) & (2) and Section 20(3) of the Pre-conception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994 for cancellation, suspension or suspension in public interest respectively by the appropriate authority specified in Section 17 of PC & PNDT Act.

Headnotes

Pre-conception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994 – S.20(1), (2) & (3) – Interpretation of:

Held: Bare reading of the provisions makes it clear that s.20(1) & (2) deals with both suspension or cancellation as the case may be, while s.20(3) only deals with suspension in public interest – The authority, while exercising power under sub-sections (1) & (2) of s.20 of PC&PNDT Act, may act *suo moto* or on a complaint and after notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic for the reasons to show cause why its registration should not be suspended or cancelled, and affording reasonable opportunity of hearing and having regard to the advice of the Advisory Committee and on being satisfied that there was a breach of the provisions of the PC&PNDT Act or the Rules, without prejudice to any criminal action, may suspend or cancel its registration as the case maybe – Sub-Section (3) of s.20 only deals with suspension and confers independent power to the appropriate authority irrespective and notwithstanding the power under sub-sections (1) or (2) of s.20 – The said power may only be exercised by the appropriate authority if the said authority is of the opinion that exercise of such power is necessary or expedient in public

* Author

interest – Meaning thereby that the exercise of such power of suspension by appropriate authority is in a contingency where it is expedient or necessary to take immediate action in public interest – While exercising such power, it is incumbent on the authority to form an opinion for reasons to be recorded in writing to indicate the said public interest – The said power is not akin to the power as specified in sub-section 2 of s.20 of PC&PNDT Act and the Rules thereto. [Paras 10, 11]

Pre-conception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994 – S.20(1), (2) & (3) – During inspection of the hospital run by respondent no.1, the appropriate authority and its team found some lapses contravening the provisions of PC&PNDT Act – On 25.10.2010, the appropriate authority without giving any notice passed an order suspending the registration of the hospital in exercise of the power u/s. 20(1) & (2) of the PC & PNDT Act – Appellate Authority directed the appropriate authority to pass a suitable order – Pursuant thereto, appropriate authority passed fresh order on 29.12.2010 that there was breach of mandatory provisions and suspended the registration u/s. 20(3) of the PC&PNDT Act in public interest – Propriety:

Held: The power of sub-section (3) of s.20 of PC&PNDT Act is notwithstanding the power of sub-sections (1) & (2) of s.20 – The said power can only be exercised when the appropriate authority forms an opinion that it is necessary or expedient in public interest to do so – It is incumbent upon the appropriate authority to form its opinion based on reasons expedient or necessary to exercise the power of suspension – The contents of the suspension order dated 29.12.2010 does not contain reasons as required to form an opinion that it is necessitated or expedient in public interest to exercise the power of suspension –Therefore, it does not fulfill the requirement of sub-section (3) of s.20 of PC&PNDT Act – Neither the first order of suspension dated 25.10.2010 nor the second order of suspension dated 29.12.2010 qualifies the requirement of sub-section (3) of s.20 of the PC&PNDT Act – The said view is fortified by the Single Judge and the Division Bench of the High Court. [Para 16]

Pre-conception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994 – S.20 (2) & (3) – Intendment of:

Held: It is clarified that if the appropriate authority finds breach of provisions of PC&PNDT Act or the Rules it may, after issuing notice and giving a reasonable opportunity of being heard, without prejudice to any criminal action against the licensed entity, suspend its registration for such period as it may think fit or cancel the same as the case maybe – The appropriate authority has also been conferred with a power under sub-section (3) of s.20 notwithstanding the power under sub-section (1) & (2) of s.20 – In the said situation in case, the authority forms an opinion that it is necessary or expedient in public interest, then after recording reasons in writing, it may suspend the registration of the licensed entity without notice as specified in sub-section (1) of s.20 – Thus, the power of sub-section (3) is intermittent and in addition to the power of sub-section (2) but it may be exercised sparingly, in exceptional circumstances in public interest. [Para 17]

Case Law Cited

Malpani Infertility Clinic Pvt. Ltd. vs. Appropriate Authority, **2004 SC Online Bom 834;** *J. Sadanand M. Ingle (Dr) vs. State of Maharashtra,* **2013 SCC online Bom 697;** *Priykant Mokalal Kapadia vs. State of Gujarat,* **Special Civil Application No. 9424 of 2014;** *Sujit Govind Dange vs. State of Maharashtra and others,* **2012(6) Mh.L.J. 289 – referred to.**

List of Acts

Preconception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994.

List of Keywords

Cancellation or suspension of registration; Issue of notice; Reasonable opportunity of hearing; Breach of provisions; Recording of reasons in writing; Exercise of power in exceptional circumstance.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.3831 of 2024

From the Judgment and Order dated 06.01.2015 of the High Court of Gujarat at Ahmedabad in LPA No.311 of 2014

District Appropriate Authority under the PNDT Act and Chief District Health Officer v. Jashmina Dilip Devda & Anr.

Appearances for Parties

Sanjay Parikh, Sr. Adv., Ms. Rashmi Nandakumar, Advs. for the Appellant.

Hemal Kiritkumar Sheth, Ms. Hemantika Wahi, Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Srikant Swaroop, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J.K. Maheshwari J.

1. Leave Granted

2. In the present appeal, the issue concerns the interpretation of power of Section 20(1) & (2) and Section 20(3) of the Pre-conception and Pre-Natal Diagnostic Techniques (Regulation & Prevention of Misuse) Act, 1994 (hereinafter to be referred to as the "**PC&PNDT Act**") for cancellation, suspension or suspension in public interest respectively by the appropriate authority specified in Section 17 of the PC&PNDT Act.

3. The brief facts are that the respondent no.1 is running a hospital at Ahmedabad by the name of "*Dev Hospital*" which is a type of polyclinic having doctors from multiple branches like gynecology, general physician and general surgeon treating patients in the said hospital. The hospital was registered under the PC&PNDT Act and the said registration was valid up to 23.05.2015. On the basis of one complaint made by Shilpa Punani of Wadhwan District Surendranagar, an inspection of the hospital was conducted on 21.10.2010. During inspection, the appropriate authority and its team found some lapses contravening the provisions of PC&PNDT Act. Consequently, the sonography machine operated in the hospital was seized. On 25.10.2010, the appropriate authority without giving any notice passed an order suspending the registration of the hospital in exercise of the power under Section 20(1) & (2) of the PC&PNDT Act. On filing appeal by respondent no.1, the appellate authority vide order dated 21.12.2010 directed the appropriate authority to pass a suitable order within 15 days and to clarify whether the order dated 25.10.2020, was passed in exercise of the power under Section 20(1) & (2) or under Section 20(3) of PC&PNDT Act. The appropriate authority taking cue from the order of the appellate authority, passed

a fresh order on 29.12.2010 that there is a breach of mandatory provisions and accordingly suspended the registration purportedly under Section 20(3) of PC&PNDT Act in public interest till finalization of the criminal proceedings.

4. An appeal preferred against the subsequent order dated 29.12.2010 by respondent no.1 was dismissed on 17.03.2011 by the appellate authority. Being aggrieved, by the order of suspension dated 29.12.2010 and the order passed in appeal dated 17.03.2011, writ application being SCA No. 6215/2011 was filed by respondent no.1 before the High Court of Gujarat (hereinafter referred to as "**High Court**") to set aside the said orders and to revoke the suspension of registration of the hospital. Prayer was also made to release the sonography machine seized by the appropriate authority.

5. Learned Single Judge vide order dated 05.08.2013 was pleased to allow the writ application *inter alia* observing that looking to the condition of foetus in the womb, once the patient has consented for abortion, she cannot make a complaint for alleged violation of provisions of PC&PNDT Act. The Court found that neither any notice was issued nor an opportunity of hearing was afforded prior to passing the order suspending the registration. It was further held that while passing the first order of suspension on 25.10.2010, powers were exercised by appropriate authority under Sections 20(1) & (2) of PC&PNDT Act without affording an opportunity of hearing, which was contrary to the spirit of the said provisions and wholly unjustified. The Learned Single Judge was of the view that appellate authority was not justified to remit the matter in appeal against the order of suspension to the appropriate authority suggesting clarification whether such powers were exercised by him under Section 20(1) & (2) or under Section 20(3) of the PC&PNDT Act and how far the reasons for exercising such power are justified. The Court further held that the reason as assigned in the subsequent order, if accepted as valid, then each and every case of suspension would fall within the purview of Section 20(3) of PC&PNDT Act and the provisions of Section 20(1) & (2) will be rendered redundant.

6. Being aggrieved by the order of Learned Single Judge, appropriate authority challenged the same by filing the Letters Patent Appeal which was dismissed by the order impugned by the Division Bench, putting a stamp of approval to reasonings of the Learned Single Judge. The

Division Bench was of the opinion that all the cases of suspension would not automatically fall within the purview of Section 20(3) of the PC&PNDT Act. It was observed that the reasons assigned in subsequent order of suspension by the appropriate authority are not valid to exercise such power in public interest. Therefore, the Letters Patent Appeal filed by the appropriate authority was dismissed.

7. Learned counsel for the appellant authority submits that on the scope of Sections 20(1), (2) & (3) of PC&PNDT Act, there is no judgment of this Court, so the question involved in the case is of general public interest. He has placed reliance on the judgment of ***Malpani Infertility Clinic Pvt. Ltd. vs. Appropriate Authority***, 2004 SC Online Bom 834 to urge that if power is exercised by appropriate authority to suspend the registration due to pendency of the prosecution, such power may be exercised in public interest under Section 20(3) of PC&PNDT Act. It is contended that looking to the object of PC&PNDT Act, if the appropriate authority considers that the activity of the licensed entity is affecting the public at large, the power to suspend the registration or license is permissible. However, it is fairly stated that the High Court of Bombay has given a conflicting judgment in the case of ***J. Sadanand M. Ingle (Dr) vs. State of Maharashtra***, 2013 SCC online Bom 697 which lays down that sub-section (3) starts with non-obstante clause and empowers the appropriate authority to suspend the registration temporarily. Dealing with the scope of Sections 20(3) and 30 of the PC&PNDT Act, it was observed that, both Sections are independent and action can be taken independent to each other. It is also urged that issuance of the order dated 25.10.2010 referring to the wrong provisions, would not itself render the said order illegal. The power under Section 20(3) is of interim nature which can be exercised in public interest in a time bound manner. Thus, by the subsequent order dated 29.12.2010, suspension of the registration as directed by the appellant authority was justified and prayed for to allow this appeal and to set-aside the orders of the High Court.

8. *Per contra*, learned counsel for the respondent No. 1 submits that considering the tenor of the order passed by the appropriate authority and the reasons so stated, it cannot be said to be an order suspending the registration in public interest. Relying upon the judgment of High Court of Gujarat passed on 16.4.2018 in Special Civil Application No. 9424 of 2014 in the case of ***Priykant Mokalal Kapadia vs. State of Gujarat***, it is urged that the power of Section 20(3) of the

PC&PNDT Act is exceptional in nature and can be exercised only in public interest after forming opinion and recording the reasons in this regard, otherwise, such power ought not to be exercised. In support of the said contention, reliance has also been placed on a judgment of the Bombay High Court in the case of ***Sujit Govind Dange vs. State of Maharashtra and others***, 2012(6) Mh.L.J. 289 to urge that the powers under Section 20(3) of PC&PNDT Act are extra-ordinary and the appropriate authority ought to have exercised such power in larger public interest and in exceptional circumstances, in particular when the said authority is of the opinion that it is necessary or expedient to do so in public interest by recording such reasons, otherwise such power should not be exercised.

9. We have heard learned counsel for both the parties at length and to appreciate the scope of powers as specified under Section 20(1), (2) & (3) of PC&PNDT Act, it is necessary to refer the said provisions. For ready reference, Section 20(1), (2) & (3) of PC&PNDT Act are being quoted hereinbelow:

> **20**. Cancellation or suspension of registration.—
>
> (1) The Appropriate Authority may suo moto, or on complaint, issue a notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic to show cause why its registration should not be suspended or cancelled for the reasons mentioned in the notice.
>
> (2) If, after giving a reasonable opportunity of being heard to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic and having regard to the advice of the Advisory Committee, the Appropriate Authority is satisfied that there has been a breach of the provisions of this Act or the rules, it may, without prejudice to any criminal action that it may take against such Centre, Laboratory or Clinic, suspend its registration for such period as it may think fit or cancel its registration, as the case may be.
>
> (3) Notwithstanding anything contained in sub-sections (1) and (2), if the Appropriate Authority is of the opinion that it is necessary or expedient so to do in the public interest, it may, for reasons to be recorded in writing, suspend the registration of any Genetic Counselling Centre, Genetic

> Laboratory or Genetic Clinic without issuing any such notice referred to in sub-section (1).

10. Bare reading of the aforesaid provisions makes it clear that Section 20(1) & (2) deals with both suspension or cancellation as the case may be, while Section 20(3) only deals with suspension in public interest. The authority, while exercising power under sub-sections (1) & (2) of Section 20 of PC&PNDT Act, may act *suo moto* or on a complaint and after notice to the Genetic Counselling Centre, Genetic Laboratory or Genetic Clinic for the reasons to show cause why its registration should not be suspended or cancelled, and affording reasonable opportunity of hearing and having regard to the advice of the Advisory Committee and on being satisfied that there was a breach of the provisions of the PC&PNDT Act or the Rules, without prejudice to any criminal action, may suspend or cancel its registration as the case maybe. Meaning thereby that for breach of the provisions of the PC&PNDT Act and the Rules, power of suspension for such period as may deem fit or of cancellation may be exercised parallelly by the appropriate authority.

11. Sub-Section (3) of Section 20 only deals with suspension and confers independent power to the appropriate authority irrespective and notwithstanding the power under sub-sections (1) or (2) of Section 20. The said power may only be exercised by the appropriate authority if the said authority is of the opinion that exercise of such power is necessary or expedient in public interest. Meaning thereby that the exercise of such power of suspension by appropriate authority is in a contingency where it is expedient or necessary to take immediate action in public interest. While exercising such power, it is incumbent on the authority to form an opinion for reasons to be recorded in writing to indicate the said public interest. The said power is not akin to the power as specified in sub-section 2 of Section 20 of PC&PNDT Act and the Rules thereto.

12. In the light of the discussion of the above provisions, it is required to be seen whether the order of suspension passed on 25.10.2010 is really an order under sub-section (2) or under sub-section (3) of Section 20 of the PC&PNDT Act. To understand the real intent of the order, it would be proper to reproduce the order dated 25.10.2010 as under:

"No. DP/H/PNDT/Regn. Susp/Dr. Jasmina Devda/315/10

O/O Appropriate Authority, PNDT Act, 1994 & CDHO, District Panchayat, Health Branch, Ahmedabad

Date: 25.10.2010

Read:

1. The facts of the observations by Appropriate Authority during the visit & the search & Seizure operation at clinic of Dr. Jasmina D. Devda, Dev Hospital, Vasna, Ahmedabad on 21st October, 2010.
2. Advice of the PNDT Advisory Committee meeting held on 22/10/2010.
3. Powers conferred under Section 20(1) & (2) of PC&PNDT Act, 1994

Office Order:-

As per the points read above, a search & seizure operation was conducted at the clinic of Dr. Jasmina D. Devda, Dev Hospital, Kesariyaji Bus Stop, Dr. Jivraj Mehta Hospital Road, Vasna, Ahmedabad on 21st October, 2010.

Dr. Jasmina D. Devda, Dev Hospital, Vasna, Ahmedabad has convincingly contravened the Sections 4(3),5(2), 5(a) & Rules 9(1), 9(4), 9(8), 10(1A) and 13 of the PC&PNDT Act, 1994. As per powers conferred under Section No. 21(1) & 20(2) of PC&PNDT Act, 1994, the PNDT registration No. 564 allotted to the clinic of the same at the above address is hereby suspended till the next order TV undersigned.

Appropriate Authority
PNDT Act, 1994 & CDHO,
District Panchayat,
Ahmedabad.

To

Dr. Jasmina D. Devda,
Dev Seva Trust, Kesariyaji Bus Stop
Dr. Jivraj Mehta Hospital Road, Vasna,
Ahmedabad."

13. Having gone through the order and the provisions of sub-section (2) of Section 20 of the PC&PNDT Act, in our view, the order dated 25.10.2010 cannot be said to be an order under sub-section (3) of Section 20 of PC&PNDT Act. In fact, it is *simplicitor* an order passed under sub-section (2) of Section 20 alleging contraventions of the provisions of PC&PNDT Act and the Rules. Therefore, we have no hesitation to say that the appellate authority, while remanding the matter vide order dated 21.12.2010, was not required to ask the appropriate authority to clarify whether the order of suspension was under sub-section (3) or under sub-sections (1) & (2) of Section 20 of PC&PNDT Act.

14. After remand, the subsequent order of suspension dated 29.12.2010 passed in public interest was assailed before the appellate authority and the writ court. To appreciate the contents of the said order and the provisions of sub-Sections (1), (2) & (3) of Section 20 of PC&PNDT Act, it is necessary to reproduce the order dated 29.12.2010 which is as under:

> "OW No. DP/H/PNDT/Regn. Susp/Dr. Jasmina Devda/852/100/0 Appropriate Authority, PNDT Act, 1994 & CDHO, District Panchayat, Health Branch, Ahmedabad
>
> Date: 29.12.2010
>
> Read:- (1) The facts of the observation by Appropriate Authority during the visit 1 the search and seizure operation at clinic of Dr. Jasmina D. Devda, Dev Hospital, Vasna, Ahmedabad on 21st October, 2010.
>
> (2) Power conferred under Section 20(3) of PC&PNDT Act, 1994.
>
> (3) Order dated 21/12/2010 passed in Appeal No. 5/2010 by State Appropriate Authority, PC & PNDT Act.
>
> OFFICE ORDER
>
> As per the points read above, a search & seizure operation was conducted at the clinic of Dr. Jasmina D. Devda, Dev Hospital, Kesariyaji Bus Stop, Dr. Jivraj Mehta Hospital Road, Vasna, Ahmedabad on 21st October, 2010.
>
> Dr. Jasmina D. Devda, Dev Hospital, Vasna, Ahmedabad has convincingly contravened the Sections 4(3), 5(2), 6(a)

& Rules 9(1), 9(4), 9(5), 10(1A) & 13 of the PNDT Act, 1994. As per power conferred under Section No. 20(3) of PC&PNDT Act, 1994, the PNDT Registration No. 564 allotted to the clinic of the same at the above address is hereby suspended, for following reason till finalization of criminal proceedings.

There is clear breach of mandatory provisions as mentioned in the order dated 25/10/2010 viz. Section 4(3), 5(2), 6(a) & Rules 9(1), 9(4), 9(8), 10(1A) & 13. This defeats the basic purpose of the Act & hence contrary to the public interest. Thus in public interest it is required to check the activity of yours as you are not acting as per statutory provisions of Act & hence, suspension of the PNDT registration is desirable.

Appropriate Authority,
PNDT Act 1994 & CDHO,
District Panchayat,
Ahmedabad."

15. Perusal of the above order reveals that the appropriate authority while passing the order sought to exercise power under sub-section (3) of Section 20 of PC&PNDT Act and directed suspension of the registration of the clinic till finalization of the criminal proceedings because of the contraventions of the provisions of the PC&PNDT Act and the Rules. Therefore, it is said to be contrary to the public interest and such activity is required to be curbed.

16. As per the discussion made hereinabove, in our view, the power of sub-section (3) of Section 20 of PC&PNDT Act is notwithstanding the power of sub-sections (1) & (2) of Section 20. The said power can only be exercised when the appropriate authority forms an opinion that it is necessary or expedient in public interest to do so. It is incumbent upon the appropriate authority to form its opinion based on reasons expedient or necessary to exercise the power of suspension. The contents of the suspension order dated 29.12.2010 does not contain reasons as required to form an opinion that it is necessitated or expedient in public interest to exercise the power of suspension. Therefore, in our view, it does not fulfill the requirement of sub-section (3) of Section 20 of PC&PNDT Act. As per the above discussions, neither the first order of suspension dated 25.10.2010

nor the second order of suspension dated 29.12.2010 qualifies the requirement of sub-Section (3) of Section 20 of the PC&PNDT Act. The said view is fortified by the reasoning recorded by the learned Single Judge and Division Bench which we find just and concur by its reasoning. Therefore, we are not inclined to interfere in this appeal.

17. In the above context, it is necessary to refer to the intendment of Section 20(2) and Section 20(3) of PC&PNDT Act. At the cost of reiteration, we clarify that if the appropriate authority finds breach of provisions of PC&PNDT Act or the Rules it may, after issuing notice and giving a reasonable opportunity of being heard, without prejudice to any criminal action against the licensed entity, suspend its registration for such period as it may think fit or cancel the same as the case maybe. The appropriate authority has also been conferred with a power under sub-section (3) of Section 20 notwithstanding the power under sub-section (1) & (2) of Section 20. In the said situation in case, the authority forms an opinion that it is necessary or expedient in public interest, then after recording reasons in writing, it may suspend the registration of the licensed entity without notice as specified in sub-section (1) of Section 20. Thus, the power of sub-section (3) is intermittent and in addition to the power of sub-section (2) but it may be exercised sparingly, in exceptional circumstances in public interest. In our view, the power of suspension, if any exercised, by the appropriate authority deeming it necessary or expedient in public interest for the reasons so specified, it should be for interim period and not for an inordinate duration.

18. As per above discussion of the legal position, in the facts of the present case as is apparent, the inspection was made on 21.10.2010, and the order of suspension was passed on 25.10.2010 without any notice or affording any opportunity of hearing as per sub-section (2) of Section 20. On filing appeal, the appellate authority remitted it to the appropriate authority which passed the subsequent order of suspension dated 29.12.2010 exercising the power under sub-section (3) of Section 20, which in our view is not justified and has rightly been set-aside by Learned Single Judge and confirmed by the Division Bench. Therefore, the appeal filed by the appropriate authority is hereby dismissed and the order passed by Learned Single Judge and the Division Bench are hereby upheld. Since the order under challenge has been implemented and the hospital is

operational, therefore no further consequential orders are required to be passed directing to revive the registration. In the facts and circumstances of the case, there shall be no order as to costs.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeal dismissed.

[2024] 3 S.C.R. 73 : 2024 INSC 155

M/S Arif Azim Co. Ltd.
v.
M/S Aptech Ltd.

(Arbitration Petition No. 29 of 2023)

01 March 2024

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

Issue for Consideration

Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator u/s.11(6), Arbitration and Conciliation Act, 1996; if yes, whether the present petition is barred by limitation; when does the right to apply u/s.11(6) accrues; whether the court may refuse to make a reference u/s.11 of the Arbitration and Conciliation Act, 1996 where the claims are ex-facie and hopelessly time-barred.

Headnotes

Arbitration and Conciliation Act, 1996 – s.11(6) – Limitation Act, 1963 – Article 137 – Applicability – Three franchise agreements entered into between parties in 2013 – As per the agreements, the petitioner-a company based in Afghanistan, as the franchisee, was granted a non-exclusive license, by the respondent to establish and operate businesses under three trade names – Proposals were invited by the Indian Council for Cultural Relations (ICCR), for the execution of a short-term course – Proposal of the respondent accepted – Course executed by the petitioner at its centre in Kabul from February to April, 2017 – Disputes arose between the parties in relation to the renewal and payment of royalties for all the three franchise agreements – Respondent issued recovery notice for non-payment of royalty/renewal fees in 2018 – Petitioner informed the respondent of its decision to not renew two franchise agreements – In 2021, after a gap of around three years, the petitioner again took up the issue of non-payment of dues for the ICCR project with the respondent – Petitioner invoked a pre-institution mediation in 2022 however, upon failure thereof, it sent notice for invocation of arbitration to the respondent – Respondent replied denying the claims

* Author

stating that notwithstanding the merits, the claims were barred by limitation – Petitioner filed petition u/s.11(6) filed for the appointment of an arbitrator:

Held: There is no doubt as to the applicability of the Limitation Act, 1963 to arbitration proceedings in general and that of Article 137 of the Limitation Act, 1963 to a petition u/s.11(6) in particular – As is evident from Article 137, the limitation period for making an application u/s.11(6) is three years from the date when the right to apply accrues – Limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties – The request for appointment of an arbitrator was first made by the petitioner vide notice dtd. 24.11.2022 and a time of one month from the date of receipt of notice was given to the respondent to comply with the said notice – Notice was delivered to the respondent on 29.11.2022 – Hence, the said period of one month from the date of receipt came to an end on 28.12.2022 – Thus, it is only from this day that the clock of limitation for filing the present petition would start to tick – The present petition was filed by the petitioner on 19.04.2023, well within the time period of 3 years provided by Article 137 – Thus, the present petition u/s.11(6) cannot be said to be barred by limitation – Further, the notice invoking arbitration was received by the respondent on 29.11.2022, which is within the three-year period from the date on which the cause of action for the claim had arisen – Thus, it cannot be said that the claims sought to be raised by the petitioner are ex-facie time-barred or dead claims on the date of the commencement of arbitration – Petition allowed, sole arbitrator appointed.[Paras 50-52, 62, 88, 92]

Arbitration and Conciliation Act, 1996 – s.11(6) – Petition under, issue of limitation – Courts to satisfy themselves on two aspects by employing a two-pronged test:

Held: While considering the issue of limitation in relation to a petition u/s.11(6), the courts should satisfy themselves on two aspects by employing a two-pronged test – first, whether the petition u/s.11(6) is barred by limitation; and secondly, whether the claims sought to be arbitrated are ex-facie dead claims and are thus barred by limitation on the date of commencement of arbitration proceedings

– If either of these issues are answered against the party seeking referral of disputes to arbitration, the court may refuse to appoint an arbitral tribunal. [Para 89]

Arbitration and Conciliation Act, 1996 – s.11(6) – Ascertaining the relevant point in time when the limitation period for making a s.11(6) application would begin – Hohfeld's analysis of jural relations – Discussed.

Arbitration and Conciliation Act, 1996 – s.11(6) – Application for appointment of arbitrator u/s.11(6) – Categories of issues – "jurisdictional issues/objections"; "admissibility issues/ objections":

Held: Issues pertaining to the power and authority of the arbitrators to hear and decide a case are referred to as the "jurisdictional issues/objections" – Objections to the competence of arbitrators to adjudicate a dispute, existence/validity of arbitration agreement, absence of consent of the parties to submit the disputes to arbitration, dispute falling out of the scope of the arbitration agreement are some examples of jurisdictional or maintainability issues – The second category referred to as the "admissibility issues/objections" is of those issues which are related to the nature of the claim and include challenges to procedural requirements, viz. a mandatory requirement for pre-reference mediation; claim or a part thereof being barred by limitation, etc. – Although, limitation is an admissibility issue, yet it is the duty of the courts to prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process. [Paras 64, 65]

Arbitration – Cause of action – When arises – Notice for invocation of arbitration issued by the petitioner within three years from the date of accrual of cause of action, claims not ex-facie dead or time-barred on the date of commencement of the arbitration proceedings:

Held: Mere failure to pay may not give rise to a cause of action – However, once the applicant has asserted its claim and the respondent has either denied such claim or failed to reply to it, the cause of action will arise after such denial or failure – In the present case, the petitioner alleged that the respondent received the payment for the course from the ICCR on 03.10.2017 – However, the perusal of the communication exchanged between

the parties indicates that it was only on 28.03.2018 that the right of the petitioner to bring a claim against the respondent could be said to have been crystallised – Petitioner completed the course sometime in April and a letter to this effect was issued on 30.07.2017 by the EOI, Kabul – Allegedly, the ICCR made payment to the respondent on 03.10.2017 – However, the right of the petitioner to raise the claim could only be said to have accrued after the petitioner made a positive assertion in March, 2018 which was denied by the respondent vide email dated 28.03.2018 – Another reminder through email was given by the petitioner on 29.12.2018, however, mere giving reminders and sending of letters would not extend the cause of action any further from 28.03.2018 on which date the rights of the petitioner could be said to have been crystallised – Thus, in ordinary circumstances, the limitation period available to the petitioner for raising a claim would have come to an end after an expiry of three years, that is, on 27.03.2021 – However, in March 2020, in view of deadly Covid-19 pandemic, this Court directed the period commencing from 15.03.2020 to be excluded for the purposes of computation of limitation – As a result, the period from 15.03.2020 to 28.02.2022 was finally determined to be excluded for the computation of limitation – It was provided that the balance period of limitation as available on 15.03.2020 would become available from 01.03.2022 – The effect of the said order of this Court in the facts of the present case is that the balance limitation left on 15.03.2020 would become available w.e.f. 01.03.2022 – The balance period of limitation remaining on 15.03.2020 can be calculated by computing the number of days be-tween 15.03.2020 and 27.03.2021, which is the day when the limitation period would have come to an end under ordinary circumstances – The balance period thus comes to 1 year 13 days which became available to the petitioner from 01.03.2022, thereby meaning that the limitation period available to the petitioner for invoking arbitration proceedings would have come to an end on 13.03.2023 – Notice for invocation of arbitration having been issued by the petitioner within three years from the date of accrual of cause of action, the claims cannot be said to be ex-facie dead or time-barred on the date of commence-ment of the arbitration proceedings. [Paras 77, 81, 82, 84 and 91]

Arbitration and Conciliation Act, 1996 – s.21 – Commencement of arbitral proceedings:

Held: s.21 provides that the arbitral proceedings in relation to a dispute commence when a notice invoking arbitration is sent by the claimant to the other party. [Para 85]

Arbitration and Conciliation Act, 1996 – s.11(6) – Limitation Act, 1963 – Article 137 – Applicability of Article 137 to applications u/s.11(6), a result of legislative vacuum – Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation:

Held: Applicability of Article 137 to applications u/s.11(6), a result of legislative vacuum as there is no statutory prescription regarding the time limit – Period of three years is an unduly long period for filing an application u/s.11 of the Act, 1996 and goes against the very spirit of the Act, 1996 which provides for expeditious resolution of commercial disputes within a time-bound manner – Various amendments to the Act, 1996 have been made over the years to ensure that arbitration proceedings are conducted and concluded expeditiously – Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation within which a party may move the court for making an application for appointment of arbitrators u/s.11 of the Act, 1996. [Para 94]

Maxims – "Vigilantibus non dormientibus jura subveniunt" – Discussed.

Case Law Cited

M/s B and T AG v. Ministry of Defence, [2023] 7 SCR 599 **: 2023 SCC OnLine SC 657 – held inapplicable.**

SBP & Co. v. Patel Engineering Ltd. and Another, [2005] Suppl. 4 SCR 688 **: (2005) 8 SCC 618 – followed.**

Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited, [2019] 11 SCR 1108 **: (2020) 14 SCC 643;** *Bharat Sanchar Nigam Limited & Another v. Nortel Networks India Private Limited,* [2021] 2 SCR 644 **: (2021) 5 SCC 738;** *Utkal Commercial Corporation v. Central Coal Fields Ltd.,* [1999] 1 SCR 166 **: (1999) 2 SCC 571;** *Secunderabad Cantonment Board v. B. Rama-chandraiah & Sons,* [2021] 3 SCR 68 **: (2021) 5 SCC 705;** *Vidya Drolia and Others v. Durga Trading Corporation,* [2020] 11 SCR

1001 : (2021) 2 SCC 1; *NTPC Ltd. v. SPML Infra Ltd,* [2023] 2 SCR 846 : (2023) 9 SCC 385; *Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority,* [1988] 3 SCR 351 : (1988) 2 SCC 338; *Prakash Corporates v. Dee Vee Projects Ltd.,* [2022] 8 SCR 889 : (2022) 5 SCC 112; *Milkfood Ltd. v. GMC Ice Cream (P) Ltd,* [2004] 3 SCR 854 : (2004) 7 SCC 288 – **relied on.**

Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho: (2019) 1 SLR 263 – **referred to.**

Books and Periodicals Cited

International Commercial Arbitration, Wolters Kluwer, 3rd Edition, pp. 2873-2875, Gary B. Born; O.P. Malhotra in The Law & Practice of Arbitration and Conciliation, 3rd Edition, pp. 688-689; Dr. P.C. Mar-kanda in Law Pertaining to Arbitration and Conciliation, 9th Edition, LexisNexis, pp. 550-551; Mustiu and Boyd's Commercial Arbitration (1982 Ed., pp. 436) – **referred to.**

List of Acts

Arbitration and Conciliation Act, 1996

List of Keywords

Limitation; Franchise agreements; Limitation Act applicability to arbitration proceedings; Claims ex-facie and hopelessly time-barred; Petition not barred by limitation; Cause of action.

Case Arising From

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No.29 of 2023

Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996

Appearances for Parties

R. Sathish, Rajesh Kumar, Mohan Das Kk, Mathen Joseph, Mrs. S. Geetha, Advs. for the Petitioner.

Rana Mukherjee, Sr. Adv., K.V. Balakrishnan, K.V. Mohan, R.K. Raghavan, Devesh Kumar Khanduri, Ms. Oindrila Sen, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

J. B. Pardiwala, J.

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

INDEX*

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, "the Act, 1996") filed at the instance of a company based in Kabul, Afghanistan and engaged in the business of

* Ed Note : Pagination in index as per original judgment.

providing training to desirous students in computer education, English language, information technology, etc. praying for the appointment of an arbitrator for the adjudication of disputes and claims arising from the Contract dated 21.03.2013 entered into between the petitioner and the respondent.

A. FACTUAL MATRIX

2. The petitioner, M/s Arif Azim Co. Ltd., is a company based in Afghanistan, having its registered office at 1st Floor, Zarnigar Hotel, Mohammed Jan Khan Watt, Kabul, Afghanistan and is engaged in the business of providing training in computer education, information technology, English language, etc.

3. The respondent, M/s Aptech Limited, is a company having its registered office at Aptech House, A-65, MIDC Marol, Andheri (E), Mumbai – 400093, Maharashtra, India and is engaged in the business of providing training and education in information technology through its network in India and abroad.

4. On 21.03.2013, three separate franchise agreements were entered into between petitioner/franchisee and the respondent/franchisor. As per the terms of the said agreements, the petitioner, as the franchisee, was granted a non-exclusive license, by the respondent to establish and operate businesses under the following trade names:

   I. Aptech English Language Academy (for short, "AELA")

   II. Aptech Computer Education (for short, "ACE")

   III. Aptech Hardware and Networking Academy (for short, "AHNA")

5. The dispute in the present case pertains to the agreement entered into between the parties for the AELA. A perusal of the recitals of the said agreement reveals that the respondent company has the expertise in imparting training in information technology and had developed content and established programs for training in computer-based information. The programs developed by the respondent under the brand name AELA included the recurring use of trade names, trademarks, advertising and publicity, distinctive style and character of premises and furnishings, support and placement program for students, etc. The petitioner, desirous of establishing a centre for providing training in information technology in the courses conducted by the respondent with a view to train and educate students to enable

them to appear and qualify in the said courses, had approached the respondent as a result of which the franchise agreements for AELA, ACE and AHNA were entered into between the parties.

6. The relevant clauses of the AELA franchise agreement are reproduced hereinbelow:

> ***"1. GRANT OF LICENSE***
>
> 1.01 *The Franchisor hereby grants to the Franchisee for the duration of the term and upon the terms of this Agreement, an non-exclusive Licence ("the Licence") to establish and operate in the Territory, a business under the Trade Name "APTECH ENGLISH LEARNING ACADEMY" in accordance with the PROGRAM, on the terms and conditions hereinafter set forth ("the Licensed Business"), from the designated training centre located at First Floor, Zarnigar Hotel, Mohammad Jan Khan Watt, Kabul, Afghanistan (hereinafter the center)) set up in the designated territory, unless revoked otherwise by the Franchisor. The Franchisor shall Licence to the Franchisee use of the Trade Name in the said territory for the purpose of running the said center. The Franchisee shall conduct only those courses as are mentioned in Schedule 2. The Franchisee shall be required to obtain the prior written permission of the Franchisor, if so directed by the Franchisor before commencing the licensed business from the said centre. However in respect of any additional training centers in the designated territory for carrying out the Licensed Business, the Franchisee shall be required to obtain such written permissions from the Franchisor from time to time.*
>
> *xxx* *xxx* *xxx*
>
> ***3. APPOINTMENT***
>
> *Subject to the terms and conditions of this agreement the Franchisor appoints the franchisee as an independent non-exclusive partner with the right to market and train learners in the territory outlined in Schedule 1.*
>
> *Each party is acting as an independent contractor and not as an agent, partner or joint venture with the other*

party for any purpose. The franchisee shall bear all costs relating to the marketing and promotion of the courses as outlined in Schedule 2.

xxx xxx xxx

8. *PAYMENTS AND PAYMENT PROCEDURE*

8.01 In consideration of the Franchisor agreeing to grant the licence for the licensed business, in favour of the Franchisee for a period as mentioned in Clause 2 above and for the use of the technical Know- how, trade marks, trade names, service marks and logos of the Franchisor in relation to its business of computer education and the association of the Franchisee with the reputation and goodwill of the Franchisor, the Franchisee agrees to pay to the Franchisor a Non refundable sum of US$ 30,000 (US Dollars Thirty Thousand only) as initial lumpsum fees.

8.02 If the Franchisee fails to pay the aforesaid lumpsum fees within the aforesaid period, the Franchisor shall be entitled to terminate this Agreement with immediate effect and shall have the right to forfeit the fees, if any, already paid by the Franchisee.

8.03 Additionally, in consideration of the License and other rights granted, and assistance agreed to be provided hereunder, the Franchisee shall pay to the Franchisor recurring royalty fees as under.

I. The recurring royalty payment shall be on the gross collection, to be paid as given below:

- *10% of the gross collections received in the 1st Year.*
- *10% of the gross collections received in the 2nd year.*
- *12.5% of the gross collections received in the 3rd Year.*
- *15% of the gross collections received in the 4th year.*

- *17.5% of the gross collections received in the 5th year.*

Gross collections means the total gross collections, which have accrued to the Franchisee (irrespective of whether realized or not) from the conduct of licensed business of Aptech in the designated territory.

Amounts payable as Recurring Franchisee Fees will be remitted on or before 10th of the subsequent month for the preceding calendar month e.g. Recurring Franchisee Fees for the gross collections received during the period 1st April to 30th April will be remitted on or before May 10th

Such recurring payments shall be made on monthly basis accompanied by the statement of course fees for each Course for the relevant month and also for the total period for which Franchisee's financial year relates. The Franchisee shall use a format supplied by the Franchisor for such statements duly supported with requisite documentation.

II. *All the payments to be made by the Franchisee to the Franchisor shall be by way of Telegraphic Transfer / Demand Draft.*

III. *Any and all statutory tax on the payment as above as per local laws, any other taxes, incidental taxes, incremental taxes, duties or any other charges whether statutory or otherwise in respect of the payments to the Franchisor shall be borne and paid by the Franchisee alone during the term of this agreement.*

IV. *In case the payments under this agreement are not received by the due date the Franchisor shall be entitled to levy monthly compound interest @* ***24% p.a.*** *on such late payments notwithstanding the other remedies available under the laws of the land.*

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12. RENEWAL

Not less than one hundred eighty days before the expiry of this Agreement (whether or not it has previously been renewed under the provisions of this Clause) the Franchisee may apply to the Franchisor for renewal of this Agreement for further period(s). Provided that the Franchisee has complied fully with the terms and conditions of this Agreement, the Franchisor shall have option to renew this Agreement on the terms and conditions for such mutually agreed period. However in case the renewal documents and renewal fees are not received in time as stipulated by the Franchisor, the Franchisor has the absolute right to charge monthly compound interest @ 24% p.a. on the late renewal fees from the due date of such payment, notwithstanding the right to terminate the renewal of this agreement.

13. FORCE MAJEURE

Neither party to this agreement shall be liable for any failure or delay to perform any of its obligations under this agreement if the performance is prevented, hindered or delayed by a Force Majeure Event which is beyond reasonable control of either party and in such a case its obligations shall be suspended for so long as the Force Majeure event continues. Each party shall promptly inform the other in writing of the existence of a Force Majeure Event and shall consult together to find a mutually acceptable solution. "Force Majeure Even" means any event due to any cause beyond reasonable control of parties to this agreement viz. unavailability of any communication systems, breach or virus in the processes, fire, storm, earthquake, Flood. Explosion, Act of God, Civil commotion, strikes, or industrial action of any kind, riots, rebellion, war wreck, epidemic failure, statutory laws, regulations or other Government action, computer hacking, unauthorized access to computer data, etc.

The affected party shall promptly upon the occurrence of any such cause so inform the other party in writing and thereafter such party shall use reasonable endeavors to

comply with the terms of this Agreement as fully and as promptly as possible.

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17. STATUS OF AGREEMENT

17.01 Nothing in this Agreement shall constitute a partnership between the parties hereto or constitute the Franchisee an agent of the Franchisor for any purpose whatsoever and the Franchisee shall have no authority or power to bind the Franchisor or to pledge its credit.

17.02 This Agreement shall not be deemed to confer any right on the Franchisee and the license granted by this Agreement shall be personal to the Franchisee only and shall not be capable of being or be assigned by the Franchisee to any other person.

17.03 This Agreement shall in no way create a contractual relationship between the students and the Franchisor and the Franchisee shall, at all times, be wholly liable and responsible for any claims related to and arising out of the Licensed Business and the conduct of the Courses. The Franchisee undertakes to ensure that the students are made aware at the time of enrolling in the Course that Franchisee is entirely responsible for the conduct of the Courses and, that the students shall have no claim whatsoever against the Franchisor.

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21. ARBITRATION AND GOVERNING LAWS

In the event of any dispute or difference arising between the parties hereto, including the events of termination, the same shall be settled through conciliation between the parties. In the event the parties are unable to arrive at a settlement, the matter will be referred to arbitration. The party raising the dispute shall serve a notice upon the other party advising that a dispute or difference has arisen and nominate on that notice its own arbitrator. The party receiving the notice shall, within 30 days after receiving such notice, nominate its arbitrator by advising

the party raising the dispute and the name of the arbitrator appointed by the other party. The arbitrators so appointed shall appoint a third arbitrator. The award of the majority arbitrators shall be final, conclusive and binding upon the parties hereto. The venue of arbitration shall be MUMBAI and the arbitration proceedings shall be conducted in accordance with the UNCITRAL Model Rules. If arbitration process fails both the parties shall submit to the jurisdiction of the Mumbai courts.

22. This Agreement shall be construed in accordance with and governed by the Indian laws."

7. Pursuant to the signing of the aforesaid agreement, proposals were invited by the Indian Council for Cultural Relations, Azad Bhavan, Indraprastha Estate, New Delhi – 110002 (for short, "the ICCR") in 2016 for the execution of a short-term course for training in English for students from Afghanistan who were selected to pursue degree courses in Indian Universities in the academic year 2017-18 under the scholarship scheme of the Government of India (for short, "the course"). The proposal of the respondent was accepted by the ICCR vide Sanction Order No. SSSAN-2017-18 dated 10.10.2016. The sanction order prescribed the schedule for the conduct of the course, submission of progress report to the Embassy of India in Kabul (for short, "EOI, Kabul") etc. and also approved the training fees at Rs 5,000/- + service tax per student per month. The order also stipulated that the payments for the course would be released to the respondent by the ICCR at the end of every month after getting an endorsement from the EOI, Kabul.

8. After securing the aforesaid sanction order, the respondent vide email dated 17.10.2016 addressed to the petitioner Company informed about the sanction order and stated that the respondent would speak to the petitioner for the implementation of the said order once the expectations of the ICCR for the course were understood.

9. Subsequently, a series of emails were exchanged between the petitioner and the respondent regarding the details of the course including the syllabus, learning outcomes, class schedule, qualifications, salary and number of trainers, etc.

10. The EOI, Kabul *vide* email dated 24.12.2016, informed the petitioner that although the applications of Afghan students were already sent

to the Indian Universities, yet the Universities had not started granting admissions to them and thus it was suggested by the ICCR that the course should begin from the last week of January/ First week of February, 2017.

11. The course was executed by the petitioner at its centre in Kabul from February to April, 2017 for 440 Afghan students. The same was certified by the EOI, Kabul vide its letter no. KAB/327/05/2016-17 dated 30.07.2017.

12. *Vide* letters dated 04.08.2017 and 14.08.2017 respectively addressed to the EOI, Kabul, the program director for the ICCR requested for month-wise details/number of students who attended the course so as to process the payments for the course to the respondent.

13. Meanwhile disputes arose between the parties in relation to the renewal and payment of royalties for all the three franchise agreements entered into by the parties in March, 2013. Vide email dated 20.03.2018 addressed to the petitioner, the respondent issued a recovery notice for non-payment of royalty/renewal fees. The email stated that due to the non-payment of outstanding royalty, the portal operations for AELA and ACE would be shut by 21.03.2018 and by the month-end for the AHNA portal.

14. The petitioner replied to the aforesaid recovery notice vide email dated 23.03.2018, however the contents of the same have not been placed on record. The respondent replied to the reply email of the petitioner vide email dated 27.03.2018 stating that despite having sent the invoices for pending royalties, nothing had been received by the respondent. Responding to the issue of non-payment for the course conducted by the petitioner, the respondent stated in the said email that they had not received the full amount from the ICCR, which had officially held back 22% of the payment for deductions of quality. The respondent also called upon the petitioner to urgently address, inter-alia, the issue of renewal of the franchise agreements.

15. Responding to the above referred email on the very same day, i.e., 27.03.2018, the petitioner stated that it had hired 7 Indian and 4 local English trainers for executing the course and since the course had been executed in Afghanistan, it was entitled to receive 90% of the payments received by the respondent from Aptech India. The petitioner further requested the respondent to share the details of the amount received from the ICCR after the 22% deduction to

enable them to make the calculations and finalise the payment accordingly.

16. The respondent *vide* an email dated 28.03.2018 replied to the above email of the petitioner stating that it had received only 61.5% of the claimed amount from the ICCR after quality and TDS deductions. The respondent further mentioned that it was entitled to 15% royalty as opposed to the 10% stated by the petitioner and that it had incurred some incidental expenses for the project. The respondent also stressed on the issue of payment of outstanding royalty and renewal, calling upon the petitioner to address them first.

17. The petitioner replied to the above email on the same day disputing the percentage of royalty fee to which the respondent was entitled. The petitioner further stated that it had no issues regarding the quality deductions made by the ICCR, however it needed to know the exact amount disbursed by the ICCR to the respondent so that it could calculate its share from the same and adjust them towards the pending dues.

18. From the email exchanges placed on record, it is clear that the discussions regarding the non-payment of the amount received from the ICCR came to a halt between the parties on 28.03.2018, however the discussions regarding the renewal of the agreements continued. Finally, on 23.04.2018, the petitioner informed the respondent of its decision to not renew the franchise agreements for the ACE and AELA in light of the dispute regarding the payment for the course executed by the petitioner. However, the agreement for AHNA was renewed and the respondent acknowledged the same vide an email on the same day.

19. After about nine months, the petitioner once again sent an email to the respondent on 29.12.2018, raising the issue of the non-payment of the dues for the ICCR project. Although the said email refers to some phone calls and WhatsApp communication regarding the payment for the course, nothing has been placed on record by the petitioner to that effect. Vide the said email, the petitioner once again requested the respondent to provide accounting details for the expenses incurred and payment received from the ICCR for the course. The petitioner also mentioned that it had incurred expenses amounting to $ 60,000/- on salary, lodging and food for the trainers.

20. As it appears from the record, it is only after a gap of around three years that the petitioner again took up the issue of non-

payment of dues for the ICCR project with the respondent, vide a legal notice dated 26.08.2021. Through the notice, the petitioner called upon the respondent to pay Rs 73,53,000/- with 18% interest compounded monthly w.e.f. 01.11.2017 within 15 days of the receipt of the notice. The notice further stated that in the event of the respondent failing to comply with the aforesaid demand, the petitioner would file appropriate proceedings before the competent courts including a suit for settlement of accounts for recovery and also by way of damages or otherwise for breach of trust and breach of contract.

21. Again, after about 10 months, the petitioner invoked a pre-institution mediation before the Main Mediation Centre, Bombay High Court on 05.07.2022 in accordance with Section 12A of the Commercial Courts Act, 2015 making the respondent and the ICCR as party respondents. Notice was issued in the said mediation proceedings and 12.08.2022 was scheduled as the date for appearance of the parties. Upon failure of the parties to be present on the said date, 24.08.2022 was fixed as the next date for appearance. However, on the said date, the opposite parties submitted letters refusing to go into mediation and thus a non-starter report dated 24.08.2022 was issued under Rule 3(4) of the Commercial Courts (Pre-Institution Mediation and Settlement) Rules, 2018.

22. After the failure of mediation as aforesaid, the petitioner sent notice for invocation of arbitration to the respondent on 24.11.2022. Vide the notice, the petitioner called upon the respondent to pay an amount of Rs 1,48,31,067/- inclusive of interest of Rs 82,13,367/- and nominated Mr V. Giri and Mr M.L. Verma, Senior Advocates practicing in this Court as its nominee arbitrators.

23. The respondent replied to the aforesaid notice vide letter dated 05.04.2023 denying all the claims raised by the petitioner in the notice dated 24.11.2022. It further stated that notwithstanding the merits, the claims were barred by limitation. The respondent also stated that the mediation proceedings initiated before the Bombay High Court were under Section 12A of the Commercial Courts Act, 2015 which is a mandatory requirement before filing a commercial suit, and thus it was not open to the petitioner to link it to the conciliation as envisaged in the clause 21 of the franchise agreement for AELA as extracted hereinbefore.

24. The present petition then came to be filed by the petitioner on 19.04.2023 before this Court after the failure of the respondent in nominating an arbitrator as per the mutually agreed upon procedure in response to notice for invocation of arbitration.

B. SUBMISSIONS ON BEHALF OF THE PETITIONER

25. Mr. R. Sathish, the learned counsel appearing for the petitioner submitted that this Court has the requisite jurisdiction to take necessary measures for the constitution of an arbitral tribunal under Section 11(6) of the Act, 1996 as the case at hand pertains to an "international commercial arbitration" within the meaning of Section 2(f) of the Act, 1996. Further, clause 21 of the AELA agreement provides for appointment of a three-membered arbitral tribunal in case a dispute arises and cannot be resolved through conciliation between the parties.

26. The counsel submitted that the petitioner, as an independent non-exclusive partner of the respondent, is entirely responsible for the conduct of the course as per clause 17.03 of the franchise agreement and is thus entitled to receive 90% of the payments received by the respondent from the ICCR after successful completion of the course.

27. The counsel argued that as the principal contract for the course was signed between the ICCR and the respondent, the grant in aid of Rs 73,53,000/- was transferred by the ICCR to the respondent on 03.10.2017 after the certificate of successful completion of the course was issued by the EOI, Kabul. However, since the course was executed in Afghanistan by the petitioner as the franchisee, it is entitled to received 90% of the amount received as per the AELA franchise agreement.

28. The counsel further submitted that the respondent had neither informed nor disclosed the amount received from the ICCR despite repeated requests made by the petitioner for settlement of accounts. The petitioner further contended that the experience of the respondent with the ICCR and Government of India cannot be a ground for withholding of the payments by the respondent.

29. The counsel argued that the cause of action first arose on 03.10.2017 when the respondent withheld the information of receipt of Rs 73,53,000/- from the ICCR. The cause of action further arose on

28.03.2018 when the respondent informed that cash-flow wise it had received only 61.5% of the claimed amount from the ICCR and that it had incurred some incidental expenses for the project.

30. The petitioner contended that since the respondent has failed to disclose the amount received from ICCR till date, it has resulted in a continuing cause of action as the petitioner couldn't quantify the total amount due along with interest as exact details of the amount received by the respondent from the ICCR were not disclosed.

31. The counsel submitted that as the cause of action for full and final settlement of claims was yet to accrue, the reliance placed by the respondent on the decision of this Court in ***M/s B and T AG v. Ministry of Defence*** reported in 2023 SCC OnLine SC 657 was misconceived.

32. The counsel submitted that a force majeure situation as per clause 13 of the AELA agreement was created due to the coming back of Taliban in Afghanistan in August, 2021. It was contended by the petitioner that this resulted in the break-down of all communication channels disabling the petitioner from approaching the courts on time despite of doing everything in its power.

33. The counsel further submitted that the petitioner is entitled to get the benefit of the extension of limitation period as directed by this Court in SMW(C) No. 03 of 2020 by which the period from 15.03.2020 to 28.02.2022 is liable to be excluded for the purposes of computing limitation.

34. The counsel submitted that upon failure of the respondent in replying to its claims and legal notice, it had approached the Bombay High Court Mediation Centre under Section 12A of the Commercial Courts Act, 2015 and had initiated pre-reference mediation in accordance with the terms of the arbitration clause in the AELA agreement. It was further submitted that in any view of the matter, the petitioner is not estopped from invoking arbitration under clause 21 of the AELA agreement after having invoked pre-litigation mediation under the Commercial Courts Act, 2015.

35. Finally, the counsel prayed for passing an order referring the dispute to arbitration with a view to adjudicate the differences between the parties as contemplated in clause 21 of the AELA agreement dated 21.03.2013.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT

36. At the outset, Mr. Rana Mukherjee, the learned senior counsel appearing on behalf of the respondent submitted that the disputes raised by the petitioner are not arbitrable as the claims made by the petitioner relate to the sanction letter dated 10.10.2016 issued by the ICCR to the respondent which is not a part of the AELA franchise agreement entered into between the parties on 21.03.2013. Thus, in the absence of any arbitration clause in the aforesaid sanction order, and it being unrelated to the AELA franchise agreement, the petitioner cannot invoke arbitration for the adjudication of the claims.

37. It was further submitted by him that on the contrary, as per the AELA franchise agreement, it was the respondent who was entitled to receive royalty fee from the petitioner at the rates prescribed in the franchise agreement, and there was no arrangement by which the petitioner was entitled to a 90% payment.

38. The learned Senior counsel vehemently argued that notwithstanding the merits of the claim, the same is hopelessly barred by limitation on the face of it by virtue of the applicability of Article 137 of the Limitation Act, 1963. The dispute, as per the legal notice dated 26.08.2021 issued by the petitioner to the respondent, arose on 01.11.2017 and thus the limitation period, even after considering the covid exclusion, had come to an end much prior to the date when the notice for invocation of arbitration was issued by the petitioner on 24.11.2022. Further, the plea of a force-majeure event due to coming back of Taliban in Afghanistan, as raised by the petitioner is not bona-fide as most of the exchanges between the parties took place on email and the email facility was available to the petitioner even in the month of August, 2021. The counsel submitted that no effective steps were taken by the petitioner even after the covid period came to an end indicating that the petitioner was not vigilant in protecting its rights and hence the petition was liable to be dismissed as barred by limitation. The counsel contended that the mere exchange of letters would not extend the cause of action and the period of limitation for the purposes of filing the arbitration petition.

39. It was further submitted that the invocation of pre-litigation mediation proceedings before the Bombay High Court Mediation Centre by the petitioner was under Section 12A of the Commercial Courts Act, 2015 which is a mandatory pre-condition before institution of a commercial

suit under the said Act and the petitioner should not be allowed to change course by invoking arbitration after having previously submitted to the jurisdiction of the Commercial Courts Act, 2015. Further, the petitioner made the ICCR as a party in the mediation proceedings before the High Court and the ICCR also participated in the said proceedings. Thus, it is evident that the dispute arising out of the tripartite arrangement between the petitioner, respondent and the ICCR has no nexus with the arbitration clause of the AELA franchise agreement.

40. An objection was raised by the learned counsel towards the identity of the Deponent to the affidavit in support of the present arbitration petition on the ground that no Power of Attorney or Letter of Authority could have been executed by the petitioner in favour of the Deponent to the Affidavit.

41. One another submission made by the counsel was that the notice for invocation of arbitration sent by the petitioner was not a valid notice as per clause 21 of the franchise agreement being contrary to the arbitration clause which provides for appointment of three arbitrators, the notice mentions appointment of a sole arbitrator and proposes names of two arbitrators, and on this ground too, the petition is liable to be dismissed.

42. Placing reliance on the judgment of this Court in ***M/s B and T AG*** (supra) the learned senior counsel submitted that the present petition squarely falls within the dictum laid down in the said judgment and is thus hopelessly barred by limitation.

D. ANALYSIS

43. Having heard the learned counsel appearing for the parties and having perused the material on record, the following two questions fall for our consideration:

I. Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the present petition is barred by limitation?

II. Whether the court may refuse to make a reference under Section 11 of Act, 1996 where the claims are ex-facie and hopelessly time-barred?

i. Issue No. 1: Whether the Limitation Act, 1963 is applicable to an application for appointment of arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996? If yes, whether the present petition is barred by limitation?

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

45. The plain reading of Section 11(6) of the Act, 1996, which provides for the appointment of arbitrators, indicates that no time-limit has been prescribed for filing an application under the said section. However, Section 43 of the Act, 1996 provides that the Limitation Act, 1963 would apply to arbitrations as it applies to proceedings in court. The aforesaid section is reproduced hereinbelow:

> *"**43. Limitations**.—(1) The Limitation Act, 1963 (36 of 1963), shall apply to arbitrations as it applies to proceedings in court.*
>
> *(2) For the purposes of this section and the Limitation Act, 1963 (36 of 1963), an arbitration shall be deemed to have commenced on the date referred to in section 21.*
>
> *(3) Where an arbitration agreement to submit future disputes to arbitration provides that any claim to which the agreement applies shall be barred unless some step to commence arbitral proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.*

(4) Where the Court orders that an arbitral award be set aside, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Limitation Act, 1963 (36 of 1963), for the commencement of the proceedings (including arbitration) with respect to the dispute so submitted."

46. Since none of the Articles in the Schedule to the Limitation Act, 1963 provide a time period for filing an application under Section 11(6) of the Act, 1996, it would be covered by Article 137 of the Limitation Act, 1963 which is the residual provision and reads as under:

	Description of Application	*Period of limitation*	*Time from which period begins to run*
137.	*Any other application for which no period of limitation is provided elsewhere in this Division*	*Three years*	*When the right to apply accrues.*

47. In his authoritative commentary, *"International Commercial Arbitration, Wolters Kluwer, 3rd Edition, pp. 2873-2875"*, Gary B. Born has observed that as a general rule, limitation statutes are applicable to arbitration proceedings. The relevant extract is as follows:

"Most nations impose limitation or prescription periods within which civil claims must be brought. Of course, statutes of limitation differ from country to country. As discussed below, statutes of limitations are virtually always applicable in international arbitration proceedings, in the same way that they apply in national court proceedings. Choosing between various potentially-applicable statutes of limitations in international arbitration raises significant choice-of-law questions.

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Conflict of laws issues also arise as to the date that the statute of limitations period is tolled. The issue can be addressed by national laws, as well as by institutional arbitration rules. Unfortunately, inconsistencies can arise

between institutional rules and one or more potentially-applicable national laws (which may also apply in a mandatory fashion). For counsel in a particular dispute, of course, the only safe course is to satisfy the shortest potentially-applicable limitations period."

(emphasis supplied)

48. A seven-Judge Bench of this Court in ***SBP & Co. v. Patel Engineering Ltd. and Another*** reported in (2005) 8 SCC 618 held that the issue of limitation being one of threshold importance, it must be decided at the pre-reference stage, so that the other party is not dragged through a long-drawn arbitration, which would be expensive and time consuming.

49. A three-Judge Bench of this Court in ***Geo Miller and Company Private Limited v. Chairman, Rajasthan Vidyut Utpadan Nigam Limited*** reported in (2020) 14 SCC 643 observed as follows:

"14. Sections 43(1) and (3) of the 1996 Act are in pari materia with Sections 37(1) and (4) of the 1940 Act. It is well-settled that by virtue of Article 137 of the First Schedule to the Limitation Act, 1963 the limitation period for reference of a dispute to arbitration or for seeking appointment of an arbitrator before a court under the 1940 Act (see State of Orissa v. Damodar Das [(1996) 2 SCC 216]) as well as the 1996 Act (see Grasim Industries Ltd. v. State of Kerala [(2018) 14 SCC 265 : (2018) 4 SCC (Civ) 612]) is three years from the date on which the cause of action or the claim which is sought to be arbitrated first arises.

15. In Damodar Das [(1996) 2 SCC 216], this Court observed, relying upon Russell on Arbitration by Anthony Walton (19th Edn.) at pp. 4-5 and an earlier decision of a two-Judge Bench in Panchu Gopal Bose v. Port of Calcutta [(1993) 4 SCC 338], that the period of limitation for an application for appointment of arbitrator under Sections 8 and 20 of the 1940 Act commences on the date on which the "cause of arbitration" accrued i.e. from the date when the claimant first acquired either a right of action or a right to require that an arbitration take place upon the dispute concerned.

16. We also find the decision in Panchu Gopal Bose [(1993) 4 SCC 338] relevant for the purpose of this case. This was a case similar to the present set of facts, where the petitioner sent bills to the respondent in 1979, but payment was not made. After an interval of a decade, he sent a notice to the respondent in 1989 for reference to arbitration. This Court in Panchu Gopal Bose [(1993) 4 SCC 338] observed that in mercantile references of this kind, it is implied that the arbitrator must decide the dispute according to the existing law of contract, and every defence which would have been open to the parties in a court of law, such as the plea of limitation, would be open to the parties for the arbitrator's decision as well. Otherwise, as this Court observed : (SCC p. 344, para 8)

> *"8. … a claim for breach of contract containing a reference clause could be brought at any time, it might be 20 or 30 years after the cause of action had arisen, although the legislature has prescribed a limit of three years for the enforcement of such a claim in any application that might be made to the law courts."*

17. This Court further held as follows: (Panchu Gopal Bose case [(1993) 4 SCC 338] , SCC pp. 345-46, paras 11-12)

"11. Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of civil actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

12. In Russell on Arbitration….

At p. 80 it is stated thus:

'An extension of time is not automatic and it is only granted if "undue hardship" would otherwise be caused. Not all hardship, however, is "undue hardship"; it may be proper

> *that hardship caused to a party by his own default should be borne by him, and not transferred to the other party by allowing a claim to be reopened after it has become barred.' "*
>
> (emphasis supplied)

50. Having traversed the statutory framework and case law, we are of the clear view that there is no doubt as to the applicability of the Limitation Act, 1963 to arbitration proceedings in general and that of Article 137 of the Limitation Act, 1963 to a petition under Section 11(6) of the Act, 1996 in particular. Having held thus, the next question that falls for our determination is whether the present petition seeking appointment of an arbitrator is barred by limitation.

51. The determination of the aforesaid question is an exercise involving both law and facts. As is evident from Article 137 of the Limitation Act, 1963, the limitation period for making an application under Section 11(6) of the Act, 1996 is three years from the date when the right to apply accrues. Thus, to determine whether the present petition is barred by limitation, it is necessary to ascertain when the right to file the present petition under Section 11(6) of the Act, 1996 accrued in favour of the petitioner.

a. When does the right to apply under Section 11(6) accrue?

52. It has been held in a catena of decisions of this Court that the limitation period for making an application seeking appointment of arbitrator must not be conflated or confused with the limitation period for raising the substantive claims which are sought to be referred to an arbitral tribunal. The limitation period for filing an application seeking appointment of arbitrator commences only after a valid notice invoking arbitration has been issued by one of the parties to the other party and there has been either a failure or refusal on part of the other party to make an appointment as per the appointment procedure agreed upon between the parties.

53. O.P. Malhotra in *The Law & Practice of Arbitration and Conciliation, 3rd Edition, pp. 688-689* has summarised the position of law on the limitation period for a Section 11(6) petition thus:

> *"There is no specific period of limitation prescribed for making the request under Section 11(6) to the Chief Justice or his designate, to take the necessary measure*

for appointing an arbitrator. Therefore, Article 137 of the Limitation Act, 1963, which provides the limitation period of three years for filing any other application for which no period of limitation is provided elsewhere in the third division of the Schedule of the Act from the day when the right to apply accrues. It is the residuary article in regard to the applications, and it can only be applied if no other article is applicable. It would only apply to an application where it is required by law to be made. It is restricted to applications for the exercise of the Acts and powers which the court is not bound to perform suo motu. Therefore, the period of limitation for making a request under Section 11(6) is three years, and the limitation is to be counted from the date on which 30 days from the date of notice by one party to the other for appointing arbitrator expires. The question whether the claims/disputes made in reference to arbitration was valid is a question to be decided by the arbitrator, and not by the appointing authority of the arbitrator under Section 11(6) of the Act. The appointing authority is certainly required to ascertain whether the application under Section 11(6) of the Act was barred by time."

(emphasis supplied)

54. Dr. P.C. Markanda in *Law Pertaining to Arbitration and Conciliation, 9th Edition, LexisNexis, pp. 550-551* has discussed on the applicability of law of limitation to a petition under Section 11(6) of the Act, 1996 as follows:

"For the purpose of examining the right of the petitioner to apply under sub section (6) for calculating the period of limitation, it is necessary to establish, in the first instance, the relevant date when the right to apply accrued in favour of the petitioner. It is the date on which the right to apply accrues that determines the starting point. The starting point does not coincide with the date on which the cause of action for filing a suit arises. Whether the claims of a party are barred by limitation or not is for the arbitrator to see, but it is the duty of the court to see whether the application filed in the court is within limitation or not. Limitation for filing application under sub-section (4) would commence

only from the expiry of 30 days from the receipt of request mentioned in sub-section (4)(a) or (b) and the limitation for an application under sub-section (6) would commence from the happening of the contingencies mentioned in sub-clauses (a) or (b) or (c) thereof. The procedure prescribed under this section is mandatory and Art. 137, Limitation Act providing for limitation shall apply.

xxx xxx xxx

It would be entirely wrong to mix the two aspects, namely whether there was any valid claim and secondly the claim to be adjudicated by the arbitrator was barred by time. As for the second matter, it is for the arbitrator to see whether the claim was within limitation or not and the court should confine itself to see whether the application made to the court is within limitation. An application made more than three years after the accrual of cause of action is palpably time barred and liable to be dismissed. Article 137 of the Limitation Act makes it obligatory for claims to be filed within 3 years of the rescission/termination of the contract. The right of action for the department starts from the date when the work is rescinded and not from the date when the balance work is got completed through another agency.

If the petitioner delays invocation of arbitration clause for months together for no justifiable cause after the period prescribed in the arbitration agreement had elapsed, the court would not come to the rescue of such a party seeking appointment of arbitrator and the abnormal delay of more than a year cannot be condoned."

(emphasis supplied)

55. This Court in ***Bharat Sanchar Nigam Limited & Another v. Nortel Networks India Private Limited*** reported in (2021) 5 SCC 738 held thus:

"15. It is now fairly well-settled that the limitation for filing an application under Section 11 would arise upon the failure to make the appointment of the arbitrator within a period of 30 days from issuance of the notice invoking arbitration. In other words, an application under Section 11

can be filed only after a notice of arbitration in respect of the particular claim(s)/dispute(s) to be referred to arbitration [as contemplated by Section 21 of the Act] is made, and there is failure to make the appointment.

16. The period of limitation for filing a petition seeking appointment of an arbitrator(s) cannot be confused or conflated with the period of limitation applicable to the substantive claims made in the underlying commercial contract. The period of limitation for such claims is prescribed under various Articles of the Limitation Act, 1963. The limitation for deciding the underlying substantive disputes is necessarily distinct from that of filing an application for appointment of an arbitrator. This position was recognised even under Section 20 of the Arbitration Act, 1940. Reference may be made to the judgment of this Court in J.C. Budhraja v. Orissa Mining Corpn. Ltd. [(2008) 2 SCC 444 : (2008) 1 SCC (Civ) 582] wherein it was held that Section 37(3) of the 1940 Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other party, a notice requiring the appointment of an arbitrator. Para 26 of this judgment reads as follows : (SCC p. 460)

> *"26. Section 37(3) of the Act provides that for the purpose of the Limitation Act, an arbitration is deemed to have been commenced when one party to the arbitration agreement serves on the other party thereto, a notice requiring the appointment of an arbitrator. Such a notice having been served on 4-6-1980, it has to be seen whether the claims were in time as on that date. If the claims were barred on 4-6-1980, it follows that the claims had to be rejected by the arbitrator on the ground that the claims were barred by limitation. The said period has nothing to do with the period of limitation for filing a petition under Section 8(2) of the Act. Insofar as a petition under Section 8(2) is concerned, the cause of action would arise when the other*

> *party fails to comply with the notice invoking arbitration. Therefore, the period of limitation for filing a petition under Section 8(2) seeking appointment of an arbitrator cannot be confused with the period of limitation for making a claim. The decisions of this Court in Inder Singh Rekhi v. DDA [(1988) 2 SCC 338], Panchu Gopal Bose v. Port of Calcutta [(1993) 4 SCC 338] and Utkal Commercial Corpn. v. Central Coal Fields Ltd. [(1999) 2 SCC 571] also make this position clear."*
>
> (emphasis supplied)

56. The other way of ascertaining the relevant point in time when the limitation period for making a Section 11(6) application would begin is by making use of the Hohfeld's analysis of jural relations. It is a settled position of law that the limitation period under Article 137 of the Limitation Act, 1963 will commence only after the right to apply has accrued in favour of the applicant. As per Hohfeld's scheme of jural relations, conferring of a right on one entity must entail the vesting of a corresponding duty in another. When an application under Section 11(6) of the Act, 1996 is made before this Court without exhausting the mechanism prescribed under the said sub-section, including that of invoking arbitration by issuance of a formal notice to the other party, this Court is not duty bound to appoint an arbitrator and can reject the application for being premature and non-compliant with the statutory mandate. However, once the procedure laid down under Section 11(6) of the Act, 1996 is exhausted by the applicant and the application passes all other tests of limited judicial scrutiny as have been evolved by this Court over the years, this Court becomes duty-bound to appoint an arbitrator and refer the matter to an arbitral tribunal. Thus, the *"right to apply"* of the Applicant can be said to have as its jural corelative the *"duty to appoint"* of this Court only after all the steps required to be completed before instituting a Section 11(6) application have been duly completed. Thus, the limitation period for filing a petition under Section 11(6) of the Act, 1996 can only commence once a valid notice invoking arbitration has been sent by the applicant to the other party, and there has been a failure or refusal on part of that other party in complying with the requirements mentioned in such notice.

57. This Court in ***Utkal Commercial Corporation v. Central Coal Fields Ltd.*** reported in (1999) 2 SCC 571 while determining a similar question in relation to the Arbitration Act, 1940 held thus:

> *"6. Therefore, the time for the purposes of limitation begins to run from the date when the right to make an application under Section 8 accrues. Section 8 of the Arbitration Act, which is relevant for our present purposes, is reproduced below:*
>
> > *"8. Power of court to appoint arbitrator or umpire.—(1) In any of the following cases—*
> >
> > > *(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or*
> > >
> > > *(b)-(c)****
> >
> > *any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.*
> >
> > *(2) If the appointment is not made within fifteen clear days after service of the said notice, the court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."*
>
> *7. Therefore, under Section 8, before an application can be made to the court under that section, the following requirements should be satisfied:*
>
> > *(1) The arbitration agreement should provide for appointment of arbitrator/s by consent.*
> >
> > *(2) Parties do not concur in the appointment of an arbitrator.*

(3) One party serves notice on the other party to concur in the appointment.

(4) No appointment is made within 15 days of the service of the notice.

8. Thereupon the court may, on the application of the party who gave the notice and after giving the other party an opportunity of being heard, appoint an arbitrator.

9. In view of the express language of Section 8, it is quite clear that unless a party who desires to apply has resorted to the process set out in Section 8, and has failed to secure the concurrence of the other party to the appointment of an arbitrator within the prescribed period, the court will not intervene under Section 8. The right to apply under Section 8, therefore, would accrue when, within 15 clear days of the notice, the other parties do not concur in the appointment of an arbitrator."

(emphasis supplied)

58. In ***Secunderabad Cantonment Board v. B. Ramachandraiah & Sons*** reported in (2021) 5 SCC 705, this Court while determining the issue of limitation in relation to a Section 11(6) petition under the Act, 1996 held thus:

*"**19.** Applying the aforesaid judgments to the facts of this case, so far as the applicability of Article 137 of the Limitation Act to the applications under Section 11 of the Arbitration Act is concerned, it is clear that the demand for arbitration in the present case was made by the letter dated 7-11-2006. This demand was reiterated by a letter dated 13-1-2007, which letter itself informed the appellant that appointment of an arbitrator would have to be made within 30 days. At the very latest, therefore, on the facts of this case, time began to run on and from 12-2-2007. The appellant's laconic letter dated 23-1-2007, which stated that the matter was under consideration, was within the 30-day period. On and from 12-2-2007, when no arbitrator was appointed, the cause of action for appointment of an arbitrator accrued to the respondent and time began running from that day. Obviously, once time*

has started running, any final rejection by the appellant by its letter dated 10-11-2010 would not give any fresh start to a limitation period which has already begun running, following the mandate of Section 9 of the Limitation Act. This being the case, the High Court was clearly in error in stating that since the applications under Section 11 of the Arbitration Act were filed on 6-11-2013, they were within the limitation period of three years starting from 10-11-2020. On this count, the applications under Section 11 of the Arbitration Act, themselves being hopelessly time-barred, no arbitrator could have been appointed by the High Court."

(emphasis supplied)

59. Similarly, in ***Bharat Sanchar Nigam Limited*** (supra), this Court after applying the settled position of law held as follows:

"22. Applying the aforesaid law to the facts of the present case, we find that the application under Section 11 was filed within the limitation period prescribed under Article 137 of the Limitation Act. Nortel issued the notice of arbitration vide letter dated 29-4-2020, which was rejected by BSNL vide its reply dated 9-6-2020. The application under Section 11 was filed before the High Court on 24-7-2020 i.e. within the period of 3 years of rejection of the request for appointment of the arbitrator."

(emphasis supplied)

60. It's time now to apply the dicta laid down in the aforesaid judgments to the facts of the present case. The notice for invocation of arbitration was issued by the petitioner to the respondent on 24.11.2022, proposing the names of two learned arbitrators and calling upon the respondent to either release the allegedly withheld payment or nominate an arbitrator from their side within a period of 30 days from the date of receipt of the notice. As per the record, the notice was delivered to the respondent on 29.11.2022. The relevant extracts from the said notice are extracted hereinbelow:

"14. Thus disputes arose between the parties, one incorporated in a country other than India in relation to the Franchise Agreement dt. 21.3.2013, which would attract

Section 2(1)(f)(ii) of the A&C Act. Since every effort to resolve it amicably failed, our client is invoking Sec 11(6) read with Section 11(12)(a) of A & C Act before Hon'ble Supreme Court of India to seek appointment of a sole arbitrator in case M/s Aptech Ltd. is not heeding AACL request in this behalf.

15. Without prejudice to your rights, our client suggests the name of 2 persons, namely Sri. V. Giri, Sri. M L Verma, Senior advocates practicing in the Hon'ble Supreme Court subject to consent, or any Hon'ble former judges for enter into reference with consent of parties to decide all the disputes arising out of the Franchise Agreement dated 21.3.2013, between the parties, within the period as per Section 29A of the Act.

16. In case of failure on your part to return the illegally withheld money or if the above request for appointment of a sole Arbitrator from the panel suggested or any other name suggested from your side within 30 days of from the receipt of this notice, our clients will be constrained to file appropriate legal proceedings as stated in Para 14 of this notice for which M/s Aptech Ltd. will be fully responsible for all costs, risks, responsibilities, expenses and consequences thereof. Please note. Copy Retained."

61. The respondent replied to the said notice on 05.04.2023. The relevant parts from the aforesaid reply are extracted hereinbelow:

"5. My clients submit that the notice addressed by you on behalf of your clients is defective, unjustified, without any basis, documents, material and is contradictory and inconsistent with the stand taken by your clients in the mediation proceedings filed before the Hon'ble High Court.

6. My client states that your clients have misinterpreted the clause of the Arbitration under the Franchise Agreement dated 21.3.2013 i.e., the conciliation/mediation process and are linking the same to the proceedings of mediation filed before the Hon'ble Bombay High Court. My client states that the mediation proceedings filed before the Hon'ble Bombay High Court was filed under section 2(1)(c) of

the Commercial Court Act which is mandatory provision before instituting the Commercial Suit. Therefore, my clients therefore state that the invocation of arbitration clause under the Franchise Agreement dated 21.3.2013 and your notice dated 24.11.2022 is illegal, invalid, non-est and unjustified and is liable to be withdrawn forthwith.

7. My clients state that in view of the aforesaid position, there is no cause of action for referring any dispute to the Arbitration and your notice is defective, illegal and invalid. Therefore, there is no question of my clients consenting to the invocation of the arbitration clause and/or appointment of an Arbitrator.

8. My clients state that despite having conveyed the above should your client insists in initiating any legal proceedings, the same shall be defended entirely at your client's risk as to costs and consequences. My clients reiterate that nothing contained in your notice and not specifically dealt with herein shall in any manner be treated as an admission due to non traverse and in fact shall be treated as denial."

62. A perusal of the above shows that the request for appointment of an arbitrator was first made by the petitioner vide notice dated 24.11.2022 and a time of one month from the date of receipt of notice was given to the respondent to comply with the said notice. The notice was delivered to the respondent on 29.11.2022. Hence, the said period of one month from the date of receipt came to an end on 28.12.2022. Thus, it is only from this day that the clock of limitation for filing the present petition would start to tick. The present petition was filed by the petitioner on 19.04.2023, which is well within the time period of 3 years provided by Article 137 of the Limitation Act, 1963. Thus, the present petition under Section 11(6) of the Act, 1996 cannot be said to be barred by limitation.

ii. Issue No. 2: Whether the court may refuse to make a reference under Section 11 of the Arbitration and Conciliation Act, 1996 where the claims are ex-facie and hopelessly time-barred?

63. As discussed above, the present petition filed by the petitioner is not barred by limitation. Thus, the next question that falls for our

consideration is whether the claims sought to be arbitrated by the petitioner are ex-facie barred by limitation, and if so, whether the court may refuse to refer them to arbitration?

a. Jurisdiction versus Admissibility

64. There are two categories of issues that may be raised against an application for appointment of arbitrator under Section 11(6) of the Act, 1996. The first category is of the issues pertaining to the power and authority of the arbitrators to hear and decide a case and are referred to as the "jurisdictional issues/objections". Objections to the competence of arbitrators to adjudicate a dispute, existence/validity of arbitration agreement, absence of consent of the parties to submit the disputes to arbitration, dispute falling out of the scope of the arbitration agreement are some examples of jurisdictional or maintainability issues.

65. The second category is of those issues which are related to the nature of the claim and include challenges to procedural requirements, viz. a mandatory requirement for pre-reference mediation; claim or a part thereof being barred by limitation, etc. This category is referred to as the "admissibility issues/objections".

66. This Court in ***Bharat Sanchar Nigam Limited*** (supra), explained the difference between the aforesaid two category of objections and held that the issue of limitation is essentially an admissibility issue and is not a challenge to the jurisdiction of the arbitrator to decide the claim. While placing reliance on decision of the Singapore Court of Appeal in ***Swissbourgh Diamond Mines (Pty) Ltd. v. Kingdom of Lesotho*** reported in (2019) 1 SLR 263, this Court explained the *"tribunal v. claim"* test thus:

> *"43. Applying the "tribunal v. claim" test, a plea of statutory time bar goes towards admissibility as it attacks the claim. It makes no difference whether the applicable statute of limitations is classified as substantive (extinguishing the claim) or procedural (barring the remedy) in the private international law sense.*
>
> *44. The issue of limitation which concerns the "admissibility" of the claim, must be decided by the Arbitral Tribunal either as a preliminary issue, or at the final stage after evidence is led by the parties."*

67. Although, limitation is an admissibility issue, yet it is the duty of the courts to prima-facie examine and reject non-arbitrable or dead claims, so as to protect the other party from being drawn into a time-consuming and costly arbitration process.

68. In *Mustiu and Boyd's Commercial Arbitration (1982 Ed., pp. 436)* under the heading "Hopeless Claims" in Chapter 31 it is stated thus in relation to the jurisdiction of an arbitral tribunal adjudicating commercial disputes:

> *"Two situations must be distinguished. The first, which is very rare, exists when the claimant not only appreciates, but will if pressed be prepared to acknowledge, that his claim is ill-founded in law. In effect, he asserts that his claim has commercial and moral merit; that if the law gives him no remedy, there is a defect in the law; and that a commercial arbitrator ought to award him something in recognition of the true merits.*
>
> *Here, we believe that there is undoubtedly jurisdiction to interfere by way of injunction to prevent the respondent from being harassed by a claim which can never lead to valid award, for example in cases where claim is brought in respect of the alleged arbitration agreement which does not really exist, or which has ceased to exist. So also where the dispute lies outside the scope of the arbitration agreement. By parity of reasoning, the Court should be prepared to intervene where the claimant and the respondent are at one as to the absence of legal merits, so that it can be said that there is no real dispute.*
>
> *The respondent might also seek to protect himself by recourse to the arbitrator. He cannot ask the arbitrator to rule that there is no dispute, since this would be a matter affecting his own jurisdiction. An alternative would be to invite the arbitrator summarily to dismiss the claim. It would appear safer, however, to leave the matter to the court."*

69. The scope of this primary examination has been carefully laid down by a three-Judge Bench of this Court in ***Vidya Drolia and Others v. Durga Trading Corporation*** reported in (2021) 2 SCC 1 as follows:

"148. Section 43(1) of the Arbitration Act states that the Limitation Act, 1963 shall apply to arbitrations as it applies to court proceedings. Sub-Section (2) states that for the purposes of the Arbitration Act and Limitation Act, arbitration shall be deemed to have commenced on the date referred to in Section 21. Limitation law is procedural and normally disputes, being factual, would be for the arbitrator to decide guided by the facts found and the law applicable. The court at the referral stage can interfere only when it is manifest that the claims are ex facie time-barred and dead, or there is no subsisting dispute. All other cases should be referred to the Arbitral Tribunal for decision on merits. Similar would be the position in case of disputed "no-claim certificate" or defence on the plea of novation and "accord and satisfaction". As observed in Premium Nafta Products Ltd. [Fili Shipping Co. Ltd. v. Premium Nafta Products Ltd., 2007 UKHL 40 : 2007 Bus LR 1719 (HL)], it is not to be expected that commercial men while entering transactions inter se would knowingly create a system which would require that the court should first decide whether the contract should be rectified or avoided or rescinded, as the case may be, and then if the contract is held to be valid, it would require the arbitrator to resolve the issues that have arisen.

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154.4. Rarely as a demurrer the court may inerfere at Section 8 or 11 stage when it is manifestly and ex facie certain that the arbitration agreement is non-existent, invalid or the disputes are non-arbitrable, though the nature and facet of non-arbitrability would, to some extent, determine the level and nature of judicial scrutiny. The restricted and limited review is to check and protect parties from being forced to arbitrate when the matter is demonstrably "non-arbitrable" and to cut off the deadwood. The court by default would refer the matter when contentions relating to non-arbitrability are plainly arguable; when consideration in summary proceedings would be insufficient and inconclusive; when facts are contested; when the party opposing arbitration adopts delaying tactics or impairs

conduct of arbitration proceedings. This is not the stage for the court to enter into a mini trial or elaborate review so as to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold integrity and efficacy of arbitration as an alternative dispute resolution mechanism."

(emphasis supplied)

70. The aforesaid decision in ***Vidya Drolia*** (supra) was relied upon and reaffirmed in another decision of this Court in ***NTPC Ltd. v. SPML Infra Ltd.*** reported in (2023) 9 SCC 385 wherein the *"Eye of the Needle"* test was explained as follows:

*"**Eye of the needle***

25. The abovereferred precedents crystallise the position of law that the pre-referral jurisdiction of the Courts under Section 11(6) of the Act is very narrow and inheres two inquiries. The primary inquiry is about the existence and the validity of an arbitration agreement, which also includes an inquiry as to the parties to the agreement and the applicant's privity to the said agreement. These are matters which require a thorough examination by the Referral Court. The secondary inquiry that may arise at the reference stage itself is with respect to the non-arbitrability of the dispute.

26. As a general rule and a principle, the Arbitral Tribunal is the preferred first authority to determine and decide all questions of non-arbitrability. As an exception to the rule, and rarely as a demurrer, the Referral Court may reject claims which are manifestly and ex facie non-arbitrable [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4: (2021) 1 SCC (Civ) 549]. Explaining this position, flowing from the principles laid down in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], this Court in a subsequent decision in Nortel Networks [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352] held [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 45.1 : (2021) 3 SCC (Civ) 352] : (Nortel Networks case [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738 : (2021) 3 SCC (Civ) 352], SCC p. 764, para 45)

> *"45. … 45.1. … While exercising jurisdiction under Section 11 as the judicial forum, the Court may exercise the prima facie test to screen and knockdown ex facie meritless, frivolous, and dishonest litigation. Limited jurisdiction of the Courts would ensure expeditious and efficient disposal at the referral stage. At the referral stage, the Court can interfere "only" when it is "manifest" that the claims are ex facie time-barred and dead, or there is no subsisting dispute."*

27. The standard of scrutiny to examine the non-arbitrability of a claim is only prima facie. Referral Courts must not undertake a full review of the contested facts; they must only be confined to a primary first review [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 134 : (2021) 1 SCC (Civ) 549] and let facts speak for themselves. This also requires the Courts to examine whether the assertion on arbitrability is bona fide or not. [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549] The prima facie scrutiny of the facts must lead to a clear conclusion that there is not even a vestige of doubt that the claim is non-arbitrable. [BSNL v. Nortel Networks (India) (P) Ltd., (2021) 5 SCC 738, para 47 : (2021) 3 SCC (Civ) 352] On the other hand, even if there is the slightest doubt, the rule is to refer the dispute to arbitration [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 154.4 : (2021) 1 SCC (Civ) 549] .

28. The limited scrutiny, through the eye of the needle, is necessary and compelling. It is intertwined with the duty of the Referral Court to protect the parties from being forced to arbitrate when the matter is demonstrably non-arbitrable [Ibid.]. It has been termed as a legitimate interference by Courts to refuse reference in order to prevent wastage of public and private resources [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Further, as noted in Vidya Drolia [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549], if this duty within the limited compass is not exercised, and the Court becomes too reluctant to

intervene, it may undermine the effectiveness of both, arbitration and the Court [Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1, para 139 : (2021) 1 SCC (Civ) 549]. Therefore, this Court or a High Court, as the case may be, while exercising jurisdiction under Section 11(6) of the Act, is not expected to act mechanically merely to deliver a purported dispute raised by an applicant at the doors of the chosen arbitrator, as explained in DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd. [DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd., (2021) 16 SCC 743, paras 22, 26 : 2021 SCC OnLine SC 781, paras 18, 20]"

(emphasis supplied)

71. In ***Geo Miller*** (supra) where the cause of action for bringing the claim arose in 1983, this Court refused to appoint an arbitrator as the application seeking appointment of arbitrator was filed much later in 2003, that is after a delay of almost twenty years. The relevant part of the said judgment is extracted hereinbelow:

"21. Applying the aforementioned principles to the present case, we find ourselves in agreement with the finding of the High Court that the appellant's cause of action in respect of Arbitration Applications Nos. 25/2003 and 27/2003, relating to the work orders dated 7-10-1979 and 4-4-1980 arose on 8-2-1983, which is when the final bill handed over to the respondent became due. Mere correspondence of the appellant by way of writing letters/reminders to the respondent subsequent to this date would not extend the time of limitation. Hence the maximum period during which this Court could have allowed the appellant's application for appointment of an arbitrator is 3 years from the date on which cause of action arose i.e. 8-2-1986. Similarly, with respect to Arbitration Application No. 28/2003 relating to the work order dated 3-5-1985, the respondent has stated that final bill was handed over and became due on 10-8-1989. This has not been disputed by the appellant. Hence the limitation period ended on 10-8-1992. Since the appellant served notice for appointment of arbitrator in 2002, and requested the appointment of an arbitrator

before a court only by the end of 2003, his claim is clearly barred by limitation."

(emphasis supplied)

72. In ***Bharat Sanchar Nigam Limited*** (supra), this Court while observing that although the arbitration petition was not barred by limitation, yet the cause of action for the underlying claims having arisen much earlier, the claims were clearly barred by limitation on the day notice for arbitration was invoked. Relevant paragraphs are extracted hereinbelow:

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

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

50. In the notice invoking arbitration dated 29-4-2020, it has been averred that:

> *"Various communications have been exchanged between the petitioner and the respondents ever since and a dispute has arisen between the petitioner*

and the respondents, regarding non-payment of the amounts due under the tender document."

51. The period of limitation for issuing notice of arbitration would not get extended by mere exchange of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that:"where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail.

52. In the present case, the notice invoking arbitration was issued 5½ years after rejection of the claims on 4-8-2014. Consequently, the notice invoking arbitration is ex facie time-barred, and the disputes between the parties cannot be referred to arbitration in the facts of this case."

(emphasis supplied)

73. This Court, in ***M/s B and T AG*** (supra), to which two of us, the Chief Justice, Dr. D.Y. Chandrachud and Justice J.B. Pardiwala, were members of the Bench, had the occasion to ascertain in the facts of the said case whether an application for appointment of arbitrator under Section 11(6) of the Act, 1996 was barred by limitation. The facts of the said case were that disputes had arisen between the parties in relation to the alleged wrongful encashment of warranty bond by the respondent therein vide its letter dated 16.02.2016. Even after the amount got credited in the bank account of the respondent, the parties continued to engage in bilateral discussions. It was the case of the petitioner therein that the 'breaking point' was reached sometime in September, 2019 and not in 2016 as negotiations had

continued to take place between the parties. This Court rejected the contention of the petitioner and held that the encashment of bank guarantee was a positive action on part of the respondent which had crystallised the right of the petitioner to seek reference of the dispute to arbitration and mere writing of letters would not extend the cause of action. It was held that the notice for invoking arbitration having been issued almost six years after the cause of action for raising the claims had arisen, the claims were ex-facie dead and time-barred and hence dismissed the application. Relevant extracts from the judgment are as follows:

> *"65. On a conspectus of all the aforesaid decisions what is discernible is that there is a fine distinction between the plea that the claims raised are barred by limitation and the plea that the application for appointment of an arbitrator is barred by limitation.*
>
> *xxx xxx xxx*
>
> *76. At the cost of repetition, we state that when the bank guarantee came to be encashed in the year 2016 and the requisite amount stood transferred to the Government account that was the end of the matter. This "Breaking Point" should be treated as the date at which the cause of action arose for the purpose of limitation.*
>
> *77. Negotiations may continue even for a period of ten years or twenty years after the cause of action had arisen. Mere negotiations will not postpone the "cause of action" for the purpose of limitation. The Legislature has prescribed a limit of three years for the enforcement of a claim and this statutory time period cannot be defeated on the ground that the parties were negotiating.*
>
> *xxx xxx xxx*
>
> *80. The case on hand is clearly and undoubtedly, one of a hopelessly barred claim, as the petitioner by its conduct slept over its right for more than five years. Statutory arbitrations stand apart."*
>
> (emphasis supplied)

74. The learned senior counsel appearing for the respondent has strongly relied on the judgment in ***M/s B and T AG*** (supra) to argue that

the facts of the present case are squarely covered by the dicta laid down in the said judgment. However, we are of the view that the said judgment is of no avail to the respondent.

75. The respondent, relying upon the legal notice dated 26.08.2021 issued by the petitioner, submitted that the cause of action arose on 01.11.2017. The relevant part of the said notice is extracted here:

> *"10. Our client is entitled to receive 90% of the amount certified by the Embassy in Kabul. While reserving our rights without prejudice and subject to settlement of accounts illegally withheld, this notice is issued calling upon you to pay Rs. 73,53,000/- with interest compounded monthly @18% w.e.f. 1st November 2017 within 15 days of from the receipt of this notice, under intimation to us, failing which our client has given instructions to file appropriate legal proceedings before competent courts in India including a suit for settlement of accounts for recovery of money and also by way of damages or otherwise for, breach of trust, breach of contract. In default, Aptech will be fully responsible for all costs, risks, responsibilities, expenses and consequences thereof."*

76. From the email communications placed on record, it appears that due to the pre-existing disputes between the parties in relation to the franchise agreements, the respondent sent a demand notice to the petitioner seeking payment of royalty and renewal fees from the petitioner. It appears that in reply to the said notice dated 23.03.2018, the petitioner raised the issue of payment of dues relating to the ICCR project. Some more emails were exchanged between the parties on the issue however it can be seen that vide email dated 28.03.2018, the respondent clearly showed unwillingness to continue further discussions regarding payments related to the ICCR project. Thus, it can be said that the rights of the petitioner to bring a claim against the respondent were crystallised on 28.03.2018 and hence the cause of action for invocation of arbitration can also said to have arisen on this date. This position has also been admitted in the Written Submission dated 05.02.2024 wherein the petitioner has submitted as follows:

> *"4. The limitation for claiming the due amount would expire on 27.03.2021…."*

b. When does the Cause of Action arise?

77. We are not impressed with the submission canvassed on behalf of the respondent that the cause of action for raising the claims arose on 01.11.2017 and thus the limitation period for invoking arbitration should commence from the said date. The petitioner has alleged that the respondent received the payment for the course from the ICCR on 03.10.2017. However, the perusal of the communication exchanged between the parties indicates that it is only on 28.03.2018 that the right of the petitioner to bring a claim against the respondent could be said to have been crystallised. The position of law is settled that mere failure to pay may not give rise to a cause of action. However, once the applicant has asserted its claim and the respondent has either denied such claim or failed to reply to it, the cause of action will arise after such denial or failure.

78. In ***M/s B and T AG*** (supra) three principles of law came to be enunciated by this Court regarding the manner in which the point in time when the cause of action arose may be determined. First, that the right to receive the payment ordinarily begins upon completion of the work. Secondly, a dispute arises only when there is a claim by one side and its denial/repudiation by the other and thirdly, the accrual of cause of action cannot be indefinitely postponed by repeatedly writing letters or sending reminders. It was further emphasised by this Court that it was important to find out the "*breaking point*" at which any reasonable party would have abandoned the efforts at arriving at a settlement and contemplated referral of the dispute to arbitration. Such breaking point would then become the date on which the cause of action could be said to have commenced.

79. This Court in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority*** reported in (1988) 2 SCC 338 held as follows:

> "***4.*** *Therefore, in order to be entitled to order of reference under Section 20, it is necessary that there should be an arbitration agreement and secondly, difference must arise to which this agreement applied. In this case, there is no dispute that there was an arbitration agreement. There has been an assertion of claim by the appellant and silence as well as refusal in respect of the same by respondent. Therefore, a dispute has arisen regarding non-payment of the alleged dues of the appellant. The question is for*

the present case when did such dispute arise. The High Court proceeded on the basis that the work was completed in 1980 and therefore, the appellant became entitled to the payment from that date and the cause of action under Article 137 arose from that date. But in order to be entitled to ask for a reference under Section 20 of the Act there must not only be an entitlement to money but there must be a difference or dispute must arise. It is true that on completion of the work a right to get payment would normally arise but where the final bills as in this case have not been prepared as appears from the record and when the assertion of the claim was made on February 28, 1983 and there was non-payment, the cause of action arose from that date, that is to say, February 28, 1983. It is also true that a party cannot postpone the accrual of cause of action by writing reminders or sending reminders but where the bill had not been finally prepared, the claim made by a claimant is the accrual of the cause of action. A dispute arises where there is a claim and a denial and repudiation of the claim. The existence of dispute is essential for appointment of an arbitrator under Section 8 or a reference under Section 20 of the Act. See Law of Arbitration by R.S. Bachawat, first edition, page 354. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

(emphasis supplied)

80. In ***Geo Miller*** (supra), this Court held thus:

"28. Having perused through the relevant precedents, we agree that on a certain set of facts and circumstances, the period during which the parties were bona fide negotiating towards an amicable settlement may be excluded for the purpose of computing the period of limitation for reference

to arbitration under the 1996 Act. However, in such cases the entire negotiation history between the parties must be specifically pleaded and placed on the record. The Court upon careful consideration of such history must find out what was the "breaking point" at which any reasonable party would have abandoned efforts at arriving at a settlement and contemplated referral of the dispute for arbitration. This "breaking point" would then be treated as the date on which the cause of action arises, for the purpose of limitation. The threshold for determining when such a point arises will be lower in the case of commercial disputes, where the party's primary interest is in securing the payment due to them, than in family disputes where it may be said that the parties have a greater stake in settling the dispute amicably, and therefore delaying formal adjudication of the claim.

29. Moreover, in a commercial dispute, while mere failure to pay may not give rise to a cause of action, once the applicant has asserted their claim and the respondent fails to respond to such claim, such failure will be treated as a denial of the applicant's claim giving rise to a dispute, and therefore the cause of action for reference to arbitration. It does not lie to the applicant to plead that it waited for an unreasonably long period to refer the dispute to arbitration merely on account of the respondent's failure to settle their claim and because they were writing representations and reminders to the respondent in the meanwhile."

(emphasis supplied)

81. The petitioner completed the course sometime in April and a letter to this effect was issued on 30.07.2017 by the EOI, Kabul. Allegedly, the ICCR made payment to the respondent on 03.10.2017. However, the right of the petitioner to raise the claim could only be said to have accrued after the petitioner made a positive assertion in March, 2018 which was denied by the respondent vide email dated 28.03.2018. Another reminder through email was given by the petitioner on 29.12.2018, however, mere giving reminders and sending of letters would not extend the cause of action any further from 28.03.2018 on which date the rights of the petitioner could be said to have been crystallised.

82. Thus, in ordinary circumstances, the limitation period available to the petitioner for raising a claim would have come to an end after an expiry of three years, that is, on 27.03.2021. However, in March 2020, the entire world was taken under the grip of the deadly Covid-19 pandemic bringing everyday life and commercial activity to a complete halt across the globe. Taking cognisance of this unfortunate turn of events, this Court vide order dated 23.03.2020 passed in ***Suo Motu Civil Writ Petition No. 03/2020*** directed the period commencing from 15.03.2020 to be excluded for the purposes of computation of limitation. The said extension of limitation was extended from time to time by this Court in view of the continuing pandemic. As a result, the period from 15.03.2020 to 28.02.2022 was finally determined to be excluded for the computation of limitation. It was provided that the balance period of limitation as available on 15.03.2020 would become available from 01.03.2022. Operative part of the order dated 10.01.2022 is extracted hereinbelow:

> *"5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A. No. 21 of 2022 with the following directions:*
>
> *I. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi judicial proceedings.*
>
> *II. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.*
>
> *III. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect*

from 01.03.2022 is greater than 90 days, that longer period shall apply.

IV. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23 (4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

83. The operation and effect of the aforesaid order was considered and explained by a two-Judge Bench of this Court in ***Prakash Corporates v. Dee Vee Projects Ltd.***, reported in (2022) 5 SCC 112 as follows:

*"**28.** As regards the operation and effect of the orders passed by this Court in SMWP No. 3 of 2020, noticeable it is that even though in the initial order dated 23-3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : (2021) 3 SCC (Cri) 801], this Court provided that the period of limitation in all the proceedings, irrespective of that prescribed under general or special laws, whether condonable or not, shall stand extended w.e.f. 15-3-2020 but, while concluding the matter on 23-9-2021 [Cognizance for Extension of Limitation, In re, (2021) 18 SCC 250 : 2021 SCC OnLine SC 947], this Court specifically provided for exclusion of the period from 15-3-2020 till 2-10-2021. A look at the scheme of the Limitation Act, 1963 makes it clear that while extension of prescribed period in relation to an appeal or certain applications has been envisaged under Section 5, the exclusion of time has been provided in the provisions like Sections 12 to 15 thereof. When a particular period is to be excluded in relation to any suit or proceeding, essentially the reason is that such a period is accepted by law to be the one not referable to any indolence on the part of the litigant, but being relatable to either the force of circumstances or other requirements of law (like that of mandatory two months'*

notice for a suit against the Government [Vide Section 15 of the Limitation Act, 1963.]). The excluded period, as a necessary consequence, results in enlargement of time, over and above the period prescribed."

(emphasis supplied)

84. The effect of the above-referred order of this Court in the facts of the present case is that the balance limitation left on 15.03.2020 would become available w.e.f. 01.03.2022. The balance period of limitation remaining on 15.03.2020 can be calculated by computing the number of days between 15.03.2020 and 27.03.2021, which is the day when the limitation period would have come to an end under ordinary circumstances. The balance period thus comes to 1 year 13 days. This period of 1 year 13 days becomes available to the petitioner from 01.03.2022, thereby meaning that the limitation period available to the petitioner for invoking arbitration proceedings would have come to an end on 13.03.2023.

c. When is Arbitration deemed to have commenced?

85. Section 21 of the Act, 1996 provides that the arbitral proceedings in relation to a dispute commence when a notice invoking arbitration is sent by the claimant to the other party.

"21. Commencement of arbitral proceedings.—Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

86. In ***Milkfood Ltd. v. GMC Ice Cream (P) Ltd.*** reported in (2004) 7 SCC 288, it was observed thus:

*"**26.** The commencement of an arbitration proceeding for the purpose of applicability of the provisions of the Indian Limitation Act is of great significance. Even Section 43(1) of the 1996 Act provides that the Limitation Act, 1963 shall apply to the arbitration as it applies to proceedings in court. Sub-section (2) thereof provides that for the purpose of the said section and the Limitation Act, 1963, an arbitration shall be deemed to have commenced on the date referred to in Section 21.*

27. *Article 21 of the Model Law which was modelled on Article 3 of the UNCITRAL Arbitration Rules had been adopted for the purpose of drafting Section 21 of the 1996 Act. Section 3 of the 1996 Act provides for as to when a request can be said to have been received by the respondent. Thus, whether for the purpose of applying the provisions of Chapter II of the 1940 Act or for the purpose of Section 21 of the 1996 Act, what is necessary is to issue/serve a request/notice to the respondent indicating that the claimant seeks arbitration of the dispute.*

xxx xxx xxx

29. *For the purpose of the Limitation Act an arbitration is deemed to have commenced when one party to the arbitration agreement serves on the other a notice requiring the appointment of an arbitrator. This indeed is relatable to the other purposes also, as, for example, see Section 29(2) of (English) Arbitration Act, 1950.*

xxx xxx xxx

49. *Section 21 of the 1996 Act, as noticed hereinbefore, provides as to when the arbitral proceedings would be deemed to have commenced. Section 21 although may be construed to be laying down a provision for the purpose of the said Act but the same must be given its full effect having regard to the fact that the repeal and saving clause is also contained therein. Section 21 of the Act must, therefore, be construed having regard to Section 85(2)(a) of the 1996 Act. Once it is so construed, indisputably the service of notice and/or issuance of request for appointment of an arbitrator in terms of the arbitration agreement must be held to be determinative of the commencement of the arbitral proceeding."*

(emphasis supplied)

87. Similarly, in ***Bharat Sanchar Nigam Limited*** (supra), it was held by this Court thus:

*"**51.** The period of limitation for issuing notice of arbitration would not get extended by mere exchange*

of letters, [S.S. Rathore v. State of M.P., (1989) 4 SCC 582 : 1990 SCC (L&S) 50; Union of India v. Har Dayal, (2010) 1 SCC 394; CLP (India) (P) Ltd. v. Gujarat Urja Vikas Nigam Ltd., (2020) 5 SCC 185] or mere settlement discussions, where a final bill is rejected by making deductions or otherwise. Sections 5 to 20 of the Limitation Act do not exclude the time taken on account of settlement discussions. Section 9 of the Limitation Act makes it clear that:"where once the time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it." There must be a clear notice invoking arbitration setting out the "particular dispute" [Section 21 of the Arbitration and Conciliation Act, 1996.] (including claims/amounts) which must be received by the other party within a period of 3 years from the rejection of a final bill, failing which, the time bar would prevail."

(emphasis supplied)

88. In the present case, the notice invoking arbitration was received by the respondent on 29.11.2022, which is within the three-year period from the date on which the cause of action for the claim had arisen. Thus, it cannot be said that the claims sought to be raised by the petitioner are ex-facie time-barred or dead claims on the date of the commencement of arbitration.

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

E. CONCLUSION

90. The present arbitration petition having been filed within a period of three years from the date when the respondent failed to comply

with the notice of invocation of arbitration issued by the petitioner is not hit by limitation.

91. The notice for invocation of arbitration having been issued by the petitioner within a period of three years from the date of accrual of cause of action, the claims cannot be said to be ex-facie dead or time-barred on the date of commencement of the arbitration proceedings.

92. In view of the aforesaid, the present petition is allowed. We appoint Shri Justice Sanjay Kishan Kaul, Former Judge of the Supreme Court of India, to act as the sole arbitrator. The fees of the arbitrator including other modalities shall be fixed in consultation with the parties.

93. All other rights and contentions are kept open for the parties to raise before the Arbitrator.

94. Before we part with the matter, we would like to mention that this Court while dealing with similar issues in many other matters has observed that the applicability of Section 137 to applications under Section 11(6) of the Act, 1996 is a result of legislative vacuum as there is no statutory prescription regarding the time limit. We would again like to reiterate that the period of three years is an unduly long period for filing an application under Section 11 of the Act, 1996 and goes against the very spirit of the Act, 1996 which provides for expeditious resolution of commercial disputes within a time-bound manner. Various amendments to the Act, 1996 have been made over the years so as to ensure that arbitration proceedings are conducted and concluded expeditiously. We are of the considered opinion that the Parliament should consider bringing an amendment to the Act, 1996 prescribing a specific period of limitation within which a party may move the court for making an application for appointment of arbitrators under Section 11 of the Act, 1996. The Petition stands disposed of in the aforesaid terms.

95. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Divya Pandey

Result of the case: Petition allowed.

[2024] 3 S.C.R. 127 : 2024 INSC 159

Vinayak Purshottam Dube (Deceased), Through Lrs
v.
Jayashree Padamkar Bhat & Others

(Civil Appeal Nos. 7768-7769 of 2023)

01 March 2024

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

Issue for Consideration

Appellants, legal representatives of the original opposite party-a sole proprietor (since deceased) who had entered into a Development Agreement with the respondents-complainants, if liable to discharge the obligations which had to be discharged by him in his personal capacity based on his skills and expertise.

Headnotes

Consumer Protection – Legal representatives of sole proprietor-developer (since deceased), if liable for personal contract of the deceased – Contract Act, 1872 – ss.37, 40 – Code of Civil Procedure, 1908 – s.2(11) – Sole proprietor-developer entered into a Development Agreement with the respondents-complainants – Complainants alleged failure to fulfill payment obligations, breaches of the agreement including deviations from sanctioned plan, non-construction of a compound wall, etc. – Sole proprietor died during the pendency of the matter before NCDRC – NCDRC held that appellants-legal representatives of the sole proprietor were liable both w.r.t the monetary payments that he was directed to pay and also to comply with the other directions issued – Appellants, if liable to comply with obligations such as construction to be made and certain approvals etc. to be obtained on completion of the construction which had to be performed by sole proprietor-developer in his personal capacity based on his skills and expertise:

Held: s.37, Contract Act states that a promise made by a promisor is binding on his representatives in case of his/her death, unless a contrary intention appears from the contract – Legal representatives are liable for the debts of their predecessor, but their liability is limited to the extent of the estate of the deceased inherited by them – Thus, the representatives of a promisor are bound to perform

* Author

the promisor's contract to the extent of the assets of the deceased falling in their hands – But they are not personally liable under the contracts of the deceased and are also not liable for personal contracts of the deceased – When personal considerations are the basis of a contract they come to an end on the death of either party, unless there is a stipulation express or implied to the contrary – This is especially so when the contracts involve exercise of special skills such as expressed in s.40, Contract Act – A contract involving exercise of individual's skills or expertise of the promisor or which depends upon his/her personal qualification or competency, the promisor has to perform the contract by himself and not by his/her representatives – s.2(11), CPC defines a "legal representative – Legal representatives of a deceased are liable only to the extent of the estate which they inherit – Where the decree or order is not against the estate of a deceased sole proprietor but based on the skills and expertise of the sole proprietor, the obligations which had to be performed by the sole proprietor would come to an end on his demise and the same cannot be imposed on his legal heirs or representatives – Such a position is distinguished from a position where the estate of the deceased sole proprietor would become liable to satisfy the decree in monetary terms as a proprietorship firm is not a separate legal entity as compared to the proprietor and his estate would become liable only to satisfy a decree or an order in monetary terms on his demise – In the case of a personal obligation imposed on a person under the contract and on the demise of such person, his estate does not become liable and therefore, the legal representatives who represent the estate of a deceased would obviously not be liable and cannot be directed to discharge the contractual obligations of the deceased – Legal representatives of the deceased opposite party-appellants not liable to discharge the obligation which had to be discharged by the deceased opposite party in his personal capacity and hence that portion of the impugned orders of the NCDRC, State Commission and District Forum are set aside. [Paras 20, 21, 23, 24, 27, 31]

Proprietary concern – Jurisprudential status – Discussed.

Legal right – Characteristics of, according to Salmond – Salmond's classification of proprietary and personal rights; inheritable and uninheritable rights – Discussed.

Contract – Contract of service, personal to the promisor and on his death he is discharged from the contract:

Vinayak Purshottam Dube (Deceased), Through Lrs
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Held: A contract of service is also personal to the promisor – This is because when a person contracts with another to work or to perform service, it is on the basis of the individual's skills, competency or other qualifications of the promisor and in circumstances such as the death of the promisor he is discharged from the contract – Correspondingly, duties or obligations which are personal in nature cannot be transmitted from a person who had to personally discharge those duties, on his demise, to his legal representatives – Just as a right is uninheritable and the right personal to him dies with the owner of the right, similarly, a duty cannot be transferred to the legal representatives of a deceased if the same is personal in nature. [Paras 21, 22]

Code of Civil Procedure, 1908 – s.50:

Held: Any decree which is relatable to the extent of the property of the deceased which has come to the hands of the legal representatives and has not been duly disposed of, the same would be liable for execution by a decree holder so as to compel the legal representatives to satisfy the decree – In this context, even a decree for preventive injunction can also be executed against the legal representatives of the deceased judgment-debtor if such a decree is in relation to the property or runs with the property if there is a threat from such legal representatives. [Para 30]

Words and expressions – "legal representative" – Code of Civil Procedure, 1908 – s.2(11) – Discussed. [Para 23]

Case Law Cited

Raghu Lakshminarayanan v. Fine Tubes, **[2007] 4 SCR 885 : (2007) 5 SCC 103;** *Ajmera Housing Corporation vs. Amrit M. Patel (Dead) through LRs,* **(1998) 6 SCC 500 – relied on.**

Custodian of Branches of Banco National Ultramarino vs. Nalini Bai Naique, **[1989] 2 SCR 810 : AIR 1989 SC 1589 – referred to.**

Books and Periodicals Cited

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List of Acts

Contract Act, 1872; Code of Civil Procedure, 1908; Indian Succession Act, 1925.

List of Keywords

Consumer Protection; Legal representatives; Personal liability for personal contracts of the deceased; Obligations to be discharged in personal capacity; Development Agreement; Sole proprietor; Special skills; Expertise; Contract of service; Personal obligation; Injunction; Vinculum juris.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7768-7769 of 2023

From the Judgment and Order dated 02.05.2018 of the National Consumers Disputes Redressal Commission, New Delhi in RA Nos. 26 and 27 of 2017

Appearances for Parties

Aniruddha Deshmukh, Adv. for the Appellants.

Abhishek Yadav, Ruchit Mohan, Braj Kishore Mishra, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Nagarathna, J.

These appeals have been filed by the legal representatives of the opposite party-sole proprietor against the common final judgment and order dated 02.05.2018 passed by the National Consumer Disputes Redressal Commission (hereinafter referred to as "NCDRC") in Review Application No.26 of 2017 in Review Petition No.3283 of 2008 and Review Application No.27 of 2017 in Review Petition No.2794 of 2008.

The NCDRC *vide* the impugned order dismissed the review applications while affirming its earlier order dated 31.05.2016 passed in review petition with reference to the order dated 03.01.2017 passed by this Court in Special Leave Petition (Civil)… CC Nos.24515-

24516 of 2016 granting liberty to the appellants to resort to remedy of review before the NCDRC.

2. The brief facts giving rise to the present appeal are as follows:

2.1 The appellants herein are the legal heirs of the original opposite party in the consumer complaint before the District Forum. All the respondents herein are the complainants.

2.2 For the sake of convenience, the parties shall be referred to as complainants and opposite party.

2.3 The complainants, Jayashree Padmakar and others, owners of property CTS Nos.1465/1 and 1465/2, 'C' Ward, Kolhapur, had entered into a Development Agreement dated 30.07.1996 with the opposite party. According to the agreement, the complainants were entitled to receive eight residential flats and Rs.6,50,000/- as consideration. Allegedly, the opposite party failed to fulfill the payment obligations, resulting in payment of a balance amount and accruing interest at 18% per annum with effect from 01.04.1997. The complainants alleged breaches of the agreement, including deviations from sanctioned plan, non-construction of a compound wall impacting parking and issues regarding access and unauthorized constructions beyond sanctioned plan, subsequently sold to third parties. They also noted defects in the building construction, such as cracks, in the building, terrace work being not completed and the absence of provision for electricity meters. Despite notices issued by the complainants, the opposite party denied the allegations asserting that the complainants owed them Rs.8,60,000/- for construction and amenities.

2.4 Seeking a resolution of the ongoing breaches under the Consumer Protection Act, the complainants pursued their legal recourse to address the deadlock by filing Complaint No.184 of 2005 before the District Consumer Forum, Kolhapur. Their prayers for relief were several: they demanded payment of outstanding dues inclusive of interest; reimbursement of expenses incurred and compensation for the mental distress caused to them. Additionally, they sought structural rectification, emphasizing on the removal of unauthorized constructions; rectification of construction defects; completion of pending work

and the provision of essential amenities as initially agreed upon.

2.5 In his version, the original opposite party disputed the existence of any consumer relationship, denied breaches and argued for the resolution of contractual disputes through the civil court. The opposite party claimed that the complaint was time-barred and sought its dismissal with compensatory costs of Rs.10,000/-.

2.6 The District Consumer Forum at Kolhapur, *vide* order dated 16.10.2006, on perusal of various supporting documents, including the Development Agreement, building plans, notices, replies, certificates, estimates, receipts and affidavits partly allowed the Consumer Complaint No.184 of 2005 filed against the opposite party. The District Forum observed that as per the Development Agreement between the parties, the transaction between the parties was not one of sale and purchase of property but of development of property. Since the services regarding construction are covered by the Consumer Protection Act, the dispute was held to be a consumer dispute. Further, the District Forum refused to take into consideration the points raised by the complainants regarding defects in construction, amenities and facilities due to lack of evidence provided in that regard. However, the opposite party was found to be liable to pay to the complainants an amount of Rs. l,65,000/- along with interest at the rate of 18% per annum with effect from 01.05.1997 till payment; an amount of Rs. 1,85,000/- along with interest at the rate of 18% per annum with effect from 31.08.1997 till payment; and an amount of Rs.1,50,000/- at the time of conveyance.

2.7 Both the parties challenged the order of the District Forum before the Consumer Disputes Redressal Commission, Maharashtra State, Mumbai (for short, "the State Commission"). The State Commission, *vide* its common judgment dated 08.04.2008 in First Appeal Nos.2570 of 2006 and 1115 of 2007, partly modified the order of the District Forum by setting aside the directions to pay Rs. 1.85 lakhs and Rs. 1.65 lakhs as the said claims were held to be time-barred but upheld the direction to pay Rs. 1.5 lakhs. However, the State Commission placed reliance on some other clauses of the Development Agreement such as clause 4(k), to hold that the building was incomplete and that the opposite party was liable to get the construction of the

compound wall and give separate access in terms of Schedule-II of the Development Agreement. The opposite party was further directed to obtain and handover the Completion Certificate to the complainants; to execute the Conveyance Deed and to give electricity connections to the complainants for which they had already paid Rs.15,000/- to the developer-opposite party.

2.8 The complainants as well as the opposite party approached the NCDRC by filing Revision Petition Nos.3283 of 2008 and 2794 of 2008. During the pendency of the petition before the NCDRC, the original opposite party-Vinayak Purushottam Dube died and his legal representatives i.e., his wife and two sons were brought on record, who are the appellants before this Court. The NCDRC, *vide* order dated 31.05.2016, again partly modified the order of the State Commission. The NCDRC disagreed with the finding and conclusion of the State Commission with respect to the time-barred transaction of Rs. 1.85 lakhs and Rs. 1.65 lakhs, by observing that the limitation of the said claims had to be adjudged by looking at the transaction between the parties as a whole, which established a continuous cause of action in the matter. The NCDRC upheld the directions given by the State Commission with respect to the Completion Certificate; Conveyance Deed; Electricity Connection, etc., since the developer did not challenge any part of those directions as the same were in accordance with the Development Agreement. In other words, the NCDRC upheld the order of payment of 1.65 lakhs and 1.85 lakhs along with interest as directed by the District Forum, and also upheld the slew of directions issued by the State Commission to the developer-opposite party.

3. The appellants-opposite party thereafter approached this Court by preferring Special Leave Petition (Civil).... CC Nos.24515-24516 of 2016 to challenge the order of the NCDRC dated 31.05.2016 in Revision Petition Nos.3283 of 2008 and 2794 of 2008. This Court, *vide* order dated 03.01.2017, refused to interfere with the view taken by the NCDRC and disposed of the same by granting liberty to the appellants-opposite party herein to resort to the remedy of review before the National Commission.

4. Thereafter, the appellants-opposite party filed Review Application No.26 of 2017 and the complainants filed Review Application No.27

of 2017, both before the NCDRC and the order of review proceeding is assailed in the present case. The NCDRC, *vide* order dated 02.05.2018, upheld its earlier findings on the question of limitation, status of complainants as consumers and the relief being in excess of the payment made by the complainants. Further, NCDRC refused to accept the contention of the appellants-opposite party that after the death of the original owner, the legal representatives are not accountable for the liabilities under the agreement. In paragraph 12 of the order, the NCDRC held that the death of a developer has no effect upon the obligations of the developer under the Development Agreement and the same have to be executed by the legal heirs of the developer. The relevant part of the said paragraph 12 is extracted as under:

> "12. Further, we have no reason to agree with the contention raised by the review applicant that after the death of the original owner, the legal representatives are not accountable for the liabilities under the agreement. In the eventuality of death of the developer, it cannot be stated that various clauses of the development agreement between the parties becomes redundant or the complainant is not entitled to seek execution of the provisions of the development agreement. Such execution has to be made by the legal heirs of the developer only."

5. The legal representatives of the opposite party being aggrieved by the aforesaid reasoning of the NCDRC have preferred these appeals.

6. We have heard learned counsel Sri Aniruddha Deshmukh for the appellants and learned counsel Sri Abhishek Yadav for the respondents and perused the material on record.

7. The controversy in these appeals is in a very narrow compass. No doubt, the complainants succeeded before the District Forum, the State Commission as well as the NCDRC. During the pendency of the revision preferred by the original opposite party before the NCDRC, the original opposite party died. His legal representatives i.e. his widow and two sons were brought on record. In fact, the complainants also had preferred their Revision Petition. The NCDRC reasoned that the legal representatives of the opposite party were liable both with regard to the monetary payments that the original opposite party was directed to pay and also liable to comply with

the other directions issued by the District Forum as modified by the State Commission and thereafter modified by the NCDRC.

8. Learned counsel for the appellants submitted that the appellants as the legal representatives of the deceased opposite party are willing to make the payment as directed. But as far as the other set of the directions are concerned, it is not permissible for them to comply with them inasmuch as the said directions were issued by the District Forum as well as the State Commission personally against the opposite party who is since deceased. Those directions are with regard to construction of compound wall so as to give separate access in terms of Schedule II of the Development Agreement; to obtain and handover completion certificate to the complainants-respondents; to execute the conveyance deed and to give electricity connection and such other directions.

9. Learned counsel for the appellants contended that the aforesaid directions cannot now be complied with by the legal representatives of the deceased - original opposite party inasmuch as those were personal directions as issued against the original opposite party. He contended that the original opposite party was having the proprietorship concern and therefore, the estate of the deceased proprietor would be liable insofar as the satisfaction of the compensatory payments only but not for complying the other directions issued which cannot now fall on his legal representatives to comply. It was contended that the original opposite party had skills and expertise to comply with the said directions as a developer but on his demise, his legal representatives, namely, his widow and two sons, cannot be compelled to carry out those directions as they neither possess the necessary skills nor expertise and further, they are not continuing the proprietorship concern of the original opposite party which has now been wound up on the demise of the sole proprietor. Therefore, learned counsel for the appellants-opposite party contended that the various clauses of the Development Agreement which had placed duties and obligations on the original opposite party, who is since deceased, cannot now be enforced against and performed by his legal representatives or heirs.

10. *Per contra*, learned counsel for the complainants–respondents submitted that no doubt the legal representatives of the original opposite party would comply with the directions for payments from

out of the estate of the deceased opposite party but the complainants would be left high and dry insofar as the other obligations which had to be discharged by the opposite party and therefore, the NCDRC was justified in directing the legal representatives of the deceased opposite party to take steps for also complying with those directions.

11. Having heard learned counsel for the respective parties, we note that admittedly the original opposite party was in the business of real estate and as a developer, had entered into the Development Agreement dated 30.07.1996 with the complainants. According to the complainants-respondents herein, they were entitled to eight residential flats and there were various other terms and conditions of the said Development Agreement which imposed an obligation on the original opposite party.

12. The question is: what would happen to the obligations imposed personally on the original opposite party on his demise? No doubt, the estate of the original opposite party would be liable for any monetary decree or directions for payment issued in the present case. However, what about the obligations which had to be performed under the Development Agreement such as certain construction to be made and certain approvals etc. to be obtained by him on completion of the construction. Can the legal representatives be liable to comply with those obligations under the Development Agreement on the demise of the original opposite party?

13. In this regard, it is necessary to discuss the jurisprudential status of a proprietary concern. In a report of the Insolvency Law Committee submitted in February, 2020, the definition of 'Proprietorship Firms' reads as under:

> "**2. DEFINITION OF 'PROPRIETORSHIP FIRMS'**
>
> 2.2 Proprietorship firms are businesses that are owned, managed and controlled by one person. They are the most common form of businesses in India and are based in unlimited liability of the owner. Legally, a proprietorship is not a separate legal entity and is merely the name under which a proprietor carries on business. ***[Raghu Lakshminarayanan vs. Fine Tubes (2007) 5 SCC 103.]***
>
> Due to this, proprietorships are usually not defined in statutes. Though some statutes define proprietorships,

such definition is limited to the context of the statute. For example, Section 2 (haa) of the Chartered Accountants Act, 1949 defined a 'sole proprietorship' as "an individual who engages himself in practice of accountancy or engages in services…". Notably, 'proprietorship firms' have also not been statutorily defined in many other jurisdictions."

[**Source**: Report of the Insolvency Law Committee, Page No.117-118, Government of India (Ministry of Corporate Affairs, February, 2020).]

14. According to Salmond, there are five important characteristics of a legal right:

    1. It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, or the person of inherence.

    2. It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of duty, or as the person of incidence.

    3. It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.

    4. The act or omission relates to something (in the widest sense of that word), which may be termed the object or subject matter of the right.

    5. Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner.

    [**Source**: PJ Fitzgerald, Salmond on Jurisprudence, Page No.221 (Universal Law Publishing Co. Pvt. Ltd., 12th Edition, 1966)]

15. Salmond also believed that no right can exist without a corresponding duty. Every right or duty involves a bond of legal obligation by which two or more persons are bound together. Thus, there can be no duty unless there is someone to whom it is due; there can be no right unless there is someone from whom it is claimed; and there can be no wrong unless there is someone who is wronged, that is to say, someone whose right has been violated. This is also called as *vinculum juris* which means "a bond of the law". It is a tie that legally binds one person to another. [**Source**: PJ Fitzgerald, *Salmond*

on Jurisprudence, Page No.220 (Universal Law Publishing Co. Pvt. Ltd., 12th Edition, 1966)].

16. Salmond's classification of proprietary and personal rights are encapsulated as under:

	Proprietary Rights	**Personal Rights**
1	Proprietary rights means a person's right in relation to his own property. Proprietary rights have some economic or monetary value.	Personal rights are rights arising out of any contractual obligation or rights that relate to status.
2	Proprietary rights are valuable.	Personal rights are not valuable in monetary terms.
3	Proprietary rights are not residual in character.	Personal rights are the residuary rights which remain after proprietary rights have been subtracted.
4	Proprietary rights are transferable.	Personal rights are not transferable.
5	Proprietary rights are the elements of wealth for man.	Personal rights are merely elements of his well-being.
6	Proprietary rights possess not merely judicial but also economic importance.	Personal rights possess merely judicial importance.

[**Source:** PJ Fitzgerald, *Salmond on Jurisprudence,* Page No.238 (Universal Law Publishing Co. Pvt. Ltd., 12th Edition, 1966)].

17. Salmond's classification of inheritable and uninheritable rights is stated as under:

Inheritable Rights	**Uninheritable Rights**
A right is inheritable if it survives the owner.	A right is uninheritable if it dies with the owner.

[**Source:** PJ Fitzgerald, *Salmond on Jurisprudence,* Page Nos.415 & 442 (Universal Law Publishing Co. Pvt. Ltd., 12th Edition, 1966)].

18. On a reading of the above, it is clear, when it comes to personal rights (as opposed to a proprietary rights) are rights arising out of any

contractual obligations or the rights that relate to status. Such personal rights are not transferable and also not inheritable. Correspondingly, Section 306 of the Indian Succession Act, 1925 (for short, "1925 Act") applies the maxim "*actio personalis moritur cum persona*" (a personal right of action dies with the person) which is limited to a certain class of cases and would apply when the right litigated is not heritable. By the same logic, a decree holder cannot enforce the same against the legal representatives of a deceased judgment debtor unless the same survives as against his legal representatives. Section 306 of the 1925 Act reads as under:

> "**Section 306 – Demands and rights of action of or against deceased survive to and against executor or administrator.—**
>
> All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in *favor of or against* a person at the time of his decease, survive *to and against* his executors or administrators; except causes of action for defamation, assault, as defined in the Indian Penal Code, 1860 (45 of 1860) or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory."

19. We may also advert to Sections 37 and 40 of the Indian Contract Act, 1872, which read as under:-

> "**37. Obligation of parties to contracts**.—The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.
>
> Promises bind the representatives of the promisors in case of the death of such promisors before performance, unless a contrary intention appears from the contract.
>
> x x x
>
> **40.Person by whom promise is to be performed**.—If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained

> in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a competent person to perform it."

20. Section 37 of the aforesaid Act states that a promise made by a promisor is binding on his representatives in case of his/her death, unless a contrary intention appears from the contract. Legal representatives are liable for the debts of their predecessor, but their liability is limited to the extent of the estate of the deceased inherited by them. Therefore, the representatives of a promisor are bound to perform the promisor's contract to the extent of the assets of the deceased falling in their hands. But they are not personally liable under the contracts of the deceased and are also not liable for personal contracts of the deceased. Therefore, when personal considerations are the basis of a contract they come to an end on the death of either party, unless there is a stipulation express or implied to the contrary. This is especially so when the contracts involve exercise of special skills such as expressed in Section 40 of the Indian Contract Act, 1872.

21. Thus, a contract can be performed vicariously by the legal representatives of the promisor depending upon the subject matter of the contract and the nature of performance that was stipulated thereto. But a contract involving exercise of individual's skills or expertise of the promisor or which depends upon his/her personal qualification or competency, the promisor has to perform the contract by himself and not by his/her representatives. A contract of service is also personal to the promisor. This is because when a person contracts with another to work or to perform service, it is on the basis of the individual's skills, competency or other qualifications of the promisor and in circumstances such as the death of the promisor he is discharged from the contract.

22. Correspondingly, duties or obligations which are personal in nature cannot be transmitted from a person who had to personally discharge those duties, on his demise, to his legal representatives. Just as a right is uninheritable and the right personal to him dies with the owner of the right, similarly, a duty cannot be transferred to the legal representatives of a deceased if the same is personal in nature.

In ***Raghu Lakshminarayanan vs. Fine Tubes*, *(2007) 5 SCC 103***, while distinguishing a juristic person such as a company, a partnership or an association of persons from a proprietary concern, it was observed that a person who carries on business in the name of a business concern, but he being a proprietor thereof, would be solely responsible for conduct of its affairs. A proprietary concern is not a company. Further, a proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the proprietary business which is by representing the estate of the deceased proprietor. The real party who is being sued is the proprietor of the said business. Therefore, if a proprietor had to carry on certain obligations personally under a contract, the same cannot be fastened on his legal representatives.

23. Further, Section 2(11) of the Code of Civil Procedure, 1908 (for short, "CPC") defines a "legal representative" to mean a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. Thus, the legal representatives of a deceased are liable only to the extent of the estate which they inherit.

In ***Custodian of Branches of Banco National Ultramarino vs. Nalini Bai Naique*, *AIR 1989 SC 1589*,** it was observed that the expression "legal representative" as defined in the CPC is applicable to proceedings in a suit. It means a person who in law represents the estate of a deceased person and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued. The definition is inclusive in character and its scope is wide as it is not confined to legal heirs only, instead, it stipulates a person who may or may not be a heir, competent to inherit the property of the

deceased or he should represent the estate of the deceased person. It includes heirs as well as persons who represent the estate even without title, either as executors or administrators in possession of the estate of the deceased. All such persons would be covered by the expression "legal representative". If there are many heirs, those in possession bona fide, without there being any fraud or collusion, are also entitled to represent the estate of the deceased.

24. The aforesaid judgment refers to representation of an estate of a deceased person which would devolve on his legal representatives and where the decree has to be executed *vis-à-vis* such an estate. In such a case, the heirs of the deceased judgment debtor would be under a legal obligation to discharge their duties to satisfy the decree or an order from the estate of a deceased.

But in the case of sole proprietorship, which is a common form of business in India, when a legal obligation arises under a contract which has to be discharged personally by the sole proprietor, who is since deceased, had entered into the agreement, such as, in the case of a Development Agreement in the instant case, can such obligations be imposed on his legal representatives or heirs who are not parties to the Development Agreement and where the obligations under such an agreement *per se* cannot be fulfilled inasmuch as they neither have the skills nor the expertise to do so and those obligations depend purely on the skills and expertise of the deceased sole proprietor? In other words, where the decree or order is not against the estate of a deceased sole proprietor but based on the skills and expertise of the sole proprietor, we are of the view that in the latter case, the obligations which had to be performed by the sole proprietor would come to an end on his demise and the same cannot be imposed on his legal heirs or representatives. We reiterate that such a position is distinguished from a position where the estate of the deceased sole proprietor would become liable to satisfy the decree in monetary terms. This is because a proprietorship firm is not a separate legal entity as compared to the proprietor and his estate would become liable only to satisfy a decree or an order in monetary terms on his demise.

In this context, the following terms of the Development Agreement dated 30.07.1996 would clearly indicate that the obligations on the opposite party were to be carried out personally by him:

"NOW THIS AGREEMENT WINESSETH AND IS AGREED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

1.1 The owners hereby grant to the developer sole and exclusive development rights in respect of the property bearing C.S. No. C. 1465 situated in 'C' Ward, Laxmipuri Kolhapur -416002 in the form of license to enter upon the said property in the capacity of the licensee of the owners for the sole purpose of developing the said property and selling the offices/premises / shops to the extent and in the manner stipulated hereafter and upon the terms and conditions agreed by the between the parties hereto and set out here below in this agreement. Subject to clause No. 2. the license hereby granted is irrevocable till the entire property is developed and all the premises constructed thereon are sold out. It is however, hereby expressly understood that the right of entry granted under this clause is for the sole purpose of developing the said property selling all premises (except those to be allotted to owners) including the shop/s basement/offices therein and common restricted areas or facilities as the case may be and such entry shall not be construed to mean that the owners have placed the developer in legal or physical possession of the said property.

x x x

16. The developer undertakes to comply with and carry out all the legal and contractual obligations that may be entered into for the construction of the buildings and for the sale of the various premises in the said buildings. The developer further undertakes to indemnify and keep indemnified the owners from and against any action either civil or criminal suit proceedings, damages, penalties or any other similar actions which may be initiated, made or ledged by any person or persons by reason of the failure of the developer to comply with, carry out or perform any such legal and contractual obligations."

25. In this regard, it would be useful to illustrate that in a general sense, an injunction is a judicial mandate operating *in personam* by which

upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. On the other hand, a direction to pay money either by way of final or interim order is not considered to be an injunction. An order of injunction is normally issued against a named person and is addressed to the defendant personally and on his demise the cause of action would come to an end insofar as such a person who is since deceased even if it relates to a proprietary right unless his legal representatives are also causing a threat in which case the cause of action would continue *vis-à-vis* the legal representatives also.

26. Therefore, if the estate of the deceased becomes liable then the legal representatives who in law represent the estate of a deceased person or any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued is liable to the extent the estate has devolved. Hence, what is crucial is that the estate of a deceased person which becomes liable and the legal representatives must discharge their liability to a decree holder or a person who has been granted an order to recover from the estate of the deceased which they would represent and not beyond it.

27. But in the case of a personal obligation imposed on a person under the contract and on the demise of such person, his estate does not become liable and therefore, the legal representatives who represent the estate of a deceased would obviously not be liable and cannot be directed to discharge the contractual obligations of the deceased.

28. In ***Ajmera Housing Corporation vs. Amrit M. Patel (Dead) through LRs, (1998) 6 SCC 500***, this Court observed that the defendants in the said case had no privity of contract with the plaintiff therein and the contract had been entered into on the basis of the skills and capacity of the party to perform under the contract and the rights and duties were also personal to the party who had to discharge the obligations under the contract. In the circumstances, it was observed that the legal representatives of the builder under the contract had neither the capacity nor the special skills to discharge the obligations of the deceased.

29. This position is also clear on a reading of Section 50 of the CPC which states as under:

> "**Section.50:**- (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.
>
> (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit."

30. Thus, any decree which is relatable to the extent of the property of the deceased which has come to the hands of the legal representatives and has not been duly disposed of, the same would be liable for execution by a decree holder so as to compel the legal representatives to satisfy the decree. In this context, even a decree for preventive injunction can also be executed against the legal representatives of the deceased judgment-debtor if such a decree is in relation to the property or runs with the property if there is a threat from such legal representatives.

31. In view of the aforesaid discussion, we hold that the legal representatives of the deceased opposite party-appellants herein are not liable to discharge the obligation which had to be discharged by the deceased opposite party in his personal capacity and hence that portion of the impugned orders of the NCDRC, State Commission and District Forum are set aside. Needless to observe that the direction for payments shall be made by the legal representatives from the estate of the deceased opposite party if not already satisfied.

32. The appeals are allowed in the aforesaid terms.

33. Parties to bear their respective costs.

Headnotes prepared by: Divya Pandey

Result of the case: Appeals allowed.

[2024] 3 S.C.R. 146 : 2024 INSC 164

Thangam and Another
v.
Navamani Ammal

(Civil Appeal No. 8935 of 2011)

04 March 2024

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

Issue for Consideration

Genuineness of the Will, a registered document, executed by testator (husband of appellant no.1 and father of appellant no.2) in favour of respondent-plaintiff (daughter of his brother).

Headnotes

Will – Genuineness of – When not surrounded by suspicious circumstances – By way of Will, the testator bequeathed a part of his property in favour of the respondent-daughter of his brother – Names of his widow-appellant no.1 and minor daughter- appellant no.2 were not mentioned in the Will – Suit filed by the respondent for declaration and injunction was decreed, Will was held to be genuine by the Trial Court – Decree of the Trial Court reversed by First Appellate Court – High Court restored the decree of the Trial Court – Correctness:

Held: From the evidence of the witnesses with reference to the health of the testator, the Will cannot be held to be suspicious on the ground of the alleged ill-health of the testator at the time of the its execution – It is the admitted case of the appellants that the testator left behind about 8 acres of land and three houses – What was bequeathed to the respondent was merely a part of testator's entire property i.e. land measuring approximately 3.5 Acres – Meaning thereby the balance property of the testator was in possession of widow and daughter – This is how the interest of the natural legal heirs was taken care of – The reason to bequeath a part of the property in favour of the respondent is also evident from the material available on record – No error committed by the High Court in holding that the Will was not surrounded by the suspicious circumstances as the scribe and one of the witnesses were unison – The testator was conscious of the fact that he had

* Author

a wife and a minor child whose interest had been taken care of by leaving part of the property for them – No merit in the appeal. [Paras 9.5, 12, 13 and 16]

Code of Civil Procedure, 1908 – Order VIII Rules 3 and 5 – Specific admission and denial of the pleadings – Need of – Emphasised – Plaint filed by the respondent contained ten paragraphs besides the prayer – In the written statement filed by the appellants, there was no specific denial to the claim made by the respondent, no para-wise reply was given – In absence thereof, the allegations in the plaint were deemed to be admitted:

Held: In the absence of para-wise reply to the plaint, it becomes a roving inquiry for the Court to find out as to which line in some paragraph in the plaint is either admitted or denied in the written statement filed, as there is no specific admission or denial with reference to the allegation in different paras – Order VIII Rules 3 and 5 CPC clearly provides for specific admission and denial of the pleadings in the plaint – A general or evasive denial is not treated as sufficient – Proviso to Order VIII Rule 5 CPC provides that even the admitted facts may not be treated to be admitted, still in its discretion the Court may require those facts to be proved – This is an exception to the general rule – General rule is that the facts admitted, are not required to be proved – The requirement of Order VIII Rules 3 and 5 CPC are specific admission and denial of the pleadings in the plaint – The same would necessarily mean dealing with the allegations in the plaint para-wise. [Paras 15-15.2]

Case Law Cited

Badat and Co. Bombay Vs. East India Trading Co., **[1964] 4 SCR 19 : AIR 1964 SC 538;** *Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar,* **(1993) 4 SCC 6 – relied on.**

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Will; Genuineness; Not surrounded by suspicious circumstances; Interest of the natural legal heirs taken care of; Pleadings; Admission and denial of the pleadings.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.8935 of 2011

From the Judgment and Order dated 18.04.2007 of the High Court of Madras in SA No.1344 of 1996

Appearances for Parties

K. K. Mani, Ms. T. Archana, Rajeev Gupta, Advs. for the Appellants.

Pulkit Tare, D. Kumanan, Sandeepan Pathak, Suvendu Suvasis Dash, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. The issue under consideration in the present appeal is regarding genuineness of the Will dated 09.10.1984, which is a registered document, executed by Palaniandi Udyar in favour of Navamani Amma.

2. A suit[1] filed by the respondent/plaintiff for declaration and injunction was decreed by the Trial Court[2], holding the Will to be genuine. In appeal[3] by the appellants, judgment and decree of the Trial Court was reversed by the First Appellate Court[4]. In second appeal[5] filed by the respondent the judgment and decree of the First Appellate Court was set aside and that of the Trial Court was restored by the High Court[6].

3. Before we embark upon to consider the issues in detail, we deem it appropriate to mention the relations between the parties and certain brief facts.

   3.1. The testator of the Will dated 09.10.1984, Palaniandi Udayar, was the husband of appellant no. 1 Thangam and father of appellant no. 2 Laila.

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1 O.S. No. 402 of 1986.

2 Additional District Munsif Court, Ariyalur.

3 Appeal Suit No. 7 of 1991.

4 Subordinate Judge, Ariyalur.

5 Second Appeal No. 1344 of 1996.

6 High Court of Judicature at Madras.

3.2. The Will was executed on 09.10.1984 in favour of Navamani Amma/Plaintiff, who as per the narration in the Will is said to be daughter of the brother of the testator.

3.3. The defendant in the suit originally filed was widow of the testator, however, later on his minor daughter was also impleaded. Both are the appellants before this Court.

3.4. The appellant no. 1 is the third wife of the testator. The earlier two wives expired and were not having any child from the loins of the testator.

3.5. Even as per the admitted case of the defendant no. 1/widow of the testator, the testator was having total land about 8 acres besides three houses.

3.6. By way of Will, the testator had bequeathed approximately 3.5 Acres of land in favour of the plaintiff stating therein that she is like his daughter, being daughter of his brother. The value of the suit property was estimated to be about ₹16,000/-.

ARGUMENTS

4. In the aforesaid factual matrix, the argument raised by learned counsel for the appellants challenging the judgment and decree of the High Court was that the execution of Will was surrounded by various suspicious circumstances and deserves to be discarded as was rightly done by the First Appellate Court. The finding of facts recorded by the First Appellate Court was erroneously reversed by the High Court without the same being perverse. Re-appreciation of the facts merely to come to another possible conclusion does not fall within the scope of consideration of a matter in second appeal. There was no substantial question of law involved in the second appeal before the High Court. There were discrepancies in the statements of the scribe and the attesting witnesses to the Will. The health of the testator was not good and he was not in a position to understand and comprehend the contents of the Will. There were differences in the thumb impressions of the testator on the Will and on the register in the office of the Sub-Registrar.

5. Though, admittedly the testator left behind his widow and a minor daughter but there is no mention in the Will about the same. How their interest was taken care of, the Will is silent. In fact, the appellants were in possession of the suit property. The suit filed by the respondent was totally misconceived.

6. On the other hand, learned counsel for the respondent submitted that the execution of Will by a person in favour of any other relative always would mean that the testator wishes to take away some property from the normal course of inheritance. In fact, the respondent being like daughter to the testator was taking care of his health, who was suffering from asthma and chronic cough. It is not that the entire property owned by the testator was given to the respondent by way of Will, rather it was only a part thereof. She is in possession of the suit property after the death of the testator. The need to file the suit arose more than two years after the death of the testator as her possession was disturbed by the appellants. Otherwise also the appellants had not taken any step to take care of the testator when he was not keeping good health or the property left by him after his death. Admittedly, the appellant no. 1 was living away from the testator. Even at the time of his death the appellants were not present as she came later on. Even the expenses for performing last rites of the testator were borne by the husband of the respondent. There is no error in the judgment of the High Court. The findings recorded by the First Appellate Court being totally perverse were rightly interfered by the High Court.

6.1. In the written statement filed by the appellants, there was no specific denial to the claim made by the respondent/plaintiff. No para-wise reply was given. In the absence thereof, the allegations in the plaint were deemed to be admitted.

DISCUSSION

7. Heard learned counsel for the parties and perused the relevant referred record. We may record that the translated copies of whatever documents have been placed on record by the parties, are being considered as such as to the same, no dispute has been raised by the either side.

8. What is required to be considered while examining the correctness of the judgment of the High Court is as to whether the Will in question was surrounded by suspicious circumstances whereby the testator had not mentioned the names of his widow and minor daughter in the Will and has bequeathed a part of his property to the respondent.

8.1. The appellant no. 1 is the third wife of the testator whereas the appellant no. 2 is the daughter. From the earlier two wives no child was born.

9. Firstly, coming to the health of the testator the Plaintiff/PW-1 stated in her examination-in-chief that though the testator was having Asthma but otherwise he was in good health condition. In her Cross-Examination PW-1 stated that the testator was suffering from Asthma and Cough for about 5 to 6 years. She denied that the testator was having any drinking habit. She denied the suggestion that the testator was bed-ridden for three months before executing the Will.

   9.1. PW-2/Vadivelu, who is an attesting witness to the Will, in his cross-examination stated that he inquired about the health of the testator and he told PW-2 that he was having some cough problem and was otherwise suffering from T.B.

   9.2. PW-3/Govindasamy, who was a witness in the office of Sub-Registrar, in his cross-examination stated that at the time of execution of Will the testator was having cough.

   9.3. PW-4/Subramanian, who is Scribe of the Will, stated in his examination-in-chief that at the time of execution of Will the testator was in good physical condition and he was having cough only. He was not put any question in this regard in cross-examination.

   9.4. DW-1/Thangam Ammal, who is the widow of the testator, stated in her examination-in-chief that before his death the testator 'was suffering from lever wound and he had dysentery and suffered very much' (sic). DW-1 in her cross-examination sated that three months before his death the testator was not in good physique and before that he was in good condition. DW-1 further stated that the testator was bed ridden for 3 months and she was taking care of him.

   9.5. From the aforesaid evidence of the witnesses with reference to the health of the testator we do not find that he was not in good senses and was unable to understand his welfare or take correct decisions. Hence, the Will cannot be held to be suspicious on the ground of the alleged ill-health of the testator at the time of the execution of the Will.

10. Now, coming to another aspect with reference to the genuineness of the Will, the PW-4/Subramanian, who is scribe of the Will, stated in his examination-in-chief that the testator had put his thumb impression

on the Will and that he witnessed the same. He further stated the Will was registered in the office of Sub-Registrar.

10.1. In his cross-examination, he stated that on enquiry testator told him that the Plaintiff can take the suit property and other properties can be taken by the Defendants i.e., his wife and daughter. This shows that even at the time of execution of the Will, the testator was fully conscious of the welfare of his widow and minor daughter as sufficient property was left for them.

11. The Plaintiff examined PW-2/Vadivelu, who was the attesting witness to the Will. In his examination-in-chief he stated that the testator was very well known to him and that he was witness in the above Will. He stated that the Will was written under a tree at Palavur. Details were given by the Testator. After writing of Will, the testator asked PW-4/ scribe to read over the same. After hearing and being satisfied the testator had put his thumb impression. He and one other attesting witness, Muruganian (DW-2), had witnessed the testator putting thumb impression on the Will. In his cross-examination he stated that the Will was written without compulsion and in good conscious were expressed by Testator alone. He asked testator whether he was having any legal heir and testator told him that as per his desire alone the Will was written.

11.1. The Defendants examined Murugaian, who was also an attesting witness to the Will, as DW-2, who in his examination-in-chief stated that he was asked by Paramasivam, who is husband of the Plaintiff, to be witness in the office of Sub-Registrar. He further stated that he was requested to sign as witness and after putting his signature he returned. DW-2 further stated that he did not see the testator put his thumb impression. In Cross-examination DW-2 stated that he saw the testator sitting under a tree and that the testator told him that he was writing the Will in favour of his heirs.

12. It is the admitted case of the appellants that the testator left behind about 8 acres of land and three houses. What has been bequeathed to the respondent is merely a part of testator's entire property i.e. land measuring approximately 3.5 Acres**.** Meaning thereby the balance property of the testator is in possession of widow and daughter. This is how the interest of the natural legal heirs has been taken care of.

12.1. The reason to bequeath a part of the property in favour of the respondent is also evident from the material available on record. It has come in evidence that the testator was not keeping good heath as he was suffering from asthma and cough. The appellants were not living with him for quite sometime as it is the admitted case of DW-1 in her cross-examination that she had gone to her paternal home on account of marriage of her brother and was not living with the testator at the time of execution of Will. It has also come on record that she was not present when the testator died. Expenses for his last rites were borne by the husband of the respondent who was taking care of the land of the testator.

12.2. There is nothing on record to suggest that the appellants were taking care of the property left by the testator immediately after his death or that any steps were taken by them to get the same mutated in their favour.

13. From the aforesaid evidence on record, in our opinion, no error has been committed by the High Court in holding that the Will was not surrounded by the suspicious circumstances as the scribe and one of the witnesses were unison. The testator was conscious of the fact that he had a wife and a minor child whose interest had been taken care of by leaving part of the property for them. It came in response to a specific question asked by PW-4 to the testator at the time of execution of the Will. It was so stated by PW-4 in his cross-examination. Even in para 14 of the written statement, the appellants stated that they are enjoying the suit properties and other properties left by the testator. This clearly shows that certain part of the properties was left by the testator for his widow and minor daughter.

14. Before we part with the judgment we are constraint to observe the manner in which the pleadings have been filed in the Trial Courts or may be in some cases in the High Courts.

14.1. A perusal of the plaint filed by the respondent shows that it contains ten paragraphs besides the prayer. In the written statement filed by the appellants, no specific para-wise reply was given. It was the own story of the respondent containing fifteen paragraphs besides the prayer in para 16.

15. In the absence of para-wise reply to the plaint, it becomes a roving inquiry for the Court to find out as to which line in some paragraph

in the plaint is either admitted or denied in the written statement filed, as there is no specific admission or denial with reference to the allegation in different paras.

15.1. Order VIII Rules 3 and 5 CPC clearly provides for specific admission and denial of the pleadings in the plaint. A general or evasive denial is not treated as sufficient. Proviso to Order VIII Rule 5 CPC provides that even the admitted facts may not be treated to be admitted, still in its discretion the Court may require those facts to be proved. This is an exception to the general rule. General rule is that the facts admitted, are not required to be proved.

15.2. The requirement of Order VIII Rules 3 and 5 CPC are specific admission and denial of the pleadings in the plaint. The same would necessarily mean dealing with the allegations in the plaint para-wise. In the absence thereof, the respondent can always try to read one line from one paragraph and another from different paragraph in the written statement to make out his case of denial of the allegations in the plaint resulting in utter confusion.

15.3. In case, the defendant/respondent wishes to take any preliminary objections, the same can be taken in a separate set of paragraphs specifically so as to enable the plaintiff/petitioner to respond to the same in the replication/rejoinder, if need be. The additional pleadings can also be raised in the written statement, if required. These facts specifically stated in a set of paragraphs will always give an opportunity to the plaintiff/petitioner to respond to the same. This in turn will enable the Court to properly comprehend the pleadings of the parties instead of digging the facts from the various paragraphs of the plaint and the written statement.

15.4. The issue regarding specific admission and denial of the pleadings was considered by this Court in **Badat and Co. Bombay Vs. East India Trading Co**[7]. While referring to Order VIII Rules 3 to 5 of the CPC it was opined that the aforesaid Rules formed an integrated Code dealing with the manner in

7 [1964] 4 SCR 19 : AIR 1964 SC 538.

which the pleadings are to be dealt with. Relevant parts of para '11' thereof are extracted below:

> "11. Order 7 of the Code of Civil Procedure prescribes, among others, that the plaintiff shall give in the plaint the facts constituting the cause of action and when it arose, and the facts showing the court has jurisdiction. The object is to enable the defendant to ascertain from the plaint the necessary facts so that he may admit or deny them. Order VIII provides for the filing of a written-statement, the particulars to be contained therein and the manner of doing so;
>
> XXX XXX XXX
>
> These three rules form an integrated code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non- compliance. The written statement must deal specifically with each allegation of fact in the plaint and when a defendant denies any such fact, he must not do so evasively, but answer the point of substance. If his denial of a fact is not specific but evasive, the said fact shall be taken to be admitted. In such an event, the admission itself being proof, no other proof is necessary."

15.5. The matter was further considered by this Court in **Lohia Properties (P) Ltd., Tinsukia, Dibrugarh, Assam Vs. Atmaram Kumar**[8] after the 1976 Amendment Act in CPC whereby the existing Rule 5 of Order VIII of the CPC was numbered as sub-rule (1) and three more sub-rules were added dealing with different situations where no written statement is filed. In paras 14 and 15 of the aforesaid judgment, the position of law as stated earlier was reiterated. The same are extracted below:

> "14. What is stated in the above is, what amount to admit a fact on pleading while Rule 3 of Order 8 requires

8 (1993) 4 SCC 6.

that the defendant must deal specifically with each allegation of fact of which he does not admit the truth.

15. Rule 5 provides that every allegation of fact in the plaint, if not denied in the written statement shall be taken to be admitted by the defendant. What this rule says is, that any allegation of fact must either be denied specifically or by a necessary implication or there should be at least a statement that the fact is not admitted. If the plea is not taken in that manner, then the allegation shall be taken to be admitted."

15.6. We have made the aforesaid observations as regularly this Court is faced with the situation where there are no specific para-wise reply given in the written statement/counter affidavit filed by the defendant(s)/respondent(s). In our opinion, if the aforesaid correction is made, it may streamline the working.

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

Headnotes prepared by: Divya Pandey

Result of the case:
Appeal dismissed.

[2024] 3 S.C.R. 157 : 2024 INSC 172

Prabhat Kumar Mishra @ Prabhat Mishra
v.
The State of U.P. & Anr.

(Criminal Appeal No.(s). 1397 of 2024)

05 March 2024

[B.R. Gavai and Sandeep Mehta,* JJ.]

Issue for Consideration

High Court, if justified in rejecting the application filed by the accused appellant u/s. 482 CrPC seeking quashing of proceeding of the criminal case registered against him u/s. 306 IPC and s. 3(2)(v) of the Schedule Castes and the Schedule Tribes (Prevention of Atrocities) Act, 1989.

Headnotes

Penal Code, 1860 – ss. 306, 107 – Abetment of suicide – Allegations set out in the suicide note, if constitutes necessary ingredients of abetment to commit suicide – Suicide note by the victim-posted as Senior Clerk, that he was frustrated and bothered by the style of functioning of the appellant-District Saving Officer and of the Chief Development Officer and thus, was left with no option but to end his life, and was also bothered by the pressure of working in two districts – Criminal proceedings against the appellant for the offences punishable u/s. 306 and s. 3(2)(v) of the SC/ST Act – Application by the appellant u/s. 482 CrPC seeking quashing of proceedings – Rejected by the High Court – Justification:

Held: Prosecution of the appellant for the offence u/s.3(2)(v) of the SC/ST Act is ex facie illegal and unwarranted since from the admitted allegations of the prosecution, the necessary ingredients of the offence u/s.3(2)(v) of the SC/ST Act are not made out – Prosecution case is entirely based on the suicide note left behind by the victim before committing suicide – On a minute perusal of the suicide note, the contents thereof do not indicate any act or omission on the part of the appellant which could make him responsible for abetment as defined u/s. 107 – Suicide note clearly shows that the deceased was frustrated on account of work pressure and was apprehensive of various random factors unconnected to his official duties – Necessary ingredients of the offence of abetment to commit suicide are not made out from the chargesheet – Thus, allowing prosecution of the appellant is grossly illegal for the offences

* Author

punishable u/s.306 and s.3(2)(v) of the SC/ST Act tantamounts to gross abuse of process to law – Also, investigating agency itself proposed a closure report in the matter after conducting thorough investigation – Thus, the impugned order passed by the High Court and all proceedings sought to be taken against the appellant in the criminal case pending, quashed and set aside. [Paras 16, 18, 22-25]

Case Law Cited

Masumsha Hasanasha Musalman v. State of Maharashtra, [2000] 1 SCR 1155 **: (2000) 3 SCC 557;** *Netai Dutta v. State of W.B.,* **(2005) 2 SCC 659;** *M. Mohan v. State represented by the Deputy Superintendent of Police,* [2011] 3 SCR 437 **: (2011) 3 SCC 626 – referred to.**

List of Acts

Penal Code, 1860; Schedule Castes and the Schedule Tribes (Prevention of Atrocities) Act, 1989; Code of Criminal Procedure, 1973.

List of Keywords

Abetment of suicide; Suicide; Suicide note; Caste; Act or omission; Frustrated on account of work pressure.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1397 of 2024

From the Judgment and Order dated 26.07.2022 of the High Court of Judicature at Allahabad in A482 No.12691 of 2015

Appearances for Parties

Pallav Shishodia, Sr. Adv., Danish Zubair Khan, Ajeet Pandey, Dr. Lokendra Malik, Advs. for the Appellant.

Ankit Goel, Ram Shiromani Yadav, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. Leave granted.

2. This appeal is directed against the judgment dated 26th July, 2022 passed by the High Court of Judicature at Allahabad rejecting the

Criminal Misc. Application No. 12691 of 2015 filed by the accused appellant herein under Section 482 of Court of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC').

3. By way of the said application, the accused appellant sought quashing of proceeding of the Criminal Case No. 6476 of 2005 pending against him in the Court of learned Chief Judicial Magistrate, Farrukhabad for the offences punishable under Section 306 of the Indian Penal Code, 1860(hereinafter being referred to as the 'IPC') and Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter being referred to as 'SC/ST Act').

4. The case aforesaid came to be registered on the basis of a charge-sheet filed by the investigating agency pursuant to investigation of C.C. No. 516/2002 P.S. Kotwali, District Farrukhabad.

5. The accused appellant herein was working as the District Savings Officer in Kannauj District. It is alleged that one Data Ram(deceased), posted as Senior Clerk, Child Welfare Board, Fatehgarh, committed suicide on 3rd October, 2002 by consuming a poisonous substance in his own house. The deceased wrote a suicide note before ending his life.

6. The dead body of the Data Ram was recovered lying in his house, i.e. Mohalla Gwal Toli, Fatehgarh, District-Farrukhabad. FIR No. 249/2002 came to be registered at P.S. Kotwali, Fatehgarh on the basis of the suicide note left behind by the deceased for the offences punishable under Section 306 IPC and Section 3(2)(v) of the SC/ST Act.

7. The Investigating Officer conducted the investigation and filed a closure report. Later on, investigation was re-opened and Charge-sheet No. 253 of 2002 came to be filed against the accused appellant for the offences punishable under Section 306 IPC and Section 3(2)(v) of the SC/ST Act.

8. The suicide note written by the deceased which forms the basis of the FIR and the charge-sheet is reproduced hereinbelow for the sake of ready reference: -

> "The learned District Magistrate
>
> It is hereby informed that on 1.10.2002 in night time at 8 'O' Clock, the District Savings Officer Kannauj Shri

Prabhat Mishra made telephonic call to me and even got my conversations done from Chief Development Officer, Kannauj and told that you come to Kannauj on 2.10.2002 in morning at 11 O' Clock and meet me and some information has to be prepared. On 2.10.2002, at 10 O'Clock, I went to District Social Welfare Officer for obtaining permission to go to Kannauj, then he directed me to not go to Kannauj. When, it has already been written to the District Savings Officer that you call your record, then, you do not need to go there. Thereafter, I returning back to the Office, started performing official work. In noon time at 12.30 O' Clock, the Chief Development Officer, gave me information on telephone that you leave all your work and go to Kannauj and meet the learned District Magistrate. I immediately reached Kannauj by Scooter, where, at 2:15 O' Clock, I went the bungalow of District Magistrate, where, it was told that the learned District Magistrate has departed and you please meet the District Savings Officer Prabhat Mishra, then, I went to Shri Mishra at 2:45 O' Clock, then, he continued sitting me in his Office till 5:30 O' Clock and told me that the learned District Magistrate has not sit till now and we will go from here at 5 O'clock. At 5:30 O' Clock, Shri Mishra had taken me to the Chief Development Officer Shri Shashidhar Dwivedi. Conversation of Shri Mishra had already taken place previously with CDO Sahab. The CDO Sahab asked that why the pension of 327 widows has not been distributed yet, then I replied that due to non-availability of their bank accounts, it could not have been distributed. On this, he, while using very indecent words, used odd words against me very much and that I am unable to give full particulars of above. He told me that even after my call, you did not come to me, have you become a very big governor. Further says that DM Sahab has refused to go there and thereat, he keeps filling the Officers a lot and does not want to perform work and even everything was told about Suspension and other things. Thereafter, Shri Mishra had taken me at the residence of learned District Magistrate from where, I was called at 7:30 O'clock. After making me aware about the information, the respected

> sir asked me reason for not coming to Kannauj, then, I made him aware about the situation.
>
> Sir, it is requested that I, even after the fact that the post of District Probation Officer is lying vacant, am executing, and discharging my duties diligently with honesty and full devotion. Due to non-availability of my Officers in two districts, now, it is beyond my control to perform work with two different Officers. Sir, it was told by you that to not go to Kannauj and discharge your duty of Farrukhabad smoothly, but, I was suddenly given order to go to Kannauj that you leave all the work and come to Kannauj and then, I have already sent the information on 1.10.2002, to the District Economics and Statistics Officer, Kannauj, where it was available, but, I was called only for insulting me.
>
> Even I also understand this fact that during my lifetime, duties of both the Districts will not be discharged and I will continuously grinding in between two Officers equally. So, for avoiding from the torture of Shri Prabhat Mishra and Shri Shashidhar Dwivedi, Chief Development Officer, I am sacrificing my life, so that, I, while visiting Kannauj, may not be compelled to be harassed till now, I have not been insulted and harassed by any learned District Magistrate/ Chief Development Officer, in this manner and all the Officers have appreciated my duties and work. With touching feet with respect, please forgive me. With best regards."

9. It is not in dispute that the aforesaid suicide note is the only foundation of the charge-sheet filed against the accused appellant. The accused appellant approached the High Court by filing an application under Section 482 CrPC for quashing of the chargesheet and proceedings of the criminal case registered against him. The said application was rejected vide order dated 26th July 2022 which is challenged in this appeal.

10. Mr. Pallav Shishodia, learned senior counsel appearing for the accused appellant contended that even if the allegations as set out in the suicide note are taken to be true on their face value, the same do not constitute the necessary ingredients of the offences alleged and hence, it is a fit case wherein the charge-sheet deserves to be quashed.

11. Learned senior counsel contended that from the admitted allegations as set out in the aforesaid suicide note *(supra)*, no inference can be drawn that the appellant in any manner, instigated or abetted the deceased to commit suicide. At best, what can be inferred from the suicide note *(supra)* is that the deceased was frustrated and bothered by the style of functioning of the appellant herein and of Shashidhar Dwivedi, CDO, and thus he felt that he was left with no option but to end his life. He also seems to have been bothered by the pressure of working in two districts and took the extreme step of ending his life being unable to withstand the pressure.

12. Learned senior counsel further urged that all proceedings sought to be taken against the appellant as a consequence of the charge sheet, deserve to be quashed as the same amount to an abuse of process of the Court.

13. *Per contra*, Mr. Ankit Goel, learned standing counsel for the State of Uttar Pradesh has opposed the submissions advanced by the learned senior counsel representing the accused appellant.

14. Learned counsel for the State urged that the appellant and Shashidar Dwivedi, CDO being the superior officers of the deceased, harassed and humiliated him to such an extent that he was left with no option but to end his life. The allegations set out in the suicide note constitute the necessary ingredients of abetment to commit suicide. Thus, it is not a fit case warranting interference in the well-reasoned order passed by the High Court refusing to interfere and quash the proceedings of the criminal case registered against the appellant.

15. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the material placed on record.

16. At the outset, we may take note of the fact that the prosecution of the appellant herein for the offence under Section 3(2)(v) of the SC/ST Act is ex facie illegal and unwarranted because it is nowhere the case of the prosecution in the entire charge-sheet that the offence under IPC was committed by the appellant upon the deceased on the basis of his caste.

17. This Court in the case of ***Masumsha Hasanasha Musalman v. State of Maharashtra***[1] considered this issue and held as under:-

1 [2000] 1 SCR 1155 : (2000) 3 SCC 557

> **"9.** Section 3(2)(v) of the Act provides that whoever, not being a member of a Scheduled Caste or a Scheduled Tribe, commits any offence under the Penal Code, 1860 punishable with imprisonment for a term of ten years or more against a person or property on the ground that such person is a member of a Scheduled Caste or a Scheduled Tribe or such property belongs to such member, shall be punishable with imprisonment for life and with fine. In the present case, there is no evidence at all to the effect that the appellant committed the offence alleged against him on the ground that the deceased is a member of a Scheduled Caste or a Scheduled Tribe. To attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Penal Code, 1860 is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. In that view of the matter, we think, both the trial court and the High Court missed the essence of this aspect. In these circumstances, the conviction under the aforesaid provision by the trial court as well as by the High Court ought to be set aside."

18. Thus, from the admitted allegations of the prosecution, the necessary ingredients of the offence under Section 3(2)(v) of the SC/ST Act are not made out so as to justify prosecution of the accused appellant for the said offence.

19. The parameters required to bring an act or omission by the person charged within the purview of the offence under Section 306 IPC have been elaborated by this Court time and again and a few of these judgments are quoted below for ready reference.

20. In the case of ***Netai Dutta v. State of W.B.***[2] in almost similar circumstances, this Court quashed the proceedings sought to be taken against the petitioner under Section 306 IPC. The relevant observations from the said judgment are reproduced as under:-

2 (2005) 2 SCC 659

"4. One Pranab Kumar Nag was an employee of M/s M.L. Dalmiya & Co. Ltd. During the course of his employment, he had been posted at various worksites of the Company and on 11-9-1999 he was transferred to the worksite of the Company's stores located at 160, B.L. Saha Road, Kolkata. It seems that pursuant to the transfer order, Pranab Kumar Nag did not join duty and after a period of about two years he sent in a letter of resignation written in his own hand wherein he expressed his grievance of stagnancy of salary and also alleged that he was a victim of unfortunate circumstances. The Company accepted his resignation with immediate effect. On 16-2-2001, a dead body was found at the railway tracks near Ballygunge Railway Station and it was revealed that it was the body of Pranab Kumar Nag. His brother went to the office where Pranab Kumar Nag had worked and made enquiries. The dead body of Pranab Kumar Nag was released to his brother after the post-mortem examination on 19-2-2001. After a period of two months, a complaint was lodged before the police post on the basis of a suicide note allegedly recovered from the dead body of Pranab Kumar Nag. Based on the complaint, a case was registered against the appellant and some others. A translated copy of the suicide note is produced before us by the appellant. We have carefully read the alleged suicide note. The substance of this suicide note is that deceased Pranab Kumar Nag alleged that appellant Netai Dutta and one Paramesh Chatterjee engaged him in several wrongdoings (he has shown as a type of torture) and at the end of the letter, a reference is also made to Paramesh Chatterjee and Netai Dutta alleging that he reported certain incidents to them. A reading of the letter would show that deceased Pranab Kumar Nag was not very much satisfied with the working conditions in the office. In the letter he has stated that he had to be at the workplace sometimes throughout the day and night and he had to remain in the company of some drivers who had been sometimes in drunken condition at about one o'clock or two o'clock in the night. It is also alleged that the drivers who had been present at the workplace had

been having non-vegetarian food. He also complained that he had to work even on Sundays. He further stated that one day he could leave the workplace at 8 o'clock in the evening and all the restaurants were closed and that he reported the matter to the present appellant.

5. There is absolutely no averment in the alleged suicide note that the present appellant had caused any harm to him or was in any way responsible for delay in paying salary to deceased Pranab Kumar Nag. It seems that the deceased was very much dissatisfied with the working conditions at the workplace. But, it may also be noticed that the deceased after his transfer in 1999 had never joined the office at 160, B.L. Saha Road, Kolkata and had absented himself for a period of two years and that the suicide took place on 16-2-2001. It cannot be said that the present appellant had in any way instigated the deceased to commit suicide or he was responsible for the suicide of Pranab Kumar Nag. 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.

7. Apart from the suicide note, there is no allegation made by the complainant that the appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the appellant is without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the appellant. The prosecution initiated against the appellant would only result in sheer harassment to the appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the first information report against the appellant disclosed the elements of a cognizable offence. There was absolutely no ground to proceed against the appellant herein. We find that this is a fit case where the extraordinary power under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the appellant and accordingly allow the appeal."

21. In the case of ***M. Mohan v. State represented by the Deputy Superintendent of Police***[3], this Court held as below:-

"36. We would like to deal with the concept of "abetment". Section 306 of the Code deals with "abetment of suicide" which reads as under:

"306. Abetment of suicide. —If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

37. The word "suicide" in itself is nowhere defined in the Penal Code, however, its meaning and import is well known and requires no explanation. "Sui" means "self" and "cide" means "killing", thus implying an act of self-killing. In short, a person committing suicide must commit it by himself, irrespective of the means employed by him in achieving his object of killing himself.

3 [2011] 3 SCR 437 : (2011) 3 SCC 626

38. In our country, while suicide itself is not an offence considering that the successful offender is beyond the reach of law, attempt to suicide is an offence under Section 309 IPC.

39. "Abetment of a thing" has been defined under Section 107 of the Code. We deem it appropriate to reproduce Section 107, which reads as under:

> "107.Abetment of a thing.—A person abets the doing of a thing, who—
>
> First.—Instigates any person to do that thing; or
>
> Secondly.—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, and in order to the doing of that thing; or
>
> Thirdly.—Intentionally aides, by any act or illegal omission, the doing of that thing."
>
> Explanation 2 which has been inserted along with Section 107 reads as under:
>
> Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

40. The learned counsel also placed reliance on yet another judgment of this Court in Ramesh Kumar v. State of Chhattisgarh [(2001) 9 SCC 618], in which a three- Judge Bench of this Court had an occasion to deal with the case of a similar nature. In a dispute between the husband and wife, the appellant husband uttered "you are free to do whatever you wish and go wherever you like". Thereafter, the wife of the appellant Ramesh Kumar committed suicide.

41. This Court in SCC para 20 of Ramesh Kumar [(2001) 9 SCC 618 has examined different shades of the meaning of "instigation". Para 20 reads as under: (SCC p. 629)

> "20. 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 consequence must be capable of being spelt out. The present one is not a case 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 been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.

In the said case this Court came to the conclusion that there is no evidence and material available on record wherefrom an inference of the appellantaccused having abetted commission of suicide by Seema (the appellant's wife therein) may necessarily be drawn.

42. In State of W.B. v. Orilal Jaiswal [(1994) 1 SCC 73], this Court has cautioned that (SCC p. 90, para 17) the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it appears to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and difference in domestic life, quite common to the society, to which the victim belonged and such petulance, discord and difference were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

43. This Court in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) [(2009) 16 SCC 605] had an occasion to deal with this aspect of abetment. The Court dealt with the dictionary meaning of the word "instigation" and "goading". The Court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of

self-esteem and self-respect. Therefore, it is impossible to lay down any straitjacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

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.

46. In V.P. Shrivastava v. Indian Explosives Ltd. [(2010) 10 SCC 361] this Court has held that when prima facie no case is made out against the accused, then the High Court ought to have exercised the jurisdiction under Section 482 CrPC and quashed the complaint.

47. In a recent judgment of this Court in Madan Mohan Singh v. State of Gujarat [(2010) 8 SCC 628], this Court quashed the conviction under Section 306 IPC on the ground that the allegations were irrelevant and baseless and observed that the High Court was in error in not quashing the proceedings.

48. In the instant case, what to talk of instances of instigation, there are even no allegations against the appellants. There is also no proximate link between the incident of 14-1-2005 when the deceased was denied permission to use the Qualis car with the factum of suicide which had taken place on 18-1-2005. Undoubtedly, the deceased had died because of hanging. The deceased was undoubtedly hypersensitive to ordinary petulance, discord and differences which happen in our day-to-day life. In a joint family, instances of this kind are not very uncommon. Human sensitivity of each individual differs from person to person. Each individual has his own idea of self-esteem and self-respect. Different people behave differently in the same

situation. It is unfortunate that such an episode of suicide had taken place in the family. But the question that remains to be answered is whether the appellants can be connected with that unfortunate incident in any manner?

49. On a careful perusal of the entire material on record and the law, which has been declared by this Court, we can safely arrive at the conclusion that the appellants are not even remotely connected with the offence under Section 306 IPC. It may be relevant to mention that criminal proceedings against the husband of the deceased Anandraj (A-1) and Easwari (A-3) are pending adjudication.

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62. In State of Haryana v. Bhajan Lal [1992 Supp (1) SCC 335] this Court in the backdrop of interpretation of various relevant provisions of the Code of Criminal Procedure under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent powers under Section 482 CrPC, gave the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. Thus, this Court made it clear that it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list to myriad kinds of cases wherein such power should be exercised : (SCC pp. 378-79, para 102)

"(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

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65. This Court in Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque [(2005) 1 SCC 122] observed thus : (SCC p. 128, para 8)

"8. ... It would be an abuse of process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers, court would be justified to quash any proceeding if it finds that initiation/continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence

> is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto."
>
> *****
>
> **68.** In the light of the settled legal position, in our considered opinion, the High Court was not justified in rejecting the petition filed by the appellants under Section 482 CrPC for quashing the charges under Section 306 IPC against them. The High Court ought to have quashed the proceedings so that the appellants who were not remotely connected with the offence under Section 306 IPC should not have been compelled to face the rigmaroles of a criminal trial. As a result, the charges under Section 306 IPC against the appellants are quashed."

22. It is not in dispute that the prosecution case is entirely based on the suicide note left behind by the deceased before committing suicide. On a minute perusal of the suicide note, we do not find that the contents thereof indicate any act or omission on the part of the accused appellant which could make him responsible for abetment as defined under Section 107 IPC.

23. We have minutely perused the suicide note (reproduced *supra*) which clearly shows that the deceased was frustrated on account of work pressure and was apprehensive of various random factors unconnected to his official duties. He was also feeling the pressure of working in two different districts. However, such apprehensions expressed in the suicide note, by no stretch of imagination, can be considered sufficient to attribute to the appellant, an act or omission constituting the elements of abetment to commit suicide. The facts of the case at hand are almost identical to the case of ***Netai Dutta*** *(supra)*. Thus, we have no hesitation in holding that the necessary ingredients of the offence of abetment to commit suicide are not made out from the chargesheet and hence allowing prosecution of the appellant is grossly illegal for the offences punishable under Section 306 IPC and Section 3(2)(v) of the SC/ST Act tantamounts to gross abuse of process to law.

24. It may be noted that in the first instance, the investigating agency itself proposed a closure report in the matter after conducting thorough investigation. In this background, we are of the opinion that there do not exist any justifiable ground so as to permit the prosecution of the appellant for the offences under Section 306 IPC and Section 3(2)(v) of the SC/ST Act.

25. Thus, the impugned order passed by the High Court and all proceedings sought to be taken against the appellant in the criminal case pending for the offences punishable under Section 306 IPC and Section 3(2)(v) of the SC/ST Act are hereby quashed and set aside.

26. The appeal is allowed accordingly.

27. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal allowed.

[2024] 3 S.C.R. 174 : 2024 INSC 174

Sangam Milk Producer Company Ltd.
v.
The Agricultural Market Committee & Ors.

(Civil Appeal No. 6493 of 2014)

05 March 2024

[Sudhanshu Dhulia* and S.V.N. Bhatti, JJ.]

Issue for Consideration

Whether "ghee" is a "product of livestock" under the provisions of the Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 and; whether the Government 1994 notification, which inter alia notified "ghee" as one of the products of livestock for the purpose of regulation of purchase and sale of "ghee" in all notified market areas was published after due compliance of the procedure contemplated under the provisions of the Act.

Headnotes

Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 – "Ghee" if a "product of livestock":

Held: Yes – The argument that "ghee" is not a product of livestock is baseless, and bereft of any logic – The contrary argument that "ghee" is indeed a product of livestock is logically sound – Livestock has been defined u/s.2(v) of the Act, where Cows and buffalos are the livestock – Undisputedly, "ghee" is a product of milk which is a product of the livestock – Reasoning adopted by the Full Bench of the High Court that 'Ghee' is derived out of 'milk' by undergoing a process, yet it still remains a product of livestock, for the purposes of the Act and payment of "market fee", agreed with – Further, there was nothing wrong in the 1994 notification and the challenge to the notification was rightly turned down by the Full Bench of the High Court – The argument of the appellant that the procedure given u/s.3 of the Act was not followed, is not correct – There is a basic difference between the notification which has to be made u/s.3 of the Act and the notification made subsequently u/s.4 of the Act – Majority opinion in the Full Bench concluded that procedural compliance is only necessary when there is a declaration or later a merger/de-merger of a notified area and there is no requirement of following any particular procedure

* Author

while issuing a notification u/s.4 (4) of the Act notifying/de-notifying any already notified products for the purpose of regulation by any respective Agricultural Market Committee – Thus, a prior hearing or prior publication of the draft notification is not a requirement u/s.4 of the Act, since the notification of the year 1994 is a notification u/s.4 and not of s.3 of the Act – Therefore, the argument that the process u/s.3, was not followed is totally misconceived – No prior process was required to be followed as contemplated u/s.3 of the Act for working the scheme u/s.4 of the Act – Majority decision of the High Court upheld. [Paras 10 ,11 and 14]

Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 – Issue as regards market fee – 1994 notification had an effect which made 'Ghee' a product that could be regulated under provisions of the Act, Market Committees were empowered to levy fee on the sale and purchase of 'ghee' as per s.12 of the Act:

Held: Appellants' argument that the Market Committees did not provide any facilities, rejected – Appellants availed the facility given by the Market Committee and hence are liable to pay the fee – There may also be a question of unjust enrichment here – Thus, this market fee should be paid as well – Appellants' prayer that respondent Market Committees should be restrained from collecting market fees prior to the date of the High Court Judgment not accepted. [Para 13]

Case Law Cited

Kommisetty Nammalwar & Co. Guntur v. Agricultural Market Committee, Tenali & Ors., **(2009) SCC OnLine AP 317 – approved.**

Park Leather Industry (P) Ltd. v. State of U.P., **[2001] 1 SCR 1035 : (2001) 3 SCC 135;** *Kishan Lal v. State of Rajasthan,* **[1990] 2 SCR 142 : AIR 1990 SC 2269;** *Ram Chandra Kailash Kumar v. State of U.P., :* **(1980) Supp (1) SCC 27;** *Smt. Sita Devi (Dead) by LRs. v. State of Bihar & Ors.,* **[1994] Suppl. 5 SCR 682 : (1995) Supp (1) SCC 670 – referred to.**

List of Acts

The Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966.

List of Keywords

"Ghee"; Livestock; "Product of livestock"; Agricultural Market Committee; Unjust enrichment; Market Committees; Market fee.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No.6493 of 2014

From the Judgment and Order dated 24.09.2009 of the High Court of A.P. at Hyderabad in WP No.1897 of 2007

With

C.A. Nos. 6494, 6495, 6496, 6497 and 6498 of 2014

Appearances for Parties

Ajit Bhasme, Sr. Adv., Byrapaneni Suyodhan, Ms. Nitipriya Kar, Bharat J Joshi, Kumar Shashank, Rupesh Kumar, Mukesh Kumar Pandey, Ms. Himani Bhatnagar, Sanjay Kumar Visen, Ms. Tatini Basu, Ms. Pankhuri Shrivastava, Atreya G.C., Advs. for the Appellant.

Mrs. D. Bharathi Reddy, Guntur Prabhakar, Sahil Bhalaik, Tushar Giri, Siddharth Anil Khanna, Ms. Gulshan Jahan, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sudhanshu Dhulia, J.

1. Two questions arise in these appeals for our determination. The first question is whether "ghee" is a "product of livestock" under the provisions of The Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 (hereinafter referred to as "the Act") and the second would be whether the Government notification (G.O. Ms. No.286 dated 05.07.1994), which *inter alia* notifies "ghee" as one of the products of livestock for the purpose of regulation of purchase and sale of "ghee" in all notified market areas was published after due compliance of the procedure contemplated under the provisions of the Act?

2. In the erstwhile State of Andhra Pradesh, the above Act was brought with the purpose to consolidate and amend the laws regulating the purchase and sale of agricultural produce, livestock and products of livestock, along with establishment of markets in connection

therewith. The aim was to secure effective and remunerative price of commodities by bringing producers and traders face to face thereby eliminating middlemen and do away with some other earlier unethical trade practices, which were exploiting agriculturists and farmers. In other words, it was a farmer friendly legislation. The commodities which were to be regulated were not only agricultural produce but also livestock as well as products of livestock. Whereas livestock has been defined under Section 2(v) and products of livestock has been defined under Section 2(xv). Both the Sections are reproduced below:

> *(v) **'livestock'** means cows, buffaloes, bullocks, bulls, goats and sheep, and includes poultry, fish and such other animals as may be declared by the Government by notification to be livestock for the purposes of this Act;*
> *(xv) **'products of livestock'** means such products of livestock as may be declared by the Government by notification, to be products of livestock for the purposes of this Act.*

3. Under sub-Section (1) of Section 3 of the Act, the Government has to initially publish a draft notification declaring its intention of regulating purchase and sale of proposed notified agricultural produce, livestock or products of livestock in an area. It is only after hearing objections from public, it finally publishes its notification under sub-Section (3) of Section 3 declaring the area to be a 'notified area' in respect of such agricultural produce, livestock and products of livestock. Under Sub-Section (4) of Section 3 the Government also has a power to exclude from a notified area, any area earlier included in it.

4. After a notification is made under Section 3, there comes the process of notification under Section 4 of the Act. Under Section 4 (1) of the Act, a process is given wherein the Government further notifies a market committee for every notified area. Under Sub Section (3) of Section 4, the market committee is empowered to establish markets for the purchase and sale of any notified agricultural produce, livestock or products of livestock. After the establishment of markets by the market committee under Section 4 (3), the Government declares by a notification under Section 4 (4)[1],

1 Section 4 (4) stands omitted vide the Andhra Pradesh (Agricultural Produce and Livestock) Markets (Amendment) Act, 2015.

the 'notified market area' for the purposes of the Act in respect of the notified products.

In short, the above provisions provide that first there will be a larger physical unit called "notified area" wherein the market committee shall establish markets and thereafter, through a notification u/s 4 (4), the Govt. declares a "notified market area" in respect of the notified products.

5. In the year 1968, the State of Andhra Pradesh had issued a notification u/s 3 (3) of the Act declaring "notified areas" in the State where "ghee" was included in Schedule II of the said notification as a livestock product. Thereafter, in the year 1971, a notification u/s 4 (4) was published, which declared the 'notified market areas' in respect of the respondent-committee, i.e. Agricultural Market Committee, Guntur and "ghee" was specified as a notified product. However, in 1972 the 1971 notification was amended and "ghee" was taken out of the list of notified livestock products in respect of the respondent-committee, and it remained so for a considerable period of time. We must clarify here that both these notifications i.e., notifications of 1971 & 1972 were issued u/s 4 (4) of the Act and not u/s 3 (3) of the Act.

6. Later, on 15.07.1994, the Govt of A.P. published a general notification directing all the notified markets within the State of AP to regulate all the products notified in Schedule II of the 1968 Notification, which also included Ghee.

7. It is this notification of the year 1994 which came to be challenged by the producers of livestock products and which has now before us for determination. This notification was challenged before the Andhra Pradesh High Court on two grounds. The first challenge was that "ghee" is not a "product of livestock" and therefore cannot be regulated and notified. The second ground for challenge was that there is a procedure which is laid down under the law, mainly under Section 3 of the Act which prescribes the process i.e., first a draft notification has to be published, objections are invited against the notification and only after hearing such objections can this notification be made. It was contended that this process has not been followed and therefore the notification is bad.

8. This matter ultimately went to a Full Bench of the Andhra Pradesh High Court in Writ Petition No. 24818 of 2008 titled ***Kommisetty***

Nammalwar & Co. Guntur v. Agricultural Market Committee, Tenali & Ors. (2009) SCC OnLine AP 317 and by a 2:1 majority, the Andhra Pradesh High Court rejected the argument of the appellants and upheld the notification of the year 1994, holding that the notification under challenge is not under Section 3 but under Section 4 of the Act, and is valid and moreover "ghee" is a livestock product. Based on the said judgment the Writ Petitions filed by the appellants in Civil Appeal Nos. 6493 of 2014 (M/s Guntur District Milk Production[2]), 6494 of 2014 (M/s. Lakshmi Das Premji Ghee Merchants), 6496 of 2014 (M/s Durga Dairy Ltd.), 6497 of 2014 (The Krishna District Milk Producers Co-operative Union Ltd., Vijaywada) & 6498 of 2014 (M/s. Karnataka Co-operative Milk Producers Federation Limited) were also dismissed by the Andhra Pradesh High Court. The decision of the Full Bench in ***Kommisetty Nammalwar*** (supra) upholding the validity of the 1994 notification is also under challenge before us in C.A No.6495 of 2014.

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

10. The argument that "ghee" is not a product of livestock is baseless, and bereft of any logic. The contrary argument that "ghee" is indeed a product of livestock is logically sound. Livestock has been defined under Section 2(v) of the Act, where Cows and buffalos are the livestock. Undisputedly, "ghee" is a product of milk which is a product of the livestock. The majority opinion of the Full Bench decision in ***Kommisetty Nammalwar*** (supra) while referring to the judgments of this Court in ***Park Leather Industry (P) Ltd. v. State of U.P. (2001) 3 SCC 135; Kishan Lal v. State of Rajasthan, AIR 1990 SC 2269; Ram Chandra Kailash Kumar*** *v.* ***State of U.P. 1980 Supp (1) SCC 27*** *and* ***Smt. Sita Devi (Dead) by LRs. v. State of Bihar & Ors. (1995) Supp (1) SCC 670*** held that all animal husbandry products would fall within the meaning of 'products of livestock' as defined under Section 2 (xv) of the Act. Further, the majority decision has also held that the inclusion of "ghee" as a livestock product cannot be faulted merely because it is derived from another dairy product. It was observed by the High Court that even though "ghee" is not directly obtained from milk, which is a product of livestock, it would

2 Vide Order dated 02.01.2024 passed by this Court in IA No.241663 of 2023 in CA No.6493 of 2014 name of appellant is amended as Sangam Milk Producer Company Ltd.

still be a "*product of a product of livestock"*. The relevant portion of the judgment of the High Court is as under:

> *"Scientifically or common sense point of view, even though ghee is not directly obtained from milk (which is certainly a product of cow/buffalo), it is certainly a product of a product of livestock i.e., cow or buffalo. It would be rather illogical or irrational to say that ghee is not a milk/dairy product or to say that it is not a product of livestock. Ghee is certainly a product of livestock. It is, therefore, to be seen whether ghee comes within the definition of product of livestock or within the meaning of notified product of livestock. Section 2(x) and 2(xv) of the Act used the plural 'products of livestock'. The legislative intention is very clear that not only a product of livestock like milk (when notified by the Government), butter etc., are products of livestock but even derivative items (derived from a product of livestock) are intended to be product of livestock for the purpose of the Act. We are convinced that the term 'ghee' has to be interpreted on the basis of expression 'products of livestock' as defined in Section 2(xv) of the Act. Whatever products are declared as such by the Government by notification, they become products of livestock for purposes of the Act."*

Another case of which a reference must be made here is the decision taken by this Court in ***Park Leather Industry (P) LTD. v. State of U.P. and Others* (2001) 3 SCC 135.** In this case, the Supreme Court was dealing with the provisions of U.P. Krishi Utpadan Mandi Adhiniyam, 1964, which has a provision dealing with similar issues as are there before this Court. In the U.P. Act, "agricultural produce" was widely defined and it included *inter alia* produce of animal husbandry which were specified in the schedule. In the schedule, one of the items was prescribed under the head "animal husbandry products" was "hides and skins". The question was whether tanned leather would come within the term "hides and skins" or not? This Court held that the term "tanned leather" can be included under "hides and skins", for the purposes of the Act and more importantly for the purposes of payment of "market fee". The reason being that although while making a leather into "tanned leather" a process of cleaning, curing and adding preservatives may be adopted, yet the finished product which is "tanned leather" though different in physical appearance or

even chemical combination and even commercially a different item still remains "leather" and would come under the definition of "hides and skins". The same reasoning has been adopted by the Full Bench of Andhra Pradesh High Court that 'Ghee' is derived out of 'milk' by undergoing a process, yet it still remains a product of livestock, for the purposes of the Act and payment of "market fee".

We are absolutely in agreement with the above reasoning.

11. The second argument of the appellant that the procedure given under Section 3 of the Act has not been followed, is also not correct. There is a basic difference between the notification which has to be made under Section 3 of the Act and the notification which has to be made subsequently under Section 4 of the Act. What has to be done under Section 3 is a one-time measure where the Government notifies an area where purchase and sale of agricultural produce, livestock and products of livestock can be made. This is a one-time exercise. What happens under Section 4 of the Act is that the Govt. declares the 'notified market area' in respect of any notified product (products which have already been notified under section 3 of the Act). A perusal of Sections 3 and 4 of the Act clearly shows that whereas a draft notification is mandatory under Section 3 and so is the hearing of objections to the draft notification, there is no similar provision under Section 4 of the Act.

The two Sections of the Act Section 3 and Section 4 are being reproduced below for a comparative analysis :

Section 3	Section 4
3. Declaration of notified area :–	**4. Constitution of Market Committee and declaration of notified market area :-**
(1) The Government may publish in such manner as may be prescribed a draft notification declaring their intention of regulating the purchase and sale of such agricultural produce, livestock or products of livestock in such area as may be specified in such notification.	(1) The Government shall constitute, by notification, a market committee for every notified area from such date as may be specified in the notification and the market committee so constituted shall be a body corporate by such name as the Government may specify in the said notification, having perpetual succession and a common seal with power to acquire, hold and dispose of property and may, by its corporate name, sue and be sued:

(2) Such notification shall state that any objections or suggestions which may be received by the Government from any person within a period to be specified therein will be considered by them.

(3) After the expiration of the period specified in the draft notification and after considering such objections and suggestions as may be received before such expiration, the Government may publish in such manner as may be prescribed a final notification declaring the area specified in the draft notification or any portion thereof, to be a notified area for the purposes of this Act in respect of any agricultural produce, livestock and products of livestock specified in the draft notification.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the Government may, by notification –

(a) exclude from a notified area, any area comprised therein; or

(b) include in any notified area, any area specified in such notification; or

(c) declare a new notified area by separation of area from any notified area or by uniting two or more notified areas or parts thereof or by uniting any area to a part of any notified area;

Provided that where, as result of declaration of a new notified area under this clause, the entire area comprised in an existing notified area is united to one or more notified areas, the said existing notified are shall stand abolished.

Provided that any market committee functioning immediately before such constitution in respect of a notified area abolished under the proviso to clause(c) of sub-section (4) of section 3 shall stand abolished.

(1-A) Any notification made under sub-section (1) for the constitution of a new market committee in respect of any new notified are declared under clause (c) of sub-section (4) of section 3, may contain such supplemental, incidental and consequential provisions, including provisions as to the composition of the new market committee or new and existing market committees and the apportionment of the assets and liabilities between the market committees affected thereby].

[(1-B) Notwithstanding anything contained in Section 3 and in sub-section (1) and (1-A) of Section 4 of the Act, the Government, may, by notification, also constitution a separate market committee to a special market in a notified area.]

(2) It shall be the duty of the market committee to enforce the provisions of this Act and rules and bye-laws made thereunder in the notified area

(3) (a) Every market committee shall establish in the notified area excluding the scheduled areas such number of markets as the Government may, from time to time, direct for the purchase and sale of any notified agricultural produce, livestock or products of livestock and shall provide such facilities in the market as may be specified by the Government, from time to time, by a general or special order.

	(b) Every market committee shall also establish in the notified area such number of markets as the Government may, from time to time, direct for the purchase and sale, solely of vegetables or fruits and shall provide such facilities in the market as may be specified by the Government, from time to time, by a general or special order. [(bb) Every market committee may also establish in the notified area such number of special market as the Government may from time to time direct for the purchase and sale of any notified agricultural produce, livestock or products of livestock or fruits and vegetable and may provide such facilities in the special market as may be specified by the Government from time to time, by a general or special order.] [(bbb) Every Market Committee may also declare in the notified area any warehouse or cold storage or processing unit or any other place as a market by following the procedure as may be prescribed.][3] [(c) The Market Committee shall specify the limits of every market established or declared as a market by it and the Government may notify the market with such limits, to be notified market area for the purposes of this Act.][4]

3 Added by the Andhra Pradesh (Agricultural Produce and Livestock) Markets (Amendment) Act, 2015.

4 Subs. by *Ibid.*

	[(4) As soon as may be after the establishment of a market under sub-section (3), the Government shall declare by the notification the market area such other area adjoining thereto as may be specified in the notification, to be notified market area for the purpose of this Act in respect of any notified agricultural produce, livestock or products of livestock. (5) Subject to the provisions of sub-sections (1), (2),(3) and (4), the Government may, by notification – (a) exclude from a notified market area, any area comprised therein; or (b) include in any notified market area, any area specified in such notification.][5]

After discussing provisions of Sections 3 & 4 of the Act, the majority opinion in the Full Bench concluded that procedural compliance is only necessary when there is a declaration or later a merger/de-merger of a notified area and there is no requirement of following any particular procedure while issuing a notification under Section 4 (4) of the Act notifying/de-notifying any already notified products for the purpose of regulation by any respective Agricultural Market Committee (AMC). In other words, a prior hearing or prior publication of the draft notification is not a requirement under Section 4 of the Act, since the notification of the year 1994 is a notification under Section 4 and not of Section 3 of the Act. Therefore, the argument that the process under Section 3, has not been followed is totally misconceived. No prior process was required to be followed as contemplated under Section 3 of the Act for working the scheme under Section 4 of the Act. Consequently, we hold that there was nothing wrong in the 1994 notification and the challenge to the notification has rightly been turned down by the Full Bench of the Andhra Pradesh High Court.

5 Omitted vide the Andhra Pradesh (Agricultural Produce and Livestock) Markets (Amendment) Act, 2015.

12. We are now left with one more issue related to the market fee. Since the 1994 notification had an effect which made 'Ghee' a product that could be regulated under provisions of the Act, Market Committees were empowered to levy fee on the sale and purchase of 'ghee' as per section 12 of the Act. During the pendency of the matter before the High Court, the appellants were not required to pay market fee as they were granted interim protection by the High Court. After the majority decision of the High Court in **Kommissetty Nammalwar (Supra**), market committees started issuing demand notices to the producers of 'Ghee' asking them to pay fees from the date of the notification in the year 1994 to the date of the High Court judgment i.e. 01.05.2009. This issue was also raised by appellants in the present appeals and it was prayed that they should be exempted from paying the fee to the market committees prior to the High Court judgment. This Court while issuing the notices in present matters, vide interim order, restrained market committees from collecting the market fees for the period prior to the High Court judgment. Even some of the present appeals were heard on this limited question.

13. As per section 4(2) of the Act, the Market Committee has the duty to enforce the provisions of the Act within a notified area. Section 4(3), which empowers Market Committees to establish markets within the notified area, also directs that these Market Committees have to provide facilities in the markets for the purchase and sale of notified products. Appellants' argument that these Market Committees did not provide any facilities has already been dealt with and rejected by the High Court and we are also of the same view as that taken by the High Court. The appellants have availed the facility given by the Market Committee and hence they are liable to pay the fee. There may also be a question of unjust enrichment here. For all these reasons, we are of the opinion that this market fee should be paid as well. The appellants' prayer that Respondent Market Committees should be restrained from collecting market fees prior to the date of the High Court Judgment cannot be accepted. All the same, since this fee which has now accumulated for more than 14 years between 05.07.1994 to 01.05.2009 may entail some hardship on the appellants, they shall be permitted to deposit this fee with the Committee within two years from today, in four equal instalments.

14. Consequently, we dismiss these appeals and uphold the majority decision of the Andhra Pradesh High Court. The interim orders

passed by this Court in the present batch of cases where we had restrained the respondents from collecting market fees prior to the date of the High Court judgment during the pendency of these appeals, stand vacated.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeals dismissed.

[2024] 3 S.C.R. 187 : 2024 INSC 178

In Re : T.N. Godavarman Thirumulpad
v.
Union of India & Ors.
In Re : Gaurav Kumar Bansal

I.A. No.20650 of 2023
In
Writ Petition (Civil) No.202 Of 1995

06 March 2024

[B.R. Gavai,* Prashant Kumar Mishra and Sandeep Mehta, JJ.]

Issue for Consideration

The issues were : (i) Whether Tiger Safaris and Zoos are on the same footing; (ii) Whether establishment of a 'Tiger Safari' at Pakhrau in Corbett Tiger reserve was legal; (iii) Illegal construction in Corbett Tiger reserve and illegal felling of trees for the said purpose; (iv) 'Public Trust' Doctrine and (v) Principle of Ecological Restitution.

Headnotes

Wildlife Protection – 'Tiger Reserve' – Management and protection of – Whether 'zoo' as defined u/s.2(39) and dealt with under Chapter IVA of the Wild Life (Protection) Act, 1972 and 'Tiger Safaris' as conceptualized by the National Tiger Conservation Authority (NTCA) would stand on a same footing – 'Tiger Safari', if permissible in buffer / fringe areas of Tiger reserve – Establishment of 'Tiger Safari' at Pakhrau in Corbett Tiger Reserve – Legality of – NTCA guidelines for Normative Standards for Tourism Activities and for Project Tiger for tiger conservation in the buffer and core areas of the tiger reserves, 2012 – NTCA Guidelines to Establish Tiger Safaris in Buffer and Fringe Areas of the Tiger Reserves, 2016 – NTCA Guidelines to Establish Tiger Safaris in Buffer and Fringe Areas of the Tiger Reserves, 2019 – Wild Life (Protection) Act, 1972 – National Tiger Conservation Authority (NTCA) guidelines for preparation of Tiger Conservation Plan (TCP), 2007 – National Wildlife Action Plan, 2017-2031 – National Forest Policy, 1988.

Held: 1.1. The definition of 'zoo' as defined under s.2(39) of the Wild Life (Protection) Act, 1972 (WLP Act) itself would show that

* Author

it is meant to be an establishment, whether stationary or mobile, where captive animals are kept for exhibiting to the public or ex-situ conservation and include a circus and off-exhibit facilities such as rescue centres and conservation breeding centres – However, it does not include the establishment of a licensed dealer in captive animals – Though a 'zoo' as contemplated under Chapter IVA of the WLP Act also deals with conservation, it emphasizes on ex-situ conservation – Insofar as area covered under a sanctuary is concerned, a safari cannot be constructed within the said area unless there is a prior approval of the National Board of Wildlife – 'Tiger Safaris' conceptualized by the NTCA are not for the parks which are working either as zoos or as an extension to zoos. [Paras 79, 80, 83]

1.2. Prima facie, there is no infirmity in the guidelines issued by the NTCA, i.e., the 2012 Guidelines and the 2016 Guidelines for establishing the 'Tiger Safaris' in the buffer and fringe areas of the 'Tiger Reserve' – The said Guidelines emphasizes on the rehabilitation of injured tigers (after suitable treatment), conflict tigers, and orphaned tiger cubs which are unfit for rewilding and release into the wild – However, the 2019 Guidelines, departing from the aforesaid purpose, provide for sourcing of animals from zoos in the Tiger Safaris – This would be totally contrary to the purpose of the Tiger Conservation – Although it will not be permissible to establish a 'Tiger Safari' in a core or critical tiger habitat area without obtaining the prior approval of the National Board, such an activity would be permissible in the buffer or peripheral area – However, such a 'safari' can be established only for the purposes specified in clause 9 of the 2016 Guidelines and not as per the 2019 Guidelines. [Paras 100, 101, 103]

1.3 On facts, the concerned authorities, who have expertise in the matter, have approved the said site at Pakhrau – In the peculiar facts, this Court is inclined to approve the establishment of the 'Tiger Safari' at Pakhrau. [Paras 113 and 114]

1.4. Presence of a Tiger in the forest is an indicator of the well-being of the ecosystem – Unless steps are taken for the protection of the Tigers, the ecosystem revolving around Tigers cannot be protected – The events like illegal constructions and illicit felling of trees on a rampant scale like the one that happened in the Corbett National Park cannot be ignored – Steps are required to prevent this – Courts are not experts in the field – It will be appropriate that

experts in the field come together and come out with a solution that would go a long way in the effective management and protection of the Tiger Reserves. [Para 160]

1.5. The following directions need to be issued in the interests of justice :

A. The Safaris which are already existing and the one under construction at Pakhrau will not be disturbed. However, insofar as the Safari at 'Pakhrau' is concerned, the State of Uttarakhand is directed to relocate or establish a rescue centre in the vicinity of the 'Tiger Safari'. The directions which would be issued by this Court with regard to establishment and maintenance of the 'Tiger Safaris' upon receipt of the recommendations of the Committee which is being directed to be appointed would also be applicable to the existing Safaris including the Safari to be established at Pakhrau.

B. The Ministry of Environment, Forest and Climate Change (MoEF&CC) shall appoint a Committee consisting of the following : (i) a representative of the NTCA; (ii) a representative of the Wildlife Institute of India (WII); (iii) a representative of the Central Empowered Committee (CEC); and (iv) an officer of the MoEF&CC not below the rank of Joint Secretary as its Member Secretary. The Committee would be entitled to co-opt any other authority including a representative of Central Zoo Authority (CZA) and also take the services of the experts in the field, if found necessary.

C. The said Committee will : (i) recommend the measures for restoration of the damages, in the local *in situ* environment to its original state before the damage was caused; (ii) assess the environmental damage caused in the Corbett Tiger Reserve (CTR) and quantify the costs for restoration; (iii) identify the persons/officials responsible for such a damage. The State shall recover the cost so quantified from the persons/ delinquent officers found responsible for the same. The cost so recovered shall be exclusively used for the purpose of restoration of the damage caused to the environment; and (iv) specify how the funds so collected be utilized for active restoration of ecological damage.

D. The aforesaid Committee, inter alia, shall consider and recommend :

(i) The question as to whether Tiger Safaris shall be permitted in the buffer area or fringe area;

(ii) If such Safaris can be permitted, then what should be the guidelines for establishing such Safaris?

(iii) While considering the aforesaid aspect, the Committee shall take into consideration the following factors :

a) the approach must be of ecocentrism and not of anthropocentrism;

b) the precautionary principle must be applied to ensure that the least amount of environmental damage is caused;

c) the animals sourced shall not be from outside the Tiger Reserve. Only injured, conflicted, or orphaned tigers may be exhibited as per the 2016 Guidelines. To that extent the contrary provisions in the 2019 Guidelines stand quashed;

d) That such Safaris should be proximate to the Rescue Centres. The aforesaid factors are only some of the factors to be taken into consideration and the Committee would always be at liberty to take such other factors into consideration as it deems fit.

(iv) The type of activities that should be permitted and prohibited in the buffer zone and fringe areas of the Tiger Reserve. While doing so, if tourism is to be promoted, it has to be ecotourism. The type of construction that should be permissible in such resorts would be in tune with the natural environment.

(v) The number and type of resorts that should be permitted within the close proximity of the protected areas. What restriction to be imposed on such resorts so that they are managed in tune with the object of protecting and maintaining the ecosystem rather than causing obstruction in the same.

(vi) As to within how much areas from the boundary of the protected forest there should be restriction on noise level and what should be those permissible noise levels.

(vii) The measures that are required to be taken for effective management and protection of Tiger Reserves which shall be applicable on a Pan India basis.

(viii) The steps to be taken for scrupulously implementing such recommendations.

E. The CBI is directed to effectively investigate the matter as directed by the High Court of Uttarakhand at Nainital in its judgment and order dated 6th September 2023, passed in Writ Petition No.178 of 2021.

F. The present proceedings shall be kept pending so that this Court can monitor the steps taken by the Authorities as well as the investigation conducted by the CBI.

G. This Court will consider issuing appropriate directions after the recommendations are received by this Court from the aforesaid Committee. The Committee is requested to give its preliminary report within a period of three months from today.

H. The CBI shall submit a report to this Court within a period of three months from today.

I. The State of Uttarakhand is directed to complete the disciplinary proceedings against the delinquent officers as expeditiously as possible and in any case, within a period of six months from today. The status report in this regard shall be submitted to this Court within a period of three months from today. [Para 161]

Wild Life (Protection) Act, 1972 – Enactment of – Purpose.

Held: The enactment of the WLP Act was necessitated since it was noticed that there was rapid decline of India's wild animals and birds, which was one of the richest and most varied in the world – The Wild Birds and Animals Protection Act, 1912 had become completely outmoded – The existing State laws were not only outdated but provided punishments that were not commensurate with the offence and the financial benefits which accrue from poaching and trade in wildlife produce – However, since the subject matters were relatable to Entry 20 of the State list in the Seventh Schedule to the Constitution of India, the Parliament had no power to make a law unless the Legislatures of two or more States passed a resolution in pursuance of Article 252 of the Constitution – Accordingly, 11 States had passed resolutions to that effect – In this background, the WLP Act came to be enacted – The entire emphasis of the WLP Act is on the conservation, protection, and management of wildlife. [Paras 9, 10, 46]

Environment – Environmental justice – Need to drift away from anthropocentrism principle to ecocentrism principle.

Held: The approach has to be ecocentric and not anthropocentric – The approach has to be nature-centred where humans are a part of nature and non-humans have intrinsic value – National Wildlife Action Plan 2002-2012 and the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 are centred on the principle of ecocentrism. [Para 69, 91]

Environment – Environmental and ecological protection – Principle of sustainable development – Discussed. [Para 77]

Environment – 'Public Trust' doctrine – Importance of, in environmental and ecological matters – Discussed. [Para 134, 135, 136, 138]

Environment – Forest – Restoration of the damaged ecological system – Role of the State – Principle of Ecological Restitution – Discussed – Convention on Biological Diversity, 1992.

Held : Worldwide as well as in our jurisprudence, the law has developed and evolved emphasizing on the restoration of the damaged ecological system – A reversal of environmental damage in conformity with the principle under Article 8(f) of the Convention on Biological Diversity, 1992 (CBD) is what is required – The focus has to be on restoration of the ecosystem as close and similar as possible to the specific one that was damaged – Bringing the culprits to face the proceedings is a different matter and restoration of the damage already done is a different matter – The State cannot run away from its responsibilities to restore the damage done to the forest – The State, apart from preventing such acts in the future, should take immediate steps for restoration of the damage already done; undertake an exercise for determining the valuation of the damage done and recover it from the persons found responsible for causing such a damage. [Paras 156, 157 and 158]

Case Law Cited

T.N. Godavarman Thirumulpad v. Union of India and others **[2012] 3 SCR 460 : (2012) 3 SCC 277 : 2012 INSC 87;** *Centre for Environmental Law, World Wide Fund-India v. Union of India and others* **[2013] 6 SCR**

757 : (2013) 8 SCC 234 : 2013 INSC 254; *Vellore Citizens' Welfare Forum v. Union of India and others* **[1996] Supp. 5 SCR 241 : (1996) 5 SCC 647 : 1996 INSC 952;** *Intellectuals Forum, Tirupathi v. State of A.P. and others* **[2006] 2 SCR 419 : (2006) 3 SCC 549 : 2006 INSC 101;** *Indian Council for Enviro-Legal Action v. Union of India and others* **[1996] Supp. 1 SCR 507 : (1996) 5 SCC 281 : 1996 INSC 543;** *Resident's Welfare Association and another v. Union Territory of Chandigarh and others* **[2023] 1 SCR 601 : (2023) 8 SCC 643 : 2023 INSC 22;** *State of Himachal Pradesh and others v. Yogendera Mohan Sengupta and another* **[2024] 1 SCR 973 : 2024 INSC 30;** *State of Uttar Pradesh and others v. Uday Education and Welfare Trust and others* **[2022] 19 SCR 781 : 2022 SCC OnLine SC 1469 : 2022 INSC 465;** *M.C. Mehta v. Kamal Nath and others* **[1996] Supp. 10 SCR 12 : (1997) 1 SCC 388 : 1996 INSC 1482;** *Association for Environment Protection v. State of Kerala and others* **[2013] 7 SCR 352 : (2013) 7 SCC 226 : 2013 INSC 413;** *Tata Housing Development Company Limited v. Aalok Jagga and others* **[2019] 13 SCR 577 : (2020) 15 SCC 784 : 2019 INSC 1203;** *Indian Council for Enviro-Legal Action and others v. Union of India and others* **[1996] 2 SCR 503 : (1996) 3 SCC 212 : 1996 INSC 237;** *S. Jagannath v. Union of India and others* **[1996] Supp. 9 SCR 848 : (1997) 2 SCC 87 : 1996 INSC 1466 – relied on.**

Costa Rica v. Nicaragua [Certain Activities Carried Out by Nicaragua in the Border Area, Compensation Judgment] (2018) I.C.J. Reports 15; The Factory at Chorzow (Germany v. Poland), 13 September 1928, PCIJ, Merits, p. 47 – referred to.

List of Acts

Wild Life (Protection) Act, 1972; Forest (Conservation) Act, 1980; National Tiger Conservation Authority (NTCA) guidelines for preparation of Tiger Conservation Plan (TCP), 2007; NTCA guidelines for Normative Standards for Tourism Activities and for Project Tiger for tiger conservation in the buffer and core areas of the tiger reserves, 2012; NTCA Guidelines to Establish Tiger

Safaris in Buffer and Fringe Areas of the Tiger Reserves, 2016; NTCA Guidelines to Establish Tiger Safaris in Buffer and Fringe Areas of the Tiger Reserves, 2019; National Wildlife Action Plan; National Forest Policy, 1988; Wild Birds and Animals Protection Act, 1912; Constitution of India; Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009; Convention on Biological Diversity, 1992.

List of Keywords

Tiger; Safari; Zoo; Reserve; Illegal; Construction; Trees; Restitution; Wildlife; Conservation; Authority; Buffer; Fringe; Guideline; ex-situ; Rescue; Board; Forest; Ecosystem; Corbett; National; Park; Pakhrau; Committee; Ministry; Institute; Committee; Damage; Environment; Ecocentrism; Anthropocentrism; Precautionary; Recommendation; Disciplinary; Delinquent; Justice; Protection; Sustainable; Development; Public Trust; Doctrine; State; Principle; Biological; Diversity

Case Arising From

CIVIL ORIGINAL JURISDICTION : I.A. No.20650 Of 2023

In

Writ Petition (Civil) No.202 of 1995

(Under Article 32 of The Constitution of India)

Appearances for Parties

A.D.N. Rao, Harish N. Salve, Ms. Aparajita Singh, Sr. Advs. [A.Cs.], Siddhartha Chowdhury, K. Parameshwar, [A.Cs.], M.V. Mukunda, Ms. Kanti, Ms. Aarti Gupta, Chinmay Kalgaonkar, Ms. Raji Gururaj, Advs.

Tushar Mehta, SG, Ms. Aishwarya Bhati, A.S.G., Ms. Archana Pathak Dave, A.N.S. Nadkarni, Sr. Advs., Ms. Shagun Thakur, Ms. Manisha Chava, Gurmeet Singh Makker, Ms. Suhashini Sen, S. S. Rebello, Shyam Gopal, Raghav Sharma, Sughosh Subramanyam, Ms. Ruchi Kohli, Atul Sharma, Salvador Santosh Rebello, Ms. Deepti Arya, Ms. Arzu Paul, Siddhant Gupta, Ms. Manisha Gupta, Rishikesh Haridas, Abhishek Atrey, Ms. Vidyottma Jha, Ms. Deepanwita Priyanka, Dr. Abhishek Atrey, Ms. Aruna Gupta, Ramesh Allanki, Syed Ahmad Naqvi, Advs. for the appearing parties.

Petitioner/Applicant-in-person.

In Re: T.N. Godavarman Thirumulpad v. Union of India & Ors.
In Re: Gaurav Kumar Bansal

Judgment / Order of the Supreme Court

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ABBREVIATIONS

CBD	:	Convention on Biological Diversity, 1992
CBI	:	Central Bureau of Investigation
CEC	:	Central Empowered Committee
CZA	:	Central Zoo Authority
DFO	:	Divisional Forest Officer
ERC	:	Elephant Rehabilitation/Rescue Centres
ESZ	:	Eco Sensitive Zone
FAC	:	Forest Advisory Committee
FC	:	Forest Clearance
FC Act	:	Forest (Conservation) Act,1980
FSI	:	Forest Survey of India

* Ed Note : Pagination as per original judgment.

HoFF	:	Head of Forest Forces
IFS	:	Indian Forest Service
IFSR	:	India State of Forest Report
MDF	:	Moderate Dense Forest
MoEF&CC	:	Ministry of Environment, Forest and Climate Change
NPV	:	Net Present Value
NTCA	:	National Tiger Conservation Authority
OF	:	Open Forest
PCCF	:	Principal Chief Conservator of Forests
SC, NBWL	:	Standing Committee of National Board for Wild Life
SOP	:	Standard Operating Procedure
sq.km.	:	square kilometer
TCP	:	Tiger Conservation Plan ("TCP
VDF	:	Very Dense Forest
WII	:	Wildlife Institute of India
WLP Act	:	Wild Life (Protection) Act, 1972

Judgment

B.R. Gavai, J.

"The tiger perishes without the forest and the forest perishes without its tigers. Therefore, the tiger should stand guard over the forest and the forest should protect all its tigers."

This is how the importance of the tigers in the ecosystem has been succinctly described in 'Mahabharta'. The existence of the forest is necessary for the protection of tigers. In turn, if the tiger is protected, the ecosystem which revolves around him is also protected. The tiger represents the apex of the animal pyramid and the protection of their habitat must be a priority. "A healthy tiger population is an indicator of sustainable development in the 13 tiger range countries"[1].

1 Midori Paxton

In spite of such an importance given to the tiger and many statutory provisions enacted for the conservation and protection of the tiger, the present case depicts a sorry state of affairs as to how human greed has led to devastating one of the most celebrated abodes of tigers i.e. the Corbett Tiger Reserve.

When we consider this issue, it will also be apposite to refer to the restoration experiment at the Yellowstone National Park of the United States of America.

The impact of the absence of carnivores in a forest and the regenerative effect on their re-introduction was witnessed in the recent past in the famous Yellowstone National Park.

Wolves were hunted down by the mankind and the last recorded wolf in the park was shot down by a park ranger in the year 1926. Resultantly, owing to lack of apex predators in the park, the population of deer and other herbivores rose significantly. Efforts made by humans to control the herbivore population proved unsuccessful and resultantly these animals grazed away the vegetation which had the cascading effect of soil erosion and depletion of forest. As an ambitious restoration experiment, the scientists re-introduced a pack of wolves in the Yellowstone National Park in the year 1995.

Once the wolves arrived, even though few in number, the same had remarkable effects. The obvious outcome of such reintroduction was the reduction in the population of deer; but even more significantly, the wolves changed the behaviour of the deer which started avoiding certain parts of the park, particularly the valleys and gorges. This resulted in regeneration of the flora of the national park and an increase in the height of trees which quintupled in mere six years. The valley sides quickly became forests of aspen and willow and cottonwood. Consequently, the birds started migrating to the Yellowstone National Park, sparking an increase in migratory and songbirds. The population of beavers increased and like the wolves, they too are ecosystem engineers who built natural dams in the rivers, creating habitat for otters, muskrats, ducks, fishes, reptiles and amphibians.

The wolves hunted the coyotes as well, which resulted in the rise of rabbits and mice, enticing more hawks, weasels and foxes. The ravens and eagles came down to feed on the carrion

left by the wolves. The regeneration of shrubs also aided in the growth of bears, who mostly fed on berries and the carrion. The bears also reinforced the impact of the wolves by killing deer. Most interestingly, the experiment of reintroduction of the wolves helped in stabilising the water banks and fixing the course of rivers. There was reduction in soil erosion due to recovery of the valley and the vegetation. So, a small number of wolves left an indelible mark in the transformation of the first national park of the world, the Yellowstone National Park and its physical geography within a short period of around 20 years. This kind of regenerative effect cannot even be thought of by human efforts whatever the magnitude be thereof.

Looking at the empirical evidence of the impact of carnivores in maintaining the ecosystem of forests, the efforts of tiger conservation in the Jim Corbett National Park, an iconic National Park of this country is imperative and of utmost importance.

I. BACKGROUND

1. The background leading to the present proceedings, in brief, is thus :

1.1 Mr. Gaurav Kumar Bansal, who has intervened in the present proceedings, had approached the Delhi High Court by filing W.P. (C) No. 8729 of 2021 and CM Application No. 27181 of 2021, alleging therein that illegal construction of bridges and walls within the Tiger Breeding Habitat of Corbett Tiger Reserve and that too, without the approval from the Competent Authority were being carried out. He had sought intervention of the Court to protect and conserve the Biological Diversity, flora and fauna as well as the ecology of the Corbett National Park.

1.2 The Delhi High Court vide its judgment dated 23rd August 2021, disposed of the said petition observing thus :

> "We have heard the Petitioner. Looking to the averments in the writ petition and the provisions of the Wildlife Protection Act, 1972, more particularly, Section 38(O)(b) thereof, we deem it appropriate, at this stage, to direct the Respondent to treat this writ petition as a Representation and look into the issues flagged and highlighted by the Petitioner. Needless to state that in case the Respondent finds merit in the issues raised, necessary action shall be taken by

the Respondent, in accordance with law, keeping in mind the provisions of the Wildlife Protection Act, 1972 and the necessity of conserving the flora and fauna as well as the ecology of the National Park. For the purpose of taking a decision and consequential action, if any, it is open to the Respondent to call for an inspection report, in order to verify the factual status with respect to the allegations made in the writ petition. The exercise shall be carried out by the Respondent as expeditiously as possible and practicable."

1.3 The Division Bench of the High Court of Uttarakhand at Nainital, noticing a news published in "Times of India", vide its order dated 27th October 2021, in Writ Petition (PIL) No. 178 of 2021, took *suo motu* cognizance of the illegal construction activities being undertaken by unknown persons. It will be relevant to refer to the said order, which reads thus :

"A news item has appeared in the "Times of India" newspaper, dated 23.10.2021, regarding the illegal construction activities being undertaken by unknown persons, which are clearly in violation of the Forest Laws. The said illegal construction activities are being undertaken in the Corbett Tiger Reserve, one of the premier Tiger Reserves of the country.

2. According to the said article, a Committee of the National Tiger Conservation Authority ("NTCA" for short) had recently visited the Corbett Tiger Reserve. The Committee discovered not only illegal construction of bridges and buildings, but even the felling of trees. The Committee further noted that there has been violation of the provisions of the Wildlife (Protection) Act, 1972, the Forest (Conservation) Act, 1980, as well as the Indian Forest Act, 1927. Surprisingly, a single lane road is being constructed in the core/critical habitat of the Corbett Tiger Reserve. Despite the fact that the Committee has recommended that all illegal constructions in Morghatti and Pakhrau FRH campuses be demolished, and eco-restoration work be undertaken

with immediate effect, no concrete steps have been taken by the respondents.

3. Moreover, despite the fact that the Committee recommended that the Ministry of Environment should initiate action against the responsible officers, as per the provisions contained in the Forest (Conservation) Act, 1980, not even initial steps have been taken even by the Ministry. Therefore, this Court issues notices to the respondents.

4. Mr. Rakesh Thapliyal, the learned Assistant Solicitor General for the Union of India, accepts notice on behalf of the respondent no.1.

5. Mr. C.S. Rawat, the learned Chief Standing Counsel for the State of Uttarakhand, accepts notice on behalf of the respondent nos. 2, 3, 5, 6, 7, 8, 9, 10 and 11.

6. Issue notice to the respondent no.4. Rule made returnable within four weeks.

7. The Registry is directed to implead the National Tiger Conservation Authority as a party respondent in this Writ Petition.

8. Meanwhile, the Principal Chief Conservator of Forest (General), Uttarakhand, the respondent no.5, the Principal Chief Conservator of Forest (Wildlife), Uttarakhand, the respondent no.6, and the Director of the Corbett National Park, Uttarakhand, the respondent no.8, are directed to inspect the site, and to submit a report with regard to the nature and extent of the illegal constructions being carried out, with regard to the persons, who are responsible for carrying out the said illegal constructions, and with regard to the concrete steps taken by the respondent nos. 5, 6 and 8 against such persons, and against the illegal constructions."

1.4 It appears that in the meantime, Mr. Gaurav Kumar Bansal also filed an Application No.1558 of 2021 before the Central Empowered Committee ("CEC" for short), bringing to the notice of the CEC the following :

"a. Illegal felling of trees in the name of establishment of Tiger Safari in Gujjar Sot, Pakhrau Block, Sonandi Range, Kalagarh Division, Corbett Tiger Reserve;

b. Illegal construction of buildings and waterbodies etc. by way of cutting trees illegally in

(i) Saneh Forest Rest House toward Pakhrau Forest Rest House.

(ii) Pakhrau Forest Rest House towards Morghatti Forest Rest House and

(iii) Moraghatti Forest Rest House towards Kalagarh Forest Rest House.

According to the Applicant the above said activities within buffer area of Corbett Tiger Reserve apart from being illegal also cause irreversible damage to the Biological Diversity, Ecology, Flora and Fauna in the Corbett landscape. The Applicant has requested that appropriate action be taken in accordance with law."

1.5 It further appears that I.A. No. 186910 of 2022 came to be registered in the present proceedings based on the CEC Report No.30 of 2022 in Application No.1557 of 2022 filed before it by Mr. Gaurav Kumar Bansal. It was alleged by Mr. Gaurav Kumar Bansal in the said proceedings that in the Rajaji National Park as well as in the Corbett National Park, illegal roads were being constructed. In the said I.A., we have passed the following order on 11th January 2023 :

"I.A. NO.186910/2022

[CEC REPORT 30/2022- REPORT OF CEC IN APPLN. NO.1557/2022 FILED BEFORE IT BY GAURAV KR. BANSAL]

IN RE : GAURAV KR. BANSAL

Issue notice, returnable on 08.02.2023.

Shri Abhishek Atrey, learned counsel, appears and accepts notice on behalf of the State of Uttarakhand.

By way of ad interim order, we direct that all construction activities in respect of the road in question shall be stopped, until further orders."

1.6 Shri Bansal had also filed a Contempt Petition (Civil) No.319 of 2019, alleging that the Authorities had acted in violation of the orders passed by this Court. We, therefore, passed the following order on 11th January, 2023 :

"Shri Mahendra Vyas, Member of the CEC, states that report of the CEC would be filed within ten days and copies thereof shall also be supplied to the counsel for the State of Uttarakhand.

The respondent(s)/State shall file reply to the report of the CEC prior to 03.02.2023.

Put up on 08.02.2023."

1.7 When the aforesaid I.A.(s) and Contempt Petition(s) along with I.A. No.20650 of 2023, containing the report of the CEC on Application No.1558 of 2021 filed by Mr. Gaurav Kumar Bansal before it was placed before us on 8th February 2023, we have passed the following order :

"**CONTEMPT PETITION (C) NO.319/2021, I.A. NOS.186910/2022 AND 20650/2023 (ITEM NO.8.)**

1. Issue notice in I.A. Nos.186910/2022 and 20650/2023 to the Ministry of Environment, Forest and Climate Change and the National Tiger Conservation Authority (NTCA), returnable on 15.03.2023.

2. In addition to the usual mode, liberty is granted to the petitioner to serve notice through the Standing Counsel for the respondent/State.

3. A perusal of the report(s) would reveal that various constructions have been carried out within the area of the Tiger Reserve. The photograph would show that a cordoned area has been constructed between the Tiger Reserve.

4. Mr. Abhishek Attri, learned counsel appearing for the State of Uttrakhand, submits that the concept of jungle tourism permits such a safari to be constructed in jungle areas,

and according to the learned counsel, such a phenomenon is acceptable worldwide.

5. Prima facie, we do not appreciate the necessity of having a zoo inside Tiger Reserves or National Parks. The concept of protecting Tiger Reserves and National Parks is that the fauna must be permitted to reside in the natural habitat and not the artificial environs.

6. We, therefore, call upon the NTCA to explain the rationale behind granting such a permission for permitting Tiger Safaris within Tiger Reserves and National Parks.

7. Until further orders, we restrain the authorities from making any construction within the areas notified as Tiger Reserves and National Parks and Wildlife Sanctuaries.

8. The State of Uttarakhand is directed to file its reply in I.A. Nos.186910/2022 and 20650/2023, within three weeks.

CONTEMPT PETITION (C) NO.302/2020 (ITEM NO.9)

List on 13.02.2023."

1.8 Subsequently, an I.A. came to be filed by the State of Uttarakhand for modification of the order passed by this Court dated 8th February 2023. It was submitted in the I.A. that the State of Uttarakhand was not in a position to even carry out the routine management activities, such as construction of watch towers, water bodies, and other necessary activities required for the day-to-day management of the Sanctuary, National Parks, and Reserves. It was submitted on behalf of the State that all such works are covered and approved by this Court in its order of 14th September 2007, upon recommendation of the CEC. In the said I.A., it was submitted that all illegal constructions have since been demolished and even the debris has been removed. The State of Uttarakhand, therefore, prayed for modification of the order of this Court dated 8th February 2023.

1.9 We passed the following order dated 28th November 2023 :

"1. I.A.No.181182 of 2023 is filed for modification of the order dated 08th February 2023 permitting the construction activities mentioned in paragraph 6 and 8 of I.A. No.181182 of 2023.

2. Shri K. Parameshwar, learned Amicus Curiae, has raised concern about some of the items with regard to which permission is sought.

3. We find that most of the items for which the permission is sought are essential for maintaining the Tiger Reserves, National Parks and Wildlife Sanctuaries.

4. Therefore, we allow the construction activities as mentioned in paragraph 6 and 8 of the I.A. No.181182 of 2023.

5. If under the garb of the orders passed by this Court, the State Government misuses the liberty and raises some constructions which are unnecessary, the same can always be brought to the notice of the Court.

6. However, taking into consideration the past experience with regard to illegal construction in Jim Corbett National Park and Rajaji National Park, we warn the State Government that it shall ensure that the aforesaid constructions are made strictly in accordance with the relevant guidelines.

7. With these observations and directions, these applications are disposed of."

1.10 On 11th January 2024, we segregated the Contempt Petition (C) No. 319 of 2021 and I.A. No.186910 of 2022, since they pertained to the Rajaji National Park.

1.11 In the meantime, Writ Petition No. 178 of 2021 was also heard by the Division Bench of the High Court of Uttarakhand at Nainital on 1st September 2023. The judgment in the said matter came to be delivered on 6th September 2023. The operative part of the judgment and order dated 6th September 2023 reads thus :

"29. This Court, after considering the material on record, comes to the conclusion that the present matter falls within the principles enunciated by the Hon'ble Constitution Bench and we are satisfied that the material on record does disclose a prima facie case calling for an investigation by the Central Bureau of Investigation.

30. Therefore, the present matter is referred to C.B.I. for proper and uninfluenced investigation in accordance with law.

31. A copy of this order be sent to the Director, C.B.I., New Delhi for compliance.

32. All the authorities in the State, if requested, are directed to cooperate with the C.B.I. in conducting fair investigation of the case.

33. We make it clear that we have not expressed any opinion on the merits of the allegations or make any comment on the contents of the enquiries and reports."

1.12 We have heard the I.A. No.20650 of 2023 about the issues concerning the Corbett National Park on the 11th and 12th of January 2024.

2. A perusal of report of the CEC, which is numbered as I.A. No.20650 of 2023 as well as other reports submitted by various authorities, which were also taken into consideration by the CEC in its report, depicts a bleak picture of things in the Corbett National Park which is one of the first National Parks established in India. The reports make it clear that some of the Forest officers have blatantly resorted to illegal felling of trees, proceeding with construction activities in flagrant disregard of the provisions of the law and orders of this Court. We therefore decided to treat this as a test case and determine as to what directions are necessary to be issued, so that in future, such illegal activities are not repeated and as to what measures are required to be resorted to for protecting the precious wildlife.

3. We extensively heard Mr. K. Parameshwar, learned Amicus Curiae, Mr. A.N.S. Nadkarni, learned Senior Counsel appearing for the State of Uttarakhand, Ms. Aishwarya Bhati, learned Additional Solicitor General appearing for the Union of India and Mr. Gaurav Kumar Bansal, applicant-in-person.

II. SUBMISSIONS OF THE PARTIES

4. The submissions made by Mr. K. Parameshwar could be summarized as under :

(i) The forests of the Corbett Tiger Reserve form an essential corridor link between the Corbett and the Rajaji National Park through the Rawasana – Sonanadi Corridor in the Lansdowne Forest Division. The construction of 'Tiger Safari' would lead to habitat fragmentation.

(ii) That, under Section 38V of the Wild Life (Protection) Act, 1972 (hereinafter referred to as "WLP Act"), the State Government, on the recommendations of the Tiger Conservation Authority, is required to notify an area as a tiger reserve. It is also required to prepare a Tiger Conservation Plan (hereinafter referred to as "TCP") including the staff development and deployment plan for the proper management of each area to ensure the protection of the tiger reserve, ecologically compatible land uses in the tiger reserves and the forestry operations of regular forest divisions.

(iii) That, under sub-section (4) of Section 38V of the WLP Act, the concept of integrity of Tiger Reserve requires protection of buffer area and adequate dispersal for the species.

(iv) That, the TCP prepared by the National Tiger Conservation Authority ("NTCA" for short) proposed a Safari at the Karnashram area of Lansdowne Forest Division. However, the Central Zoo Authority ("CZA" for short) unilaterally changed the proposed site to Pakhrau Block, Kalagarh Division.

(v) That, the WLP Act emphasizes on the conservation of wildlife and not tourism. However, establishing a zoo in a buffer area would amount to giving preference to tourism over wildlife protection.

(vi) That, conservation of wildlife should be eco-centric and not anthropocentric.

(vii) That, the provisions of the WLP Act would reveal that the National Board of Wildlife, State Board of Wildlife, Chief Wildlife Warden, and the NTCA are experts for *in situ* conservation of wildlife whereas the CZA is an expert body for *ex situ* mode of conservation.

(viii) That, the final authority insofar as *in situ* 'Tiger Safari' is concerned should be exclusively within the domain of NTCA, which is an expert body insofar as conservation and protection of Tigers is concerned. He therefore submits that the 2019 Guidelines, which restore the primacy to the CZA, are against the said principle.

(ix) That, until 2016, the regulatory regime only recognized safaris as being an *ex-situ* mode of conservation.

(x) That, the 'Tiger Safari' is not defined under the WLP Act or any other statute. The concept of 'Safari' is found only in the proviso to Section 33(a). The proviso to Section 33(a) also bans the construction of 'hotels, zoos and safari parks' inside a sanctuary and National Parks without the prior approval of the National Board.

(xi) That, for the first time, the concept of "Tiger Safari" in the wild was introduced by the Government in the Tourism Guidelines, 2012. It provided for the creation of 'Tiger Safaris' in the buffer areas of tiger reserves 'which experience immense tourist influx in the core/critical tiger habitat for viewing tigers.'

(xii) That, the "Tiger Safari" as is envisaged, is not a measure of conservation but a means for tourism.

(xiii) That, though the 2016 Guidelines provided that the injured, conflict or orphaned tigers may be exhibited in 'Tiger Safaris', the 2019 Guidelines provided that the animals shall be selected as per Section 38I of the WLP Act, providing thereby that the animals from the zoos would be brought in the 'Tiger Safaris'.

(xiv) That, the understanding of the NTCA is that 'Tiger Safaris' are merely 'zoos' made inside the Tiger Reserve, which is erroneous.

(xv) That, the 2019 Guidelines which permit the animals from zoos outside their natural habitat to be relocated in the 'Tiger Safaris' situated in the buffer zone, would lead to the risk of zoonotic disease transmission. It is submitted that, if the animals from zoos are allowed into the Tiger Reserves, it will not only cause interference with the natural habitat of the animals, but the onset of zoonotic disease would be highly dangerous to the tigers in the National Park.

(xvi) Insofar as existing zoos in the Tiger Reserves are concerned, the said zoos were established much before the creation of the NTCA and the conservation of tigers through Tiger Reserves.

(xvii) That, it is necessary to employ the precautionary principle so as to prevent harm that would be caused on account of the relocation of animals from the zoos to the Tiger Reserves/ Safaris.

(xviii) That, the delegation of power by the NTCA to the CZA, which is an expert body only for captive animals in *ex situ* conservation violates the entire scheme of the WLP Act.

(xix) That, the Court must employ the restorative principle to restore the damages caused to the environment when constructions were raised for the Safari.

(xx) Mr. Parmeshwar has also given various suggestions for the protection of wildlife and restoration of environmental damages as has been done in the case of the Jim Corbett National Park.

5. The submissions of Mr. A.N.S. Nadkarni could be summarized as under :

(i) It is submitted that insofar as the illegal constructions are concerned, the same has already been demolished and even debris has been removed.

(ii) That, all illegal construction works of buildings including the Forest Rest House at Mor Ghatti, Pakhrau, Kugadda Forest Camp, and Saneh Forest Rest House were being carried out by the Divisional Forest Officer ("DFO" for short), Kalagarh without the requisite administrative and financial approvals of the Competent Authority. That, the said works were executed solely under the orders of the DFO, Kalagarh, who was not competent to sanction the said works.

(iii) That, proceedings have been initiated against the erring officials/officers. Immediately Mr. J.S. Suhag, the then Principal Chief Conservator of Forests ("PCCF" for short) Wildlife, since deceased, was suspended; the Field Director of Corbett was transferred and the DFO Kalagarh along with the Range Officer, Kalagarh and several other officials lower in rank were also suspended.

(iv) An FIR was also lodged by the Vigilance Department against the DFO Kishan Chand and a Forest Ranger for offences punishable under Sections 420, 466, 467, 468, 471, 409, 120B, 218/34 IPC, Section 26 of the Forest Act and Section 13(1)(a) and 13(2) of the Prevention of Corruption Act.

(v) The buffer areas are peripheral to core areas. As per Section 38V(4) of the WLP Act, a lesser degree of habitat protection

is accorded and this aims to promote co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social, and cultural rights of the local people. However, in carrying out these activities, the requisite permissions have been taken.

(vi) That, the project for establishing 'Tiger Safari' was not initiated by the State of Uttarakhand. It was NTCA, which wrote to the Field Directors of four (04) Tiger Reserves across the county, by letter dated 19th December 2014, calling upon them to send a proposal for the establishment of 'Tiger Safari' in the buffer area of Tiger Reserves.

(vii) Pursuant to this, a proposal was forwarded by the State of Uttarakhand on the 5th of June 2015 to establish the 'Tiger Safari' and an in-principal approval was granted by the NTCA with a further direction to forward the same to the CZA for vetting.

(viii) That, under the provisions of Section 38H of the WLP Act, the CZA is the statutory authority for grant of approval for the establishment of 'Tiger Safaris'.

(ix) That, TCP for the Corbett Tiger Reserve was forwarded by the State of Uttarakhand to the Government of India on 27th January 2015. That, the Government of India granted its approval on 4th March 2015 to the TCP prepared by the State of Uttarakhand. The said TCP also had a plan for the setting up of a rescue centre-cum-tiger safari in the buffer area of Corbett Tiger Reserve.

(x) Vide letter dated 12th February 2019, the CZA conveyed its approval for the establishment of 'Tiger Safari' in the Gujar Sot, Pakhrau Block, Sona Nadi Range, Kalagarh Division, Corbett Tiger Reserve (hereinafter referred to as "Pakhrau") on an area of 106.16 Hectares.

(xi) Though initially it was proposed to establish the 'Tiger Safari' at Karnashram area of Lansdowne Forest Division, the said site was found unsuitable. The site at Pakhrau was found to be more suitable since it was at the edge of the buffer zone.

(xii) After the CZA granted its approval, an in-principal approval under the Forest Conservation Act was granted by the Government of India on 30th October 2020.

(xiii) That, at the relevant time, setting up of a 'Tiger Safari' was considered as a 'part forest and part non-forestry' activity. As such, the State of Uttarakhand had approached the Government of India for getting the Forest Clearance for 15% of the area, as mandated. However, as of today, the position is different inasmuch as the establishment of zoos and the 'Tiger Safari' are now considered as 'forestry activities' and do not require any Forest Clearance.

(xiv) Thereafter, Stage-II clearance was granted on 10th September 2021.

(xv) As such, the 'Tiger Safari' was established due to the initiative taken by the NTCA and after the grant of all the requisite approvals.

(xvi) It was submitted that the project "Tiger Safari' has been completed to the extent of 80%, investing a huge amount of public money.

(xvii) As such, the allegations about the violation of statutory provisions for the establishment of the 'Tiger Safari' are without substance.

(xviii) That, the report of the Forest Survey of India ("FSI" for short) which was entrusted with the work of carrying out the survey regarding the illegal felling of trees is concerned, the same does not depict a correct picture.

(xix) That, the total area involved in the construction of the 'Tiger Safari' was approximately 16 Hectares and it is impossible that in such a small area, 6000 trees could be felled.

(xx) When the State applied for Forest Clearance for the establishment of the 'Tiger Safari' project, the number of trees present in the 16 Hectares was enumerated after counting them physically which was also contained in the proposal. The said proposal mentioned that there are 3,620 trees standing on the site.

(xxi) In the survey conducted by the Forest Department, it was found that, apart from 163 trees for which there was valid permission, an additional 97 trees were cut down in the process.

(xxii) That, the FSI report is based on Google Image calculation and does not depict the correct picture.

(xxiii) That, the FSI was asked by the State of Uttarakhand to provide the methodology used for arriving at its report, but the FSI failed to do so.

(xxiv) That, the works which are carried out after obtaining the permission of this Court by order dated 28th November 2023 are all routine management activities, such as setting up of watch towers and other necessary activities required for the day-to-day management of the Sanctuaries, National Parks and Reserves.

(xxv) Insofar as Interpretation Centre is concerned, it was submitted that the Interpretation Centre has been held to be a 'forestry activity' not requiring Forest Clearance from the Central Government.

(xxvi) It was further submitted that, the area of Pakhrau Tiger Safari is 106.16 Hectares, which amounts to only 0.082% of the total area of the Corbett Tiger Reserve and 0.22% of the buffer area of the Tiger Reserve. In any case, it is situated at the edge of the buffer zone. On the other side of the buffer zone, there are farm lands of the villagers residing in the adjoining area. As such, the contention that the establishment of 'Tiger Safari' would shrink the available tiger habitat and as such, obstruct the corridors for the movements of the tigers is without substance.

6. Ms. Aishwarya Bhati, learned ASG submitted that the 2016 Guidelines took into consideration the concern of injured tigers, conflict tigers, or orphaned tiger cubs. However, the 2019 Guidelines were issued to bring it in tune with Section 38I of the WLP Act. It is submitted that, in the TCP submitted by the State of Uttarakhand, a 'Tiger Safari' was proposed at the Karnashram area of Lansdowne Forest Division. Ms. Bhati submitted that there are about 20 Safaris situated in the National Parks. Some of them have been operating since the 1970s.

7. Mr. Gaurav Kumar Bansal reiterated that various illegal constructions were made in the Corbett National Park in total violation of the statutory provisions. He further submitted that illegal felling of trees was also done to facilitate the illegal construction.

III. STATUTORY PROVISIONS

8. Before we consider the submissions of the learned counsel for the parties, it will be relevant to refer to certain provisions of the WLP Act.

9. The statement of objects and reasons for the WLP Act would reveal that the enactment of the WLP Act was necessitated since it was noticed that there was rapid decline of India's wild animals and birds, which was one of the richest and most varied in the world. Some wild animals and birds had already become extinct in the country and others were in danger of being so. Areas that were once teeming with wildlife had become devoid of it and even in Sanctuaries and National Parks, the protection afforded to wildlife needed to be improved. It was noticed that, the Wild Birds and Animals Protection Act, 1912 (8 of 1912) had become completely outmoded. The existing State laws were not only outdated but provided punishments that were not commensurate with the offence and the financial benefits which accrue from poaching and trade in wildlife produce. It was noticed that such laws mainly related to the control of hunting and did not emphasize the other factors which were also prime reasons for the decline of India's wildlife, namely, taxidermy and trade in wildlife and products derived therefrom.

10. However, since the subject matters were relatable to Entry 20 of the State list in the Seventh Schedule to the Constitution of India, the Parliament had no power to make a law unless the Legislatures of two or more States passed a resolution in pursuance of Article 252 of the Constitution of India. Accordingly, 11 States had passed resolutions to that effect. In this background, the WLP Act came to be enacted.

11. The long title of the WLP Act was amended by the Wild Life (Protection) Amendment Act, 2022 (No. 18 of 2022), which reads thus :

> "An Act to provide for the **[conservation, protection and management of wild life]** and for matters connected therewith or ancillary or incidental thereto with a view to ensuring the ecological and environmental security of the country."
>
> [emphasis supplied]

12. Prior to the aforesaid amendment, the bracketed portion read thus :

> "protection of wild animals, birds and plants"

13. Sub-section (1) of Section 2 of the WLP Act defines "animal", which reads thus :

> "(1) "animal" includes mammals, birds, reptiles, amphibians, fish, other chordates and invertebrates and also includes their young and eggs;"

14. Sub-section (5) of Section 2 of the WLP Act defines "captive animal", which reads thus :

> "(5) "captive animal" means any animal, specified in Schedule I or Schedule II, which is captured or kept or bred in captivity;"

15. Sub-section (20A) of Section 2 of the WLP Act defines "National Board", which reads thus :

> "(20A) "National Board" means the National Board for Wild Life constituted under Section 5A;"

16. Sub-section (21) of Section 2 of the WLP Act defines "National Park", which reads thus :

> "(21) "National Park" means an area declared, whether under Section 35 or Section 38, or deemed, under sub-section (3) of Section 66, to be declared, as a National Park;"

17. Sub-section (24A) of Section 2 of the WLP Act defines "protected area", which reads thus :

> "(24A) "protected area" means a National Park, a sanctuary, a conservation reserve or a community reserve notified under Sections 18, 35, 36-A and 36-C of the Act;"

18. Sub-section (26) of Section 2 of the WLP Act defines "sanctuary", which reads thus :

> "(26) "sanctuary" means an area declared as a sanctuary by notification under the provisions of Chapter IV of this Act and shall also include a deemed sanctuary under sub-section (4) of Section 66;"

19. Sub-Section (36) of Section 2 of the WLP Act defines "wild animal", which reads thus :

> "(36) "wild animal" means any animal specified in Schedule I or Schedule II and found wild in nature;"

20. Sub-section (39) of Section 2 of the WLP Act defines "zoo", which reads thus :

> "(39) "zoo" means an establishment, whether stationary or mobile, where captive animals are kept for exhibiting to the public or *ex-situ* conservation and includes a circus and off-exhibit facilities such as rescue centres and conservation breeding centres, but does not include an establishment of a licensed dealer in captive animals."

21. Chapter IV of the WLP Act deals with "protected areas". Section 18 provides for "Declaration of sanctuary", which reads thus :

> "**18. Declaration of sanctuary**.—(1) The State Government may, by notification, declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment.
>
> (2) The notification referred to in sub-section (1) shall specify, as nearly as possible, the situation and limits of such area.
>
> *Explanation*.—For the purposes of this section, it shall be sufficient to describe the area by roads, rivers, ridges or other well-known or readily intelligible boundaries."

22. It will be relevant to refer to Section 33 of the WLP Act, which deals with "Control of sanctuaries". It reads thus :

> "**33. Control of sanctuaries**.—The Chief Wild Life Warden shall be the authority who shall control, manage and protect all sanctuaries in accordance with such management plans for the sanctuary approved by him as per the guidelines issued by the Central Government and in case the sanctuary also falls under the Scheduled Areas or areas where the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 is applicable, in accordance with the management plan for such sanctuary prepared after due consultation with

the Gram Sabha concerned and for that purpose, within the limits of any sanctuary,—

(*a*) may construct such roads, bridges, buildings, fences or barrier gates, and carry out such other works as he may consider necessary for the purposes of such sanctuary :

Provided that no construction of tourist lodges, including Government lodges, for commercial purposes, hotels, zoos and safari parks shall be undertaken inside a sanctuary except with the prior approval of the National Board;

(*b*) shall take such steps as will ensure the security of wild animals in the sanctuary and the preservation of the sanctuary and wild animals therein;

(*c*) may take such measures, in the interests of wild life, as he may consider necessary for the improvement of any habitat;

(*d*) may regulate, control or prohibit, in keeping with the interests of wild life, the grazing or movement of livestock."

[emphasis supplied]

23. Section 35 of the WLP Act deals with "Declaration of National Parks", which reads thus :

"**35. Declaration of National Parks**.—(1) Whenever it appears to the State Government that an area, whether within a sanctuary or not, is, by reason of its ecological, faunal, floral, geomorphological or zoological association or importance, needed to be constituted as a National Park for the purpose of protecting, propagating or developing wild life therein or its environment, it may, by notification, declare its intention to constitute such area as a National Park :

Provided that where any part of the territorial waters is proposed to be included in such National Park, the provisions of Section 26A shall, as far as may be, apply

in relation to the declaration of a National Park as they apply in relation to the declaration of a sanctuary.

(2) The notification referred to in sub-section (1) shall define the limits of the area which is intended to be declared as a National Park.

(3) Where any area is intended to be declared as a National Park, the provisions of Sections 19 to 26-A [both inclusive except clause (*c*) of sub-section (2) of Section 24)] shall, as far as may be, apply to the investigation and determination of claims, and extinguishment of rights, in relation to any land in such area as they apply to the said matters in relation to any land in a sanctuary.

(3A) When the State Government declares its intention under sub-section (1) to constitute any area as a National Park, the provisions of Sections 27 to 33-A (both inclusive), shall come into effect forthwith, until the publication of the notification declaring such National Park under sub-section (4).

(3B) Till such time as the rights of the affected persons are finally settled under Sections 19 to 26A [both inclusive except clause (*c*) of sub-section (2) of Section 24], the State Government shall make alternative arrangements required for making available fuel, fodder and other forest produce to the persons affected, in terms of their rights as per the Government records.

(4) When the following events have occurred, namely,—

(*a*) the period for preferring claims has elapsed, and all claims, if any, made in relation to any land in an area intended to be declared as a National Park, have been disposed of by the State Government, and

(*b*) all rights in respect of lands proposed to be included in the National Park have become vested in the State Government,

the State Government shall publish a notification specifying the limits of the area which shall be comprised within the National Park and declare that

the said area shall be a National Park on and from such date as may be specified in the notification.

(5) No alteration of the boundaries of a National Park by the State Government shall be made except on a recommendation of the National Board.

(6) No person shall destroy, exploit or remove any Wild Life including forest produce from a National Park or destroy or damage or divert the habitat of any wild animal by any act whatsoever or divert, stop or enhance the flow of water into or outside the National Park, except under and in accordance with a permit granted by the Chief Wild Life Warden, and no such permit shall be granted unless the State Government being satisfied in consultation with the National Board that such removal of wild life from the National Park or the change in the flow of water into or outside the National Park is necessary for the improvement and better management of wild life therein, authorises the issue of such permit :

Provided that where the forest produce is removed from a National Park, the same may be used for meeting the personal bona fide needs of the people living in and around the National Park and shall not be used for any commercial purpose.

(7) No grazing of any livestock shall be permitted in a National Park and no livestock shall be allowed to enter therein except where such livestock is used as a vehicle by a person authorised to enter such National Park.

(8) The provisions of Sections 27 and 28, Section 30 to 32 (both inclusive), and clauses (*a*), (*b*) and (*c*) of Section 33, Section 33A and Section 34 shall, as far as may be, apply in relation to a National Park as they apply in relation to a sanctuary.

Explanation.—For the purposes of this section, in case of an area, whether within a sanctuary or not, where the rights have been extinguished and the land has become vested in the State Government under any Act or otherwise, such area may be notified by it, by a notification, as a National

Park and the proceedings under Sections 19 to 26 (both inclusive) and the provisions of sub-sections (3) and (4) of this section shall not apply."

24. Section 36A of the WLP Act deals with "Declaration and management of a conservation reserve", which reads thus :

"**36A. Declaration and management of a conservation reserve**.—(1) The State Government may, after having consultations with the local communities, declare any area owned by the Government, particularly the areas adjacent to National Parks and sanctuaries and those areas which link one protected area with another, as a conservation reserve for protecting landscapes, seascapes, flora and fauna and their habitat :

Provided that where the conservation reserve includes any land owned by the Central Government, its prior concurrence shall be obtained before making such declaration.

(2) The provisions of sub-section (2) of Section 18, sub-sections (2), (3) and (4) of Section 27, Sections 30, 32 and clauses (*b*) and (*c*) of Section 33 shall, as far as may be, apply in relation to a conservation reserve as they apply in relation to a sanctuary."

25. Section 36C of the WLP Act deals with "Declaration and management of community reserve", which reads thus :

"**36-C. Declaration and management of community reserve**.—(1) The State Government may, where the community or an individual has volunteered to conserve wild life and its habitat, declare any private or community land not comprised within a National Park, sanctuary or a conservation reserve, as a community reserve, for protecting fauna, flora and traditional or cultural conservation values and practices.

(2) The provisions of sub-section (2) of Section 18, sub-sections (2), (3) and (4) of Section 27, Sections 30, 32 and clauses (*b*) and (*c*) of Section 33 shall, as far as may be, apply in relation to a community reserve as they apply in relation to a sanctuary.

(3) After the issue of notification under sub-section (1), no change in the land use pattern shall be made within the community reserve, except in accordance with a resolution passed by the management committee and approval of the same by the State Government."

26. Chapter IVA of the WLP Act deals with "Central Zoo Authority and Recognition of Zoos". The only relevant provision for consideration of the issue in the present matter is Section 38-I, which reads thus :

"**38-I. Acquisition of animals by a zoo**.—(1) Subject to the other provisions of this Act, no zoo shall acquire, sell or transfer any wild animal or captive animal specified in Schedules I except with the previous permission of the Authority.

(2) No zoo shall acquire, sell or transfer any wild or captive animal except from or to a recognized zoo :

Provided that nothing in this sub-section shall apply to a conservation breeding centre."

27. Chapter IVB of the WLP Act deals with "National Tiger Conservation Authority". Section 38-O deals with "Powers and Functions of Tiger Conservation Authority", which reads thus :

"**38-O. Powers and functions of Tiger Conservation Authority**.—(1) The Tiger Conservation Authority shall have the following powers and perform the following functions, namely : —

(a) to approve the Tiger Conservation Plan prepared by the State Government under sub-section (3) of Section 38V of this Act;

(b) evaluate and assess various aspect of sustainable ecology and disallow any ecologically unsustainable land use such as, mining, industry and other projects within the tiger reserves;

(c) lay down normative standards for tourism activities and guidelines for project tiger from time to time for tiger conservation in the buffer and core area of tiger reserves and ensure their due compliance;

(d) provide for management focus and measures for addressing conflicts of men and wild animals and to emphasise on co-existence in forest areas outside the National Parks, sanctuaries or tiger reserve, in the working plan code;

(e) provide information on protection measures including future conservation plan, estimation of population of tiger and its natural prey species, status of habitats, disease surveillance, mortality survey, patrolling, reports on untoward happenings and such other management aspects as it may deem fit including future plan conservation;

(f) approve, co-ordinate research and monitoring on tiger, co-predators, prey, habitat, related ecological and socio-economic parameters and their evaluation;

(g) ensure that the tiger reserves and areas linking one protected area or tiger reserve with another protected area or tiger reserve are not diverted for ecologically unsustainable uses, except in public interest and with the approval of the National Board for Wild Life and on the advice of the Tiger Conservation Authority;

(h) facilitate and support the tiger reserve management in the State for biodiversity conservation initiatives through eco-development and people's participation as per approved management plans and to support similar initiatives in adjoining areas consistent with the Central and State laws;

(i) ensure critical support including scientific, information technology and legal support for better implementation of the tiger conservation plan;

(j) facilitate ongoing capacity building programme for skill development of officers and staff of tiger reserves; and

(k) perform such other functions as may be necessary to carry out the purposes of this Act with regard to conservation of tigers and their habitat.

(2) The Tiger Conservation Authority may, in the exercise of its powers and performance of its functions under this chapter, issue directions in writing to any person, officer or authority for the protection of tiger or tiger reserves and such person, officer or authority shall be bound to comply with the directions :

Provided that no such direction shall interfere with or affect the rights of local people particularly the Scheduled Tribes."

28. Section 38V of the WLP Act deals with "Tiger Conservation Plan", which reads thus :

"**38V. Tiger Conservation Plan**.—(1) The State Government shall, on the recommendations of the Tiger Conservation Authority, notify an area as a tiger reserve.

(2) The provisions of sub-section (2) of Section 18, sub-sections (2), (3) and (4) of Section 27, Sections 30, 32 and clauses (*b*) and (*c*) of Section 33 of this Act shall, as far as may be, apply in relation to a tiger reserve as they apply in relation to a sanctuary.

(3) The State Government shall prepare a Tiger Conservation Plan including staff development and deployment plan for the proper management of each area referred to in sub-section (1), so as to ensure—

(a) protection of tiger reserve and providing site specific habitat inputs for a viable population of tigers, co-predators and prey animals without distorting the natural prey-predator ecological cycle in the habitat;

(b) ecologically compatible land uses in the tiger reserves and areas linking one protected area or tiger reserve with another for addressing the livelihood concerns of local people, so as to provide dispersal habitats and corridor for spill over population of wild animals from the designated core areas of tiger reserves or from tiger breeding habitats within other protected areas;

(c) the forestry operations of regular forest divisions and those adjoining tiger reserves are not incompatible with the needs of tiger conservation.

(4) Subject to the provisions contained in this Act, the State Government shall, while preparing a Tiger Conservation Plan, ensure the agricultural, livelihood, developmental and other interests of the people living in tiger bearing forests or a tiger reserve.

Explanation.—For the purposes of this section, the expression "tiger reserve" includes,—

(i) core or critical tiger habitat areas of National Parks and sanctuaries, where it has been established, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers, and notified as such by the State Government in consultation with an Expert Committee constituted for the purpose;

(ii) buffer or peripheral area consisting of the area peripheral to critical tiger habitat or core area, identified and established in accordance with the provisions contained in Explanation (*i*) above, where a lesser degree of habitat protection is required to ensure the integrity of the critical tiger habitat with adequate dispersal for tiger species, and which aim at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined on the basis of scientific and objective criteria in consultation with the concerned Gram Sabha and an Expert Committee constituted for the purpose.

(5) Save as for voluntary relocation on mutually agreed terms and conditions, provided that such terms and conditions satisfy the requirements laid down in this sub-section, no Scheduled Tribes or other forest dwellers shall be resettled or have their rights adversely affected for the purpose of creating inviolate areas for tiger conservation unless—

(i) the process of recognition and determination of rights and acquisition of land or forest rights of the Scheduled Tribes and such other forest dwelling persons is complete;

(ii) the concerned agencies of the State Government, in exercise of their powers under this Act, establishes with the consent of the Scheduled Tribes and such other forest dwellers in the area, and in consultation with an ecological and social scientist familiar with the area, that the activities of the Scheduled Tribes and other forest dwellers or the impact of their presence upon wild animals is sufficient to cause irreversible damage and shall threaten the existence of tigers and their habitat;

(iii) the State Government, after obtaining the consent of the Scheduled Tribes and other forest dwellers inhabiting the area, and in consultation with an independent ecological and social scientist familiar with the area, has come to a conclusion that other reasonable options of co-existence, are not available;

(iv) resettlement or alternative package has been prepared providing for livelihood for the affected individuals and communities and fulfils the requirements given in the National Relief and Rehabilitation Policy;

(v) the informed consent of the Gram Sabha concerned, and of the persons affected, to the resettlement programme has been obtained;

(vi) the facilities and land allocation at the resettlement location are provided under the said programme, otherwise their existing rights shall not be interfered with."

29. Section 38W of the WLP Act deals with "Alteration and de-notification of tiger reserves", which reads thus :

"**38W. Alteration and de-notification of tiger reserves**.—
(1) No alteration in the boundaries of a tiger reserve

shall be made except on a recommendation of the Tiger Conservation Authority and the approval of the National Board for Wild Life.

(2) No State Government shall de-notify a tiger reserve, except in public interest with the approval of the Tiger Conservation Authority and the National Board for Wild Life."

30. It will also be relevant to refer to Section 38XA of the WLP Act, which reads thus :

> "**38-XA. Provisions of Chapter to be in addition to provisions relating to sanctuaries and National Parks**.—The provisions contained in this Chapter shall be in addition to, and not in derogation of, the provisions relating to sanctuaries and National Parks (whether included and declared, or are in the process of being so declared) included in a tiger reserve under this Act."

31. A perusal of the entire scheme of the WLP Act read with the Statement of objects and reasons would clearly reveal that the entire emphasis is on "conservation, protection and management of the wildlife". The WLP Act also provides for the matters connected therewith or ancillary or incidental thereto for the conservation, protection and management of wildlife. It also emphasizes on ensuring the ecological and environmental security of the country.

32. A perusal of the aforementioned provisions of the WLP Act would reveal that various measures have been provided under the said Act for the protection of protected areas. No doubt that the definition of "protected area" as defined under sub-section (24A) of Section 2 of the WLP Act only includes a National Park, a sanctuary, a conservation reserve, or a community reserve, which are notified under Sections 18, 35, 36A and 36C of the WLP Act. However, the harmonious construction of the various provisions of the WLP Act would reveal that the legislature intended the "Tiger Reserves" to be kept at a higher pedestal than a sanctuary, a National Park, a conservation reserve, or a community reserve.

33. As discussed hereinabove, the declaration of sanctuary is as provided under Section 18 of the WLP Act. We have already reproduced Section 18 hereinabove.

34. The Chief Wild Life Warden has been entrusted with the functions and duties to control, manage, and protect all sanctuaries in accordance with such management plans for the sanctuary as approved by him as per the guidelines issued by the Central Government. Under clause (a) of Section 33 of the WLP Act; though construction of roads, bridges, buildings, fences or barrier gates, and such other works as he may consider necessary for sanctuary is permissible, the proviso thereto specifically prohibits the construction of tourist lodges including Government lodges for commercial purposes. It further prohibits the construction of hotels, zoos and safari parks inside a sanctuary except with the prior approval of the National Board. Clause (b) thereof requires the Chief Wild Life Warden to take such steps as would ensure the security of wild animals in the sanctuary and the preservation of the sanctuary and wild animals therein. He is also authorized to take such measures, in the interests of wildlife, as he may consider necessary for the improvement of any habitat. He is also authorized to regulate, control, or prohibit, in keeping with the interests of wildlife, the grazing or movement of livestock.

35. Section 35 of the WLP Act deals with "Declaration of National Parks". In view of sub-section (8) thereof, the provisions which are applicable under clauses (a), (b) and (c) of Section 33 of the WLP Act to the 'sanctuary' would also be applicable to a 'National Park'.

36. Section 36A of the WLP Act deals with "Declaration and management of a conservation reserve". In view of sub-section (2) thereof, the provisions under clauses (b) and (c) of Section 33 of the WLP Act, which are applicable to a 'sanctuary' shall, as far as may be, apply also in relation to a 'conservation reserve'.

37. Section 36C of the WLP Act deals with "Declaration and management of community reserve". In view of sub-section (2) thereof, the provisions under clauses (b) and (c) of Section 33 of the WLP Act, which are applicable to a 'sanctuary' shall, as far as may be, apply also in relation to a 'community reserve'.

38. Section 38-O deals with "Powers and Functions of Tiger Conservation Authority". Clause (a) thereof provides for approval of the TCP prepared by the State Government under sub-section (3) of Section 38V of the WLP Act. Under clause (b), it has to evaluate and assess various aspects of sustainable ecology and disallow any ecologically unsustainable land use such as setting up of mining, industry, and

other projects within the tiger reserves. Under clause (c), it is required to lay down normative standards for tourism activities and guidelines for 'Project Tiger' from time to time for tiger conservation in the buffer and core area of tiger reserves and ensure their due compliance. Under clause (d), it has to provide for management focus and measures for addressing conflicts of men and wild animals and to emphasize on co-existence in forest areas outside the National Parks, sanctuaries, or tiger reserves in the working plan code. Under clause (e), it has to provide information on protection measures including future conservation plans, estimation of the population of tigers and its natural prey species, status of habitats, diseases surveillance, mortality surveys, patrolling, reports on untoward happenings, and such any other management aspects as it may deem fit including future plans for conservation. Under clause (f), the Tiger Conservation Authority is required to approve, co-ordinate research and monitor on tigers, co-predators, prey, habitats, related ecological and socio-economic parameters, and their evaluation. Under clause (g), it is required to ensure that the tiger reserves and areas linking one protected area or tiger reserve with another protected area or tiger reserve are not diverted for ecologically unsustainable uses, except in public interest and that too, with the approval of the National Board for Wild Life and on the advice of the Tiger Conservation Authority. Under clause (h), it is required to facilitate and support the tiger reserve management in the State for biodiversity conservation initiatives through eco-development and people's participation as per approved management plans and to support similar initiatives in adjoining areas consistent with the Central and State laws. Under clause (i), it is required to ensure critical support including scientific, information technology, and legal support for better implementation of the TCP. Under clause (j), it is required to facilitate an ongoing capacity building programme for the skill development of officers and staff of tiger reserves. Under clause (k), it is required to perform such other functions as may be necessary to carry out the purposes of the WLP Act with regard to the conservation of tigers and their habitat.

39. The importance given to the Tiger Conservation Authority can be seen in sub-section (2) of Section 38-O of the WLP Act, which empowers it to issue directions in writing to any person, officer or authority for the protection of tiger or tiger reserves and such person, officer or authority are bound to comply with the directions. No doubt that the

proviso thereto provides that no such direction shall interfere with or affect the rights of local people, particularly the Scheduled Tribes.

40. Section 38V of the WLP Act deals with the notification of an area as a tiger reserve and preparation of the "TCP". Under sub-section (1) thereof, the State Government is required to notify an area as a tiger reserve, on such recommendations being made by the Tiger Conservation Authority. Sub-section (2) thereof provides that the provisions of sub-section (2) of Section 18, sub-sections (2), (3) and (4) of Section 27, Sections 30, 32 and clauses (*b*) and (*c*) of Section 33 of the said Act shall, as far as may be, apply in relation to a tiger reserve as they apply in relation to a sanctuary.

41. Under sub-section (3) of Section 38V, the State Government is required to prepare a TCP including staff development and deployment plan for the proper management of each area referred to in sub-section (1), so as to ensure protection of tiger reserve and providing site specific habitat inputs for a viable population of tigers, co-predators and prey animals without distorting the natural prey-predator ecological cycle in the habitat. It is also required to ensure ecologically compatible land uses in the tiger reserves and areas linking one protected area or tiger reserve with another for addressing the livelihood concerns of local people, so as to provide dispersal habitats and corridor for spill over population of wild animals from the designated core areas of tiger reserves or from tiger breeding habitats within other protected areas. It is also required to ensure that the forestry operations of regular forest divisions and those adjoining the tiger reserves are not incompatible with the needs of tiger conservation.

42. Under sub-section (4) of Section 38V, the State Government, while preparing a TCP, is also required to ensure the agricultural, livelihood, developmental and other interests of the people living in tiger bearing forests or a tiger reserve. Explanation thereto provides that the 'tiger reserve' shall consist of two areas. The first area shall be core or critical tiger habitat areas of National Parks and sanctuaries; which, on the basis of scientific and objective criteria, are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers, and notified as such by the State Government in consultation with an Expert Committee constituted for the said purpose. The second area, i.e., the buffer or peripheral area, shall consist of the area peripheral

to critical tiger habitat or core area, identified and established in accordance with the provisions contained in Explanation (*i*). In such area, a lesser degree of habitat protection is required to ensure the integrity of the critical tiger habitat with adequate dispersal for tiger species. The creation of the buffer zone is aimed at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined on the basis of scientific and objective criteria in consultation with the concerned Gram Sabha and an Expert Committee constituted for the said purpose.

43. Sub-section (5) of Section 38V deals with resettlement etc. of the Scheduled Tribes and, therefore, it may not be necessary for us to go into the provisions of sub-section (5).

44. Section 38W of the WLP Act deals with alteration and de-notification of tiger reserves. It provides that no alteration in the boundaries of a tiger reserve shall be made except on a recommendation of the Tiger Conservation Authority and the approval of the National Board for Wild Life. Sub-Section (2) thereof prohibits the State Government from de-notifying a tiger reserve, except in public interest with the approval of the Tiger Conservation Authority and the National Board for Wild Life.

45. Section 38XA of the WLP Act which was inserted by the Wild Life (Protection) Amendment Act, 2022 (No. 18 of 2022) makes the legislative intent amply clear. It provides that, the provisions contained in the said Chapter shall be in addition to, and not in derogation of the provisions relating to sanctuaries and National Parks (whether included and declared, or are in the process of being so declared) included in a tiger reserve under this Act.

46. It could thus be seen that, the entire emphasis of the WLP Act is on the conservation, protection, and management of wildlife. Various provisions contained in the WLP Act, discussed hereinabove, emphasize on providing measures for the conservation, protection and management of wildlife. The provisions contained in Chapter IVA lay a specific emphasis on the protection of tigers and other habitats in the tiger reserve. The provisions contained therein are in addition to the provisions contained for sanctuaries and National Parks.

IV. GUIDELINES ISSUED BY VARIOUS AUTHORITIES

47. In light of the aforesaid statutory provisions, it will also be necessary to refer to certain guidelines issued by various authorities.

48. The NTCA published guidelines for preparation of TCP in 2007. The said guidelines provide for what should be the approach for preparation of TCP. It will be relevant to refer to clause 3.1 thereof, which reads thus :

> "**3.1 Consolidating and strengthening of 'source' populations of tiger in tiger reserves and protected areas**
>
> The management interventions would involve :
>
> 1. Protection, anti-poaching activities and networking
> 2. Strengthening of infrastructure within Tiger Reserves
> 3. Habitat improvement including water development
> 4. Rehabilitation package for traditional hunting tribes living around tiger reserves
> 5. Staff development and capacity building
> 6. Delineating inviolate spaces for wildlife and relocation of villagers from crucial habitats in Tiger Reserves within a timeframe (five years) and settlement of rights
> 7. Safeguarding tiger habitats from ecologically unsustainable development"

49. It will also be relevant to refer to clause 3.2 thereof, which reads thus :

> "**3.2 Managing 'source-sink' dynamics by restoring habitat connectivity to facilitate dispersing tigers to repopulate the core areas**
>
> The management interventions would involve :
>
> 1. Co-existence agenda in buffer/fringe areas (landscape approach/sectoral integration) with ecologically sustainable development programme for providing livelihood options to local people, with a view to reduce their resource dependency on the core. The strategy would involve reciprocal commitments with the local community on a

quid-pro-quo basis to protect forests and wildlife, based on village level, participatory planning and implementation through ecodevelopment committees (EDC).

2. Addressing man-animal conflict issues (ensuring uniform, timely compensation for human injuries and deaths due to wild animals, livestock depredation by carnivores, crop depredation by wild ungulates).

3. Mainstreaming wildlife concerns in the buffer landscape by targeting the various production sectors in the area, which directly or incidentally affect wildlife conservation, through 'Tiger Conservation Foundation', as provided in the Wildlife (Protection) Amendment Act, 2006.

4. Addressing tiger bearing forests and fostering corridor conservation through restorative strategy in respective working plans of forest divisions, involving local communities, to arrest fragmentation of habitats.

5. Ensuring safeguards/retrofitting measures in the area in the interest of wildlife conservation."

50. The guidelines also deal with various production sectors in the buffer zone which require mainstreaming of wildlife concerns in these sectors like :

"(a) Forestry (D)

(b) Agriculture (D)

(c) Integrated Development (ecodevelopment, development through District Administration) (D)

(d) Tourism (D)

(e) Fisheries (D)

(f) Tea/Coffee Estates (I)

(g) Road / Rail transport (D)

(h) Industry (D)

(i) Mining (I)

(j) Thermal power plants (I)

(k) Irrigation projects (D)

(l) Temple tourism (I)

(m) Communication projects (D)"

51. Clause 6 of the said guidelines deals with importance of a buffer zone vis-à-vis the tiger land tenure dynamics, which reads thus :

"**6. Importance of a buffer zone vis-à-vis the tiger land tenure dynamics**

6.1 Tiger is a territorial animal, which advertises its presence in an area and maintains a territory. It is a well known fact that partial overlaps of resident male territories in an area do occur. However, the degree of overlap increases lethal internecine combats. Several female territories do occur in an overlapping manner within the territory of a male tiger. The tiger land tenure dynamics ensures presence of prime adults in a habitat which act as source populations, periodically replacing old males by young adults from nearby forest areas (Plate 2).

6.2 The ongoing study and analysis of available research data on tiger ecology indicate, that the minimum population of tigresses in breeding age, which are needed to maintain a viable population of 80-100 tigers (in and around core areas) require an inviolate space of 800 -1000 sq km (see Annexure I). Tiger being an "umbrella species", this will also ensure viable populations of other wild animals (co-predators, prey) and forest, thereby ensuring the ecological viability of the entire area / habitat. Therefore, buffer areas with forest connectivity are imperative for tiger dynamics, since such areas foster sub adults, young adults, transients and old members of the population. The young adults periodically replace the resident ageing males and females from the source population area.

6.3 The buffer area, absorbs the "shock" of poaching pressure on populations of tiger and other wild animals. In case of severe habitat depletion in buffer areas, the source population would get targeted and eventually decimate.

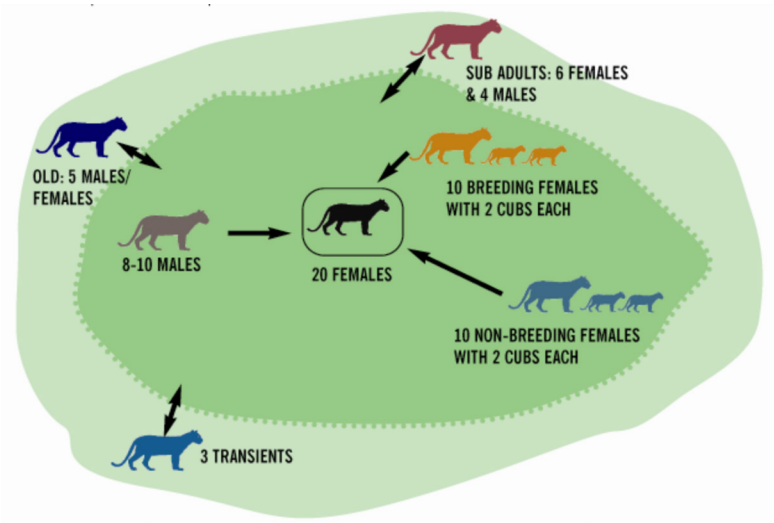

Plate 2 : Tiger Land Tenure Dynamics. Minimum population of tigers in breeding age needed for maintaining a viable population (80-100 tigers), which require an inviolate space of 800-1000 square kilometers."

52. Clause 8 of the said guidelines deals with the importance of the corridors, which reads thus :

"**8. Value of Corridors**

8.1 Isolated populations of wild animals face the risk of extinction owing to insularization. Habitat fragmentation adversely affects wildlife due to decreased opportunity available for wild animal movement from different habitats. This in turn prevents gene flow in the landscape. The equilibrium theory of island biogeography predicts greater species richness in large wildlife areas or in smaller areas connected by habitat corridors owing to increased movements of wild animals. Such connecting habitats, apart from facilitating animal movements also act as refuge for spill over populations from the core areas. They may also act as smaller "source" by facilitating breeding and movement of native wildlife populations to colonize adjoining habitats. Natural

linear features like rivers or mountain ranges may act as boundaries for wildlife populations. However, disturbance of corridors on account of human interventions (highways, canals, industries, roads, railway tracks, transmission lines) is deleterious to wildlife."

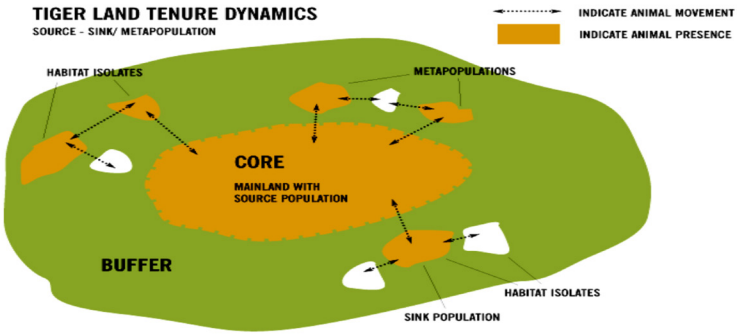

Plate 3 : Tiger Land Tenure Dynamics

8.2 "Source" populations are those which produce a surplus of animals which are potential colonizers. On the other hand, "Sinks" are those populations in which deaths exceed births, and their persistence depends on regular influx of immigrants.

8.3 Patches of suitable habitats in the landscape may support wildlife populations (local populations), which may be separated from one another on account of various disturbance factors. Collectively, such patches of local populations are known as "regional populations". This general situation of sub divided populations interacting with one another in a landscape to supplement new genes through movement, is known as a "meta population". In the context of tiger land tenure dynamics, the core-buffer areas conform to the "island-mainland" or "coresatellite" form of meta population model. The core area of a tiger reserve provides a source of colonizers for the surrounding local populations of different sizes and varying degrees of isolation. The

core area may not readily experience extinction owing to the protection inputs for maintaining its inviolate nature. However, the surrounding isolated patches in the buffer area may suffer from local extinction if wildlife concerns are not mainstreamed in the area. Therefore, a meta population management approach is required for the buffer zone as well as corridors to facilitate :

(a) Supplementing declining local tiger populations

(b) Facilitating re-colonization in habitat patches through restorative management

(c) Providing opportunity to tiger for colonizing new areas through patches of habitats (stepping stones) between isolated populations (**Plate 4**).

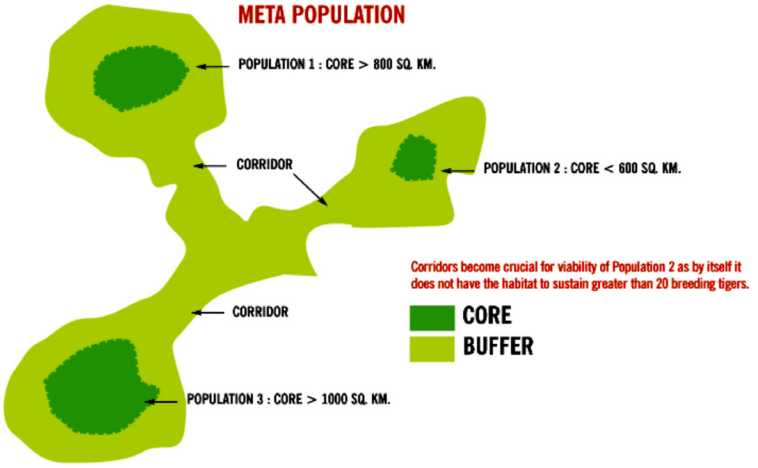

Plate 4 : Meta population dynamics. Corridors become crucial for maintaining viability of Population 2 as by itself it does not have the habitat to sustain greater than 20 breeding tigers."

53. In 2012, the NTCA issued Guidelines for Normative Standards for Tourisms Activities and for Project Tiger for tiger conservation in the buffer and core areas of the tiger reserves which were notified vide Gazette Notification dated 15th October 2012 (hereinafter referred to as "the 2012 Guidelines")

54. Clause 16.2 of the 2012 Guidelines deals with strengthening of infrastructure within the tiger reserve, which reads thus :

> "**16.2. Strengthening of infrastructure within Tiger Reserves (ongoing) (non recurring for new civil works and recurring for maintenance).**
>
> The following activities, inter alia, would form part of reinforcing the infrastructure of tiger reserves (including support to new tiger reserves) :
>
> (i) Civil Works (staff quarters, family hostels, office improvement, patrolling camp, house keeping buildings, museum, culverts).
>
> (ii) Maintenance, creation and upgradation of road network.
>
> (iii) Maintenance and creation of wireless tower.
>
> (iv) Maintenance and creation of fire watch tower.
>
> (v) Maintenance and creation of bridges, dams, anicuts.
>
> (vi) Maintenance, creation of firelines and firebreaks.
>
> (vii) Maintenance and creation of earthen ponds.
>
> (viii) Procurement and maintenance of vehicles (Gypsy, Jeep, Truck, Tractor etc.).
>
> (ix) Habitat improvement works.
>
> (x) Procurement of hardware, software/Geographical Information System (GIS).
>
> (xi) Procurement of compass, range finder, Global Positioning System (GPS), camera traps.
>
> (xii) Procurement of satellite imageries for management planning.
>
> (xiii) Map digitization facility for management planning.
>
> (xiv) Monitoring system for Tigers' Intensive Protection and Ecological Status (M-STrIPES) monitoring.
>
> (xv) E-surveillance."

55. Clause 16.21 of the 2012 Guidelines deals with establishment of Tiger Safari, interpretation and awareness centres in buffer and fringe areas, which reads thus :

> "**16.21 Establishment of Tiger Safari, interpretation and awareness centres under the existing component of 'co-existence agenda in buffer and fringe areas', and management of such centres through the respective Panchayati Raj Institutions (creation - Non-Recurring; maintenance - Recurring).**
>
> The Tiger Safaris may be established in the buffer areas of tiger reserves which experience immense tourist influx in the core/critical tiger habitat for viewing tiger. The interpretation and awareness centres would also be supported in such buffer areas to foster awareness for eliciting public support. The management of such centres would be through the respective Panchayati Raj (PR) institutions."

56. In 2016, the NTCA notified the Guidelines to Establish Tiger Safaris in Buffer and Fringe Areas of the Tiger Reserves (hereinafter referred to as "2016 Guidelines"). These guidelines provide for the basic criteria, and procedure required to be followed in the buffer and fringe areas of tiger reserves for dealing with the establishment, management, and administration of the 'Tiger Safaris' after following the due procedure prescribed under the law and the 2012 Guidelines. Clause 8 thereof provides that, tourism activities in the tiger reserves are regulated by the normative guidelines on tourism issued by the NTCA as well as by the prescriptions on eco-tourism as contained in the TCPs of the tiger reserves. It provides that the last three years' average visitation will be taken into consideration while determining the need for a tiger safari. It provides that, if the carrying capacity is 100% utilized, then a proposal for establishing a tiger safari can be placed before the NTCA.

57. Clause 9 of the 2016 guidelines is very important. It provides that no tiger shall be obtained from the zoo exhibit. Wild tigers that are from the same landscape as that of the area where the tiger safari is established, falling under the categories of (a) injured tigers (after suitable treatment); (b) conflict tigers; and (c) orphaned tiger cubs which are unfit for re-wilding and release into the wild shall be selected. It further provides that no visibly injured or incapacitated tiger shall be put on the safari. It further provides that recovered/ treated animals shall be put on display only after assessment by the

NTCA. Further, no healthy wild tiger or any other animal shall be sourced from the wild as per provisions of the National Zoo Policy.

58. Clause 10 of the 2016 guidelines further provides that the location of the tiger safari shall be identified preferably in the buffer (not falling in notified National Parks and/or Wildlife Sanctuary)/peripheral area of the tiger reserve based on the recommendations of a committee comprising of members from the NTCA, CZA, Forest Department of State concerned, an experienced tiger biologist/scientist/ conservationist and a representative, nominated by the Chief Wildlife Warden of the concerned State. It also provides that tiger dispersal routes shall be avoided in all circumstances. The area of a Safari Park should be as large as possible; however, the minimum area of a tiger safari should be 40 hectares, extendable as per requirements. The topography for the safari should be undulating and well- drained, without steep slopes. The vegetation maintained in the Safari Park should be indigenous. The density of flora should be regulated according to needs, and to provide a naturalistic effect. It should provide shelters and withdrawal areas for animals. It provides that the entire safari area should be surrounded by a suitable peripheral chain link fence. The said chain link fence should be of a minimum height of 5 meters in case of large carnivores like tigers with a suitable both way –overhang at the top or as prescribed by the CZA from time to time. It also provides that a buffer zone (strip) of about 5 meters width be provided around the fenced area. It also provides for the erection of a watch tower of about 5 meters in height. It also provides for the sensitization of visitors at 'Visitor Centres'. It provides that visitors shall enter the park in eco-friendly vehicles which run on solar and/or battery power only. There are various other details with regard to layout of roads, hours of the day during which vehicles should be permitted, the equipment to be provided, veterinary care, education. It also provides for the frequency of vehicles entering the Safari Park. It further restricts taking the vehicles near the animals and to maintain a distance of at least 10 meters. It also provides for waste disposal, monitoring, and supervision.

59. Clause 14 of the 2016 guidelines provides for management of the tiger safari based on prescriptions of a Master Plan which shall be formulated as per guidelines of the CZA and duly approved by the said Authority. It further provides that care should be taken to harmonize the Master Plan with prescriptions of the TCP of the area concerned.

60. The NTCA again in 2019 notified guidelines to establish tiger safaris in buffer and fringe areas of tiger reserves. Most of the guidelines are similar to those contained in the 2016 guidelines. In some areas, elaborate details have been provided. The only substantial distinction is about clause 9, which reads thus :

> "**9. Selection of Animal :** The selection of the animal shall be done in conformity of section 38I of Wildlife (Protection) Act, 1972 after due approval of the Central Zoo Authority (CZA)."

61. It will further be relevant to note that the NTCA has notified the Standard Operating Procedure to deal with orphaned, abandoned tiger cubs and old/injured tigers in wild (hereinafter referred to as "SOP"). The said SOP provides detailed procedures as to what are the causes and circumstances leading to orphaned/abandoned tiger cubs and old/injured tigers in the wild. It provides a procedure for establishing the identity of the tigresses/cub(s)/old/injured/sick tigers by comparing camera trap photographs with the National Repository of Camera Trap Photographs of Tigers. It provides for the collection of recent cattle/livestock depredation or human injury/fatal encounter data, if any, in the area. It further deals with how such cubs and tigers are to be dealt with.

62. The said SOP provides that, rearing of the tiger cubs should be in the *in situ* enclosure for wilding/re-wilding towards subsequent release in the wild. It provides a detailed procedure as to how the *in situ* enclosure should be constructed in order to avoid the 'Pavlovian' conditioning of tiger cubs in the *in situ* enclosure and the release of natural prey animals within the tiger enclosure with minimum sound. It also provides for maintaining of a record of the kills made by the tiger cubs. It provides that the tiger cubs should be reared in the *in situ* enclosure for a minimum of two years, and each cub should have a successful kill record of at least 50 prey animals. It provides that the tiger cubs which have a successful kill record may be released in the wild in consultation with the NTCA after radio collaring, to a suitable, productive habitat within the same landscape, while keeping in mind the land tenure dynamics of tigers or the presence of human settlements in the new area. The SOP also deals with 'Hard' release of tiger cubs in the wild.

63. The SOP also provides for the rehabilitation of the sick/injured/ old tigers in zoos. A perusal of the SOP would reveal that only in

extreme situations, where an old/injured tiger may create a human-tiger interface problem leading to livestock/human depredation; such tigers should be rehabilitated in a recognized zoo.

64. The SOP also, in detail, has provisions with regard to the design of cages/transportation protocol; design and related details of the *in situ* enclosure; housekeeping details for the rearing of abandoned/ orphaned newborn tiger cubs; and safeguards for the field staff.

65. It is further relevant to note that, the Ministry of Environment and Forests, Department of Environment, Forests & Wildlife, Union of India has issued a Resolution dated 7th December 1988, thereby providing for the National Forest Policy, 1988. Para 4.5 of the said Policy deals with 'Wildlife Conservation', which reads thus :

> "**4.5 Wildlife Conservation**
>
> Forest Management should take special care of the needs of wildlife conservation, and forest management plans should include prescriptions for this purpose. It is specially essential to provide for "corridors" linking the protected area in order to maintain genetic continuity between artificially separated sub-sections of migrant wildlife."

66. It is further relevant to note that the National Wildlife Action Plan, 2017-2031 also emphasizes on the concept of protection of the wildlife as a whole, beyond protected areas to protect the integrity of the Tiger Reserve. The relevant portion of the Plan is reproduced herein below :

> ***"Landscape Level Approach for Wildlife Conservation***
>
> *Overview and Objectives-*
>
> 1. It is increasingly recognized that ***wildlife conservation has to go beyond Protected Areas (PAs)*** to the larger landscapes in which these are embedded. A landscape is defined as 'a large tract of land constituted by a mosaic of interacting land uses with people and the impacts of their activities as the cornerstone of its management.' ***Landscape allows ecosystem level conservation actions at the existing internal smaller nested spatial scales of management/ administration such as PAs and***

territorial forest divisions as well as larger units to achieve conservation goals at the largest spatial scale possible in practical terms.

2. Landscape level conservation of species must be seen as maintaining or enhancing genetic exchanges between metapopulations and significantly improving the prospects of their long term persistence. Therefore, the plans must address species loss in the short-term and the reasons for such depletions in the long run.

xxx xxx xxx

6. ***Further, conservation of wildlife can not be seen isolated from the whole development of the region or landscape. Local governance systems, local land use patterns and land use systems, ecosystem-interfaces and socio-economic circumstances are mutually intertwined at the landscape level. Therefore, a mosaic approach to landscape planning needs to be developed in partnership with other agencies and stakeholders."***

[emphasis supplied]

67. It is thus amply clear that the National Wild Life Action Plan also recognizes the necessity of wildlife conservation beyond the protected areas. It states that the landscape allows ecosystem level conservation actions at the existing internal smaller nested spatial scales of management/administration such as protected areas and territorial forest divisions as well as larger units to achieve conservation goals at the largest spatial scale possible in practical terms. It further states that the conservation of wildlife cannot be seen to be isolated from the whole development of the region or landscape. It states that the local governance systems, local land use patterns and land use systems, ecosystem-interfaces and socio-economic circumstances are mutually intertwined at the landscape level. It emphasizes that a mosaic approach to landscape planning needs to be developed in partnership with other agencies and stakeholders.

In Re: T.N. Godavarman Thirumulpad v. Union of India & Ors.
In Re: Gaurav Kumar Bansal

V. CONSIDERATION

68. This Court had an occasion to consider an issue with regard to environmental justice in the case of ***T.N. Godavarman Thirumulpad v. Union of India and others***[2], wherein this Court held thus :

> "**17.** ***Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric.*** Many of our principles like sustainable development, polluter-pays principle, intergenerational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and that non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature-centred where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. ***Ecocentrism is therefore life-centred, nature-centred where nature includes both humans and non-humans.*** The National Wildlife Action Plan 2002-2012 and the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 are centred on the principle of ecocentrism."
>
> [emphasis supplied]

69. It could thus be seen that this Court has held that, to achieve environmental justice, the approach of anthropocentrism i.e. human interest focused and that non-human has only instrumental value to humans will have to be avoided. It has been held that ecocentrism i.e. nature centered where humans are a part of nature and non-humans have intrinsic value will have to be adopted. It has been held that human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. It has been held that the National Wildlife Action Plan 2002-2012 and the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 are centred on the principle of ecocentrism.

2 [2012] 3 SCR 460 : (2012) 3 SCC 277 : 2012 INSC 81

70. This Court again in the case of ***Centre for Environmental Law, World Wide Fund-India v. Union of India and others***[3], following the earlier judgments, observed thus :

> "**44.** The scope of the Centrally-sponsored scheme was examined in T.N. Godavarman Thirumulpad v. Union of India [(2012) 3 SCC 277] (Wild Buffalo case) and this Court directed implementation of that scheme in the State of Chhattisgarh. ***The Centrally-sponsored scheme, as already indicated, specifically refers to the Asiatic lions as a critically endangered species and highlighted the necessity for a recovery programme to ensure the long-term conservation of lions. NWAP, 2002-2016 and the Centrally-sponsored scheme, 2009 relating to integrated development of wildlife habitats are schemes which have statutory status and as held in Lafarge case [Lafarge Umiam Mining (P) Ltd. v. Union of India, (2011) 7 SCC 338] and have to be implemented in their letter and spirit.*** While giving effect to the various provisions of the Wildlife (Protection) Act, the Centrally-sponsored scheme, 2009, the NWAP, 2002-2016 our approach should be ecocentric and not anthropocentric."
>
> [emphasis supplied]

71. It could thus be seen that, this Court held that the National Wildlife Action Plan (NWAP), 2002-2016, and the Centrally-sponsored scheme, 2009 related to the integrated development of wildlife habitats are schemes that have a statutory status, and will have to be implemented in letter and spirit.

72. It can further be seen that, this Court has emphasized on the importance of sustainable development, i.e., balancing the rights of the citizens and the concern for the environmental and ecological issues.

73. In this respect, it will be appropriate to refer to Articles 48-A and 51-A(g) of the Constitution, which read thus :

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3 [2013] 6 SCR 757 : (2013) 8 SCC 234 : 2013 INSC 254

> "**48-A.** ***Protection and improvement of environment and safeguarding of forests and wildlife***.—The State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country.
>
> ***
>
> **51-A.** ***Fundamental duties***.—It shall be the duty of every citizen of India—
>
> ***
>
> (*g*) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures;"

74. In ***Vellore Citizens' Welfare Forum v. Union of India and others***[4], this Court observed thus :

> "**10**. The traditional concept that development and ecology are opposed to each other is no longer acceptable. "Sustainable Development" is the answer. In the international sphere, "Sustainable Development" as a concept came to be known for the first time in the Stockholm Declaration of 1972. Thereafter, in 1987 the concept was given a definite shape by the World Commission on Environment and Development in its report called "Our Common Future". The Commission was chaired by the then Prime Minister of Norway, Ms G.H. Brundtland and as such the report is popularly known as "Brundtland Report". In 1991 the World Conservation Union, United Nations Environment Programme and Worldwide Fund for Nature, jointly came out with a document called "Caring for the Earth" which is a strategy for sustainable living. Finally, came the Earth Summit held in June 1992 at Rio which saw the largest gathering of world leaders ever in history—deliberating and chalking out a blueprint for the survival of the planet. Among the tangible achievements of the Rio Conference was the signing of two conventions, one on biological diversity and another on climate change. These conventions were

4 [1996] Supp. 5 SCR 241 : (1996) 5 SCC 647 : 1996 INSC 952

signed by 153 nations. The delegates also approved by consensus three non-binding documents, namely, a Statement on Forestry Principles, a declaration of principles on environmental policy and development initiatives and Agenda 21, a programme of action into the next century in areas like poverty, population and pollution. During the two decades from Stockholm to Rio "Sustainable Development" has come to be accepted as a viable concept to eradicate poverty and improve the quality of human life while living within the carrying capacity of the supporting ecosystems. "Sustainable Development" as defined by the Brundtland Report means "Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs". We have no hesitation in holding that "Sustainable Development" as a balancing concept between ecology and development has been accepted as a part of the customary international law though its salient features have yet to be finalised by the international law jurists.

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16. The constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law right of clean environment. It would be useful to quote a paragraph from Blackstone's commentaries on the Laws of England (*Commentaries on the Laws of England of Sir William Blackstone*) Vol. III, Fourth Edn. published in 1876. Chapter XIII, "Of Nuisance" depicts the law on the subject in the following words :

'Also, if a person keeps his hogs, or other noisome animals, or allows filth to accumulate on his premises, so near the house of another, that the stench incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbour sets up and exercises any offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule

> is, "*sic utere tuo, ut alienum non leadas*"; this therefore is an actionable nuisance. And on a similar principle a constant ringing of bells in one's immediate neighbourhood may be a nuisance.
>
> … With regard to other corporeal hereditaments; it is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a watercourse, by erecting a dye-house or a lime-pit, for the use of trade, in the upper part of the stream; to pollute a pond, from which another is entitled to water his cattle; to obstruct a drain; or in short to do any act in common property, that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would they should do unto ourselves".' ""

75. Further in the case of ***Intellectuals Forum, Tirupathi v. State of A.P. and others***[5], this Court observed thus :

> "**84**. The world has reached a level of growth in the 21st century as never before envisaged. While the crisis of economic growth is still on, the key question which often arises and the courts are asked to adjudicate upon is whether economic growth can supersede the concern for environmental protection and whether sustainable development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations could be ignored in the garb of economic growth or compelling human necessity. The growth and development process are terms without any content, without an inkling as to the substance of their end results. This inevitably leads us to the conception of growth and development, which sustains from one generation to the next in order to secure "our common future". In pursuit of development, focus has to be on sustainability of development and policies

5 [2006] 2 SCR 419 : (2006) 3 SCC 549 : 2006 INSC 101

towards that end have to be earnestly formulated and sincerely observed. As Prof. Weiss puts it, "conservation, however, always takes a back seat in times of economic stress". It is now an accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their well-being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that present as well as the future generations are aware of them equally."

76. In ***Indian Council for Enviro-Legal Action v. Union of India and others***[6], this Court observed thus :

"**41**. With rapid industrialisation taking place, there is an increasing threat to the maintenance of the ecological balance. The general public is becoming aware of the need to protect environment. Even though, laws have been passed for the protection of environment, the enforcement of the same has been tardy, to say the least. With the governmental authorities not showing any concern with the enforcement of the said Acts, and with the development taking place for personal gains at the expense of environment and with disregard of the mandatory provisions of law, some public-spirited persons have been initiating public interest litigations. The legal position relating to the exercise of jurisdiction by the courts for preventing environmental degradation and thereby, seeking to protect the fundamental rights of the citizens, is now well settled by various decisions of this Court. The primary effort of the court, while dealing with the environmental-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. The courts, in a way, act as the guardian of the people's fundamental rights but in regard to many technical matters, the courts may not be fully equipped. Perforce, it has to rely on outside agencies for reports and recommendations whereupon orders have been passed

6 [1996] Supp. 1 S.C.R. 507 : (1996) 5 SCC 281 : 1996 INSC 543

> from time to time. Even though, it is not the function of the court to see the day-to-day enforcement of the law, that being the function of the Executive, but because of the non-functioning of the enforcement agencies, the courts as of necessity have had to pass orders directing the enforcement agencies to implement the law."

77. Emphasizing on the concern for environmental and ecological protection, the Courts have recognised the importance of sustainable development. Development which can be achieved only by way of protecting the environment and conserving the natural resources for the benefit of humanity and future generations. This Court holds that, it is now an accepted social principle that all human beings have a fundamental right to a healthy environment, commensurate with their well-being, coupled with a corresponding duty of ensuring that resources are conserved and preserved in such a way that the present as well as future generations will be aware of them equally. This Court has further held that, the primary effort of the court while dealing with the environment-related issues, is to see that the enforcement agencies, whether it be the State or any other authority, take effective steps for the enforcement of the laws. It has been held that the courts, in a way, act as the guardian of the people's fundamental rights. This Court has observed that it is not the function of the court to see the day-to-day enforcement of the law; that being the function of the Executive, but because of the non-functioning of the enforcement agencies, the courts out of necessity have had to pass orders directing the enforcement agencies to implement the law. In the recent judgments of this Court in the cases of ***Resident's Welfare Association and another v. Union Territory of Chandigarh and others***[7], ***State of Himachal Pradesh and others v. Yogendera Mohan Sengupta and another***[8] and ***State of Uttar Pradesh and others v. Uday Education and Welfare Trust and others***[9], to which one of us (B.R. Gavai, J.) was a party, this Court has also emphasized on the principle of sustainable development.

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7 [2023] 1 SCR 601 : (2023) 8 SCC 643 : 2023 INSC 22

8 [2024] 1 SCR 973 : 2024 SCC OnLine SC 36 : 2024 INSC 30

9 [2022] 19 SCR 781 : 2022 SCC OnLine SC 1469 : 2022 INSC 465

(a) Consideration as to whether Tiger Safaris and Zoos are on the same footing or not.

78. In this background, we will have to consider the question as to whether the 'zoo' as defined under Section 2(39) and dealt with under Chapter IVA of the WLP Act and the 'Tiger Safaris' as conceptualized by the NTCA would stand on a same footing or not.

79. We have already reproduced the definition of 'zoo' as defined under Section 2(39) of the WLP Act. The definition of 'zoo' itself would show that it is meant to be an establishment, whether stationary or mobile, where captive animals are kept for exhibiting to the public or *ex-situ* conservation and include a circus and off-exhibit facilities such as rescue centres and conservation breeding centres. However, it does not include the establishment of a licensed dealer in captive animals. It could thus be seen that though a 'zoo' as contemplated under Chapter IVA of the WLP Act also deals with conservation, it emphasizes on *ex situ* conservation.

80. Proviso to Section 33(a) of the WLP Act specifically prohibits any construction of tourist lodges, including Government lodges for commercial purposes, hotels, zoos and safari parks inside a sanctuary except with the prior approval of the National Board. It could thus be seen that, insofar as the area which is covered under a sanctuary is concerned, there will be no difficulty to hold that a safari cannot be constructed within the said area unless there is a prior approval of the National Board. However, the question that falls for consideration in the present case is, as to whether a 'Tiger Safari' would be permissible in the buffer zone or not.

81. For the first time, a 'safari' was defined in the 'Guidelines for Safari Parks which are Working either as Zoos or as Extension to Zoos, 1996'. It reads thus :

> "Safaries are specialized zoos where the captive animals are housed in any large naturalistic enclosures to and the visitors are allowed to enter the enclosure to view the animals in a mechanized vehicle or a pre-determined route from close quarters."

82. It could thus be seen from the title of the said Guidelines itself that the same would be applicable only insofar as safari parks which are working either as zoos or as an extension to zoos.

83. Undisputedly, the 'Tiger Safaris' which are conceptualized by the NTCA are not for the parks which are working either as zoos or as an extension to zoos.

84. As already discussed herein above, the entire thrust of the WLP Act is on the conservation, protection, and management of wildlife. Noticing the importance of tigers as a centre of the eco-system, Chapter IVB of the WLP Act, which deals with NTCA, was inserted by the Wild Life (Protection) Amendment Act, 2006 (No. 39 of 2006) with effect from 4th September 2006. A perusal of Chapter IVB would reveal that it emphasizes on the conservation and protection of tigers and the management of the 'Tiger Reserves'. A very important role has been entrusted to the NTCA which is to be chaired by the Minister in charge of the Ministry of Environment and Forests insofar as the conservation and protection of tigers and the management of 'Tiger Reserves' is concerned.

85. As already discussed herein above, clause (c) of Section 38-O of the WLP Act requires the NTCA to lay down normative standards for tourism activities and guidelines for project tiger from time to time for tiger conservation in the buffer and core area of tiger reserves and ensure their due compliance. Clause (g) thereof requires the NTCA to ensure that the tiger reserves and areas linking one protected area or tiger reserve with another protected area or tiger reserve are not diverted for ecologically unsustainable uses, except in public interest and that too, with the approval of the National Board for Wild Life and on the advice of the Tiger Conservation Authority.

86. It is to be noted that after the State Government, on the recommendation of the NTCA, notifies an area as a 'Tiger Reserve', the restriction as provided under the provisions of sub-section (2) of Section 18, sub-sections (2), (3) and (4) of Section 27, Sections 30, 32 and clauses (*b*) and (*c*) of Section 33 of this Act shall, as far as may be, apply in relation to a 'Tiger Reserve' as they apply in relation to a sanctuary.

87. Section 38XA of the WLP Act specifically provides that the provisions contained in the said Chapter shall be in addition to, and not in derogation of, the provisions relating to sanctuaries and National Parks. As such, it could be seen that the legislature has put 'Tiger Reserve' on a higher pedestal than the sanctuaries and the National Parks.

88. Sub-section (4) of Section 38V of the WLP Act requires the State Government, while preparing a TCP, to ensure the agricultural, livelihood, developmental and other interests of the people living in tiger bearing forests or a tiger reserve. Explanation thereto divides the 'Tiger Reserve' into two areas, i.e., (i) core or critical tiger habitat areas of National Parks and sanctuaries, which are required to be kept as inviolate for the purposes of tiger conservation, without affecting the rights of the Scheduled Tribes or such other forest dwellers; and (ii) buffer or peripheral area, where a lesser degree of habitat protection is required to ensure the integrity of the critical tiger habitat. While doing so, the State Government is required to ensure adequate dispersal for the tiger species, which aims at promoting co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights of the local people, wherein the limits of such areas are determined based on the scientific and objective criteria in consultation with the concerned Gram Sabha and an Expert Committee constituted for the purpose are to be provided.

89. It is thus clear that, even in buffer or peripheral areas, though a lesser degree of habitat protection than the core area is to be provided, however, the provisions are required to be made to ensure the integrity of the critical tiger habitat with adequate dispersal for tiger species. An effort has to be made to promote co-existence between wildlife and human activity with due recognition of the livelihood, developmental, social and cultural rights.

90. It is further to be noted that the National Forest Policy, 1988 also emphasizes the necessity to provide for "corridors" linking the protected areas to maintain genetic continuity between artificially separated sub-sections of migrant wildlife. Even the National Wildlife Action Plan 2017-31 emphasizes on the same. As held by this Court in the case of ***Centre for Environmental Law, World Wide Fund-India*** (supra), this Policy has a statutory flavor.

91. As held by this Court in the case of ***T.N. Godavarman Thirumulpad v. Union of India and others*** (supra), the approach has to be ecocentric and not anthropocentric. The approach has to be nature-centred where humans are a part of nature and non-humans have intrinsic value.

92. We will now have to examine as to how the concept of 'Tiger Safaris' came to be introduced.

93. We have already reproduced the relevant part of the Guidelines for Preparation of Tiger Conservation Plan, 2007. The said Guidelines show how important is the buffer zone vis-à-vis the tiger land tenure dynamics. Based on the available research data, it has been found that the minimum population of tigresses in breeding age, which is needed to maintain a viable population of 80-100 tigers (in and around core areas) requires an inviolate space of 800 -1000 sq. km. It also states that the tiger being an "umbrella species", such an area would also ensure viable populations of other wild animals (co-predators, prey) and forest, thereby ensuring the ecological viability of the entire area/habitat. It can also be seen that the buffer areas with forest connectivity are imperative for tiger dynamics since such areas foster sub-adults, young adults, transients, and old members of the population. The young adults periodically replace the resident aging males and females from the source population area. It also states that the buffer area absorbs the "shock" of poaching pressure on populations of tigers and other wild animals.

94. It is for the first time, in "the 2012 Guidelines" issued by the NTCA on 15th October 2012, that the concept of establishment of the 'Tiger Safari' could be found, which has already been reproduced herein above. The said Guidelines provided that the 'Tiger Safaris' may be established in the buffer areas of tiger reserves which experience immense tourist influx in the core/critical tiger habitat for viewing tigers. It also provided for the establishment of interpretation and awareness centres in such buffer areas to foster awareness for eliciting public support. It provided that the management of such centres would be through the respective Panchayati Raj (PR) institutions.

95. Thereafter in 2016, the NTCA issued guidelines to establish 'Tiger Safaris' in the buffer and fringe areas of tiger reserves. These guidelines provided for the basic criteria, and procedure required in the buffer and fringe areas of tiger reserves for dealing with the establishment, management, and administration of 'Tiger Safaris' after following the due procedure prescribed under the law and the 2012 guidelines as also the CZA guidelines for the establishment of new zoos under section 38H(1A) of the WLP Act. Clause 8 of the said Guidelines provides that, if the carrying capacity is 100% utilized, then a proposal for establishing a 'Tiger Safari' can be placed before the NTCA.

96. Clause 9 of the 2016 guidelines is very important. It specifically provides that no tiger shall be obtained from a zoo exhibit. It further provides that wild tigers which are from the same landscape as that of the area where the tiger safari is established, would fall under the categories of (a) injured tigers (after suitable treatment); (b) conflict tigers; and (c) orphaned tiger cubs which are unfit for re-wilding and release into the wild should be selected. It further provides that no visibly injured or incapacitated tiger shall be put in the safari. It further provides that recovered/treated animals shall be put on display only after assessment by the NTCA. It further provides that no healthy wild tiger or any other animal shall be sourced from the wild as per the provisions of the National Zoo Policy.

97. Clause 10 of the 2016 guidelines further provides that the location of the tiger safari shall be identified preferably in the buffer (not falling in notified National Parks and/or Wildlife Sanctuary)/peripheral area of the tiger reserve on the basis of the recommendations of a committee comprising of members from the NTCA, CZA, Forest Department of State concerned, an experienced tiger biologist/ scientist/conservationist and a representative, nominated by the Chief Wildlife Warden of the concerned State. It further provides that tiger dispersal routes shall be avoided in all circumstances.

98. However, the NTCA has issued fresh guidelines in November 2019. The 2019 Guidelines are similar to the 2016 Guidelines, except clause 9, which provides that the selection of the animal shall be done in conformity with Section 38I of the WLP Act after due approval of the CZA.

99. It could thus be seen that under the 2016 Guidelines, the concept of 'Tiger Safaris' was mainly for rehabilitation of the injured tigers (after suitable treatment), conflict tigers, and orphaned tiger cubs which are unfit for re-wilding and release into the wild. The final authority insofar as selection of the animals is concerned, vested with the NTCA. It could also be seen that the said 2016 Guidelines are also consistent with the SOP of the NTCA to deal with orphaned, abandoned tiger cubs and old/injured tigers in wild. The concept was changed in the 2019 Guidelines i.e. animals from zoo will be put in Safari. It provided that the selection of the animals shall be done in conformity with Section 38I of the WLP Act. The final authority of the selection of animals is vested with the CZA.

100. We *prima facie* find no infirmity in the guidelines issued by the NTCA, i.e., the 2012 Guidelines and the 2016 Guidelines for establishing the 'Tiger Safaris' in the buffer and fringe areas of the 'Tiger Reserve'. In our view, the said Guidelines emphasizes on the rehabilitation of injured tigers (after suitable treatment), conflict tigers, and orphaned tiger cubs which are unfit for re-wilding and release into the wild. However, the 2019 Guidelines, departing from the aforesaid purpose, provide for sourcing of animals from zoos in the Tiger Safaris. In our view, this would be totally contrary to the purpose of the Tiger Conservation. Similarly, the vesting of final authority in the CZA and not in the NTCA, in our view, is not in tune with the emphasis on tiger conservation as provided under Chapter IVB of the WLP Act. We are also of the view that since undertaking of establishment of such a 'Tiger Safari' would be basically for the '*in-situ'* conservation and protection of the tiger, it is the NTCA that shall have the final authority. No doubt that the CZA can be taken on board so that it can render its expertise in the management of such 'Safaris'.

101. We also find that, a reading of the provisions contained in the proviso to Section 33(a) and the provisions contained in the Explanation (ii) of sub-section 4 of Section 38V of the WLP Act would reveal that, although it will not be permissible to establish a 'Tiger Safari' in a core or critical tiger habitat area without obtaining the prior approval of the National Board, such an activity would be permissible in the buffer or peripheral area.

102. As already discussed herein above, while preparing a TCP, the State Government is required to ensure that the agricultural, livelihood, developmental, and other interests of the people living in tiger bearing forests or a tiger reserve are taken care of.

103. Undisputedly, it may not be out of place to mention that the establishment of such 'safaris' in the buffer zone would generate employment for the local people and promote co-existence between wildlife and human activity. However, we are of the considered view that such a 'safari' can be established only for the purposes specified in clause 9 of the 2016 Guidelines and not as per the 2019 Guidelines.

(b) Whether establishment of a 'Tiger Safari' at Pakhrau is legal or not.

104. We will now have to consider whether the establishment of the 'Tiger Safari' at Pakhrau is legal or not.

105. TCP in respect of the Corbett Tiger Reserve Core Zone for the period 2012-13 to 2021-2022 was submitted to the NTCA on 27th January 2015. The said TCP has been approved by the NTCA on 4th March 2015.

106. It will be apposite to refer to the relevant portion of clause 13.1.2 of the said TCP, which reads thus :

> "There is also need to develop a Rescue Centre cum Tiger Safari in the buffer area of CTR so as to provide an easy option for rescue and rehabilitation of injured and/or infirm or problem tigers and to provide opportunities for visitors to see tigers up close in a near natural controlled environment."

107. It could thus be seen that, the TCP also provided for developing a Rescue Centre-cum-Tiger Safari to provide an easy option for the rescue and rehabilitation of the injured and/or infirm or problem tigers and also to provide an opportunity for visitors to see tigers up close and in a near-natural controlled environment.

108. It will be relevant to refer to clause J of the said TCP, which reads thus :

> "**J. Exploring the possibility of a Tiger Safari :**
>
> Though Corbett Tiger Reserve is known for its tigers and it attracts lots of tourists, many of them could not see tiger and they return with heavy hearts. It is a fact that maximum tourists are only interested with the sighting of tigers. Although the park administration is trying its best to educate and aware tourists to enjoy the breath taking landscape with wildlife such as elephants, deer and crocodiles, casual tourists always hunt for sighting of a tiger. At this point the recent guideline enacted by NTCA for setting up of a 'Tiger Safari' in the buffer area to divert casual tourists from the tourism zone which will ultimately benefit the habitat from unnecessary pressure from growing tourists. The tiger safari will generate huge revenue which will enrich the 'Tiger Conservation Foundation of CTR' and ultimately the fringe villagers. A

> detail proposal will be prepared as per the guidelines of NTCA and CZA for funding by NTCA. There is a strong possibility of developing such a safari in Karnashram area of Lansdowne Forest Division."

109. The TCP takes into consideration the concept of diversion of casual tourists from the tourism zone to the 'Tiger Safari' in the buffer zone. It also states that this will ultimately benefit the habitat from unnecessary pressure from the growing tourists. It states that the 'Tiger Safari' will generate huge revenue which will enrich the 'Tiger Conservation Foundation of CTR' and ultimately the fringe villages. It also proposed a site for a 'Tiger Safari' at Karnashram area of Lansdowne Forest Division.

110. A perusal of the materials placed on record would reveal that the NTCA vide its order dated 5th June 2015, had granted an in-principal approval for establishment of the 'Tiger Safari' in Pakhrau. The CZA, vide order dated 12th February 2019, conveyed its approval on the conditions stipulated therein. The 'Tiger Safari' project, therefore, was approved by the CZA. Since at the relevant time, 'Tiger Safari' was considered as a 'part forest and part non-forestry' activity, an in-principal approval was granted by the Government of India under the Forest Conservation Act on 30th October 2020 for the Forest Clearance of 15% of the area. The Stage-I clearance was granted on 30th October 2020 and the Stage II clearance was granted on 10th September 2021.

111. It could be seen that, the location of the 'Tiger Safari' has not been identified as per clause 10 of the 2016 Guidelines which requires recommendations of the Committee comprising of the members from (i) NTCA, (ii) CZA, (iii) Forest Department of concerned State, (iv) an experienced tiger biologist/scientist/conservationist, and (v) a representative, nominated by the Chief Wildlife Warden of the concerned State.

112. From the record, it does not appear that such a Committee was constituted for the purpose of determining the location of the 'Tiger Safari' at Pakhrau. However, since there are approvals from the NTCA and the CZA and since the proposal for the establishment of 'Tiger Safari' was submitted by the Forest Department of the State, and since the Chief Wildlife Warden was also associated with identification of the location, we find that, though technically

there will be non-compliance with the requirement of clause 10 of the 2016 Guidelines; in fact, since most of the authorities mentioned therein are *ad idem,* we do not wish to interfere with the decision to establish the 'Tiger Safari' at Pakhrau.

113. We also place on record that Shri Anup Malik, IFS, PCCF (HoFF), Uttarakhand, and Dr. Samir Sinha, IFS, PCCF (Wildlife) & Chief Wildlife Warden, Uttarakhand**,** who were present in the Court during the hearing, have informed the Court that 80% of the work of the 'Tiger Safari' is complete. It is further informed that there are many tigers, who after their treatment are waiting in the rescue centre for being rehabilitated in the 'Safari'. It is also informed that the location of the 'Tiger Safari' is at the edge of the buffer zone, abutting the farmlands of the villagers. It is also informed that the topography of Karnashram area of Lansdowne Forest Division was not found suitable for the 'Tiger Safari' due to its terrain and the site at Pakhrau was found to be suitable. In any case, the concerned authorities, who have expertise in the matter, have approved the said site at Pakhrau.

114. In these peculiar facts, we are inclined to approve the establishment of the 'Tiger Safari' at Pakhrau. However, we find that when the TCP of 2015 itself provided for the establishment of a Rescue Centre-cum-Tiger Safari at a nearby place, there appears to be no logic for establishing a rescue centre at another place. We therefore find that it will be appropriate that the State of Uttarakhand is directed to also relocate the rescue centre nearby the 'Tiger Safari'. At the same time, it will also be necessary to issue directions that, while undertaking construction of these 'Tiger Safaris', the provisions of the 2016 Guidelines are scrupulously followed. We also propose to issue further directions in this regard, in the operative part of the judgment. The directions which would be issued by us would also be applicable to the existing safaris including the Pakhrau Tiger Safari.

(c) Illegal construction and felling of trees

115. The next question that requires consideration is with regard to the illegal construction carried out in the Corbett Tiger Reserve and the illegal felling of trees for the said purpose.

116. The Corbett National Park is one of the oldest parks in the country. It was declared a National Park by the United Provinces National Park Act, 1935. After the launch of 'Project Tiger' and the amendment to the WLP Act in the year 2006, which inserted Chapter IVB, a

Tiger Reserve admeasuring 1,288.31 sq. km. was notified by the Government of Uttarakhand by notification dated 26th February 2010, issued under Section 38V(1). Out of this 1,288.31 sq. km., 821.99 sq. km. has been declared as the core critical Tiger Habitat. Further, out of this 821.99 sq. km., 520.82 sq. km. forms part of the Corbett National Park, and 301.17 sq. km. of the Sonanadi Wildlife Sanctuary. The remaining reserved forest to the extent of 466.32 sq. km is a buffer area constituting 306.90 sq. km. in the Kalagarh Forest Division and 159.4 sq. km. in the Ram Nagar Forest Division.

117. The forests of the Corbett Tiger Reserve form an essential link corridor between Corbett and Rajaji National Park through the Rawasana – Sonanadi Corridor in the Lansdowne Forest Division.

118. The importance of the Corbett National Park has been captured in the "Status of Tigers, Co-predators & Prey in India" in the following words :

> "Corbett Tiger Reserve is the largest source population for tigers in Shivalik-Gangetic landscape and responsible for the remarkable recovery of tiger population in this landscape. The corridors connecting Corbett with the surrounding forest divisions and protected areas are crucial for the long-term survival of this metapopulation.
>
> xxx xxx xxx
>
> With a high ungulate biomass in the park Corbett Tiger Reserve maintains a high tiger density acting as a source of dispersing tigers to neighbouring protected areas (Lansdowne, Terai West, Amangarh and Ramnagar Forest Division) and is therefore of great importance for tiger and wildlife conservation in this landscape. Corbett Tiger Reserve has the largest tiger population in any single Protected Area in the world."

119. The Fifth Cycle of the 'Management Effectiveness Evaluation of Tiger Reserves in India' was released in the year 2023 based on the survey conducted in the year 2022. Though this evaluation gives a good rating to the Corbett Tiger Reserve, yet certain weaknesses have been pointed out. The Indian State of Forest Report 2021 (ISFR 21) suggests that the forest cover in the Corbett Tiger Reserve in 2011 was VDF 330.88 sq. km.; MDF 825 sq. km.; and OF 91.61 sq.km.

and that it has undergone changes, as found in the year 2021. The report also says that there has been a loss of 22 sq. km. of forest cover in the Tiger Reserve. It further noticed that the human-tiger conflict in the landscape is also increasing, and the loss of tree cover has resulted in loss of habitat and increased conflict with humans. It is pointed out that, as of now no Eco Sensitive Zone ("ESZ" for short) has been notified for the Corbett Tigre Reserve. It suggested that in the absence of such notification, the activities in the 10 km. deemed ESZ must be regulated.

120. It further points out that the building materials were found stored for remodeling private resorts along the Ramnagar-Ranikhet highway. It recommended that such activities must be regulated. It also points out that the Ramnagar-Ranikhet highway is persistently acting as a barrier for many species, including the elephant. It suggested that these roads have to be made eco-friendly according to the guidelines.

121. Report No. 3 of 2023 in Application No.1558 of 2021 in Writ Petition (Civil) No.202 of 1995 submitted by the CEC has annexed various reports containing findings of the Committees constituted under the orders of the High Courts. The CEC has considered the following :

(i) Findings of the Committee constituted by the NTCA pursuant to the order dated 23rd August 2021, passed by the High Court of Delhi in Writ Petition No.8729 of 2021 filed by the applicant-Mr. Gaurav Kumar Bansal;

(ii) Report dated 9th November 2021 filed jointly by PCCF (General), PCCF (Wildlife) and the Director of the Corbett National Park before the High Court of Uttarakhand pursuant to the order of the High Court dated 27th October 2021 in Writ Petition No.178 of 2021;

(iii) Site Inspection Report of the Regional Office, MoEF&CC, Dehradun in respect of the illegal felling of trees and illegal construction of buildings and waterbodies in the Corbett Tiger Reserve Landscape, Uttarakhand.

(iv) Findings of the Five Member Kapil Joshi Committee constituted by the Principal Chief Conservator of Forest (HoFF) vide letter No.948/P.O. dated 27th December 2021 and 1002/P.O. dated 12th January 2022.

(v) Report of FSI dated 20th October 2022 on the felling of trees in the name of establishment of the Pakhrau Tiger Safari, Uttarakhand.

122. After considering the aforesaid reports/findings, the CEC has come to a finding that various irregularities have been committed in the areas outside the Tiger Safari as well as in the Pakhrau Tiger Safari. They have been listed as under :

"A. IRREGULARITIES OUTSIDE THE TIGER SAFARI

a) improvement to Kandi Road over a length of 1.2 KM by way of raising the level of the road and construction of culverts without the approval/ sanction of the competent authority and without any provision in the budget.

b) construction of four buildings each with 4 rooms at Forest Rest House (FRH) complex, Pakhrau.

c) construction of four buildings, each with 4 rooms at Forest Rest House Complex, Morghatti.

d) construction of a water body each near Pakhrau FRH and Morghatti FRH after clearing the tree growth

e) construction of four buildings outside the Kugadda Forest CAMP in Palean Range, Kalagarh Forest Division falling with in the Corbett Tiger Reserve. These four buildings had identical building plans similar to those seen in Morghatti and Pakhrau, FRH Complex.

f) construction by DFO, Kalagarh of Saneh Forest Rest House falling in Lansdowne Forest Division pursuant to the directions of CCF, Garhwal vide letter dated 15.09.2021.

g) laying of underground 11 KV electrical cables between Saneh and Pakhrau.

The noted works at (a) to (g) above were being carried out without requisite administrative and financial approvals of the competent authority. The works

were being executed solely under the orders of the DFO, Kalagarh and DFO Kalagarh is not competent to sanction these works.

B. IRREGULARITIES IN PAKHRAU TIGER SAFARI

a) Illegal felling of estimated 6053 trees at the proposed Tiger Safari construction sites in place of 163 permitted to be cut in the FC clearance granted by MoEF&CC

b) Commencement of construction work of Pakhrau Tiger Safari even before getting stage II clearance under FC Act 1980 and final approval of the Layout Plans by the Central Zoo Authority

c) Concrete buildings are being constructed instead of using bamboo which has been approved by MoEF&CC.

d) Additional civil structures are planned and being built without approval of the revised plan and accordingly the estimate has escalated from Rs.26.81 crores to Rs.102.11 crores"

123. The aforesaid list of irregularities would reveal that a vast number of illegal construction activities have been carried out. Such constructions cannot be completed overnight. Though an action has been taken in respect of certain officers of the Forest Department, we are of the *prima facie* view that many other persons must have been involved in the commission of the said irregularities. However, since the CBI is conducting the investigation as per the orders passed by the High Court, we do not propose to make any comments thereto.

124. It has been categorically stated in the report that CEC was informed about all the civil structures being constructed in respect of works at "A" except one building at Kuggada which has been demolished. It has been stated that one building which has not been demolished has been used by the Forest Staff as their camping place because of lack of alternative accommodation. We are also informed during the hearing that, except for the works executed at the Pakhrau Tiger Safari site, the contractors who executed the works without the approval of competent authorities have not been made any payments and that the contractors have also not made any claims in this regard.

125. The CEC during the site visit was shown the locations where the unauthorized buildings once stood but these buildings were not there at the time of the site visit of CEC as they had been demolished on the orders of the Director, 'Project Tiger'.

126. The CEC has further noticed that the DFO, Kalagarh who executed the work illegally had committed similar irregularities during his earlier postings. It is also noticed that the PCCF & HoFF and the DIG Police, Vigilance Department had written in this regard to the Government requesting not to post the said officer in any sensitive post. The Range Officer posted in Pakhrau range had earlier worked with Kishan Chand, DFO, Kalagarh while he was the DFO in the Rajaji Tiger Reserve. Despite the fact that both these officers were accused of the irregularities that took place in the Rajaji Tiger Reserve, they were again posted together in the Kalagarh Forest Division.

127. The CEC also noticed that the DFO, Kalagarh was transferred from the Kalagarh Forest Division only after the site visit of the CEC even though the report submitted by the NTCA had found that the illegalities/irregularities were committed by him. It is also noticed that even after it came to the notice of the higher authorities that the DFO, Kalagarh had issued work orders without any authority in respect of the works which have been listed above, yet for unknown reasons, he was not named as an accused in the forest offences.

128. The CEC has formed an opinion that the cavalier attitude of the Government of Uttarakhand indicated that the officer was having tacit backing of his bosses in the execution of the unauthorized works worth crores of rupees at the cost of the environment and the wildlife in a prestigious and world-renowned Tiger Reserve.

129. The CEC further found that, though the works at the Forest Rest House Campuses were supposed to be for the accommodation of the forest staff, they do not appear to be so. They appear to be meant for providing accommodation consisting of 16 rooms at four locations (64 rooms) for tourists. As per the CEC, it was clear that this was done for the promotion of tourism.

130. The report of the CEC further found that the proposal for the felling of trees at the site of Pakhrau Tiger Safari submitted to MoEF&CC under the Forest (Conservation) Act, 1980 relates to the felling of only 163 trees out of 3,620 trees that have been enumerated within

the 16 Hectares out of the 106.16 Hectares that has been approved for the establishment of the Tiger Safari. It also refers to the report of the FSI dated 20th October 2022, which has estimated the total number of trees felled at the Pakhrau Tiger Safari site to be 2,651. The report further states that approximately additional 534 trees have been felled for the construction of tourist accommodation facilities and water bodies outside the proposed Pakhrau Tiger Safari.

131. No doubt that the report refers to the objection of the Uttarakhand Forest Department to the estimation of the FSI, which is also reiterated before us by Mr. Nadkarni, learned Senior Counsel during his arguments.

132. The report of the CEC further highlights that taking into consideration the sequence of events that happened, it was of the opinion that it was the then Hon'ble Forest Minister who was the main architect of the entire matter. In a nutshell, the reasons thereof are as under :

(i) That, the State Vigilance Department vide letter dated 19th September 2019 and the PCCF and HoFF vide letters dated 18th September 2019 and 21st September 2019 had requested the State Government not to post Mr. Kishan Chand at any sensitive post, he was still given a posting in a sensitive post.

(ii) That, though there was no proposal from the Forest Department and no recommendation from the Civil Service Board (CSB) to post Mr. Kishan Chand at the Kalagarh Forest Division, ignoring the recommendation of the PCCF & HoFF and the State Vigilance Department, the then Hon'ble Forest Minister inserted the name of Mr. Kishan Chand, DFO at serial No. 11 in the proposal relating to transfer and postings. This insertion was made on 26th April 2021 before the concerned file was submitted to the Hon'ble Chief Minister for approval of the posting proposal.

(iii) Though the Secretary (Forests) vide notings dated 27th October 2021, after considering the seriousness of the irregularities reported by the NTCA, recommended placing Mr. Kishan Chand under suspension, the then Hon'ble Forest Minister has not only overruled the recommendation of the Secretary (Forests) for suspension but also justified the proposed posting to Lansdowne Division stating that Mr. Kishan Chand only executed works which had been started by his predecessors.

(iv) The then Hon'ble Forest Minister justified the construction of new buildings on the ground that they were being constructed as per the approvals granted by the Corbett Tiger Reserve Foundation. Overruling the proposal of the Secretary (Forest) for suspension, the then Hon'ble Forest Minister justified the actions of the DFO Mr. Kishan Chand, and recommended that the officer be transferred from the post of DFO Kalagarh Forest Division to the post of DFO Lansdowne Forest Division, Lansdowne.

(v) Subsequently, the posting of Mr. Kishan Chand was reviewed and revised on 24th November 2021 by the Hon'ble Chief Minister and the officer was posted to the Office of the HoFF on administrative grounds. This change in proposal relating to the posting of Mr. Kishan Chand was put up to the Chief Minister directly as was noticed by the CEC from the copies of the notings on the file.

(vi) Ignoring the recommendation of the authorities to place Mr. Kishan Chand under suspension, the then Hon'ble Forest Minister once again attempted to post the officer to Lansdowne Territorial Forest Division by inserting his name at serial no. 16 in the transfer and posting proposals. This was done again without any proposal from the Forest Department and without the recommendation of CSB.

(vii) That, it was only after the then Forest Minister demitted office that Mr. Kishan Chand, DFO was finally put under suspension.

(d) 'Public Trust' Doctrine

133. It appears that the then Hon'ble Forest Minister and Mr. Kishan Chand had completely forgotten about the 'Public Trust' doctrine.

134. The importance of the 'Public Trust' doctrine in environmental and ecological matters has been explained by this Court in the case of ***M.C. Mehta v. Kamal Nath and others***[10]. This Court has elaborately referred to various articles and the judgments on the issue to come to a conclusion that the 'public trust' doctrine is a part of the law of the land in the following paragraphs :

10 [1996] Supp. 10 SCR 12 : (1997) 1 SCC 388 : 1996 INSC 1482

"23. The notion that the public has a right to expect certain lands and natural areas to retain their natural characteristic is finding its way into the law of the land. The need to protect the environment and ecology has been summed up by David B. Hunter (University of Michigan) in an article titled *An ecological perspective on property* : *A call for judicial protection of the public's interest in environmentally critical resources* published in Harvard Environmental Law Review, Vol. 12 1988, p. 311 is in the following words :

> "Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970s as well as by the pesticide scare of the 1960s. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth. The absolute finiteness of the environment, when coupled with human dependency on the environment, leads to the unquestionable result that human activities will at some point be constrained.
>
> > 'Human activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations. Reliance on improving technology can delay temporarily, but not forever, the inevitable constraints. There is a limit to the capacity of the environment to service ... growth, both in providing raw materials and in assimilating by-product wastes due to consumption. The largesse of technology can only postpone or disguise the inevitable.'
>
> Professor Barbara Ward has written of this ecological imperative in particularly vivid language :

'We can forget moral imperatives. But today the morals of respect and care and modesty come to us in a form we cannot evade. We cannot cheat on DNA. We cannot get round photosynthesis. We cannot say I am not going to give a damn about phytoplankton. All these tiny mechanisms provide the preconditions of our planetary life. To say we do not care is to say in the most literal sense that "we choose death".'

There is a commonly-recognized link between laws and social values, but to ecologists a balance between laws and values is not alone sufficient to ensure a stable relationship between humans and their environment. Laws and values must also contend with the constraints imposed by the outside environment. Unfortunately, current legal doctrine rarely accounts for such constraints, and thus environmental stability is threatened.

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources — for example, wetlands and riparian forests — can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.

In sum, ecologists view the environmental sciences as providing us with certain laws of nature. These laws, just like our own laws, restrict our freedom of conduct and choice. Unlike our laws, the laws of nature cannot be changed by legislative fiat; they are imposed on us by the natural world. An understanding of the laws of nature must therefore inform all of our social institutions."

24. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the ideas that certain common properties such as rivers, seashore, forests and the air were held by Government in trusteeship for the free and unimpeded use of the general public. Our contemporary concern about "the environment" bear a very close conceptual relationship to this legal doctrine. Under the Roman law these resources were either owned by no one (*res nullious*) or by every one in common (*res communious*). Under the English common law, however, the Sovereign could own these resources but the ownership was limited in nature, the Crown could not grant these properties to private owners if the effect was to interfere with the public interests in navigation or fishing. Resources that were suitable for these uses were deemed to be held in trust by the Crown for the benefit of the public. Joseph L. Sax, Professor of Law, University of Michigan — proponent of the Modern Public Trust Doctrine — in an erudite article "*Public Trust Doctrine in Natural Resource Law* : *Effective Judicial Intervention*", Michigan Law Review, Vol. 68, Part 1 p. 473, has given the historical background of the Public Trust Doctrine as under :

> "The source of modern public trust law is found in a concept that received much attention in Roman and English law — the nature of property rights in rivers, the sea, and the seashore. That history has been given considerable attention in the legal literature, need not be repeated in detail here. But two points should be emphasized. First, certain interests, such as navigation and fishing, were sought to be preserved for the benefit of the public; accordingly, property used for those purposes was distinguished from general public property which the sovereign could routinely grant to private owners. Second, while it was understood that in certain common properties — such as the seashore, highways, and running water — 'perpetual use was dedicated to the public', it has never been clear whether the public had an enforceable right to prevent infringement of those

> interests. Although the State apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government."

25. The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. According to Professor Sax the Public Trust Doctrine imposes the following restrictions on governmental authority :

> "Three types of restrictions on governmental authority are often thought to be imposed by the public trust : first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third the property must be maintained for particular types of uses."

26. The American law on the subject is primarily based on the decision of the United States Supreme Court in *Illinois Central Railroad Co.* v. *People of the State of Illinois* [146 US 387 : 36 L Ed 1018 (1892)]. In the year 1869 the Illinois Legislature made a substantial grant of submerged lands — a mile strip along the shores of Lake Michigan extending one mile out from the shoreline — to the Illinois Central Railroad. In 1873, the Legislature changed its mind and repealed the 1869 grant. The State of Illinois sued to quit title. The Court while accepting the stand of the State of Illinois held that the title of the State in the land in dispute was a title different in character from that which the State held in lands intended for sale. It was different from the title which the United States held in

public lands which were open to pre-emption and sale. It was a title held in trust — for the people of the State that they may enjoy the navigation of the water, carry on commerce over them and have liberty of fishing therein free from obstruction or interference of private parties. The abdication of the general control of the State over lands in dispute was not consistent with the exercise of the trust which required the Government of the State to preserve such waters for the use of the public. According to Professor Sax the Court in *Illinois Central* [146 US 387 : 36 L Ed 1018 (1892)] "articulated a principle that has become the central substantive thought in public trust litigation. When a State holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties".

27. In *Gould* v. *Greylock Reservation Commission* [350 Mass 410 (1966)] the Supreme Judicial Court of Massachusetts took the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest. In 1886 a group of citizens interested in preserving Mount Greylock as an unspoiled natural forest, promoted the creation of an association for the purpose of laying out a public park on it. The State ultimately acquired about 9000 acres, and the legislature enacted a statute creating the Greylock Reservation Commission. In the year 1953, the legislature enacted a statute creating an Authority to construct and operate on Mount Greylock an Aerial Tramway and certain other facilities and it authorised the Commission to lease to the Authority any portion of the Mount Greylock Reservation. Before the project commenced, five citizens brought an action against both the Greylock Reservation Commission and the Tramway Authority. The plaintiffs brought the suit as beneficiaries of the public trust. The Court held both the lease and the management agreement invalid on the ground that they were in excess of the statutory grant of

the authority. The crucial passage in the judgment of the Court is as under :

> "The profit-sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. In addition to the absence of any clear or express statutory authorization of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find no express grant to the Authority or power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit."

Professor Sax's comments on the above-quoted paragraph from *Gould* decision are as under :

> "It hardly seems surprising, then, that the court questioned why a State should subordinate a public park, serving a useful purpose as relatively undeveloped land, to the demands of private investors for building such a commercial facility. The court, faced with such a situation, could hardly have been expected to have treated the case as if it involved nothing but formal legal issues concerning the State's authority to change the use of a certain tract of land…. *Gould*, like *Illinois Central*, was concerned with the most overt sort of imposition on the public interest : commercial interests had obtained advantages which infringed directly on public uses and promoted private profits. But the Massachusetts court has also confronted a more pervasive, if more subtle, problem — that concerning projects which clearly have some public justification. Such cases arise when, for example, a highway department seeks to take a piece of parkland or to fill a wetland."

28. In *Sacco* v. *Development of Public Works* [532 Mass 670], the Massachusetts Court restrained the Department of Public Works from filling a great pond as part of its plan to relocate part of State Highway. The Department purported to act under the legislative

authority. The court found the statutory power inadequate and held as under :

> "the improvement of public lands contemplated by this section does not include the widening of a State highway. It seems rather that the improvement of public lands which the legislature provided for … is to preserve such lands so that they may be enjoyed by the people for recreational purposes."

29. In *Robbins* v. *Deptt. of Public Works* [244 NE 2d 577], the Supreme Judicial Court of Massachusetts restrained the Public Works Department from acquiring Fowl Meadows, "wetlands of considerable natural beauty … often used for nature study and recreation" for highway use.

30. Professor Sax in the article (Michigan Law Review) refers to *Priewev* v. *Wisconsin State Land and Improvement Co.* [93 Wis 534 (1896)], *Crawford County Lever and Drainage Distt. No. 1* [182 Wis 404], *City of Milwaukee* v. *State* [193 Wis 423], *State* v. *Public Service Commission* [275 Wis 112] and opines that "the Supreme Court of Wisconsin has probably made a more conscientious effort to rise above rhetoric and to work out a reasonable meaning for the public trust doctrine than have the courts of any other State".

31. Professor Sax stated the scope of the public trust doctrine in the following words :

> "If any of the analysis in this Article makes sense, it is clear that the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties. Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffused public interests need protection against tightly organized groups with clear and immediate goals. Thus, it seems that the delicate mixture of procedural and substantive protections

> which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining of wetland filling on private lands in a State where governmental permits are required."

32. We may at this stage refer to the judgment of the Supreme Court of California in *National Audubon Society* v. *Superior Court of Alpine County* [33 Cal 3d 419]. The case is popularly known as "*the Mono Lake case*". Mono Lake is the second largest lake in California. The lake is saline. It contains no fish but supports a large population of brine shrimp which feed vast numbers of nesting and migrating birds. Islands in the lake protect a large breeding colony of California gulls, and the lake itself serves as a haven on the migration route for thousands of birds. Towers and spires of tura (*sic*) on the north and south shores are matters of geological interest and a tourist attraction. In 1940, the Division of Water Resources granted the Department of Water and Power of the City of Los Angeles a permit to appropriate virtually the entire flow of 4 of the 5 streams flowing into the lake. As a result of these diversions, the level of the lake dropped, the surface area diminished, the gulls were abandoning the lake and the scenic beauty and the ecological values of Mono Lake were imperilled. The plaintiffs environmentalist — using the public trust doctrine — filed a law suit against Los Angeles Water Diversions. The case eventually came to the California Supreme Court, on a Federal Trial Judge's request for clarification of the State's public trust doctrine. The Court explained the concept of public trust doctrine in the following words :

> "'By the law of nature these things are common to mankind — the air, running water, the sea and consequently the shores of the sea.' (Institutes of Justinian 2.1.1) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns 'all of

its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people.' "

The Court explained the purpose of the public trust as under :

"The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. As we observed in *Marks* v. *Whitney* [6 Cal 3d 251], '[p]ublic trust easements (were) traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. We went on, however, to hold that the traditional triad of uses — navigation, commerce and fishing — did not limit the public interest in the trust res. In language of special importance to the present setting, we stated that '[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favouring one mode of utilization over another. There is a growing public recognition that one of the important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.'

Mono Lake is a navigable waterway. It supports a small local industry which harvests brine shrimp for sale as fish food, which endeavour probably qualifies the lake as a 'fishery' under the traditional public trust cases. The principal values plaintiffs seek to

> protect, however, are recreational and ecological — the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks* v. *Whitney* [6 Cal 3d 251], it is clear that protection of these values is among the purposes of the public trust."

The Court summed up the powers of the State as trustee in the following words :

> "Thus, the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust…."

The Supreme Court of California, inter alia, reached the following conclusion :

> "The State has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. Just as the history of this State shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. (*See* Johnson, 14 U.C. Davis L. Rev. 233, 256-57/; Robie, *Some Reflections on Environmental Considerations in Water Rights Administration*, 2 Ecology L.Q. 695, 710-711 (1972); Comment, 33 Hastings L.J. 653, 654.) As a matter of practical necessity, the State may have to approve appropriations despite foreseeable harm to public trust uses. In so doing, however, the State must bear in mind its duty as trustee to consider the effect of the taking on the public trust (see *United Plainsmen* v. *N.D. State Water Cons.*

> *Comm'n* [247 NW 2d 457 (ND 1976)] at pp. 462-463, and to preserve, so far as consistent with the public interest, the uses protected by the trust."

The Court finally came to the conclusion that the plaintiffs could rely on the public trust doctrine in seeking reconsideration of the allocation of the waters of the Mono basin.

33. It is no doubt correct that the public trust doctrine under the English common law extended only to certain traditional uses such as navigation, commerce and fishing. But the American Courts in recent cases have expanded the concept of the public trust doctrine. The observations of the Supreme Court of California in *Mono Lake case* [33 Cal 3d 419] clearly show the judicial concern in protecting all ecologically important lands, for example fresh water, wetlands or riparian forests. The observations of the Court in *Mono Lake case* [33 Cal 3d 419] to the effect that the protection of ecological values is among the purposes of public trust, may give rise to an argument that the ecology and the environment protection is a relevant factor to determine which lands, waters or airs are protected by the public trust doctrine. The Courts in United States are finally beginning to adopt this reasoning and are expanding the public trust to encompass new types of lands and waters. In *Phillips Petroleum Co.* v. *Mississippi* [108 SCt 791 (1988)] the United States Supreme Court upheld Mississippi›s extension of public trust doctrine to lands underlying non-navigable tidal areas. The majority judgment adopted ecological concepts to determine which lands can be considered tide lands. *Phillips Petroleum case* [108 SCt 791 (1988)] assumes importance because the Supreme Court expanded the public trust doctrine to identify the tide lands not on commercial considerations but on ecological concepts. We see no reason why the public trust doctrine should not be expanded to include all ecosystems operating in our natural resources.

34. Our legal system — based on English common law — includes the public trust doctrine as part of its

jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.

35. We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."

135. This Court in unequivocal terms has held that the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources.

136. The law with regard to the importance of the 'public trust' doctrine in ecological/environmental matters has further been evolved and expanded by this Court in subsequent judgments. In the case of ***Association for Environment Protection v. State of Kerala and others***[11], this Court has referred to some of the judgments which followed the law laid down in the case of ***Kamal Nath*** (supra), which are as under :

> **"6.** In *M.I. Builders (P) Ltd.* v. *Radhey Shyam Sahu* [(1999) 6 SCC 464], the Court applied the public trust doctrine for upholding the order of the Allahabad High Court which had quashed the decision of Lucknow Nagar Mahapalika permitting appellant M.I. Builders (P) Ltd. to construct an underground shopping complex in Jhandewala Park, Aminabad Market, Lucknow, and directed demolition of the construction made on the park land. The High Court had noted that Lucknow Nagar Mahapalika had entered into an agreement with the appellant for construction of shopping complex and given it full freedom to lease out the shops and also to sign agreement on its behalf and held that this was impermissible. On appeal by the builders, this Court held that the terms of agreement were unreasonable, unfair and atrocious. The Court then invoked the public trust doctrine and held that being a trustee of the park on behalf of the public, the Nagar Mahapalika could not have transferred the same to the private builder and thereby deprived the residents of the area of the quality of life to which they were entitled under the Constitution and municipal laws.
>
> **7.** In *Intellectuals Forum v. State of A.P.* [(2006) 3 SCC 549], this Court again invoked the public trust doctrine in a matter involving the challenge to the systematic destruction of percolation, irrigation and drinking water tanks in Tirupati Town, referred to some judicial precedents including *M.C. Mehta v. Kamal Nath* [*M.C. Mehta* v. *Kamal Nath*, (1997) 1 SCC 388], *M.I. Builders (P) Ltd.* [(1999) 6 SCC 464], *National Audubon Society* [*National Audubon*

11 [2013] 7 SCR 352 : (2013) 7 SCC 226 : 2013 INSC 413

Society v. *Superior Court*, 658 P 2d 709 : 33 Cal 3d 419 (1983)] and observed : (*Intellectuals Forum case* [(2006) 3 SCC 549], SCC p. 575, para 76)

> "*76.* … This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly *prohibit* the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government›s general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources…."
>
> (emphasis in original)

8. In *Fomento Resorts and Hotels Ltd.* v. *Minguel Martins* [(2009) 3 SCC 571 : (2009) 1 SCC (Civ) 877], this Court was called upon to consider whether the appellant was entitled to block the passage to the beach by erecting a fence in the garb of protecting its property. After noticing the judgments to which reference has been made hereinabove, the Court held : (SCC pp. 614-15 & 619, paras 53-55 & 65)

> "*53.* The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.

54. The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, 'The Public Trust Doctrine in Natural Resources Law : Effective Judicial Intervention' (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.

55. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people›s rights and the people›s long-term interest in that property or resource, including downslope lands, waters and resources.

***

65. We reiterate that natural resources including forests, water bodies, rivers, seashores, etc. are held by the State as a trustee on behalf of the people and especially the future generations. These

> constitute common properties and people are entitled to uninterrupted use thereof. The State cannot transfer public trust properties to a private party, if such a transfer interferes with the right of the public and the court can invoke the public trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural ecosystems."

137. The importance of the doctrine of 'public trust' has further been emphasized in the case of ***Tata Housing Development Company Limited v. Aalok Jagga and others***[12] to which one of us (B.R. Gavai, J.) was a party.

138. In the present case, it is clear beyond doubt that the then Forest Minister and Mr. Kishan Chand, DFO considered them to be the law unto themselves. They have, in blatant disregard of the law and for commercial purposes, indulged in the illicit felling of trees on a mass-scale to construct buildings on the pretext of promotion of tourism. This is a classic case that shows how the politicians and the bureaucrats have thrown the public trust doctrine in the dustbin. Though Mr. Kishan Chand, DFO was found to have been involved in serious irregularities at his earlier postings, and even though the Authorities had recommended not to post the said officer at any sensitive post, the then Hon'ble Forest Minister inserted his name in the proposal relating to transfer and postings at a sensitive post. Not only that, even after the NTCA found Mr. Kishan Chand, DFO involved in serious irregularities, and the Secretary (Forests) recommended placing him under suspension, the then Hon'ble Forest Minister has not only overruled the recommendation of the Secretary (Forest) for suspension but also justified his proposed posting to the Lansdowne Division. It was only after the then Hon'ble Forest Minister demitted his office, that Mr. Kishan Chand, DFO could be put under suspension. This is a case that shows how a nexus between a Politician and a Forest Officer has resulted in causing heavy damage to the environment for some political and commercial gain. Even the recommendation of the Senior Officers

12 [2019] 13 SCR 577 : (2020) 15 SCC 784 : 2019 INSC 1203

of the Forest Department, the Vigilance Department, and the Police Department which objected to his posting at a sensitive post have been totally ignored. We are amazed at the audacity of the then Hon'ble Forest Minister and Mr. Kishan Chand, DFO in giving a total go-bye to the statutory provisions. However, since the matter is pending investigation by the CBI, we do not propose to comment any further on the matter.

(e) Concern of the CEC

139. The CEC in its report has also elaborately dealt with the past and present policy of MoEF&CC in granting the Forest Clearance (FC) and the Standing Committee of National Board for Wild Life (SC, NBWL) clearances to set up zoos and safaris as forestry and non-forestry activities. It is stated that from the perusal of the minutes of the meeting of the Forest Advisory Committee (FAC) held on 17th February 2021, it would show that, in order to grant clearances under the Forest (Conservation) Act,1980 ("FC Act" for short), zoos were treated as forestry activity till 2007. However, from 2017 onwards, it was treated as a non-forestry activity. Thereafter, only 15% of the total area required for parking and cafeteria, etc. for the setting up of zoos/safaris was treated as a non-forestry activity. However, the State is required to get an approval from the MoEF&CC under the FC Act for the entire area required for the setting up of zoos and safaris. The Net Present Value (NPV) is being collected only in respect of 15% of the total area. The CEC therefore observed that there was a lack of clarity in policy regarding the setting up of zoos and safaris inside the forest boundary in such a sensitive matter.

140. The CEC has also highlighted various clauses in the NTCA Guidelines. It has referred to inconsistencies between the 2016 Guidelines and the 2019 Guidelines. We do not want to elaborately discuss the said issue since we have already referred to the same in the earlier paragraphs.

141. The CEC has also expressed its concern about the issue that the location of Tiger Safaris within Tiger Reserve with tigers sourced from zoos is bound to endanger the population of wild tigers in the Tiger Reserves.

142. The CEC has further observed that, the Tiger Safaris are not site-specific activities as confirmed by the MoEF&CC. It also expressed

its opinion that the Tiger Safaris do not have to be necessarily located within the notified Tiger Reserves, be it buffer or fringe areas of the Tiger Reserves. It has been stated in the report that at times the density of the tiger population is higher in the buffer area as compared to the core area. The concern expressed is that, by permitting the "zoos bred captive animals" in the buffer or fringe areas, the possibility of tigers being exposed to pests and diseases is enhanced. The CEC has also expressed that even the visitors to the Tiger Safari can be carriers of diseases and pests. It has recommended that the Tiger Safaris, not being site-specific, are to be discouraged within the forest areas.

143. The CEC has further expressed that there is a great risk to free-ranging animals from zoos/Safaris which have been set up close to the wildlife-rich protected areas because of epidemiological reasons. It states that zoonosis, especially of infectious diseases, is commonly found in zoo/safari animals, including the tigers. It states that, hundreds of pathogens and many different transmission modes are involved and many factors influence the epidemiology of the various such zoonosis. It further states that the risk of such zoonotic disease transmission drastically increases in any setting where wild animals are confined in close proximity to humans, including the public display facilities like zoos and safaris.

144. The report refers to some of the studies in various zoos/Safari Parks, including Hyderabad Zoo, Jaipur Zoo, Etawah Safari Park, etc.

145. The CEC elaborately refers to various mortalities that occurred in various zoos in the recent past. The CEC report also refers to the stand of the NTCA about the in-principle approvals that have been granted by them for 5 Tiger Safaris in and around the Tiger Reserves of India. The report states that the NTCA highlighted the following main advantages/disadvantages in setting up zoos and safaris within the forest area/protected area/Tiger Reserve :

"Advantages

i. Will help to reduce the pressure from core/critical tiger habitat area

ii. Will facilitate promotion of conservation education and livelihood generation

Disadvantages

i. Its an intensive resource use establishment

ii. Clearance/modification of forest area will have to be resorted to in certain cases."

146. The CEC also refers to the stand of the CZA with regard to locating the Tiger Safaris inside the Tiger Reserves. The report states thus :

"55. A. The Central Zoo Authority have supported the establishment of Tiger Safari inside the Tiger Reserve stating that :

i. there is need for development of off-display facilities under fairly undisturbed conditions alongwith availability of adequate and optimal land and which may be challenging. Under the given circumstances, forest land could offer optimal conditions to establish such facilities;

ii. standards/norms for recognition of Elephant Rehabilitation/Rescue Centres (ERC) under Section 42 of the Wildlife (Protection) Act, 1972 recommends that ERCS should be located, preferably near the forest areas with access to water body/streams (F.No.2-5/2006-PE (Vol.II) dated 29.10.2017;

iii. as per provision 2.1.4 of National Zoo Policy, 1998,'…. zoos shall continue to function as rescue centres for orphaned wild animals, subject to the availability of appropriate housing and upkeep infrastructure…'. In consonance with this, Rescue Centres are an important component of all recognized zoos in the country. This will therefore aid in the mitigation of conflict in a particular region (e.g. to ensure that rescued animals do not have to be transported long-distances/have a better chance at rehabilitation); and

iv. Wildlife Tourism is a thriving sector in India, and with over 8 crore visitors annually, zoos are in the forefront of this sector and significantly contribute to spreading awareness about wildlife conservation. Most zoos are easily accessible to people, are open

year-round and are relatively economical while having high impact in spreading wildlife awareness. This gives zoos an edge over more expensive and relatively less accessible wilderness area such as wildlife safaris.

B) The disadvantages of establishment of Tiger Safari inside Tiger Reserves include

i. clearing of vegetation which could be denser in forest lands; and

ii. accessibility to forest areas may be limited and hence, the establishment could be resource intensive."

147. The CEC also gives its opinion about the impact of the Pakhrau Tiger Safari on the disbursal of tigers from the Corbett Tiger Reserve. The CEC in its report opines that it may not be feasible to locate the Tiger Safaris in the Tiger Reserves including the protected area, buffer zone, on the fringe area.

148. The report of the CEC as also the reports of various Committees which were constituted as per the directions of the High Court of Uttarakhand as well as other authorities would clearly show that there has been rampant deforestation in the Corbett National Park. A huge number of trees have been felled thereby causing a heavy loss to the environment.

149. It is also brought to our notice that in the Ramnagar area as also in other areas around the Corbett Tiger Reserve, there is a mushrooming growth of resorts, which are acting as a hindrance to the free movement of animals including the tigers and elephants. It is also brought to our notice that similarly, there is a mushrooming growth of resorts around various Tiger Reserves throughout the country which are now being used as marriage destinations. It is brought to our notice that in the said resorts, music is played at a very loud volume which causes disturbance to the habitat of the forests. Undisputedly, mushrooming growth of resorts within the close proximity of the protected areas and uncontrolled activities therein, including sound pollution are capable of causing great harm to the ecosystem. We propose to issue certain directions in that regard in the operative part of our judgment.

(f) Principle of Ecological Restitution

150. It will be relevant to refer to the Convention on Biological Diversity, 1992 ("CBD" for short), to which India is a signatory. Article 8 of the CBD pertains to *in situ* conservation. Under clause (f) thereof, it requires the contracting parties to, as far as possible and as appropriate, to rehabilitate and restore the degraded ecosystems and promote the recovery of threatened species. It reads thus :

> (f) **Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species,** inter alia, through the development and implementation of plans or other management strategies.
>
> [emphasis supplied]

151. In the Chorzow Factory Case[13], the Permanent Court of International Justice (PCIJ) laid down the standard in international law for reparations for the commission of internationally wrongful acts. The Court held :

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that ***reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.*** Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it -such are the principles which should serve to determine the amount of compensation due for an act contrary to international law (…)"
>
> [emphasis supplied]

152. The International Court of Justice (ICJ), while applying the principle of restoration of degraded ecosystem in the case of ***Costa Rica v. Nicaragua[14]***, has observed thus :

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13 The Factory at Chorzow (Germany v. Poland), 13 September 1928, PCIJ, Merits, p. 47)

14 Certain Activities Carried Out by Nicaragua in the Border Area, Compensation Judgment, (2018) I.C.J. Reports 15

> "42. The Court is therefore of the view that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law. Such compensation may include indemnification for the impairment or loss of environmental goods and services in the period prior to recovery and ***payment for the restoration of the damaged environment***.
>
> 43. Payment for restoration accounts for the fact that natural recovery may not always suffice to return an environment to the state in which it was before the damage occurred. In such instances, ***active restoration measures*** may be required in order to ***return the environment to its prior condition***, in so far as that is possible.
>
> (…)
>
> 53. In determining the compensation due for environmental damage, the Court will assess, as outlined in paragraph 42, ***the value to be assigned to the restoration of the damaged environment as well as to the impairment or loss of environmental goods and services prior to recovery***."
>
> (emphasis supplied)

153. While considering the aspect of valuation of environmental restoration costs to be awarded to Costa Rica, the ICJ observed thus :

> "85. (…) with respect to biodiversity services (in terms of nursery and habitat), the "corrected analysis" does not sufficiently account for the particular importance of such services in an internationally protected wetland where the biodiversity was described to be of high value by the Secretariat of the Ramsar Convention. ***Whatever regrowth may occur naturally is unlikely to match in the near future the pre-existing richness of biodiversity in the area***. Thirdly, in relation to gas regulation and air quality services, Nicaragua's "corrected analysis" does not account for the ***loss of future annual carbon***

sequestration ("carbon flows"), since it characterizes the loss of those services as a one-time loss. The Court does not consider that the impairment or loss of gas regulation and air quality services can be valued as a one-time loss.

86. The Court recalls (…) that the ***absence of certainty as to the extent of damage does not necessarily preclude it from awarding an amount that it considers approximately to reflect the value of the impairment or loss of environmental goods and services***. In this case, the Court, while retaining some of the elements of the "corrected analysis", considers it reasonable that, for the purposes of its overall valuation, an adjustment be made to the total amount in the "corrected analysis" to account for the shortcomings identified in the preceding paragraph. The Court therefore awards to Costa Rica the sum of US$120,000 for the impairment or loss of the environmental goods and services of the impacted area in the period prior to recovery."

(emphasis supplied)

154. This Court also while applying the principle of environmental restitution in the case of ***Indian Council for Enviro-Legal Action and others v. Union of India and others***[15] observed thus :

"**60.** (…) we are of the considered opinion that even if it is assumed (for the sake of argument) that this Court cannot award damages against the respondents in these proceedings that does not mean that the Court cannot direct the Central Government to determine ***and recover the cost of remedial measures*** from the respondents. Section 3 of the Environment (Protection) Act, 1986 expressly empowers the Central Government (or its delegate, as the case may be) to "*take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of environment*…". Section 5 clothes the Central Government (or its delegate) with the power

15 [1996] 2 SCR 503 : (1996) 3 SCC 212 : 1996 INSC 237

to issue directions for achieving the objects of the Act. Read with the wide definition of 'environment' in Section 2(*a*), Sections 3 and 5 clothe the Central Government with all such powers as are "necessary or expedient for the purpose of protecting and improving the quality of the environment". The Central Government is empowered to take all measures and issue all such directions as are called for for the above purpose. In the present case, ***the said powers will include giving directions for the removal of sludge, for undertaking remedial measures and also the power to impose the cost of remedial measures on the offending industry and utilise the amount so recovered for carrying out remedial measures***. This Court can certainly give directions to the Central Government/its delegate to take all such measures, if in a given case this Court finds that such directions are warranted. (…)

xxx xxx xxx

66. (…) it follows, in the light of our findings recorded hereinbefore, that Respondents 4 to 8 are absolutely liable to compensate for the harm caused by them to the villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove the sludge and other pollutants lying in the affected area (…) and also to ***defray the cost of the remedial measures required to restore the soil and the underground water sources***. Sections 3 and 4 of Environment (Protection) Act confers upon the Central Government the power to give directions of the above nature and to the above effect. Levy of costs required for carrying out remedial measures is implicit in Sections 3 and 4 which are couched in very wide and expansive language. Appropriate directions can be given by this Court to the Central Government to invoke and exercise those powers with such modulations as are called for in the facts and circumstances of this case."

[emphasis supplied]

155. In the case of ***S. Jagannath v. Union of India and others***[16], this Court was considering the issue of pollution created by the industry which had caused harm to the villagers in the affected area, to the soil and to the underground water. This Court observed thus :

> "49. (…) Consequently the polluting industries are 'absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water and hence, they are bound to take all necessary measures to remove sludge and other pollutants lying in the affected areas'. The 'Polluter Pays Principle' as interpreted by this Court means that ***the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of 'Sustainable Development'*** and as such the polluter is liable to pay the cost to the individual sufferers as well as the ***cost of reversing the damaged ecology*** (…)."
>
> [emphasis supplied]

156. It could thus be seen that, worldwide as well as in our jurisprudence, the law has developed and evolved emphasizing on the restoration of the damaged ecological system. A reversal of environmental damage in conformity with the principle under Article 8(f) of the CBD is what is required. At times, the compensatory afforestation permits forestation at some other site. However, the principle of restoration of damaged ecosystem would require the States to promote the recovery of threatened species. We are of the considered view that the States would be required to take steps for the identification and effective implementation of active restoration measures that are localized to the particular ecosystem that was damaged. The focus has to be on restoration of the ecosystem as close and similar as possible to the specific one that was damaged.

157. No doubt that the CBI is investigating the issue as to who is responsible for the same. However, the investigation by the CBI

16 [1996] Supp. 9 SCR 848 : (1997) 2 SCC 87 : 1996 INSC 1466

would only lead to finding out the culprits who are responsible for such huge devastation. The law will take its own course.

158. We find that, bringing the culprits to face the proceedings is a different matter and restoration of the damage already done is a different matter. We are of the considered view that the State cannot run away from its responsibilities to restore the damage done to the forest. The State, apart from preventing such acts in the future, should take immediate steps for restoration of the damage already done; undertake an exercise for determining the valuation of the damage done and recover it from the persons found responsible for causing such a damage.

VI. CONCLUSIONS

159. It is well known that the presence of a Tiger in the forest is an indicator of the well-being of the ecosystem. Unless steps are taken for the protection of the Tigers, the ecosystem revolving around Tigers cannot be protected. The figures which are placed before us to show that there has been a substantial reduction in tiger poaching and an increase in the tigers' strength throughout the country. However, that should not be enough. The ground realities cannot be denied. The events like illegal constructions and illicit felling of trees on a rampant scale like the one that happened in the Corbett National Park cannot be ignored. Steps are required to prevent this.

160. We therefore requested Shri Chandra Prakash Goyal, former Director General of Forest, Shri Anup Malik, IFS, PCCF (HoFF), Uttarakhand, and Dr. Samir Sinha, IFS, PCCF (Wildlife) & Chief Wildlife Warden, Uttarakhand to give their suggestion for more effective management of the "Tiger Reserves" in India. Accordingly, they have given their suggestions. No doubt that on some issues there is no coherence in the suggestions given. They are conflicting and contradictory to each other. In any event, all three Officers have vast experience in the Forest Department. Dr. Samir Sinha is a person who has prepared the TCP for the Corbett Tiger Reserve. Similarly, Shri Goyal has worked as the Director General of Forest and has also worked as a Field Director of some of the Tiger Reserves. At the same time, we are not experts in the field. We therefore find that it will be appropriate that experts in the field come together and come out with a solution that would go a long way in the effective management and protection of the Tiger Reserves.

161. We therefore find that the following directions need to be issued in the interests of justice :

A. The Safaris which are already existing and the one under construction at Pakhrau will not be disturbed. However, insofar as the Safari at 'Pakhrau' is concerned, we direct the State of Uttarakhand to relocate or establish a rescue centre in the vicinity of the 'Tiger Safari'. The directions which would be issued by this Court with regard to establishment and maintenance of the 'Tiger Safaris' upon receipt of the recommendations of the Committee which we are directing to be appointed would also be applicable to the existing Safaris including the Safari to be established at Pakhrau.

B. The MoEF&CC shall appoint a Committee consisting of the following :

(i) a representative of the NTCA;

(ii) a representative of the Wildlife Institute of India (WII);

(iii) a representative of the CEC; and

(iv) an officer of the MoEF&CC not below the rank of Joint Secretary as its Member Secretary.

We however clarify that the Committee would be entitled to co-opt any other authority including a representative of CZA and also take the services of the experts in the field, if found necessary.

C. The said Committee will :

(i) recommend the measures for restoration of the damages, in the local *in situ* environment to its original state before the damage was caused;

(ii) assess the environmental damage caused in the Corbett Tiger Reserve (CTR) and quantify the costs for restoration;

(iii) identify the persons/officials responsible for such a damage. Needless to state that the State shall recover the cost so quantified from the persons/delinquent officers found responsible for the same. The cost so recovered shall be exclusively used for the purpose of restoration of the damage caused to the environment.

(iv) specify how the funds so collected be utilized for active restoration of ecological damage.

D. The aforesaid Committee, inter alia, shall consider and recommend :

(i) The question as to whether Tiger Safaris shall be permitted in the buffer area or fringe area.

(ii) If such Safaris can be permitted, then what should be the guidelines for establishing such Safaris?

(iii) While considering the aforesaid aspect, the Committee shall take into consideration the following factors :

a) the approach must be of ecocentrism and not of anthropocentrism;

b) the precautionary principle must be applied to ensure that the least amount of environmental damage is caused;

c) the animals sourced shall not be from outside the Tiger Reserve. Only injured, conflicted, or orphaned tigers may be exhibited as per the 2016 Guidelines. To that extent the contrary provisions in the 2019 Guidelines stand quashed.

d) That such Safaris should be proximate to the Rescue Centres.

Needles to state that the aforesaid factors are only some of the factors to be taken into consideration and the Committee would always be at liberty to take such other factors into consideration as it deems fit.

(iv) The type of activities that should be permitted and prohibited in the buffer zone and fringe areas of the Tiger Reserve. While doing so, if tourism is to be promoted, it has to be eco-tourism. The type of construction that should be permissible in such resorts would be in tune with the natural environment.

(v) The number and type of resorts that should be permitted within the close proximity of the protected areas. What restriction to be imposed on such resorts so that they

are managed in tune with the object of protecting and maintaining the ecosystem rather than causing obstruction in the same.

(vi) As to within how much areas from the boundary of the protected forest there should be restriction on noise level and what should be those permissible noise levels.

(vii) The measures that are required to be taken for effective management and protection of Tiger Reserves which shall be applicable on a Pan India basis.

(viii) The steps to be taken for scrupulously implementing such recommendations.

E. The CBI is directed to effectively investigate the matter as directed by the High Court of Uttarakhand at Nainital in its judgment and order dated 6th September 2023, passed in Writ Petition No.178 of 2021.

F. The present proceedings shall be kept pending so that this Court can monitor the steps taken by the Authorities as well as the investigation conducted by the CBI.

G. We will consider issuing appropriate directions after the recommendations are received by this Court from the aforesaid Committee. We request the Committee to give its preliminary report within a period of three months from today.

H. The CBI shall submit a report to this Court within a period of three months from today. We request the learned ASG to communicate this order to the Director, CBI.

I. The State of Uttarakhand is directed to complete the disciplinary proceedings against the delinquent officers as expeditiously as possible and in any case, within a period of six months from today. The status report in this regard shall be submitted to this Court within a period of three months from today.

162. We place on record our appreciation for the assistance rendered by Ms. Aishwarya Bhati, learned ASG, Mr. A.N.S. Nadkarni, learned Senior Counsel, Mr. Gaurav Kumar Bansal, applicant-in-person. However, we will be failing in our duty if we do not make a special mention of the valuable assistance rendered by Mr. K. Parameshwar, learned Amicus Curiae. His in-depth research and meticulous

formulations have immensely assisted us in deciding this issue, which is of paramount importance to environmental and ecological justice. We direct the State of Uttarakhand to pay an amount of Rs.10,00,000/- (Rupees Ten lakh) to Mr. K. Parameshwar, learned Amicus Curiae, as honorarium.

163. The matter is stand over for Twelve (12) weeks.

Headnotes prepared by : Bibhuti Bhushan Bose

Result of the case : Directions issued.