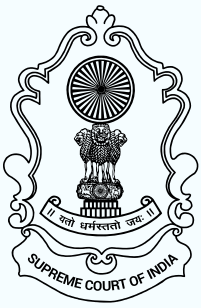

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[2024] 3 S.C.R. 913 : 2024 INSC 215

Navas @ Mulanavas
v.
State of Kerala

(Criminal Appeal No. 1215 of 2011)

18 March 2024

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

Issue for Consideration

Appellant-accused was held guilty for the offences punishable u/ss.302, 449, 309, IPC and sentenced accordingly. For the offence punishable u/s.302, IPC, he was sentenced to death. High Court confirmed the conviction, however the sentence of death was modified and reduced to imprisonment for life with a direction that he shall not be released from prison for a period of 30 years including the period already undergone with set off u/s.428, Cr.P.C. alone. What should be the appropriate sentence and whether the High Court was justified in adopting the Swamy Shraddananda v. State of Karnataka [2008] 11 SCR 93 line of cases and whether the fixing of the quantum at 30 years without remission was the appropriate sentence, in the facts and circumstances of the case?

Headnotes

Sentence/Sentencing – Murder – Appropriate period of sentence to be imposed under the Swamy Shraddananda v. State of Karnataka [2008] 11 SCR 93 principle wherein it was held that to avoid a death sentence, the courts can device a graver form of imprisonment for life beyond fourteen years – Aggravating and mitigating circumstances – Relevant factors for arriving at the number of years which the convict will have to undergo before which remission could be sought – Trial Court sentenced the accused to death for the offence punishable u/s.302, IPC – High Court confirmed the conviction, however modified the death sentence to imprisonment for 30 years without remission following the Swamy Shraddananda line of cases – Correctness:

Held: Circumstances of the present case were by themselves consistent with the sole hypothesis that the accused and the accused alone was the perpetrator of the murders – On the aggravating side, act committed by the accused was pre-planned/

* Author

premeditated; he brutally murdered 4 unarmed and defenseless persons, one of whom was a child and the other an aged lady – By the act of the accused, three generations of single family lost their lives for no fault of theirs; nature of injuries inflicted on 'L' and two others highlights the brutality and cold-bloodedness of the act – On the mitigating side, the accused was quite young (28 years old) when he committed the act; the act committed was not for any gain or profit; he did not try to flee and in fact tried to commit suicide as he was overcome with emotions after the dastardly act; he had been in jail for 18 years and 4 months and the case was based on circumstantial evidence – Further, conduct report of the appellant indicated that no disciplinary actions were initiated against him in the prison and his conduct and behavior had been satisfactory so far – Judgment of the High Cout is upheld insofar as the conviction of the appellant u/ss.302, 449, 309 IPC is concerned – Sentence imposed for the offence u/ss.449, 309, IPC also not interfered with – High Court was justified on the facts of the case in following Swamy Shraddananda principle while imposing sentence for the offence u/s.302 IPC – However, the sentence u/s.302 imposed by the High Court is modified from a period of 30 years imprisonment without remission to that of a period of 25 years imprisonment without remission, including the period already undergone. [Paras 13, 58-60]

Sentence/Sentencing – Murder – Remission – Commutation of death penalty to life imprisonment, however convict cannot be released on the expiry of 14 years (the normal benchmark for life imprisonment) – Aggravating and mitigating circumstances – Appropriate period of sentence to be imposed under the Swamy Shraddananda principle – Relevant factors for arriving at the number of years which the convict will have to undergo before which remission could be sought:

Held: Once the court decides that the death penalty is not to be imposed and also that the convict cannot be released on the expiry of 14 years, the guidelines set out in Swamy Shraddananda, V. Sriharan and the line of cases which applied these judgments will have to be considered and principles, if any, set out therein have to be applied – There can be no straitjacket formulae – Pegging the point up to which remission powers cannot be invoked is an exercise that has to be carefully undertaken and the discretion should be exercised on reasonable grounds – The principle in Swamy Shraddananda as affirmed in V. Sriharan was evolved as

the normally accepted norm of 14 years was found to be grossly disproportionate on the lower side – At the same time, since it is a matter concerning the liberty of the individual, courts should also guard against any disproportion in the imposition, on the higher side too – A delicate balance has to be struck – 27 previously decided cases applying the Swamy Shraddananda principle, surveyed – A journey through the cases shows that the fundamental underpinning is the principle of proportionality – The aggravating and mitigating circumstances which the Court considers while deciding commutation of penalty from death to life imprisonment, have a large bearing in deciding the number of years of compulsory imprisonment without remission, too – Some of the relevant factors that the courts bear in mind for arriving at the number of years which the convict will have to undergo before which the remission powers could be invoked are number of deceased who were victims of that crime, their age and gender; the nature of injuries including sexual assault if any; the motive for which the offence was committed; whether the offence was committed when the convict was on bail in another case; the premeditated nature of the offence; the relationship between the offender and the victim; the abuse of trust if any; the criminal antecedents; and whether the convict, if released, would be a menace to the society – Some of the positive factors are age of the convict; the probability of reformation of convict; the convict not being a professional killer; the socioeconomic condition of the accused; the composition of the family of the accused and conduct expressing remorse – Additionally, the Court would be justified in considering the conduct of the convict in jail; and the period already undergone – Aforesaid factors not exhaustive but illustrative and each case would depend on the facts and circumstances therein. [Paras 26, 27, 57]

Evidence Act, 1872 – s.106 – According to the prosecution, appellant had illicit intimacy with 'L' however, after she tried to distance herself, the appellant was seriously aggrieved – Allegedly, on the fateful night he gained access into her house by making a hole in the eastern side wall of the house and murdered 'L' along with three others in the house – Appellant was the only other person inside the house, no cogent explanation came from him as to what transpired at the scene of occurrence:

Held: Evidence of the prosecution witnesses and even the version of the accused establishes his presence at the scene of

occurrence – Appellant was the only other person inside the house, with the other three being dead and one 'KA', who was injured and unconscious and who later died in that state itself – There was no cogent and plausible explanation forthcoming from the accused as to what transpired at the scene of occurrence – This coupled with the fact that his relationship with the deceased 'L' was strained clearly point to his guilt – s.106 states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him – s.106 is not intended to relieve the prosecution of its duty – However, in exceptional cases where it could be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are especially within the knowledge of the accused, the burden will be on the accused since he could prove as to what transpired in such scenario, without difficulty or inconvenience – In this case, when an offence like multiple murders is committed inside a house in secrecy, the initial burden has to be discharged by the prosecution – Once the prosecution successfully discharged the burden cast upon it, the burden did shift upon the appellant being the only other person inside the four corners of the house to offer a cogent and plausible explanation as to how the offences came to be committed but he miserably failed on that score. [Para 12 (xiv)]

Code of Criminal Procedure, 1973 – s.293 – Prosecution case was that there were writings on the wall and on certain objects in the southern room of the ground floor where the accused was found – Specimen of these writings was taken and referred to the handwriting expert – Handwriting Expert produced P-42 report – Appellant contended that the handwriting expert had not been examined:

Held: The submission flies in the face of s.293 – Exhibit P-42 Report was prepared by Dr. KPJ, Joint Director (Research), Forensic Science Laboratory, Thiruvananthapuram – The report was duly marked and exhibited and proved as Exhibit P-42 – The Joint Director who occupies a position above the Deputy Director and Assistant Director, is encompassed in the phrase "Director" used in s.293(4)(e) – Hence, the report Ex. P-42 is admissible even without the examination of Dr. KPJ. [Para 12 (vii)]

Criminal Law – Cases falling short of the rarest of the rare category – Sentencing – Principle laid down in Swamy Shraddananda v. State of Karnataka [2008] 11 SCR 93, discussed.

Navas @ Mulanavas v. State of Kerala

Evidence – Case based on circumstantial evidence – Principles to be kept in mind while convicting an accused – Discussed.

Case Law Cited

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

Ammini & Others v. State of Kerala [1997] 5 Suppl. SCR 181 : **(1998) 2 SCC 301;** *Sharad Birdhichand Sarda v. State of Maharashtra* [1985] 1 SCR 88 : **(1984) 4 SCC 116;** *Swamy Shraddananda v. State of Karnataka* [2008] 11 SCR 93 : **(2008) 13 SCC 767 – relied on.**

Padum Kumar v. State of Uttar Pradesh [2020] 1 SCR 57 : **(2020) 3 SCC 35;** *Bhupinder Singh v. State of Punjab* [1988] 3 SCR 409 : **(1988) 3 SCC 513;** *State of H.P. v. Mast Ram* [2004] Suppl. 4 SCR 269 : **(2004) 8 SCC 660;** *Shambhu Nath Mehra v. The State of Ajmer* [1956] 1 SCR 199**;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684;** *Machhi Singh v. State of Punjab* [1983] 3 SCR 413 : **(1983) 3 SCC 470;** *Haru Ghosh v. State of West Bengal* [2009] 13 SCR 847 : **(2009) 15 SCC 551;** *Mulla & Another v. State of U.P.* [2010] 2 SCR 633 : **(2010) 3 SCC 508;** *Ramraj v. State of Chhattisgarh* [2009] 16 SCR 367 : **(2010) 1 SCC 573;** *Ramnaresh and Others v. State of Chhattisgarh* [2012] 3 SCR 630 : **(2012) 4 SCC 257;** *Neel Kumar v. State of Haryana* [2012] SCR 5 696 : **(2012) 5 SCC 766;** *Sandeep v. State of Uttar Pradesh* [2012] 5 SCR 952 : **(2012) 6 SCC 107;** *Shankar Kisanrao Khade v. State of Maharashtra* [2013] 6 SCR 949 : **(2013) 5 SCC 546;** *Sahib Hussain v. State of Rajasthan* [2013] 2 SCR 1019 : **(2013) 9 SCC 778;** *Gurvail Singh & Anr. v. State of Punjab* [2013] 1 SCR 783 : **(2013) 2 SCC 713;** *Alber Oraon v. State of Jharkhand* [2014] 9 SCR 330 : **(2014) 12 SCC 306;** *Rajkumar v. State of Madhya Pradesh* [2014] 3 SCR 212 : **(2014) 5 SCC 353;** *Selvam v. State* **(2014) 12 SCC 274;** *Birju v. State of Madhya Pradesh* [2014] 1 SCR 1047 : **(2014) 3 SCC 421;** *Tattu Lodhi v. State of Madhya Pradesh* [2016] 3 SCR 561 : **(2016) 9 SCC 675;** *Vijay Kumar v. State of Jammu & Kashmir* **(2019) 12 SCC 791;** *Parsuram v. State of*

Madhya Pradesh **(2019) 8 SCC 382;** *Nand Kishore v. State of Madhya Pradesh* [2019] 1 SCR 260 **: (2019) 16 SCC 278;** *Swapan Kumar Jha v. State of Jharkhand and Another* **(2019) 13 SCC 579;** *Raju Jagdish Paswan v. State of Maharashtra* **(2019) 16 SCC 380;** *X v. State of Maharashtra* [2019] 6 SCR 1 **: (2019) 7 SCC 1;** *Irappa Siddappa Murgannavar v. State of Karnataka* [2021] 11 SCR 51 **: (2022) 2 SCC 801;** *Shiva Kumar v. State of Karnataka* [2023] 4 SCR 669 **: (2023) 9 SCC 817;** *Manoj and Others v. State of Madhya Pradesh* [2022] 9 SCR 452 **: (2023) 2 SCC 353;** *Madan v. State of U.P.* **2023 SCC OnLine SC 1473;** *Sundar v. State by Inspector of Police* [2023] 5 SCR 1016 **: 2023 SCC OnLine SC 310;** *Ravinder Singh v. State Govt. of NCT of Delhi* [2023] 4 SCR 480 **: (2024) 2 SCC 323 – referred to.**

List of Acts

Penal Code, 1860; Evidence Act, 1872; Code of Criminal Procedure, 1973.

List of Keywords

Sentence/Sentencing; Modification; Aggravating and mitigating circumstances; Remission; Remission powers; Commutation of penalty from death to life imprisonment; Principle of proportionality; Rarest of the rare category; Illicit intimacy; Handwriting expert.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1215 of 2011

From the Judgment and Order dated 09.02.2010 of the High Court of Kerala at Ernakulam in CRLA No.1620 of 2007

Appearances for Parties

Renjith B. Marar, Ms. Lakshmi N. Kaimal, Rajkumar Pavothil, Arun Poomulli, Vishnu Pazhanganat, Keshavraj Nair, Davesh Kumar Sharma, Ms. Ashu Jain, Jaleen Johnson, Harsh Vardhan Shah Shyam, Advs. for the Appellant.

Jayanth Muthraj, Sr. Adv., Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Abraham Mathew, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. The present Appeal arises out of the judgment of a Division Bench of the High Court of Kerala at Ernakulam in D.S.R. No. 4 of 2007 and Criminal Appeal No. 1620 of 2007 dated 09.02.2010. The Death Sentence Reference and the Criminal Appeal arose out of the judgment of the Court of the III Additional Sessions Judge (Adhoc), Fast Track Court No. 1, Thrissur in Sessions Case No. 491 of 2006.

2. The trial Court found the appellant (the sole accused) guilty for the offences punishable under Sections 302 and 449 IPC for having committed the murder of Latha (aged 39 years), Ramachandran (aged 45 years), Chitra (aged 11 years) and Karthiayani Amma (aged 80 years) after committing house-trespass. After committing the above said act, the accused attempted to commit suicide for which he was also found guilty under Section 309 IPC. The trial Court sentenced the accused to death for the offence punishable under Section 302 IPC. For the offence under Section 449 IPC, the accused was sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.1,000/- and, in default, to undergo simple imprisonment for six months. The accused was also sentenced to undergo simple imprisonment for two months and to pay a fine of Rs.500/- for the offence under Section 309 IPC, and in default of the payment of fine to undergo simple imprisonment for one month.

3. When the matter went for confirmation before the High Court, the High Court, while confirming the conviction, modified the sentence. The sentence of death was modified and reduced to imprisonment for life with a further direction that the accused shall not be released from prison for a period of 30 (thirty) years including the period already undergone with set off under Section 428 Cr.P.C. alone. Aggrieved, the appellant is before us in the present appeal by way of special leave.

Brief Facts:

4. The prosecution story, in brief, is that in the household of the deceased Ramachandran, there were four people residing. Apart from Ramachandran, there was his wife Latha, their daughter Chitra

and Ramachandran's mother Karthiayani Amma. The appellant, according to the prosecution, had, at an earlier point in time, illicit intimacy with Latha so much so that Latha even became pregnant, later leading to termination of pregnancy. It is the prosecution case that after Latha tried to distance herself, the appellant was seriously aggrieved, and they advert to an occurrence of 03.02.2005 when the appellant is supposed to have trespassed into the house where Latha lived and even tried to harm her. They rely on Ext. P-9 to Ext.P-11 complaints.

5. The macabre incident, out of which the present case arose, happened on the night intervening 03.11.2005 and 04.11.2005. It is alleged that the accused reached the house of the deceased late at night on 03.11.2005. Having reached the house, he made a hole in the eastern side wall of the house and gained access into the house. It is the prosecution case that, having gained access and being armed with 2 (two) knives and an iron rod, he caused the death of Ramachandran and Chitra with the iron rod in the upper floor room in the northern side of the house; that he caused serious injuries to Karthiayani Amma in the northern room on the ground floor (resulting in her death subsequently) and caused the death of Latha with multiple stab injuries in the hall near the stairs on the ground floor.

6. The prosecution case is that PW-1 Thankamani, the domestic help, who had seen the family hale and hearty the previous evening i.e., 03.11.2005, had come to sweep the house on the morning of 04.11.2005 at around 07:00 a.m. While sweeping the courtyard, she found that, unlike on normal days when the family would come out of the house in the morning, no one came out that day. While sweeping, she found that a hole had been dug on the eastern side wall of the house and to her horror also found that blood was dripping from a pipe adjoining the western side wall of the house. She raised an alarm resulting in the neighbours converging on the property.

7. It is PW-2 (Shyama Sundaran), a neighbour, who called the police after witnessing the commotion outside the house. PW-30 (KT Kumaran) the ASI rushed to the spot with his police party and reached at 08:25 AM. He also found a hole in the wall on the eastern side of the house and also that telephone cable was cut. He instructed PW-6 (Balan) & PW-23 (Rajan) to break open the door on the western side of the house first. PW-6 & PW-23 broke open the outer door but found that the inner door was also locked and it could not be opened. It

was then decided to break open the door on the front side of the house. PW-4 (Sandeep) removed the tile portion above the porch and entered the porch. He then broke open the door using a pestle and entered the *poomukham* (veranda). PW-4 then broke the glass ventilator above the main door and inserted his hand to open the door latch. As they entered, they found Latha's dead body in the passage near the stairs. The body of Ramachandran and Chitra were found dead in the upper floor room on the northern side of the house. Karthiyani Amma was found in the northern room on the ground floor unconscious. PW-6 & PW-23 took Karthiyani Amma to hospital. It was PW-32 (Ajaya Kumar), the Investigating Officer of the case, who reached the spot at 09:15 AM and saw blood droplets starting from the northern room on the ground floor to the room on the south. When he opened the door, he found the accused lying on the floor with a cut injury on his left wrist.

8. PW-30, ASI registered the *suo motu* FIR and PW-32, conducted the investigation. The appellant was sent up for trial. In all, the prosecution examined 32 witnesses (PWs 1-32) and proved Exhibits P1 to P45 series. Material Objects [M.Os.] 1-122 were also marked by the prosecution. The accused did not examine any defence witnesses; but proved Exhibits D1-D5. The accused also gave a statement while being examined under Section 313 Cr.P.C. At the Section 313 stage, he advanced a version to the effect that there was a pact between him and Latha to commit suicide; that he had come to the house of Latha on 03.11.2005 with the intention that both of them shall commit suicide; that Latha had kept the door open as usual and he gained entry into the house through such door; that after he entered the house, he found Latha and others were all lying dead/injured; that on account of grief, he had cut his left wrist in an attempt to commit suicide and that he was found available in the house in an unconscious state. The appellant was clearly implying that somebody else had gained access into the house and caused the death of all victims. It is then that he proceeded to commit suicide.

9. The case entirely rests on circumstantial evidence. Both the trial Court and the High Court have closely marshalled the circumstantial evidence in the case to arrive at the conclusion that the accused alone is responsible for the death of the four deceased. Additionally, it also relied on the fact that the accused having been found present in the house had offered no plausible and cogent explanation about

the sequence of events that had transpired inside, leading to the sole and irresistible conclusion that the accused has perpetrated the heinous crime.

Contentions:

10. We have heard Mr. Renjith B. Marar, learned counsel for the appellant, who advanced elaborate arguments, covering the entire spectrum by making available a chart setting out the summary of the deposition of the prosecution witnesses, the relevant exhibits marked and the argument of the defence in separate columns. He mainly contended that the case made out by the prosecution falls short of the proof needed in a case which is based entirely on circumstantial evidence. Learned counsel contended that with the available evidence it would be unsafe to sustain the conviction and pleaded for outright acquittal. The specific contentions of the learned counsel challenging certain individual circumstances have been dealt with hereinbelow while tabulating the circumstances. Alternatively, learned counsel pleaded that the sentence of 30 years without remission is excessive and prayed that the sentence may be appropriately tailored to meet the ends of justice.

11. Shri Jayanth Muth Raj, learned senior counsel, for the State vehemently rebutted the arguments of the counsel for the appellant and contended that the trial Court and the High Court have correctly arrived at the conclusion of guilt. Learned senior counsel contended that the case actually warranted death penalty but the High Court has modified it to a sentence of imprisonment for 30 years without remission for the offence under Section 302. According to the learned senior counsel, the sentence did not deserve any further modification.

Discussion:

12. We have carefully considered the submissions of the learned counsel for the respective parties and have perused the material on record, including the relevant original trial Court records. The circumstances that unerringly point to the guilt of the appellant as it emerges from the deposition of the witnesses and the duly proved exhibits can be summarized as under:

    (i) There was the incident on 03.02.2005 when the accused allegedly trespassed into the house and had thrown a *koduval* (curved sword) at deceased Latha. This highlights the friction

between the accused and deceased Latha. Ext. P9 - P11 complaint of 03.02.2005 has been marked by the prosecution. It also forms an important piece of evidence to establish motive.

ii) PW-3, Raman, an auto driver, deposed that on the night of 03.11.2005, the accused engaged his services to go to Orumanayur. The accused asked him to stop at a place called Muthenmavu (which is the place where the house of the deceased was situated) and he paid him Rs.70/-. We have seen the original deposition and it clearly records that it was at 10.30 PM on the night of 03.11.2005 that the accused engaged the services of PW-3 at Guruvayur auto stand to reach the area where the house of the deceased was located. Mr. Renjith B. Marar, learned counsel, has challenged the evidence of PW-3 on the ground that no test identification parade was held and the identification was for the first time at the police station. This submission need not detain the court as nothing much turns on it. The presence of the accused even otherwise, at the scene of occurrence has been spoken to by PW-1, PW-2, PW-4, PW-6, PW-23, PW-30 and PW-32, as has been discussed hereinbelow.

iii) PW-1 Thankamani has clearly spoken about the fact that, on 03.11.2005, when she left the house after her work at 7.30 p.m. all the deceased were hale and hearty. On the morning of 04.11.2005, it was she who detected the dripping of the blood from the pipe adjoining the western wall, and a hole being made in the eastern side wall of the house.

iv) The evidence of PW-1, 2, 4, 6, 23, 30 and 32 speaks about the appellant lying in the southern room of the house and being taken to the hospital from there. PWs 1,2,4,6,23 & 30 also speak about the hole that has been made on the eastern wall of the house. The seizure of M.O. 29,30,31,32,33 & 34 items i.e., 2 (two) knives, 2 (two) knife sheaths, iron rod and bag recovered also contributes as a link in the chain.

v) On 4.11.2005, M.O. 29 & 30 (Knives found in the southern room on the ground floor where the accused was found) were seized and taken into custody under Ext. P-12 (Scene Mahazar). M.O. 33 (Iron rod) was also seized and taken from the northern room in the upper floor, vide the same Ext. P-12.

vi) Another important circumstance is the report of the Finger Print Expert (Ext.P-22). The Finger Print Expert has opined that the chance finger print on the water bottle found at the scene of the crime (marked as C-9 by the Expert) was identified as the left thumb impression of the appellant in the slip made available with the Expert for verification (marked as "S" by the expert). The Expert concluded in P-22 that since the identical ridge characteristics are present in their nature and relative possessions, the finger impressions "C9" and "S" are identical i.e. that they are the impressions of the same finger of the person. The Expert concluded that, in his opinion, that the chance print marked as C-9 and developed by him from the scene of crime on 04.11.2005 is made by the left thumb of the appellant.

vii) The prosecution case is also that there were writings on the wall and on certain objects in the southern room of the ground floor where the accused was found. The writings indicate that these were parting messages of the accused (as the High Court labels them) since he had decided to commit suicide. The writings were in the following words "*Do not enter here*"; "*Shyaman, you are a O, you should not desire the ruppam of a woman, money will make people traitors, you are O, you should not destroy the local area*"; The mirror had the writing with pen on it reading '*Latha, I love you*' and same was underlined and below that it was written '*Salim, I love you' and 'Yahio I lo*" and below that '*Shabna I lo*"; The aforesaid wall had one wall clock with the label 'Samaya Quartz' inside. On it, it was written with marker pen '*Latha, I love you*'; On the wall, below the clock, it was written "*My name is Nawas, reason for my death is Latha, so myself and Latha decided to die together.....Confirm by Navaz P.M."; "Yahayikka knows that now I shall not be there, wherever, no harm should happen to Yahayikka. I may be an idiot*"; "*For Salim to know, even if I am not there, you shall always be in my eyes". Near to that it was written "night =12 O'clock, I am at the house of Latha" in two lines. Below that it was written "6 to 7= Finishing"; "I have no role in the looting of 6 lakhs. I was present in the said vehicle. This is true*" and near to that it was written "*for police to know where I was for all these days, no child knows*".

Specimen of these writings was taken and referred to the handwriting expert. The Handwriting Expert produced P-42 report. PW-32, the Investigating Officer spoke about the seizure of a mirror, a samaya quartz clock and the November-December, 2005 page of Guruvayur Cooperative Urban Bank Calendar. All these items had writings on them at the scene of the crime. Twenty black and white photographs of the handwritings were taken. These were termed 'question' writings and marked by the Handwriting Expert in the report for his reference as Q1, Q2, Q3, Q4, Q5, Q5A, Q6, Q6A to Q6P. The Expert was also furnished with the 'standard' writings by Appellant marked by the Expert for his reference as S1 to S49. In Ext. P-42, the Handwriting Expert concludes that, on comparison, the 'question' and 'standard' writings are by the same person. He concluded that they agree in general writing characteristics such as skill, speed, spacing, relative size and proportionate spelling errors. The Expert opined that similarities found between the question and standard writings are significant and numerous and there did not exist any material differences. Only with regard to the signature stamp in Q6(q), the expert concluded that it was not possible to arrive at any definite conclusion regarding the authorship for want of sufficient data on that score. With regard to all others, it was concluded that the person who wrote the blue enclosed writings stamped and marked as 'standard' writings also wrote the red enclosed 'question' writings. The High Court has found that this aspect of handwriting was not even seriously challenged by the accused. Mr. Renjith B. Marar, learned counsel, contended that the handwriting expert had not been examined. In support thereof, he relies on the judgment of this Court in ***Padum Kumar v. State of Uttar Pradesh*, *(2020) 3 SCC 35***. The submission flies in the face of Section 293 of the Code of Criminal Procedure. Exhibit P-42 Report is prepared by Dr. K.P. Jayakumar, Joint Director (Research), Forensic Science Laboratory, Thiruvananthapuram. The report is duly marked and exhibited and proved as Exhibit P-42. The Joint Director who occupies a position above the Deputy Director and Assistant Director, is encompassed in the phrase "Director" used in Section 293(4)(e). This position is expressly settled by the judgment of this Court in ***Ammini & Others v. State of Kerala*, *(1998) 2 SCC 301***. The relevant para of which is extracted hereinbelow:

> "11. .....The trial court was also wrong in holding that the report given by the Forensic Science Laboratory with

respect to the contents of MO 44 was not admissible in evidence as it was signed by its Joint Director and not by the Director. On a true construction of Section 293(4) CrPC it has to be held that Joint Director is comprehended by the expression "Director". The amendment made in clause (e) of Section 293(4) now indicates that clearly. If the Joint Director was not comprehended within the expression Director then the legislature would have certainly named him while amending the clause and providing that Section 293 applies to the Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory. **A Joint Director is a higher officer than a Deputy Director or an Assistant Director and, therefore, it would be unreasonable to hold that a report signed by Joint Director is not admissible in evidence though a report signed by the Deputy Director or Assistant Director is now admissible.** In our opinion the High Court was right in holding that the report made by the Joint Director was admissible in evidence and that it deserved to be relied upon."

(Emphasis Supplied)

Hence, the report Ex. P-42 is admissible even without the examination of Dr. K. P. Jayakumar. (See also ***Bhupinder Singh v. State of Punjab***, *(1988) 3 SCC 513 &* ***State of H.P. v. Mast Ram***, *(2004) 8 SCC 660*)

viii) The evidence of the doctors PWs-10 & 19, who conducted the post-mortem of Latha & Chitra respectively, fixed the timing of death between 6-18 hours prior to 6.25 PM on 04.11.2005. Evidence of PW-25, Doctor who conducted post-mortem of Ramachandran stated that the death occurred 12-18 hours prior to 6:25PM. This synchronizes with the time that the accused made entry into the house.

ix) The hair strands found on the body of Chitra were found to be similar and identical to the hair of the accused. In Ext.P41(b), which is the report of Dr. R. Sreekumar, Assistant Director (Biology) in the forensic laboratory, it is opined that the hairs in Item 45 (hairs from the belly of Chitra) are human scalp hairs which are similar to the sample scalp hairs in Item 58 (a tuft

of black hairs) which is the combed hair and cut hair of the appellant. Challenging the circumstances, Mr. Renjith B. Marar, learned counsel, contends that PW-27 Annamma John does not speak about the hair being seized and that there was no seizure memo spoken to in her 161 statement. This submission has no merit since Exhibit P-26 is the seizure mahazar of the objects collected by PW-27 on 04.11.2005, the day the sordid incident was unravelled. In the Inquest Report also PW-14 mentions about the collection of hair from the body of the deceased Chitra by PW-27.

x) It is also important to note that the 2 (two) strands of hair found on one of the knives, was found to be Latha's as per FSL Report (Ex. P. 41(b)).

xi) The testimonies of the Doctors PWs, 10, 19, 25 and 26, clearly bring out that the injuries sustained by the deceased could be caused by means of M.O. 29, 30 and 33. This is an additional circumstance.

xii) Ext.P41(c), which is the report of the Scientific Assistant (Chemistry), FSL, Thiruvananthapuram, clearly establishes that the black coloured ink in Item 66 (the marker pen with trade brand label as Kolor Pik permanent XL marker) and 67 (1 black coloured plastic cap) is similar to the ink used in the black coloured writings in Item 63 (wooden frame) item 64 (wall clock) with trade label samay and item 65 (calendar of Guruvayur Cooperative Urban Bank). Item numbers referred to here are the ones given for reference by the Scientific Assistant in her report. The Marker pen (part of M.O. 95) was recovered from the southern room where the Appellant was found, and rightly an inference has been drawn that the writings on M.O. 43 (Wall Clock) M.O. 90 (Mirror) and M.O. 94 (2005 Calendar) are the writings of the accused by using M.O 95 (marker pen)

xiii) At the site where the hole was drilled, soil/powder was available. It is found in the forensic report that the soil/powder on M.O. 34 bag (found in the room where the accused was found) and seized as per Ext.P-12 scene mahazar, was apparently similar to the soil/powder seized near the hole. Equally so, in the M.O. 71 shirt belonging to the accused, apparently similar soil/ powder was found. These are established by the FSL report

(Exh. 41(a)). Further, the nail clippings of the accused taken by PW-31 dated 14.11.2005 revealed apparently similar soil/ powder to the soil/powder found at the site of the hole as per FSL report (Exh. 41(a)). This is a circumstance relied upon by the prosecution to establish that the accused gained access through the hole that he dug. The argument of the accused that the nail clippings were taken on 14.11.2005 and no importance could be attached has rightly been rejected by the High Court saying that it is not even the case of the accused that the soil/ powder detected from the hole at the scene of occurrence was planted on his nail. Mr. Renjith B. Marar, learned counsel for the appellant contended that Exhibit P-41(a) report was not put in the Section 313 questioning in the context of the soil particles on the wall tallying with the soil particles in the nail clippings and on the shirt and the bag found in the room where the accused was present. We have called for the original record and examined the Section 313 statement and had the Malayalam version read over to us. We have also seen the translated version of Section 313. Exhibit P-41(a) was put in question no. 52 but it was in the context of item 68 cable and as to how it could be cut with the knives (item 22 and 23). To that extent, Mr. Renjith B. Marar is right that the report was not put in this context. The report was put to the accused albeit in the context of the cable and knives. However, viewed in the conspectus of the other circumstances even if this circumstance is eschewed, it will not make any difference to the ultimate conclusion. The further argument that there was no seizure memo for the nail clippings is clearly incorrect. PW-31 Dr. Hitesh Shankar has clearly deposed that he had collected the nail clippings and hair samples and the blood of the accused-appellant and after sealing and labeling them handed it over to the police constable-4628. Exhibit P-45(i) marked by PW-32 Ajay Kumar, Investigating Officer as part of the property list, mentions about the collection of nail clippings, hair sample and sodium fluoride tube. Hence, the contention that the chain of custody is not established cannot be countenanced. There is no reason to disbelieve PW-31 Dr. Hitesh Shankar and the documents in support of the same.

xiv) The evidence of the prosecution witnesses and even the version of the accused establishes his presence at the scene of

occurrence. His explanation that deceased Latha would always leave the door open for him to enter and that when he entered, he found them already dead and lying on the floor wounded has been found to be false. If the appellant's own case is that he entered the house that night, no cogent explanation has been given as to who opened the door. However, we have not gone by his version. His presence at the scene of crime is established by the evidence of PW-1, PW-2, PW-4, PW-6, PW-23, PW-30 and PW-32.

xv) The appellant was the only other person inside the house, with the other three being dead and one Karthiayani Amma, who was injured and unconscious and who later died in that state itself. There is no cogent and plausible explanation forthcoming from the accused as to what transpired at the scene of occurrence on the night intervening 03.11.2005 and 04.11.2005. This coupled with the fact that his relationship with the deceased Latha was strained clearly point to his guilt. Section 106 of the Indian Evidence Act, 1872 states that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. We are conscious of the warning administered by Justice Vivian Bose, rightly, in ***Shambhu Nath Mehra vs. The State of Ajmer,*** 1956 SCR 199 to the effect that Section 106 is not intended to relieve the prosecution of its duty. However, ***Shambhu Nath Mehra*** (supra) itself recognizes that in exceptional cases where it could be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are especially within the knowledge of the accused, the burden will be on the accused since he could prove as to what transpired in such scenario, without difficulty or inconvenience. In this case, when an offence like multiple murders is committed inside a house in secrecy, the initial burden has to be discharged by the prosecution. Once the prosecution successfully discharged the burden cast upon it, the burden did shift upon the appellant being the only other person inside the four corners of the house to offer a cogent and plausible explanation as to how the offences came to be committed. The appellant has miserably failed on that score. This can be considered as a very important circumstance, constituting a vital link in the chain.

13. Though the trial Court and the High Court have adverted to few other circumstances, we are satisfied that the circumstances set out hereinabove are by themselves consistent with the sole hypothesis that the accused and the accused alone is the perpetrator of these murders which were most foul.

14. It is also to be noted that the law on the appreciation of circumstantial evidence is well settled and it will be an idle parade of familiar learning to deal with all the cases. We do no more than set out the holding in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** ***(1984) 4 SCC 116***, which dealt with the *panchsheel* or the five principles essential to be kept in mind while convicting an accused in a case based on circumstantial evidence:

> **"153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (*1*) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]
>
> "Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (*2*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (*3*) the circumstances should be of a conclusive nature and tendency,

> (*4*) they should exclude every possible hypothesis except the one to be proved, and
>
> (*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> **154.** These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

15. We are convinced that the circumstances presented in evidence in this case more than meets the ingredients that are required to be established. We find no reason to interfere with the concurrent conviction recorded by the trial Court and the High Court against the appellant for the offences under Section 302 (murder), 449 (house-trespass) and 309 (attempt to commit suicide) and we maintain the conviction.

Discussion on Sentence:

16. Coming to the sentencing, while the trial Court imposed the sentence of death, the High Court has modified it to that of imprisonment for 30 years with no remission. Mr. Renjith B. Marar, learned counsel, made an impassioned plea as part of his alternative submission that imprisonment for 30 years without remission is excessive and disproportionate. Mr. Jayanth Muth Raj, learned senior counsel, left no stone unturned in contending that the appellant has got away lightly and that he is fortunate to have escaped the gallows.

17. The question before us is what should be the appropriate sentence and whether the High Court was justified in adopting the ***Swamy Shraddananda v. State of Karnataka*, *(2008) 13 SCC 767*** line of cases and even it was justified whether the fixing of the quantum at 30 years without remission was the appropriate sentence, in the facts and circumstances of the case?

18. The trial court imposed the sentence of death as far as the offence punishable under Section 302 IPC was concerned. The trial court recorded that the appellant had committed the murder of four persons; that the appellant was blood-thirsty; that he had illicit love affair with deceased Latha, the wife of deceased Ramachandran;

that she even became pregnant because of him and then fell out with the appellant; that there was an attempt to cause bodily injury earlier to Latha by throwing a *koduval* (curved sword) on 03.02.2005; that the nature of the injuries inflicted upon the deceased persons indicate that the murders were committed in an extremely brutal and dastardly manner; that they were premeditated and cold blooded murders; that the entire family was eliminated including an innocent child aged eleven years and a hapless 80 years old lady and that the collective conscience of the community was shocked. The trial court also noted that the accused attempted to commit suicide by cutting the vein in his left forearm but however discarded that circumstance and passed a sentence of death.

19. The High Court first recorded that there was no question of interfering with the sentence under Sections 449 and 309 IPC and the question was only whether the sentence of death ought to be confirmed or not. Thereafter, the High Court delved into the balance sheet of aggravating and mitigating circumstances. The High Court, while recording the argument of the prosecution, noticed that there was prior planning; that four lives were snuffed out and the entire family was wiped out including a child and an aged woman; that the deceased were unarmed and defenceless and no provocation or resistance was offered by them; that the offence was committed after mischievously planning the operation and after gaining access to the closed house in the night by making a hole on the wall; that the incident reflected a dare devil attitude; that the nature of weapons used by the accused, namely, the knife and the iron bar is also taken as an aggravating circumstance; that the nature and number of injuries inflicted on deceased Latha (43 of which 38 were stab injuries) was also an aggravating circumstance and that there were prior instances of involvement by the accused in attempting to assault Latha.

20. Dealing with the mitigating circumstance, the High Court noticed the contention of the defence, to the effect that there was no semblance of any element of gain, profit or advantage for the accused; that rightly or wrongly the accused was labouring under an impression of deprivation in love; that the accused was in an extremely agitated and excited state of mind; that there was indication to show that at some point of time deceased Latha had herself suggested commission of suicide together; that the accused had no motive whatsoever against Ramachandran, Chitra and Karthiayani Amma; that he had

great affection for Chitra and referred to Ramachandran in endearing terms; that he had not used any weapon against Karthiayani Amma; that he did not make any attempt to flee from justice and in fact attempted to commit suicide; that he was a young man of twenty eight years; that he was still young and not lost to civilization and humanity and the final contention of the defence that he was not a menace to the society.

21. Thereafter, the High Court dealt with the precedents laid down by this Court in ***Bachan Singh v. State of Punjab (1980) 2 SCC 684***, ***Machhi Singh v. State of Punjab (1983) 3 SCC 470*** to examine whether the litmus test, namely, that the alternative option being unquestionably foreclosed was fulfilled or not. Thereafter, the High Court noticed the judgment of this Court in ***Swamy Shraddananda (supra)*** and the holding thereon that to avoid a sentence of death, it is possible for the courts to device a graver form of sentence of imprisonment for life beyond fourteen years which would ensure that the society is insulated from the criminal for such period as the court may specify, including if the facts warranted, the entire rest of his life.

22. Thereafter applying ***Swamy Shraddananda (supra)***, the High Court observed as follows:

> "54. A question still remains whether the instant case is one in which the graver alternatives of a life sentence are also unquestionably foreclosed. We have rendered our anxious consideration to all that all the relevant inputs. We are unable to agree that all the options now available can be said to be unquestionably foreclosed in the given circumstances. In every case of death sentence, the court must consider the purpose of the sentence. The theory of reformation will have no place whatsoever in a case of imposition of death sentence. In a case like the instant one, the consideration of compensation/restoration cannot also have any place, as all the members of the family have been liquidated by the conduct of the accused. The purpose of a death sentence - of eliminating the menace to the society in the form of a hardened criminal and to save society from the activities of such criminal may not also have much role, given the alternative option of a life sentence which will ensure that the accused does not come into contact with the society thereafter.

> 59. Let it not be assumed that this court does not perceive the instant one to be a serious and dastardly crime. We, to say the least, are convinced that the offence committed calls for societal abhorrence and disapproval. But, the totality of circumstances instill in us the satisfaction that this is not a case where the range of further options available to the court after **Swamy Shraddananda** (supra) are unquestionably foreclosed. Placing fetter on the powers of the Executive under Section 432 and 433 Cr.P.C. for a prescribed period (and with due caution administered that the powers under Article 72 and Article 161 should not be lightly invoked to get over the prescription of such period fixed by this Court) a sentence of imprisonment for life which shall ensure that the offender does not get exposed to society for a period of 30 years can be imposed. We are not prescribing the 'entire rest of the life' as the period, as fixed by their Lordships in **Swamy Shraddananda** (supra), considering the totality of circumstances and because of the optimistic faith in the infinite capacity of the human soul to repent and reform."

Holding so, the High Court modified the sentence of death to that of imprisonment for life with the further direction that the accused shall not be released from prison for a period of 30 (thirty) years including the period already undergone with set off under Section 428 Cr.P.C. alone.

23. The State is not in appeal, having accepted the verdict of the High Court. It is only the appellant who is in appeal. It is his submission that the imposition of 30 (thirty) years sentence without remission is excessive and the counsel urges that a suitable lesser sentence be imposed under the ***Swamy Shraddananda*** principle. This is the alternative submission advanced.

24. ***Swamy Shraddananda*** ***(supra)***, since affirmed subsequently in ***Union of India v. V. Sriharan alias Murugan and Others*****, (2016) 7 SCC 1**, resolved a judge's dilemma. Often it happens that a case that falls short of the rarest of the rare category may also be one where a mere sentence of 14 years (the normal benchmark for life imprisonment) may be grossly disproportionate and inadequate. The Court may find that while death penalty may not be warranted

keeping in mind the overall circumstances, a proportionate penalty would be to fix the period between 14 years and for the imprisonment till rest of the life without remission. Addressing this issue felicitously in ***Swamy Shraddananda*** ***(supra)*** Justice Aftab Alam speaking for the court, held as follows:

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

25. In ***V. Sriharan*** ***(supra)***, a Constitution Bench of this Court affirmed the principle laid down in ***Swamy Shraddananda*** ***(supra)***. It first affirmed the principle that imprisonment for life meant imprisonment for rest of the life, subject however, to the right to claim remission, as provided in the Constitution and the statutes. It was further held that the judgment in ***Swamy Shraddananda*** ***(supra)*** did not violate any statutory prescription. The Court went on to observe that all that

***Swamy Shraddananda* (supra)** sought to declare was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim. Thereafter, in the same judgment Ibrahim Kalifulla, J., in a passage which repays study held as under:

> "98. While that be so, it cannot also be lost sight of that it will be next to impossible for even the lawmakers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeonhole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the lawmakers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary which is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists **and judicial pronouncements revealed earlier,** to determine from the nature of such grave offences found proved and depending upon the facts noted, what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the courts to decide if in its conclusion, the imposition of death may not be warranted, **what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae."**
>
> (Emphasis Supplied)

It will be clear from the paragraph above that the question of fixing the number of years within the maximum, in the case of life imprisonment, was to be left to the courts. It was mandated that the courts would with its experience, knowledge of law, the talent and infrastructure after studying the detailed parts of each case, with the guidance from the jurists and judicial pronouncements revealed earlier would decide judiciously about the period of incarceration which the case warranted. It was also indicated that for this, apart from the crime itself; the angle of the commission of such crime or crimes; the interest of society at large and all other relevant facts which cannot be put in any straitjacket formulae would be taken into account.

26. Once the court decides that the death penalty is not to be imposed and also that the convict cannot be released on the expiry of 14 years, the guidelines set out in ***Swamy Shraddananda* (supra), *V. Sriharan* (supra)** and the line of cases which have applied these judgments will have to be considered and principles, if any, set out therein have to be applied.

27. How much is too much and how much is too little? This is the difficult area we have tried to address here. As rightly observed, there can be no straitjacket formulae. Pegging the point up to which remission powers cannot be invoked is an exercise that has to be carefully undertaken and the discretion should be exercised on reasonable grounds. The spectrum is very large. The principle in ***Swamy Shraddananda* (supra)** as affirmed in ***V. Sriharan* (supra)** was evolved as the normally accepted norm of 14 years was found to be grossly disproportionate on the lower side. At the same time, since it is a matter concerning the liberty of the individual, courts should also guard against any disproportion in the imposition, on the higher side too. A delicate balance has to be struck. While undue leniency, which will affect the public confidence and the efficacy of the legal system, should not be shown, at the same time, since a good part of the convict's life with freedom is being sliced away (except in cases where the Court decides to impose imprisonment till rest of the full life), in view of his incarceration, care should be taken that the period fixed is also not harsh and excessive. While by the very nature of the task mathematical exactitude is an impossibility, that will not deter the Court from imposing a period of sentence which will constitute "a just dessert" for the convict. Precedents can be good pointers as advised in ***V. Sriharan* (supra)**. A survey of the previously decided

cases applying the ***Swamy Shraddananda*** ***(supra)*** principle would be a safe and legitimate guide. It is in pursuance of that mandate that we have made a survey of some of the cases to see how ***Swamy Shraddananda*** ***(supra)*** had come to be applied in the course of the last decade and a half.

28. In ***Swamy Shraddananda*** ***(supra)*** itself, on facts, after finding that it was a murder of the wife in a systematic preplanned manner coupled with the fact that it was a murder for gain, this Court directed that the appellant therein be not released from prison for the rest of his life.

29. In ***Haru Ghosh v. State of West Bengal, (2009) 15 SCC 551*** which involved the murder of two individuals and the attempt to murder the third by the accused who was out on bail in another case, after conviction, this Court while commuting the death penalty after taking into account the aggravating and mitigating circumstances imposed a sentence of 35 (thirty five) years of actual jail sentence without remission. It was noted that commission of the offence was not premeditated since he did not come armed and that the accused was the only bread earner for his family which included two minor children.

30. In ***Mulla & Another v. State of U.P., (2010) 3 SCC 508*** the accused/appellant, along with other co-accused, was found guilty of murdering five persons, including one woman. This Court confirmed the conviction but modified the sentence. This Court stressed on the fact that socio-economic factors also constitute a mitigating factor and must be taken into consideration as in the case the appellants belonged to extremely poor background which prompted them to commit the act. The sentence was reduced from death to life imprisonment for full life, subject to any remission by the Government for good reasons.

31. In ***Ramraj v. State of Chhattisgarh, (2010) 1 SCC 573*** which involved the murder of his wife, this Court imposed a sentence of 20 (twenty) years including remissions.

32. In ***Ramnaresh and Others vs. State of Chhattisgarh., (2012) 4 SCC 257*** the convicts were sentenced to death by the lower court, with the High Court confirming the sentence, on finding them guilty of raping and murdering an innocent woman while she was alone in her house. This Court confirmed the conviction but found the case did not fall under the 'rarest of rare' category for awarding death

sentence. Ultimately, after setting out the well-established principles and on consideration of the aggravating and mitigating circumstances, this Court, while commuting the sentence from death imposed a sentence of life imprisonment of 21 (twenty one) years.

33. ***Neel Kumar v. State of Haryana*, *(2012) 5 SCC 766*** was a case where the accused committed murder of his own four-year old daughter. This Court, after considering the nature of offence, age, relationship and gravity of injuries caused, awarded the accused 30 (thirty) years in jail without remissions.

34. In ***Sandeep v. State of Uttar Pradesh*, *(2012) 6 SCC 107*** which involved the murder of paramour and the unborn child (foetus), this Court, while considering the facts and circumstances awarded a period of 30 (thirty) years in jail without remission.

35. In ***Shankar Kisanrao Khade vs State of Maharashtra*, *(2013) 5 SCC 546,*** the accused was convicted for raping and murdering a minor girl aged eleven years and was sentenced to death for conviction under S. 302 of IPC, life imprisonment under S. 376, seven years RI under S. 366-A and five years RI under S. 363 r/w S. 34. This Court confirmed the conviction but modified the death sentence to life imprisonment for natural life and all the sentences to run consecutively.

36. **Sahib Hussain v. State of Rajasthan*, *(2013) 9 SCC 778,*** concerned killing of five persons including three children. This Court, taking note of the fact that the guilt was established by way of circumstantial evidence and the fact that the High Court had already imposed a sentence of 20 (twenty) years without remission, did not interfere with the judgment of the High Court.

37. In ***Gurvail Singh & Anr. v. State of Punjab*, *(2013) 2 SCC 713*** which involved the murder of four persons, this Court weighed the mitigating factors i.e., age of the accused and the probability of reformation and rehabilitation, and aggravating factors i.e., the number of deceased, the nature of injuries and the totality of facts and circumstances directed that the imprisonment would be for a period of 30 (thirty) years without remission.

38. In ***Alber Oraon v. State of Jharkhand*, *(2014) 12 SCC 306*** which involved the murder by the accused of his live-in partner and the two children of the partner, this Court, even though it found the

murder to be brutal, grotesque, diabolical and revolting, applied the proportionality principle and imposed a sentence of 30 (thirty) years over and above the period already undergone. It was ordered that there would be no remission for a period of 30 (thirty) years.

39. In ***Rajkumar v. State of Madhya Pradesh*, (2014) 5 SCC 353,** which involved the rape and murder of helpless and defenceless minor girl, this Court commuting the death penalty imposed a sentence of 35 (thirty five) years in jail without remission.

40. In ***Selvam v. State, (2014) 12 SCC 274,*** the accused was found guilty of rape and murder of nine year old girl. This Court imposed a sentence of imprisonment for a period of 30 (thirty) years without any remission, considering the diabolic manner in which the offence has been committed against the child.

41. In ***Birju v. State of Madhya Pradesh*, (2014) 3 SCC 421,** the accused was involved in the murder of a one-year-old child. This Court noted that various criminal cases were pending against the accused but stated that it cannot be used as an aggravating factor as the accused wasn't convicted in those cases. While commuting the death penalty, this Court imposed a sentence of rigorous imprisonment for a period of 20 (twenty) years over and above the period undergone without remission, since he would be a menace to the society if given any lenient sentence.

42. In ***Tattu Lodhi v. State of Madhya Pradesh*, (2016) 9 SCC 675** this Court was dealing with an appeal preferred by the accused who was sentenced to death after he was found guilty of committing murder of a minor girl and for kidnapping and attempt to rape after destruction of evidence. This Court reduced the sentence from death to life imprisonment for a minimum 25 (twenty five) years as it noted that there exists a possibility of the accused committing similar offence if freed after fourteen years. This Court also opined that the special category sentence developed in ***Swamy Shradhanand* (supra)** serves a laudable purpose which takes care of genuine concerns of the society and helps the accused get rid of death penalty.

43. ***Vijay Kumar v. State of Jammu & Kashmir, (2019) 12 SCC 791*** was a case where the accused was found guilty of murder of three minor children of the sister-in-law of the accused. This Court, taking note of the fact that the accused was not a previous convict or a professional killer and the motive for which the offence was committed,

namely, the grievance that the sister-in-law's family was not doing enough to solve the matrimonial problem of the accused, imposed a sentence of life imprisonment till natural death of the accused without remission.

44. In ***Parsuram v. State of Madhya Pradesh, (2019) 8 SCC 382,*** the accused had raped and murdered his own student. The Trial Court sentenced the accused to death which was affirmed by the High Court. This Court took into consideration the mitigating factors i.e., that the accused was twenty two years old when he committed the act and the fact that there exists a possibility of reformation and the aggravating factors i.e., that the accused abused the trust of the family of the victim. After complete consideration and reference to some precedents, this Court imposed a sentence of thirty years without any remission.

45. In ***Nand Kishore v. State of Madhya Pradesh, (2019) 16 SCC 278,*** the accused was sentenced to death by the Trial Court and the High Court for committing rape and murder of minor girl aged about eight years old. This Court noted the mitigating factors i.e., age of the accused at the time of committing the act [50 years] and possibility of reformation and imposed a sentence of imprisonment for a period of 25 (twenty five) years without remission.

46. ***Swapan Kumar Jha v. State of Jharkhand and Another, (2019) 13 SCC 579*** was a case relating to abduction of deceased for ransom and thereafter murder by the accused. This Court took into consideration the mitigating factors i.e., young age of the accused, possibility of reformation and the convict not being a menace to society. On the other side of the weighing scale, was the fact that the accused had betrayed the trust of the deceased who was his first cousin and the fact that the act was premeditated. This Court modified the death sentence to one of imprisonment for a period of 25 (twenty five) years with remissions.

47. ***Raju Jagdish Paswan v. State of Maharashtra, (2019) 16 SCC 380*** was a case where the accused was convicted for the rape and murder of minor girl aged about nine years and sentenced to death by the trial court which was affirmed by the High Court. This Court noted the mitigating factors i.e., murder was not pre-planned, young age of the accused, no evidence to show that the accused is a continuing threat to society and the aggravating factors i.e., the

nature of the crime and the interest of society, if petitioner is let out after fourteen years, imposed a sentence of life imprisonment for 30 (thirty years) without remission.

48. In ***X v. State of Maharashtra*, (2019) 7 SCC 1** the accused was sentenced to death by this Court on his conviction for committing rape and murder of two minor girls who lived near his house. However, in review, the question placed before the Court was whether post-conviction mental illness be a mitigating factor. This Court answered it in the affirmative but cautioned that in only extreme cases of mental illness can this factor be taken into consideration. The Court reduced the sentence from death to life imprisonment for the remainder of his life as he still poses as a threat to society.

49. In ***Irappa Siddappa Murgannavar v. State of Karnataka*, (2022) 2 SCC 801,** this Court affirmed conviction of the accused, inter alia, under S. 302 and 376 but modified the sentence from death to life imprisonment for minimum 30 (thirty years). This Court stated that mitigating factors such as young age of the accused, no criminal antecedents, act not being pre-planned, socio-economic background of the accused and the fact that conduct of the accused inside jail was 'satisfactory' concluded that sufficient mitigating circumstances exists to commute the death sentence.

50. In ***Shiva Kumar v. State of Karnataka*, (2023) 9 SCC 817,** this Court opined that the facts of the case shocked the conscience of the Court. The accused was found guilty of rape and murder of a twenty eight year old married woman who was returning from her workplace. Despite noting that the case did not fall under the 'rarest of rare' category, the Court stated that while considering the possibility of reformation of the accused, Courts held that showing undue leniency in such a brutal case will adversely affect the public confidence in the efficacy of the legal system. It concluded that a fixed term of 30 (thirty years) should be imposed.

51. In ***Manoj and Others v. State of Madhya Pradesh*, (2023) 2 SCC 353,** the three accused were sentenced to death by the lower court and confirmed by the High Court on their conviction under Section 302 for committing murder, during the course of robbery, of three women. This Court, while modifying the sentence from death to life imprisonment for a minimum 25 (twenty five) years, took into consideration the non-exhaustive list of mitigating and aggravating

factors discussed in ***Bachan Singh (supra)*** to establish a method of principled sentencing. This Court also imposed an obligation on the State to provide material disclosing psychiatric and psychological evaluation of the accused which would help the courts understand the progress of the accused towards reformation.

52. In ***Madan vs State of U.P., 2023 SCC OnLine SC 1473,*** this Court was dealing with a case wherein the accused was sentenced to death, along with other co-accused, for murdering six persons of his village. This Court called for the jail conduct report and psychological report of the accused which were satisfactory and depicted nothing out of the ordinary. This Court also took into consideration the old age of the accused and period undergone [18 yrs.] as mitigating factors. This Court concluded that the case did not fall under the rarest of rare category and commuted the death sentence to life imprisonment for minimum 20 (twenty years) including sentence undergone.

53. In ***Sundar vs State by Inspector of Police - 2023 SCC OnLine SC 310***, this Court, while sitting in review, commuted death sentence awarded to accused therein to life imprisonment of minimum 20 (twenty years). The accused had committed rape and murder of a 7-year-old girl. Factors that influenced this Court to reach such a decision were the fact that no court had looked at the mitigating factors. It called for jail conduct and education report from the jail authorities and found that the conduct was satisfactory and that accused had earned a diploma in food catering while he was incarcerated. Apart from the above, the Court noted the young age of the accused, no prior antecedents to reach a conclusion warranting modification in the sentence awarded.

54. In ***Ravinder Singh vs State Govt. of NCT of Delhi - (2024) 2 SCC 323,*** the accused was convicted under Sections 376, 377 & 506 of the IPC for raping his own 9-year-old daughter by the Sessions court and conviction was confirmed by the High Court. The Sessions Court, while imposing life imprisonment, also stated that the accused would not be given any clemency by the State before 20 years. This Court clarified that, as discussed in ***V. Sriharan (supra)***, the power to impose a special category sentence i.e., a sentence more than 14 years but short of death sentence can only be imposed by the High Court or if in appeal, by this Court. Considering the nature of the offence committed by the accused and the fact that if the

accused is set free early, he can be a threat to his own daughter, this Court imposed a minimum 20 (twenty years) life imprisonment without remissions.

55. A survey of the **27 cases** discussed above indicates that while in **five cases**, the maximum of imprisonment till the rest of the life is given; in **nine cases**, the period of imprisonment without remission was 30 years; in **six cases**, the period was 20 years (In ***Ramraj (supra)***, this Court had imposed a sentence of 20 years including remission); in **four cases**, it was 25 years; in another set of **two cases**, it was 35 years and in **one case**, it was 21 years.

56. What is clear is that courts, while applying ***Swamy Shraddananda (supra)***, have predominantly in cases arising out of a wide array of facts, keeping the relevant circumstances applicable to the respective cases fixed the range between 20 years and 35 years and in few cases have imposed imprisonment for the rest of the life. So much for statistics. Let us examine how the judgments guide us in terms of discerning any principle.

57. A journey through the cases set out hereinabove shows that the fundamental underpinning is the principle of proportionality. The aggravating and mitigating circumstances which the Court considers while deciding commutation of penalty from death to life imprisonment, have a large bearing in deciding the number of years of compulsory imprisonment without remission, too. As a judicially trained mind pores and ponders over the aggravating and mitigating circumstances and in cases where they decide to commute the death penalty they would by then have a reasonable idea as to what would be the appropriate period of sentence to be imposed under the ***Swamy Shraddananda (supra)*** principle too. Matters are not cut and dried and nicely weighed here to formulate a uniform principle. That is where the experience of the judicially trained mind comes in as pointed out in ***V. Sriharan (supra).*** Illustratively in the process of arriving at the number of years as the most appropriate for the case at hand, which the convict will have to undergo before which the remission powers could be invoked, some of the relevant factors that the courts bear in mind are:- (a) the number of deceased who are victims of that crime and their age and gender; (b) the nature of injuries including sexual assault if any; (c) the motive for which the offence was committed; (d) whether the offence was committed

when the convict was on bail in another case; (e) the premeditated nature of the offence; (f) the relationship between the offender and the victim; (g) the abuse of trust if any; (h) the criminal antecedents; and whether the convict, if released, would be a menace to the society. Some of the positive factors have been, (1) age of the convict; (2) the probability of reformation of convict; (3) the convict not being a professional killer; (4) the socio-economic condition of the accused; (5) the composition of the family of the accused and (6) conduct expressing remorse.

These were some of the relevant factors that were kept in mind in the cases noticed above while weighing the pros and cons of the matter. The Court would be additionally justified in considering the conduct of the convict in jail; and the period already undergone to arrive at the number of years which the Court feels the convict should, serve as part of the sentence of life imprisonment and before which he cannot apply for remission. These are not meant to be exhaustive but illustrative and each case would depend on the facts and circumstances therein.

58. How do these factors apply to the case at hand? The act committed by the accused was pre-planned/premeditated; the accused brutally murdered 4 (four) persons who were unarmed and were defenseless, one of whom was a child and the other an aged lady. It is also to be noted that by the act of the accused, three generations of single family have lost their lives for no fault of theirs; Nature of injuries inflicted on Latha, Ramachandran and Chitra highlights the brutality and cold-bloodedness of the act.

59. On the mitigating side, the accused was quite young when he committed the act i.e., 28 years old; The act committed by the accused was not for any gain or profit; accused did not try to flee and in fact tried to commit suicide as he was overcome with emotions after the dastardly act he committed; accused has been in jail for a period of 18 years and 4 months and the case is based on circumstantial evidence. We called for a conduct report of the appellant from the Jail Authorities. The report dated 05.03.2024 of the Superintendent, Central Prison and Correctional Home, Viyyur, Thrissur has been made available to us. The report indicates that ever since his admission to jail, he had been entrusted with prison labour work such as duty of barber, day watchman and night watchman. Presently,

he has been assigned the job as convict supervisor for the last one and a half years. The report clearly indicates that no disciplinary actions were initiated against him in the prison and that the conduct and behavior of the appellant in prison has been satisfactory so far.

Conclusion:

60. For the reasons stated above, we uphold the judgment of the High Cout insofar as the conviction of the appellant under Sections 302, 449 and 309 IPC is concerned. We also do not interfere with the sentence imposed on the accused for the offence under Section 449 and Section 309 of IPC. We hold that the High Court was justified on the facts of the case in following ***Swamy Shraddananda (supra)*** principle while imposing sentence for the offence under Section 302 IPC. However, in view of the discussion made above, we are inclined to modify the sentence under Section 302 imposed by the High Court from a period of 30 years imprisonment without remission to that of a period of 25 years imprisonment without remission, including the period already undergone. In our view, this would serve the ends of justice.

For the reasons stated above, the Appeal is partly allowed in the above terms.

Headnotes prepared by: Divya Pandey

Result of the case: Appeal partly allowed.

[2024] 3 S.C.R. 947 : 2024 INSC 216

Ms. X
v.
Mr. A and Others

(Criminal Appeal No. 1661 of 2024)

18 March 2024

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

Issue for Consideration

Whether the High Court erred in quashing the criminal proceedings by exercising the powers under Section 482 of Cr.P.C in a complaint alleging offences under Sections 354D, 376(2)(n), 504 and 506 read with 34 of the Penal Code, 1860 and Sections 3(1)(r), 3(1)(s), 3(1)(w)(i), 3(2)(v) and 3(2)(v-a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Headnotes

Crime Against Women – Sexual intercourse based on promise of marriage – The Appellant-prosecutrix believed that the accused would marry her leading her to consent to establishing a sexual relationship with the accused – Subsequent pregnancy of the Appellant –Termination of pregnancy at the instance of the accused – Refusal of the appellant to marry the Appellant [Paras 3 - 3.4]

Crime Against Women – Narrative given by the prosecutrix in initial statement qua the abortion undergone – Changed substantially in the restatement – Version of events as given by the prosecutrix in the FIR totally contrary to the restatement [Paras 9, 15].

Crime Against Women – Sexual intercourse based on promise of marriage – Consideration of material on record by the High Court – The High Court referred to pertinent documents including the original complaint, restatement, medical reports of the prosecutrix and the statement of the doctor while quashing the proceedings [Para 8].

Panel Code, 1860 – s.375 – Legal concept of "*consent*" in relation to Section 375, IPC – Engagement in sexual activity based on a false promise to marry – Propositions to be established – For the promise to marry to be false, it ought

* Author

to be given in bad faith *per se* and must also bear a direct nexus to the woman's decision to engage in the sexual act [Para 11].

Code of Criminal Procedure 1973 – s.482 – Guidelines for exercise of powers under Section 482 of Cr.P.C – Power to be exercised to prevent abuse of the process of any court or to secure the ends of justice – Categories of cases illustrated – Powers under Section 482 of Cr.P.C should be exercised only in exceptional cases where there is no sufficient ground for proceeding against the accused [Paras 17-18].

Code of Criminal Procedure 1973 – s.482 – Quashing of Proceedings under – The High Court quashed the proceedings under IPC and the SC/ST Act citing insufficiency of evidence and material contradictions in the statements of the prosecutrix – Allegations in FIR and in the restatement of the prosecutrix do not prima facie indicate a false promise to marry by the accused – No infirmity in the approach adopted by the High Court – Appeal dismissed [Paras 15-19].

Held: Relying on Shambhu Kharwar v. State of Uttar Pradesh and Another, [2022] 7 SCR 156, wherein on similar facts the court came to the finding that the relationship between the parties was purely of a consensual nature. Present case would squarely fall under the guidelines given by this court in State of Haryana and Others v. Bhajan Lal and Others, [1992] Supp. 3 SCR 735, for exercising of powers under Section 482, CrPC - In the present case, even if the allegations made in the FIR and the material on which the prosecution relies, are taken at its face value, there were no sufficient grounds for proceeding against the accused [Paras 11, 15- 19]

Case Law Cited

Shambhu Kharwar v. State of Uttar Pradesh and Another, **[2022] 7 SCR 156 : 2022 SCC OnLine SC 1032;** *Pramod Suryabhan Pawar v. State of Maharashtra and Another,* **[2019] 11 SCR 423 : (2019) 9 SCC 608;** *State of Haryana and Others v. Bhajan Lal and Others,* **[1992] Supp. 3 SCR 735 : (1992) Supp (1) 335 – relied on.**

Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and Others, **[2018] 13 SCR 920 : (2019) 18 SCC 191 – referred to.**

List of Acts

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

List of Keywords

False promise of marriage; Consent; Sexual relationship; Forced abortion; Quashing of proceedings; Mini trial; Abuse of process of law; Miscarriage of justice.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1661 of 2024

From the Judgment and Order dated 03.09.2022 of the High Court of Karnataka at Bengaluru in CRLP No.8468 of 2021

Appearances for Parties

Naman Dwivedi, Vishnu Unnikrishnan, C Kranthi Kumar, Danish Saifi, Sabarish Subramanian, Advs. for the Appellant.

M Yogesh Kanna, Raghunatha Sethupathy B, S. Sabari Bala Pandian, Santhosh K, Ms. Monica Saini, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. Leave granted.

2. The present criminal appeal challenges the order dated 3rd September 2022, passed by the learned Single Judge of the High Court of Karnataka at Bengaluru in Criminal Petition No. 8468 of 2021, whereby the High Court allowed the petition filed under Section 482 of the Criminal Procedure Code, 1973 ('Cr.P.C.' for short) preferred by the accused persons and quashed the entire proceedings pending against them before the 2nd Additional District and Sessions Judge, Chitradurga (hereinafter referred to as 'trial court') in Special Case (SC/ST) No. 1 of 2021.

3. Shorn of details, the facts leading to the present appeal are as under:

3.1. The prosecution case is that in the year 2016, while the complainant/appellant was still a minor, having been born on 12th September 1998, accused No.1 after becoming acquainted with the complainant/appellant while they both were preparing for the competitive examination, made her fall in love with him. Thereafter, they entered into a relationship and were intimate with each other. Subsequently, in the year 2019, accused No. 1 took the complainant/appellant to his aunty's house in Chitradurga whereupon he had sexual intercourse with her, after leading her to believe that he would marry her. A few days thereafter, accused No. 1 took the complainant/appellant to his house near the Gate of Siddapura Village in order to introduce her to his parents. In his family's absence, accused No. 1 forcibly engaged in sexual intercourse with the complainant/appellant on multiple occasions. As a consequence, the complainant/appellant got pregnant. Six months into the pregnancy, upon gaining knowledge of the same, accused No.1 and his brother accused No.2 forcibly took her to Krishna Nursing Home, Challakere and compelled her to undergo an abortion.

3.2. Subsequently, accused No. 1 reiterated his promise to marry her, however, he stated that such marriage would take place only after he finished his preparation for the Karnataka Administrative Service Examination. He further compelled her to maintain silence by threatening her that if she discloses any information about the termination of her pregnancy to her parents, he would kill her and would also kill himself by consuming poison. Accused No.3 and accused No.4, parents of accused No. 1 also assured the complainant/appellant that she and accused No. 1 would get married after the latter finished with his studies.

3.3. On 22nd September 2020, after the complainant/appellant's parents became aware of her relationship with accused No. 1 and the termination of her pregnancy, the complainant/appellant along with her parents visited the house of the accused persons with the request that the complainant/appellant and accused No. 1 be married to each other. However, the accused persons turned down the request and asserted that no such marriage would be possible since the complainant/appellant was a prostitute belonging to the Scheduled Caste, Madigha.

3.4. While this version of events was brought out in her original complaint, which was the basis of the First Information Report ("FIR" for short) being Case Crime No. 456 of 2020, lodged on 1st October 2020 at Police Station Challakere, District Chitradurga, the complainant/appellant in her restatement (Annexure P-6) made before the Dy. S.P., Challakere, changed the narrative with respect to the manner in which the termination of pregnancy had been carried out. She clarified that she had not been taken to Krishna Nursing Home. She stated, instead, that accused No. 1 upon gaining knowledge of her pregnancy, had informed her that he would like to continue with his studies and had thereafter brought her Ayurvedic medicine which would cause the termination of her pregnancy. Upon the said medicine being administered to the complainant/appellant by accused No.1, her pregnancy was terminated. The complainant/appellant requested that the restatement be made a part of her original complaint. Accordingly, the relevant alteration was made in the original complaint, which fact is reflected in the brief summary of the case contained in the charge-sheet, subsequently filed.

3.5. After the conclusion of the investigation, a charge-sheet came to be filed before the trial court on 22nd December 2020 against all the accused persons for the offences punishable under Sections 354D, 376(2)(n), 504 and 506 read with 34 of the Indian Penal Code, 1860 ("IPC" for short) and Sections 3(1)(r), 3(1)(s), 3(1)(w)(i), 3(2)(v) and 3(2)(v-a) of The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 ("SC/ST Act" for short).

3.6. On the charge-sheet being filed, the trial court took cognizance of the charges and initiated criminal proceedings against the accused persons vide Special Case (SC/ST) No. 01 of 2021.

3.7. Being aggrieved thereby, the accused persons preferred a petition under Section 482 of Cr.P.C. before the High Court, praying for quashing of the proceedings pending before the trial court. The High Court, by the impugned order, allowed the petition and quashed the afore-stated proceedings in respect of all the accused persons.

4. Being aggrieved thereby, the present appeal has been filed by the original complainant.

5. We have heard Shri Naman Dwivedi, learned counsel appearing on behalf of the appellant and Shri M. Yogesh Kanna, learned counsel appearing on behalf of the respondents.

6. Shri Dwivedi submitted that the learned Single Judge of the High Court has grossly erred in quashing the proceedings. It is submitted that the learned Single Judge almost conducted a mini-trial while considering a petition filed under Section 482 of Cr.P.C. It is submitted that the learned Single Judge of the High Court ought to have taken into consideration that the exercise of powers under Section 482 Cr.P.C. was permissible only when the material placed on record along with the charge-sheet was sufficient enough to come to a conclusion that the case, even if it went to trial, would not culminate into conviction. It is submitted that from the statement of the prosecutrix as well as the witnesses, the prosecution has *prima facie* shown that accused No.1, on the false promise of marriage, had entered into a forcible relationship with the victim. It is submitted that the material placed on record was also sufficient to *prima facie* point out that accused No. 1 had forced the complainant to undergo abortion when the complainant had become pregnant.

7. Per contra, Shri Kanna submitted that the learned Single Judge of the High Court has considered the material placed on record to come to a conclusion that the prosecution case, even if taken at its face value, does not constitute the ingredients of the offences charged with. The learned counsel submitted that the learned Single Judge of the High Court, relying on the judgments of this Court in the cases of ***Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and Others***[1] and ***Shambhu Kharwar v. State of Uttar Pradesh and Another***[2], has rightly held that there was no material placed on record to constitute the offences punishable under Section 376 of IPC. He submitted that no error could be found with the finding of the High Court that permitting the continuation of the proceedings would become an abuse of process of law and result in miscarriage of justice. It is submitted that the prosecutrix has gone to the extent

1 [2018] 13 SCR 920 : (2019) 18 SCC 191

2 [2022] 7 SCR 156 : 2022 SCC OnLine SC 1032

of dragging the entire family only in order to harass the accused persons.

8. The High Court, in the impugned order, has referred to the original complaint filed by the appellant, the restatement of the appellant (Annexure P-6) made before the Dy. S.P., Challakere and the statement of the doctor/Head of the Krishna Nursing Home. After considering the material placed on record, the High Court found that the complainant has totally changed her version of events in her restatement (Annexure P-6) made before the Dy. S.P., Challakere from the statement given in the original complaint filed by her. The learned Single Judge of the High Court has also referred to the report of the medical examination of the prosecutrix dated 19th December 2020.

9. We have also perused the material placed on record along with the charge-sheet. It can be seen that though the initial version of the complainant is that after she became pregnant, she was taken to the Krishna Nursing Home wherein she was compelled to undergo abortion, however, the statement of the doctor/Head of Krishna Nursing Home would show that the version of the complainant that she was brought to the Krishna Nursing Home on 17th August 2020 to abort her six months pregnancy, was completely false. The doctor/Head of Krishna Nursing Home has denied any acquaintance with the prosecutrix or the accused persons. The doctor/Head of Krishna Nursing Home has also stated that during the relevant period, on account of lockdown due to COVID virus, no patient was admitted in the hospital. It is further to be noted that the complainant, in her restatement (Annexure P-6) made before the Dy. S.P., Challakere, has changed her version and stated that she was not taken to the Krishna Nursing Home. The prosecutrix has stated that she was administered some medicine which was not allopathy which led to the termination of her pregnancy.

10. Even the statement of Anitha (CW-6) would reveal that both the prosecutrix and accused No. 1 had come together to her house and accused No. 1 informed her that the prosecutrix was his relative. According to the statement of Anitha (CW-6), six months prior to the date of recording her statement, accused No. 1 along with the prosecutrix had come to her house in the morning and had taken breakfast. After that, Anitha (CW-6) had left the house leaving both

of them in the house. Anitha (CW-6) stated that when she came back in the room at around 02.00 pm, accused No. 1 and the prosecutrix took their meals and in the evening, they went to Challakere.

11. The issue similar to the one which arises for consideration in the present matter also arose for consideration before this Court in the case of ***Pramod Suryabhan Pawar v. State of Maharashtra and Another***[3], wherein this Court observed thus:

> "**18.** To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman›s decision to engage in the sexual act.
>
> **19.** The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:
>
> **19.1.** The complainant and the appellant knew each other since 1998 and were intimate since 2004.
>
> **19.2.** The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other›s houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant.
>
> **19.3.** The appellant expressed his reservations about marrying the complainant on 31-1-2014. This led to

3 [2019] 11 SCR 423 : (2019) 9 SCC 608

arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015."

12. This Court, in the facts of the said case, set aside the judgment of the High Court which refused to exercise its jurisdiction under Section 482 of Cr.P.C. to quash the proceedings. The Court found that this was a fit case wherein the High Court ought to have invoked its jurisdiction under Section 482 of Cr.P.C. to quash the proceedings.

13. In the present case also, the facts are almost similar. Even as per the version of the complainant, the following facts have been emerged:

(i) 4 years prior to the FIR being lodged on 1st October 2020, accused No. 1 followed the prosecutrix and told her that he loved her and she should also love him;

(ii) After a period of 2 years, she agreed to love him and both were intimate with each other;

(iii) One year prior to the date of the incident, accused No. 1 took the prosecutrix to his aunty's house in Chitradurga and they stayed there. On that day at about 09.00 am, in his aunty's house, by giving trust and belief that he would marry her, accused No. 1 forcibly made sexual contact with the prosecutrix;

(iv) Thereafter, accused No. 1 took the prosecutrix to various places including his own house and committed sexual intercourse with her; and

(v) As per the version of the prosecutrix, the first incident has taken place in the year 2019. As per Karnataka Secondary Education Examination Board Certificate, her date of birth is 12th September 1998. Even if it is assumed that the incident has taken place in January 2019, she would have been over the age of 18.

14. After the prosecutrix became pregnant, accused No. 1 caused her abortion on 17th August 2020. Though her initial version was that she was admitted in the hospital for two days, it is falsified by the statement of the doctor/Head of Krishna Nursing Home. After this incident, she discussed the matter with her elders in the family and decided to lodge the complaint.

15. We find that, in the present case also like the case of ***Pramod Suryabhan Pawar*** (supra), the allegations in the FIR so also in the restatement (Annexure P-6) made before the Dy. S.P., Challakere, do not, on their face, indicate that the promise by accused No. 1 was false or that the complainant engaged in the sexual relationship on the basis of such false promise. This apart from the fact that the prosecutrix has changed her version. The version of events given by the prosecutrix in the restatement (Annexure P-6) made before the Dy. S.P., Challakere is totally contrary to the one given in the FIR.

16. Similar facts arose for consideration before this Court in the case of ***Shambhu Kharwar*** (supra). In the said case, the prosecutrix had filed a complaint that there was love affair between her and the accused for a period of three years. The accused had given an assurance to her regarding solemnization of marriage. They started living under the same roof and also made sexual relationship. Thereafter, the accused entered into a ring ceremony with someone else. In this background, the prosecutrix had lodged the complaint that the accused had forcible sexual intercourse with her on the false promise of marriage. After considering the material placed on record, the Court observed thus:

> "**13.** .....Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under Section 375 IPC are absent. The relationship between the parties was purely of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent."

17. This Court, in the case of ***State of Haryana and Others v. Bhajan Lal and Others***[4], has observed thus:

> "**102.** In the backdrop of the interpretation of the various relevant provisions of the Code 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 or the inherent powers under

4 (1992) Supp (1) 335

Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though 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 of myriad kinds of cases wherein such power should be exercised.

(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 concerned Act (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 concerned Act, 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."

18. We find that the present case would squarely fall under categories (1), (3) and (5) as reproduced hereinabove for the reasons which we have already recorded in the earlier paragraphs. No doubt, that the power of quashing the criminal proceedings should be exercised very sparingly and with circumspection and that too in the rarest of rare cases, it is also equally settled that the Court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint. However, in the present case, even if the allegations made in the FIR and the material on which the prosecution relies, are taken at its face value, we find that there are no sufficient grounds for proceeding against the accused. We find that no error has been committed by the learned Single Judge of the High Court by holding that permitting further proceedings to continue would be an abuse of process of law and result in miscarriage of justice. The High Court has correctly applied the law on the issue and come to a just finding warranting no interference.

19. In the result, the appeal is dismissed.

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

Headnotes prepared by:
Ankitesh Ojha, Hony. Associate Editor
(*Verified by:* Kanu Agrawal, Adv.)

Result of the case:
Appeal dismissed.

[2024] 3 S.C.R. 959 : 2024 INSC 237

M/s. Divgi Metal Wares Ltd.
v.
M/s. Divgi Metal Wares Employees Association & Anr.

(Civil Appeal No(s). 2032/2011)

21 March 2024

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

Issue for Consideration

Whether the Standing Orders read in conjunction with the terms of the appointment order restrain the transferability of employees.

Headnotes

Industrial Employment (Standing Orders) Act, 1946 – Validity of transfers of employees – Terms contained in standing orders as opposed to terms of appointment – Reconcilable – Transfer of employees were valid under the Standing Orders and the terms of appointment. [Para 12-15]

Industrial Employment (Standing Orders) Act, 1946 – Interpretation of terms of appointment and standing orders – Both read in conjunction permitted transfers to any department or establishment of the company – Nothing contained in the standing orders can operate in derogation or to the prejudice of the provisions as provided in the contract of service – No conflict between the terms of appointment and standing orders – Principles established in *Cipla Ltd. v. Jayakumar R. and Another,* (1999) 1 SCC 300 examined – Squarely applicable to the instant case. [Paras 11, 14]

Industrial Employment (Standing Orders) Act, 1946 – Larger issue regarding the power of modification of the standing order not considered in the instant appeal – To be adjudicated in an appropriate proceeding – High Court erred by deciding the petitions without discussing the reasoning adopted by the Tribunal – Impugned order not sustainable – quashed and set aside. [Paras 16, 24]

Held: The Supreme Court reiterated the principle that standing orders should be read in conjunction with the employment contracts/ appointment orders to determine the scope of transferability of employees – The Supreme Court also observed that the law laid down in Cipla Ltd. vs Jayakumar R. and Another (1999) 1 SCC

* Author

300 was squarely applicable to the present case – Transfers of employees were held to be lawful – The appeals were accordingly disposed of. [Paras 12-25]

Case Law Cited

Cipla Ltd. v. Jayakumar R. and Another, **(1999) 1 SCC 300 – relied on.**

List of Acts

Industrial Employment (Standing Orders) Act, 1946

List of Keywords

Transfer of employees/workmen; Standing orders; Conflict with the standing orders; Appointment order read with the Standing Order; Amendment to the standing order.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2032 of 2011

From the Judgment and Order dated 02.02.2009 of the High Court of Karnataka Bench at Dharwad in WA No.877 of 2006 (L)

With

Civil Appeal Nos.2035 and 2033 of 2011

Appearances for Parties

C. U. Singh, Sr. Adv., Nitin S. Tambwekar, Prasant B Bhat, Seshatalpa Sai Bandaru, K. Rajeev, Advs. for the Appellant.

S. G. Hasnen, Sr. Adv., Varinder Kumar Sharma, Shantanu Sharma, Ms. Deeksha Gaur, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

1. These appeals challenge the judgment and order passed by the Division Bench of the High Court of Karnataka, Circuit Bench at Dharwad dated 02.02.2009, vide which the appeal filed by the M/s. Divgi Metal Wares Employees Association, which is respondent No.1 herein, came to be allowed. Similarly, by the said order, the Writ

Petition No.31808/2003 filed by Respondent No.1 was also allowed and the Writ Petition No.7993/2006 filed by M/s Divgi Metal Wares Ltd., the appellant herein, came to be dismissed.

2. The facts leading to the filing of the present appeals are as under:-

2.1 The appellant is a company which manufactures automobile gears at two factories, one in Pune, Maharashtra and the other at Sirsi, Karnataka. The Respondent No.1 is a Trade Union registered under the provisions of the Indian Trade Unions Act, 1926. The relations between the appellant and the respondents are governed by the Industrial Employment (Standing Orders) Act, 1946 (for short, 'the said Act'). It is also not in dispute that, it was at the instance of the employer that the Deputy Labour Commissioner and Certifying Officer passed an order on 03.07.1989 thereby certifying the Standing Order. Clause 20 of the Standing Orders reads thus:-

> "20. Transfers: An employee shall be liable to be transferred at any time from the unit/factory/office/ establishment of the company located anywhere in India or from one department to another within the same unit/factory/office/establishment or from one job of similar nature and capacity to another job of same nature and capacity from one job to another similar job or from one shift to another shift, provided such a transfer does not affect his normal wages. Any refusal to accept a transfer as above will be treated as mis-conduct as per Rule 31.2.1949."

2.2 It will also be relevant to refer to Clause 31 of the Certified Standing Order. It reads thus:

> "Nothing contained in these standing Orders shall operate in derogation of any law for the time being in force or to the prejudice of any right under a contract of service, custom or usage, or an agreement settlement or award applicable to the establishment."

2.3 It is also not in dispute that Clause 5 of every letter of appointment and Clause 1 of every letter of confirmation in service issued to the workmen contains the following stipulation:-

> "Your services are transferable at short notice to any department or any works, offices belonging to the Company. In the event of transfer the terms and conditions stipulated in this letter shall continue to apply, and you will be governed by the rules and regulations of the establishment where your services are transferred."

2.4 The appeal challenging the Certified Standing Order dated 03.07.1989 came to be filed before the learned Industrial Tribunal which rejected the appeal as time barred vide order dated 06.04.1996. Indisputably, the same order has not been carried forward.

2.5 In the months of April to September, 1998 on account of reduction in orders and lack of sufficient work, 66 workmen from the Sirsi Factory were transferred to Pune Factory. All the workmen were paid in advance for one week's leave with pay @ Rs.1,000/- towards travel expenses. Though the employees collected the said amount, they did not report at the Pune Factory.

2.6 These workmen, whose services were transferred raised Industrial Disputes vide Nos.42/1998, 2/1999 and 3/1999.

2.7 On the application of the respondent, the Deputy Labour Commissioner and Certifying Officer modified the Certified Standing Orders and deleted the following words from Clause 1 on 30.09.1999:-

> "from the unit/factory/office/establishment in which he is working to any other unit/factory /office/establishment of the Company located anywhere in India, or"

2.8 The said deletion came to be challenged by way of an appeal by the appellant before the learned Industrial Tribunal. The learned Industrial Tribunal by the judgment and order dated 03.03.2001 partly allowed the appeal and set aside the modifications to the Standing Order of 3rd July, 1989. The same came to be challenged by the respondent by way of Writ Petition No.44810/2001.

2.9 In the meanwhile, the learned Industrial Tribunal, Hubli vide its common award, rejected the aforesaid three references, viz.,

ID Nos. 2/1999, 3/1999 and 42/1998 filed by the workmen on 30.05.2002. The Tribunal also held that the transfers were not malafide. A Writ Petition No.31808/2003 was filed before the High Court by the respondents challenging the said award dated 30.05.2002.

2.10 In parallel proceedings, 03 workmen who were similarly transferred on 08.02.1999 raised Reference ID no.220/2001 and 16 workmen who had been earlier transferred on 27.04.1998 raised the Reference ID No.9/2002.

2.11 These references were allowed by the learned Industrial Tribunal at Hubli vide award dated 28.02.2006 leading to filing of Writ Petition No.7993/2006 by the present appellant before the learned Single Judge of the Karnataka High Court.

2.12 In the meanwhile, the learned Single Judge dismissed the Writ Petition No.44810/2001 filed by the respondents vide order dated 20.03.2006, which led to filing of Writ Appeal No.877/2006 before the Division Bench of the High Court. The learned Judges of the Division Bench, while hearing the appeal, also called for the papers of the aforesaid two writ petitions which were pending before the learned Single Judge and passed the order as aforesaid.

3. We have heard Shri C.U. Singh, learned senior counsel for the appellant and Shri S.G. Hasnen, learned senior counsel appearing for the respondents.

4. Shri C.U. Singh submits that, the reasoning of the Division Bench to the effect that since the Schedule of the said Act does not contain provisions with regard to transfer and therefore the 1999 amendment itself was not tenable is without substance. He further submits that, as per Section 3 of the said Act, though for every item in the Schedule a provision has to be made in the Standing Order, there is no restriction for providing of additional items. He further submits that, in view of provisions of Section 7 read with Section 10(3), the modified Standing Order would have taken effect only after the period of seven days from the date on which the copies of the order of the Appellate Authority are sent to the employer and to the trade union or other prescribed representatives of the workmen under sub-Section (2) of Section 6 of the said Act. It is submitted

that the 1999 modification was challenged by way of an appeal and the said appeal was dismissed. The writ petition challenging the said appellate order was also dismissed and therefore during the period in which the transfers were made, it was the Standing Orders certified on 03.07.1989, which were in vogue.

5. Shri Singh further submits that, even if the words from Clause 20 as were directed to be deleted by the amendment of 30.09.1999; still, in view of the law laid down by this Court in the case of ***Cipla Ltd. vs Jayakumar R. and Another***[1], the transfer of workmen from Sirsi Factory to Pune Factory could not be interfered.

6. Learned counsel for the respondents, on the contrary submits that, learned Judges of the Division Bench have rightly held that there was no power to provide stipulation for transfer in the Standing Order and therefore, the Division Bench of the Karnataka High Court has rightly held the 1999 amendment to be unsustainable.

7. We find that, for deciding the present appeal, it would not be necessary for us to address the first two issues raised by Shri C.U. Singh, inasmuch as, even for the sake of argument if it is accepted that the words directed to be deleted by the amendment of 30.09.1999 are deleted from Clause 20, still in view of the law laid down by this Court in the case of ***Cipla Ltd.*** (supra) the transfers could not have been held to be invalid.

8. It will be relevant to refer to paragraph 3 of the judgment of this Court in the case of ***Cipla Ltd.*** (supra), which refers to Clause 3 and Clause 11 of the terms of appointment. It reads thus:

> "**3.** Briefly stated the facts are that the respondent was appointed as a mechanic by a letter of appointment dated 31-1-1983 in the appellant›s establishment at Bangalore. Two of the terms of appointment which are relevant for the purposes of the present case namely clause 3 and clause 11 are as follows:
>
> *Clause 3*:
>
> You will be in full time employment with the Company. You are required to work at the

1 (1999) 1 SCC 300

> Company's establishment at Bangalore or at any of its establishments in India as the Company may direct without being entitled to any extra remuneration. You shall have to carry out such duties as are assigned to you, diligently and during such hours as may be stipulated by the management from time to time. While you are in service, you shall not be employed elsewhere or have any interest in any trade or business.
>
> *Clause 11*:
>
> You will be governed by the Standing Orders applicable for workmen of the Company, a copy of which is attached for your reference."

9. It will also be relevant to refer to paragraph 9 of the judgment of this Court in the case of ***Cipla Ltd.*** (supra), wherein the argument on behalf of the employee and the relevant clause in the Standing Order applicable to the parties have been reproduced. It reads thus:

> "**9.** It was vehemently contended by the learned counsel for the respondent that notwithstanding the aforesaid clause 3 in the letter of appointment the position in law is that if there is any clause which is in conflict with the Standing Orders then the Standing Orders must prevail. It was submitted that clause 11 of the letter of appointment clearly stipulated that the Standing Orders would be applicable. The learned counsel drew our attention to the relevant clause in the Standing Orders which reads as follows:
>
> > "A workman may be transferred from one department to another, or from one section to another or from one shift to another within factory/Agricultural Research Farm, provided such transfers do not involve a reduction in his emoluments and grade. Worker who refuses such transfers are liable to be discharged."

10. In the said case, it was sought to be argued on behalf of the employees that when the Standing Order talks of transfer, it permits the transfer only in terms of the said clause and transfer de hors the same was not permissible. The argument was accepted by the

learned Single Judge as well as the Division Bench of the High Court. While reversing the order of the learned Single Judge this Court observed thus:-

> "**12**. In our opinion, the aforesaid construction does not flow from the provisions of the Standing Orders when read along with the letter of appointment and, therefore, the conclusion arrived at by the High Court was not correct. As has already been noticed the letter of appointment contains both the terms namely for the respondent being transferable from Bangalore as well as with regard to the applicability of the Standing Orders. These clauses, namely, Clauses 3 and 11 have to be read along with the Standing Orders, the relevant portion of which has been quoted hereinabove. Reading the three together we do not find that there is any conflict as has been sought to be canvassed by the learned Counsel for the respondent. Whereas the Standing Orders provide for the department wherein a workman may be asked to work within the establishment itself at Bangalore, Clause 3 of the letter of appointment, on the other hand, gives the right to the appellant to transfer a workman from the establishment at Bangalore to any other establishment of the Company in India. Therefore, as long as the respondent was serving at Bangalore he could be transferred from one department to another only in accordance with the provisions of the Standing Orders but the Standing Orders do not in any way refer to or prohibit the transfer of a workman from one establishment of the appellant to another. There is thus no conflict between the said clauses."

11. It could thus be seen that, this Court has clearly held that, when Clauses 3 and 11 of the appointment order are read alongwith the Standing Order, there is no conflict as was sought to be canvassed by the employee. It has been held that, whereas the Standing Orders provided for the department wherein a workman may be asked to work within the establishment itself in Bangalore, Clause 3 of the letter of appointment, on the other hand, gives the right to the employer to transfer a workman from the establishment at Bangalore to any other establishment of the Company in India. It has been held that the Standing Order does not in any way refer

to or prohibit the transfer of a workman from one establishment of the appellant to another and thus, there is no conflict between the said clauses.

12. The terms of appointment, which fell for consideration of this Court in the case of ***Cipla Ltd.*** (supra) are almost similar to the terms of the appointment in the appointment order as well as the confirmation order in the present case. They clearly stipulate that the services are transferable to any department or any work offices belonging to the company. It is further clarified that; upon transfer, the terms and conditions stipulated in the appointment order would continue to apply and the employees would be governed by the rules and regulations of the employment where his/her services are transferred.

13. Even for a moment if it is accepted that the reasoning of the Division Bench that the amendment to clause 20 of the Standing Order by order dated 30.09.1999 is not permissible; still, in view of the law laid down by this Court in the case of ***Cipla Ltd.*** (supra), it would make no difference. If the reasoning of the Division Bench is accepted, Clause 20 would read as under:-

> "20. Transfers: An employee shall be liable to be transferred at any time from one department to another within the same unit/factory/office/establishment or from one job of similar nature and capacity to another job of same nature and capacity from one job to another similar job or from one shift to another shift, provided such a transfer does not affect his normal wages. Any refusal to accept a transfer as above will be treated as mis-conduct as per Rule 31.2.1949."

14. If that be so, the clause in the Standing Order would be similar with the clause that fell for consideration before this Court in the case of ***Cipla Ltd.*** (supra), and as such, there would be no conflict between the Standing Order and the terms and conditions as stipulated in the order of appointment/confirmation. Whereas the Standing Order would cover the transfer from one department to another within the same unit/factory/office/establishment or from one job of similar nature and capacity to another job of same nature and capacity and also from one job to another similar job or from one shift to another shift. Per contra, the terms of appointment and confirmation would permit the transfer of an employee to any department or any works or offices

belonging to the company. Another aspect that needs to be taken into consideration is that clause 31 of the Schedule of the Standing Order, which is reproduced herein above specifically provides that nothing contained in the Standing Order shall operate in derogation of any law for the time being in force or cause prejudice to any right under contract of service, custom or usage or an agreement, settlement or award applicable to the establishment. It can thus be seen that nothing contained in the Standing Orders can operate in derogation or to the prejudice of the provisions as provided in the contract of service.

15. In this view of the matter, we find that the Division Bench has erred in allowing the writ petition of the respondents, thereby holding the transfers to be illegal. Similarly, the learned Division Bench also erred in dismissing the writ petition filed by the appellants herein, which was filed challenging the award dated 28.02.2006. It is to be noted that the said award was totally contrary to the earlier award passed by the very same Tribunal on 30.05.2001.

16. For the aforesaid reasons, we find that the impugned judgment and order is not sustainable. However, we clarify that we have not considered the larger issue with regard to power of modification of the standing order and leave it open to be adjudicated in an appropriate proceeding. We find that the learned Division Bench was in error in calling the writ petitions filed by the appellant as well as the respondent(s) and deciding them without even discussing the reasonings as were adopted by the learned Tribunal. It is to be noted that, in the first order dated 30.05.2002, the learned Industrial Tribunal apart from holding that in view of Clause 20 and in terms of appointment and confirmation orders, the challenge to the transfer orders was not sustainable, also after discussing the entire material on record, found that the transfers were not mala fide.

17. The award dated 28.02.2006 only considers that Clause 20 stood modified on 30.09.1999 and as such the transfer orders were not permissible. However, the award passed in 2006 fails to take into consideration that on 03.03.2001, the appeal against the modification was partly allowed by the learned Industrial Tribunal setting aside the order dated 30.09.1999.

18. It will be relevant to refer to Section 7 of the said Act. It reads thus:

> "**7. Date of operation of standing orders**.- Standing orders shall, unless an appeal is preferred under Section

> 6, come into operation on the expiry of thirty days from the date on which authenticated copies thereof are sent under sub-section (3) of Section 5, or where an appeal as aforesaid is preferred, on the expiry of seven days from the date on which copies of the order of the appellate authority are sent under sub-section (2) of Section 6"

19. It could thus be seen that, in view of the provisions of Section 7, the Standing Orders shall come into operation on the expiry of 30 days from the date on which the authenticated copies thereof are sent under sub-section (3) or Section 5. However, where an appeal, as provided under sub-section (2) of Section 6 is preferred, the same would come into operation only upon the expiry of seven days from the date on which copies of the order of the appellate authority are sent. Section 10 of the said Act deals with the duration and modification of standing orders.

20. It will also be relevant to refer to sub-section (3) of Section 10 of the said Act, which reads thus:

> "**10. Duration and modification of standing orders**.-
>
> (3) The foregoing provisions of this Act shall apply in respect of an application under sub-section (2) as they apply to the certification of the first standing orders."

21. It could be seen from the perusal thereof that all foregoing provisions including the provision in Section 7 of the said Act would also apply in respect of the application under sub-section (2) as they apply to certification of the first Standing Order. As such, in view of the order dated 03.03.2001 passed by the learned Industrial Tribunal, the amendment made in the year 1999 had not come into effect in view of the appeal being allowed by the learned Tribunal.

22. We therefore find that, on the date of the orders of transfer as well as the date on which the learned Industrial Tribunal passed the award dated 28.02.2006, it is the 03.07.1989 Standing Order which would be in operation. More so when the appeal challenging the same by the respondents came to be dismissed on 06.04.1996 and which order was not carried further by the respondents.

23. We further find that the learned Division Bench has also erred in not taking into consideration the law laid down by this Court in the

case of ***Cipla Ltd.*** (supra) though the said judgment was specifically cited before it.

24. In the result, the impugned judgment and order is quashed and set aside. Writ Appeal No. 877 of 2006 filed by the respondent No.1 is dismissed. The order dated 20.03.2006 passed by the learned single judge in Writ Petition No. 44810 of 2001 is upheld. Writ Petition No.31808/2003 filed by the respondent No.1 is dismissed. Writ Petition No.7993/2006 filed by the appellant is allowed. The order passed by the learned Tribunal dated 28.02.2006 is quashed and set aside. However, we clarify that we have not considered the larger issue with regard to the powers of the Certifying Officer to provide a clause in the Standing Orders, reserving the power of the employer to transfer its employees anywhere in India.

25. In our view, in view of the law laid down by this Court in the case of ***Cipla Ltd.*** (supra), it was not necessary for the Division Bench to go into the said issue, inasmuch as the facts of the case at hand, are squarely covered by ***Cipla Ltd.*** (supra).

26. The appeals are disposed of in the aforesaid terms. There shall be no orders as to costs.

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

Headnotes prepared by:
Ankitesh Ojha, Hony. Associate Editor
(*Verified by:* Kanu Agrawal, Adv.)

Result of the case:
Appeals disposed of.

[2024] 3 S.C.R. 971 : 2024 INSC 242

Avitel Post Studioz Limited & Ors.
v.
HSBC PI Holdings (Mauritius) Limited
(Previously Named Hpeif Holdings 1 Limited)

(Civil Appeal Nos. 3835 – 3836 of 2024)

04 March 2024

[Hrishikesh Roy and Prashant Kumar Mishra, JJ.]

Issue for Consideration

The High Court facilitated the enforcement of the final Award dated 27.09.2014 issued at Singapore International Arbitration Centre (SIAC). The appellants' objection to enforcement of the foreign Award, in terms of s.48 of the Arbitration and Conciliation Act, 1996 was rejected and the High Court had also directed that the order of attachment against the Award Debtors-appellants shall continue to operate during the execution proceedings to be undertaken by the respondent-Award Holder. Whether the High Court was correct in its decision to reject the objection u/s. 48(2)(b) of Indian Arbitration Act against enforcement of the foreign Award on the grounds of arbitral bias and violation of public policy. Further, whether the ground of bias could be raised at the enforcement stage u/s. 48(2)(b) for being violative of the "public policy of India" and the "most basic notions of morality or justice".

Headnotes

Arbitration and Conciliation Act, 1996 – s.48 – Chapter 1 Part II – Foreign Award – According to the appellants-Award Debtors , the Presiding Arbitrator, CL, one of the three-member Arbitral Tribunal, had failed to make a full and frank disclosure of material facts and circumstances concerning conflict of interest and therefore the Award rendered by the Tribunal presided by CL cannot be enforced as it is against public policy in terms of s.48(2) (b)of the Indian Arbitration Act – Propriety:

Held: The Award in the instant matter was passed in Singapore, a New York Convention Country and notified as a reciprocating territory by India – Chapter 1 Part II of the Indian Arbitration Act is applicable in the present case – The parties had expressly chosen Singapore as the seat of Arbitration – It is the seat court

which has exclusive supervisory jurisdiction to determine claims for a remedy relating to the existence or scope of arbitrator's jurisdiction or the allegation of bias – A contrary approach would go against the scheme of the New York Convention which has been incorporated in India – The jurisdiction was therefore chosen based on the perceived neutrality by the parties aligning with the principle of party autonomy – In the instant case, no setting aside challenge based on bias was raised before the Singapore Courts by the appellants within the limitation period – None of the grounds, which are now being pressed, were raised during the arbitration or in the time period available to the appellants to apply, to set aside the Award in Singapore – Bonafide challenges to arbitral appointments have to be made in a timely fashion and should not be used strategically to delay the enforcement process – In other words, the Award Debtors should have applied for setting aside of the Award before the Singapore Courts at the earliest point of time – As far as allegations of bias against Presiding Arbitrator CL is concerned, the High Court after adverting to the IBA guidelines concluded that there was no identity or conflict of interest between CL and the award holder, or any of its affiliates including its holding company – In assessment of this Court, the High Court correctly suggested that CL neither had a duty to disclose nor did he fail to discharge his legal duty of disclosure in accepting the assignment as the Presiding Arbitrator – In the circumstances here, it cannot be inferred that there was a bias or likelihood of bias of the Presiding Arbitrator – Award Debtors therefore cannot claim that there is any violation of the public policy, which would render the foreign award unenforceable in India – The award debtors have failed to meet the high threshold for refusal of enforcement of a foreign award u/s. 48 of the Indian Arbitration Act – Accordingly, the decision given by the High Court for enforcement/execution of the foreign award stands approved. [Paras 27, 28, 29, 35.1, 36, 43]

Arbitration – Foreign Award – Bias – Standard of public policy in India:

Held: Embracing international standards in arbitration would foster trust, certainty, and effectiveness in the resolution of disputes on a global scale – In India, an internationally recognized narrow standard of public policy must be adopted, when dealing with the aspect of bias – It is only when the most basic notions of morality

or justice are violated that this ground can be attracted – The Supreme Court in Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI) had noted that the ground of most basic notions of morality or justice can only be invoked when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice – There can be no difficulty in holding that the most basic notions of morality and justice under the concept of 'public policy' would include bias – However, Courts must endeavor to adopt international best practices instead of domestic standards, while determining bias – It is only in exceptional circumstances that enforcement should be refused on the ground of bias. [Paras 25 and 26]

Arbitration – Foreign Award – Bias – Challenge at enforcement stage:

Held: If the ground of arbitral bias is raised at the enforcement stage, it must be discouraged by the Courts to send out a clear message to the stakeholders that Indian Courts would ensure enforcement of a foreign Award unless it is demonstrable that there is a clear violation of morality and justice – The determination of bias should only be done by applying international standards – Refusal of enforcement of foreign award should only be in a rare case where, non-adherence to International Standards is clearly demonstrable. [Para 42]

Case Law Cited

In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act,1996 and the Indian Stamp Act,1899 **[2023] 15 SCR 1081 : 2023 INSC 1066 – followed.**

Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI) **[2019] 7 SCR 522 : (2019) 15 SCC 131 – relied on.**

Avitel Post Studioz v HSBC PI Holdings **[2020] 10 SCR 91 : (2021) 4 SCC 713;** *NN Global Mercantile Private Ltd. v. M/s Indo Unique Flame Ltd.* **[2023] 9 SCR 285 : (2023) 7 SCC 1;** *Renusagar Power Co. Ltd. v. General Electric Co.* **[1993] Suppl. 3 SCR 22 : (1994) Supp (1) SCC 644;** *Union of India v. Vedanta* **[2020] 12 SCR 1 : (2020) 10 SCC 1;** *Shri Lal Mahal Ltd. v. Progetto*

Grano SpA [2013] 13 SCR 599 **: (2014) 2 SCC 433;** *Vijay Karia v. Prysmian Cavi E. Sistemi SRL* [2020] 4 SCR 336 **: (2020) 11 SCC 1 – referred to.**

Perma Container(UK) Line Limited v. Perma Container Line(India) Ltd. **2014 SCC OnLine Bom 575 – referred to.**

J. Burrough, Richardson v. Mellish (1824) 2 Bing. 229 at 252**;** *Enderby Town Football Club Ltd. v. The Football Association Ltd.* [1971] Ch 591**;** *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier* 508 F.2d 969 (1974)**;** *Halliburton Co. v Chhub Bermuda Insurance Ltd.* [2020] UKSC 48**;** *Hancock v Hancock Prospecting Pty Ltd.* [2022] NSWSC 724**;** *Dutch Shipowner v. German Cattle and Meat Dealer, Bundesgerichtshof, Germany* **1 February 2001, XXIX Y.B.Com. Arb. 700 (2004) – referred to.**

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Arbitration in India (Kluwer 2021); Reinmar Wolff (ed), A Review of New York Convention: Article-by-Article Commentary (2nd edn Beck/Hart, 2019) 352; Stavroula Angoura, 'Arbitrator's Impartiality Under Article V(1)(d) of the New York Convention' (2019) 15 (1) AIAJ 29; Gary Born(n 12)3937; William W. Park, 'Arbitrator Bias' (2015) TDM 12; Sumeet Kachwaha, 'The Rule Against Bias and the Jurisprudence of Arbitrator's Independence and Impartiality'(2021) 17(2) AIAJ 104; Vibhu Bakhru J, 'Impartiality and Independence of the Arbitral Tribunal' in Shashank Garg(ed),Arbitrator's Handbook (Lexis Nexis 2022); Gary Born (n 12) 3946; AV Dicey and L. Collins, Dicey, Morris & Collins on the Conflict of laws(15th edn, Sweet and Maxwell 2018) [16-36]; Oscar Wilde, Act III, Lady Windermere's Fan, 1893 – referred to.

List of Acts

Arbitration and Conciliation Act, 1996.

List of Keywords

Arbitration; Foreign award; Seat of Arbitration; Exclusive supervisory jurisdiction; Existence or scope of arbitrator's jurisdiction; Bias; Allegation of bias; New York Convention; Arbitral appointments; Bonafide challenges to arbitral appointments; Conflict of interest; Legal duty of disclosure; Enforcement of foreign award; Enforcement process; Violation of the public policy; Basic notions of morality or justice; Principles of justice; International best practices; Domestic Standard; Refusal of enforcement of foreign award.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3835-3836 of 2024

From the Judgment and Order dated 25.04.2023 of the High Court of Judicature at Bombay in AP No.833 of 2015 and NOM No.2475 of 2016

Appearances for Parties

Mukul Rohatgi, Vikram Nankani, Sr. Advs., Shridhar Y. Chitale, Sumeet Nankani, Karan Bharihoke, Ms. Manali Singhal, Ankur Yadav, Advs. for the Appellant.

Neeraj Kishan Kaul, Darius Khambata, Nikhil Sakhardande, Sr. Advs., Rajendra Barot, Ms. Priyanka Shetty, Ms. Sherna Doongaji, Ayush Chaddha, Dhaval Vora, Shanay Shroff, Dhruv Sharma, Raghav Agarwal, Ms. Sonali Jain, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. Delay condoned.

2. Leave granted.

3. Heard Mr. Mukul Rohatgi and Mr. Vikram Nankani, learned senior counsel appearing for the appellants (Award Debtors). Also heard Mr. Neeraj Kishan Kaul and Mr. Darius Khambata, learned senior counsel appearing for the respondent (Award Holder).

4. The challenge in these appeals is to the order dated 25.04.2023 in the Arbitration Petition No. 833 of 2015 and Notice of Motion No. 2475 of 2016 respectively whereunder, the High Court has facilitated the enforcement of the final Award dated 27.09.2014 issued in the SIAC Arbitration No. 088 of 2012. The appellants' objection to enforcement of the foreign Award, in terms of Section 48 of the Arbitration and Conciliation Act, 1996 (for short "Indian Arbitration Act")was rejected and the High Court also directed that the order of attachment against the Award Debtors shall continue to operate during the execution proceedings to be undertaken by the respondent. Accordingly, the Award Debtors were called upon to place on record disclosure affidavits as regards their properties.

Facts

5. This case has a chequered history and it is essential to note the background facts for the present challenge.

   5.1. The respondent-HSBC PI Holdings (Mauritius) Limited (for short "HSBC") is a company incorporated under the laws of Mauritius. The appellant No. 1 Avitel Post Studioz Limited (for short "Avitel India") is a company incorporated under the laws of India and it is the parent company of Avitel Group. It holds entire issued capital of Avitel Holdings Limited, which in turn, holds entire issued share capital of Avitel Post Studioz FZ LLC. Appellant No. 2 is the founder of Avitel Post Studioz Limited,

being its Chairman and Director, while Appellant Nos. 3 and 4 are his sons, who are directors of Appellant No. 1.

5.2. On 21.4.2011, a Share Subscription Agreement was entered between HSBC & Avitel India whereby HSBC made an investment in the equity capital of Avitel India for a consideration of US 60 million dollars to acquire 7.8% of its paid-up capital. This agreement contained an arbitration clause which provided that the disputes shall be finally resolved at the Singapore International Arbitration Centre (SIAC). Singapore was designated as the seat of arbitration and Part I of the *Indian Arbitration Act* was excluded, except Section 9 thereof. Thereafter, the parties also entered into a Shareholders' Agreement(6.5.2011) which defined the relationship between the parties and contained an identical arbitration clause.

5.3. It is the case of HSBC(Award Holder) that the appellants at a very advanced stage made certain representations to HSBC stating that the investment of US$ 60 Million was required to service a significant contract with the British Broadcasting Corporation (BBC).

5.4. Following the investment, according to HSBC, the appellants ceased to provide any information regarding the contract with BBC, despite numerous follow-up attempts. At this stage, HSBC engaged their independent investigation agency, where it was discovered that the purported BBC Contract was non-existent and the invested amount was siphoned off to different Companies.

5.5. On 11.05.2012, HSBC invoked the arbitration clause under the SIAC Rules and claimed damages of US$ 60 million from the appellants. On 14.5.2012, SIAC Appointed Mr. Thio Shen Yi, SC as an Emergency Arbitrator. On 17.5.2012, the appellants' challenge to the appointment of the Emergency Arbitrator was considered by SIAC & Rejected. On 28.05.2012 and 29.5.2012, the emergency arbitrator passed two interim Awards, in favour of HSBC *inter alia*, directing the appellants to refrain from disposing of/diminishing the value of their assets upto US$ 50 million. On 27.7.2012, the Emergency Arbitrator made an amendment to Interim Awards granting further relief to HSBC by rejecting to desist investigations against Avitel Dubai and Avitel Mauritius.

5.6. According to HSBC, the appellants made several attempts to delay and frustrate the proceedings. The arbitral tribunal consisted of three members. Mr. Christopher Lau, SC, was the Chairman, while Justice F.I. Rebello (retired) and Dr. Michael Pryles were members of the arbitral tribunal. On 27.09.2014, the tribunal rendered its final award and directed the appellants to pay US$ 60 million as damages for fraudulent misrepresentations.

5.7. The respondent had initiated proceedings under Section 9 of the Indian Arbitration Act before the Bombay High Court. A direction was issued to the appellants to deposit US$ 60 million for the purpose of enforcement of the Award. Aggrieved by the same, the appellants filed a Special Leave Petition before this Court where it was contended, inter alia, that the dispute is non-arbitrable under Indian law as it involved allegations of fraud which included serious criminal offenses such as forgery and impersonation. Settling the law on the arbitrability of fraud, this Court in the earlier round in *Avitel Post Studioz v HSBC PI Holdings*[1], held that the dispute was arbitrable and that HSBC had a strong *prima facie* case in the enforcement proceedings, in the context of Section 9 proceedings in which HSBC had sought maintenance of the entire claim amount in Avitel's bank account.

5.8. Since the appellants failed to abide by the direction given by this Court to deposit the amount, a contempt proceeding was initiated against them. On 11.07.2022, this Court found that Avitel had deliberately and willfully disobeyed its order and hence, the appellants were directed to remain present before this Court. The Appellant Nos.2 to 4 however went abroad defying the direction given by this Court, as a result of which, warrants and look-out notices were also issued, with a further direction to the Ministry of External Affairs and Central Bureau of Investigation for issuance of Red-Corner Notice. Ultimately, appellant Nos.2 to 4 surrendered and despite tendering an unconditional apology, this Court refused to accept the same and for their conduct, appellant Nos. 2 to 4 were sentenced to imprisonment.

1 [2020] 10 SCR 791 : (2021) 4 SCC 713

Submissions

6. According to the appellants, the Presiding Arbitrator, Mr. Christopher Lau of the three-member Arbitral Tribunal, had failed to make a full and frank disclosure of material facts and circumstances concerning conflict of interest and therefore the Award rendered by the Tribunal presided by Mr. Lau cannot be enforced as it is against public policy in terms of Section 48(2)(b)of the Indian Arbitration Act.

7. The counsel for the appellants refers to the IBA Guidelines on Conflict of Interest in International Arbitration, 2004 ("IBA Guidelines") along with the Red, Orange and Green lists appended thereto covering matters concerning disclosure and conflict of interest to argue that the High Court ought to have refused enforcement of the Award. The specific contention is that the Presiding Arbitrator failed to disclose his conflict of interest to adjudicate the dispute. According to the Award Debtors the independence and impartiality of the Presiding Arbitrator was compromised, as per General Standard 3 of the IBA Guidelines.

8. On the other hand, learned counsel for the respondent (Award Holder) would submit that the concerned party here is HSBC PI Holdings (Mauritius) Limited, which is a subsidiary of HSBC Holdings PLC (United Kingdom). The other subsidiary is HSBC (Singapore) Nominees Pte Ltd. which is alleged to have a contractual association with Wing Tai. The HSBC (Singapore) held 6.29% of Wing Tai's equity capital on a trustee/nominee basis, as of 15.09.2014. But the said Wing Tai has no relationship with the Award Holder and is not part of the HSBC Group.

9. Insofar as the Presiding Arbitrator Mr. Christopher Lau is concerned, the respondent submits that he has been an independent non-executive Director of Wing Tai since 28.10.2013 and also the Chairman of the Audit and the Risk Committee of Wing Tai. But Mr. Lau is not an employee of Wing Tai and therefore it is contended that it is wrong to say that he cannot discharge responsibility as an independent arbitrator or was incapacitated in any manner, in rendering the final Award dated 27.09.2014.

10. Initially, the Award Holders argued before the High Court that bias could not be raised under the concept of "public policy of India". However, later on, submissions were made to demonstrate that

even if it is accepted for the sake of argument that the issue could be raised at the stage of enforcement, no disclosure was required on the part of the arbitrator.

11. Before this Court, the appellants attempted to raise an additional challenge to the award under Section 48(1)(b) of the Indian Arbitration Act on account of 'inability to present their case'.

12. Another ground mentioned in the SLP was to consider the effect of the dictum of the five-judge bench of this Court in *NN Global Mercantile Private Ltd. v M/s Indo Unique Flame Ltd*[2] *(for short "NN Global")* delivered on 25.04.2023 as per which the Share Subscription Agreement being insufficiently stamped would be unenforceable in India. However, during the pendency of the present proceedings, the Supreme Court in *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act,1996 and the Indian Stamp Act,1899*[3] delivered on 13.12.2023 has overruled the decision in *NN Global (supra*). The 7-judge bench had noted, *inter alia*, that the purpose of the *Stamp Act,1899* is to protect the interests of revenue and not arm litigants with a weapon of technicality by which they delay the adjudication of the lis. This may be the reason why the Counsel chose not to orally argue on this point.

13. The two grounds noted above, need not detain us as the fundamental issue that requires determination is whether enforcement can be refused on the ground of bias. In these proceedings, challenging the High Court's judgment, the appellants reiterate their contention that the enforcement of the award is impermissible on the ground of arbitral bias and is contrary to the "public policy of India" as per Section 48(2)(b) of the Indian Arbitration Act.

Discussion

14. Against this background, the consideration to be made in these matters is whether the High Court was correct in its decision to reject the objection under Section 48(2)(b) of Indian Arbitration Act against enforcement of the foreign Award on the grounds of arbitral bias and violation of public policy. This raises a further question as to whether the ground of bias could be raised at the enforcement

2 [2023] 9 SCR 285 : (2023) 7 SCC 1

3 [2023] 15 SCR 1081 : (2023) INSC 1066

stage under Section 48(2)(b) for being violative of the "public policy of India" and the "most basic notions of morality or justice"?

15. India was one of the earliest signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (for short "New York Convention")[4]. The New York Convention superseded the Geneva Convention of 1927 to facilitate the enforcement of foreign Arbitral Awards[5]. Article V(2) of the New York Convention reads as under:

> "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

16. The precursors to the New York Convention on the contrary provided for an expansive scope for invoking the public policy ground based on the violation of the "fundamental principles of the law". Although the notion that 'public policy' is 'a very unruly horse' has gained traction over the years[6], one would also do well to remember the words of Lord Denning who said that, "With a good man in the saddle, the unruly horse can be kept in control."[7] This would suggest that a proper understanding of this branch of law by the horse rider would be necessary. In that context, one of the earliest cases that dealt with the aspect of "public policy" and the general pro-enforcement bias of the New York Convention was the decision in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*,[8] where the United States Court of Appeals, Second Circuit noted:

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4 Ratified on 13.7.1960

5 Travaux Préparatoires, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Commission on International Trade Law' (United Nations)

6 J. Burrough, Richardson v. Mellish, (1824) 2 Bing. 229 at 252

7 Enderby Town Football Club Ltd. v. The Football Association Ltd., [1971] Ch 591

8 508 F.2d 969 (1974)

> "8. …The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement… Additionally, considerations of reciprocity — considerations given express recognition in the Convention itself— counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.
>
> 9. We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."

17. The above decision has been followed in various jurisdictions including the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co*[9]. The articulation of the "forum State's most basic notions of morality and justice" has been legislatively adopted in the Indian *Arbitration Act,1996.* The legal framework concerning enforcement of certain foreign awards in International Commercial Arbitration is contained in Part II of the said Act. In this jurisdiction, we must underscore that minimal judicial intervention to a foreign award is the norm and interference can only be based on the exhaustive grounds mentioned under Section 48.[10] A review on the merits of the dispute is impermissible[11]. This Court in *Vijay Karia v. Prysmian Cavi E. Sistemi SRL*,[12] had noted that Section 50 of the *Indian Arbitration Act,1996* does not provide an appeal against a foreign award enforced by a judgment of a learned Single Judge of a High Court and therefore the Supreme Court should only entertain the appeal with a view to settle the law. It was noted that the party

9 [1993] Suppl. 3 SCR 22 : 1994 Supp (1) SCC 644

10 Union of India v. Vedanta, [2020] 12 SCR 1 : (2020) 10 SCC 1

11 Shri Lal Mahal Ltd. v Progetto Grano SpA [2013] 13 SCR 599 : (2014) 2 SCC 433

12 [2020] 4 SCR 336 : (2020) 11 SCC 1

resisting enforcement can only have "one bite at the cherry" and when it loses in the High Court, the limited scope for interference could be merited only in exceptional cases of "blatant disregard of Section 48". This principle of pro-enforcement bias was further entrenched by the Supreme Court in *Union of India v Vedanta*[13].

18. At this point, we may also note that Courts in some countries have recognized that when applying their own public policy to Convention Awards, they should give it an international and not a domestic dimension[14]. The Arbitration legislation in France[15], for instance, makes an explicit distinction between national and international public policy, limiting refusal of enforcement only to the latter ground. Scholars have noted that the New York Convention's structure and objectives argue strongly against the notion that reliance should be placed on local public policies without international limitations.[16] The objective behind such a distinction is to make it less difficult to allow enforcement on public policy grounds. Most Courts have interpreted the public policy exception extremely narrowly[17].

19. The Indian Supreme Court in *Renusagar (supra)* had noted that there is no workable definition of international public policy, and "public policy" should thus be construed to be the "public policy of India" by giving it a narrower meaning. Later on, in *Shri Lal Mahal Ltd. v Progetto Grano SpA*[18], the Supreme Court held that the wider meaning given to 'public policy of India' in the domestic sphere under Section 34(2)(b)(ii) would not apply where objection is raised to the enforcement of the Award under Section 48(2)(b) of the Indian Arbitration Act. This would indicate that the grounds for resisting enforcement of a foreign award are much narrower than the grounds available for challenging a domestic award under Section 34 of the Indian Arbitration Act.

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13 [2020] 12 SCR 1 : (2020) 10 SCC 1

14 Nigel Blackaby KC, and others, Redfern and Hunter on International Arbitration (7th Edn, OUP 2022), 594

15 Article 1514 of French Code of Civil Procedure 1981

16 Gary Born, International Commercial Arbitration(3rd ed,2021) 2838; Robert Briner, Philosophy and Objectives of the Convention' in Enforcing Arbitration Awards under the New York Convention. Experience and Prospects (United Nations 1999).

17 George A Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in George A. Bermann(ed) Recognition and Enforcement of Foreign Arbitral Awards (Springer 2018) 60

18 [2013] 13 SCR 599 : (2014) 2 SCC 433

20. At this point, we may also benefit by noting that the International Law Association issued recommendations[19] at a conference held in New Delhi in 2002 on international commercial arbitration and advocated using only narrow and international standards, while dealing with "public policy". The recommendations have been regarded as reflective of best international practices. The ILA also defined international public policy as follows:

> "(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;
>
> (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and
>
> (iii.) the duty of the State to respect its obligations towards other States or international organizations."

21. Being a signatory to the New York Convention, we must therefore adopt an internationalist approach[20]. What follows from the above is that there is a clear distinction between the standards of public policy applicable for domestic arbitration and international commercial arbitration. Proceeding with the aforedeclared proposition to have a narrow meaning to the doctrine of public policy and applying an international outlook, let us now hark back to whether a foreign Award can be refused enforcement on the ground of bias.

22. Even though the New York Convention does not explicitly mention "bias", the possible grounds for refusing recognition of a foreign award are contained in Article V(1)(d)(irregular composition of arbitral tribunal), Article V(1)(b) (due process) and the public policy defence under Article V(2)(b). Courts across the world have applied a higher threshold of bias to prevent enforcement of an Award than the standards set for ordinary judicial review[21]. Therefore, Arbitral

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19 Committee On International Commercial Arbitration, 'Application Of Public Policy As A Ground For Refusing Recognition Or Enforcement Of International Arbitral Awards' In International Law Association Report Of The Seventieth Conference(New Delhi 2000)

20 Fali Nariman and others, 'The India Resolutions for the 1958 Convention on the Recognition and Enforcement of Foreign Awards' in Dushyant Dave and others(ed) Arbitration in India (Kluwer 2021)

21 Reinmar Wolff (ed), A Review of New York Convention: Article-by-Article Commentary (2nd edn Beck/ Hart, 2019) 352

awards are seldom refused recognition and enforcement, considering the existence of a heightened standard of proof for non – recognition and enforcement of an award, based on alleged partiality[22]. It invokes a higher threshold than is applicable in cases of removal of the arbitrator.[23] This is for the reasons that, greater risk, efforts, time, and expenses are involved in the non-recognition of an award as against the removal of an arbitrator during the arbitral proceedings.

23. What is also essential to note is that Courts across the world do not adopt a uniform test while dealing with allegations of bias[24]. The standards for determining bias vary across different legal systems and jurisdictions[25]. English Courts[26], for instance, adopt the "informed or fair minded" observer test to conclude whether there is a "real possibility of bias". Australia[27] adopts the "real danger of bias" test and Singapore[28] prefers the standard of "reasonable suspicion" rejecting the "real danger of bias" test. Therefore, the outcome of a challenge on the ground of bias would vary, depending on domestic standards.

24. Cautioning against applying domestic standards at the enforcement stage, Gary Born[29] emphasizing on the adherence to international standards, makes the following observation:

> "In light of developing sources of international standards with regard to arbitrators' conflict of interest, it should be possible to identify and apply international minimum standards of impartiality and independence...
>
> More generally, in considering whether to deny recognition of an award under Article V, national courts should not apply domestic standards of independence and impartiality without regard to their international context. Although

22 Stavroula Angoura, 'Arbitrator's Impartiality Under Article V(1)(d) of the New York Convention' (2019) 15 (1) AIAJ 29

23 Gary Born(n 12)3937

24 William W. Park, 'Arbitrator Bias' (2015) TDM 12; Sumeet Kachwaha,'The Rule Against Bias and the Jurisprudence of Arbitrator's Independence and Impartiality'(2021) 17(2) AIAJ 104

25 Vibhu Bakhru J, 'Impartiality and Independence of the Arbitral Tribunal' in Shashank Garg(ed),Arbitrator's Handbook (Lexis Nexis 2022)

26 Halliburton Co. v Chhub Bermuda Insurance Ltd [2020] UKSC 48

27 Hancock v Hancock Prospecting Pty Ltd [2022] NSWSC 724

28 Re Shankar Alan s/o Anant Kulkarni [2007] 1 SLR(R) 85 at [75]–[76]

29 Gary Born (n 12) 3946

> national standards of independence and impartiality may be relevant to identifying international standards, just as domestic standards of procedural fairness can be relevant under Article V(1)(b), these standards should be considered with caution in international contexts. ….Only in rare cases should domestic standards of independence or impartiality be relied upon to produce a different result from that required by international standards".

25. Embracing international standards in arbitration would foster trust, certainty, and effectiveness in the resolution of disputes on a global scale. The above discussion would persuade us to say that in India, we must adopt an internationally recognized narrow standard of public policy, when dealing with the aspect of bias. It is only when the most basic notions of morality or justice are violated that this ground can be attracted. This Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*[30] had noted that the ground of most basic notions of morality or justice can only be invoked when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice.

26. In view of the above discussion, there can be no difficulty in holding that the most basic notions of morality and justice under the concept of 'public policy' would include bias. However, Courts must endeavor to adopt international best practices instead of domestic standards, while determining bias. It is only in exceptional circumstances that enforcement should be refused on the ground of bias.

27. Let us now turn to the present facts. The Award in this matter was passed in Singapore, a New York Convention Country and notified[31] as a reciprocating territory by India. Chapter 1 Part II of the *Indian Arbitration Act* is applicable in the present case. The parties had expressly chosen Singapore as the seat of Arbitration. It is the seat court which has exclusive supervisory jurisdiction to determine claims for a remedy relating to the existence or scope of arbitrator's jurisdiction or the allegation of bias[32]. A contrary approach would go

30 [2019] 7 SCR 522 : (2019) 15 SCC 131

31 Gazette Notification S.O.542(E) dated 06.7.1999

32 AV Dicey and L. Collins, Dicey, Morris & Collins on the Conflict of laws(15th edn, Sweet and Maxwell 2018) [16-36]

against the scheme of the New York Convention which has been incorporated in India. The jurisdiction was therefore chosen based on the perceived neutrality by the parties aligning with the principle of party autonomy. Interestingly in the present case, no setting aside challenge based on bias was raised before the Singapore Courts by the appellants within the limitation period. In this context, the Bombay High Court in a judgment in *Perma Container (UK) Line Limited v Perma Container Line (India) Ltd*[33] had noted that since the objection of bias was not raised in appropriate proceedings under the *English Arbitration Act,1996*, it could not be raised at the post-award Stage. Similarly, this Court in *Vijay Karia* (*supra*) had noted that no challenge was made to the foreign award under the English Arbitration Law, even though the remedy was available. Rejecting the challenge to the award on the ground of bias, the Court in *Vijay Karia* (*supra*) remarked that the Award Debtors were indulging in "speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick". Similar view has also been taken by the German Supreme Court in *Shipowner (Netherlands) v Cattle and Meat Dealer (Germany)*[34], where it was held that the objection of bias must be first raised in the Country of origin of the Award and only if the objection was rejected or was impossible to raise, could it be raised at the time of enforcement.

28. In the present case also, the Award Holders had challenged the appointment of Mr. Christopher Lau SC and Dr Pryles before SIAC only on the ground that the Tribunal had intentionally fixed November 2013 for hearing knowing that it coincided with the Diwali vacation and that the Indian counsel would therefore not be available. This challenge was dismissed by the SIAC Committee of the Court of Arbitration in its decision dated September 13, 2014. Therefore, none of the other grounds now being pressed were raised during the arbitration or in the time period available to the appellants to apply, to set aside the Award in Singapore.

29. It needs emphasizing that bonafide challenges to arbitral appointments have to be made in a timely fashion and should not be used strategically to delay the enforcement process. In other words, the

33 2014 SCC OnLine Bom 575

34 Dutch Shipowner v. German Cattle and Meat Dealer, Bundesgerichtshof, Germany, 1 February 2001, XXIX Y.B.Com. Arb. 700 (2004)

Award Debtors should have applied for setting aside of the Award before the Singapore Courts at the earliest point of time.

Implications of the IBA Guidelines

30. The High Court in this case applied the reasonable third-person test contained in the IBA Guidelines to conclude that there is no requirement of disclosure and bias. The IBA Guidelines are a collective effort of the arbitration community to define as to what constitutes bias. However, bias has to be determined on a case-to-basis but Courts should attempt to apply international standards, while dealing with challenges at the enforcement stage.

31. The implications of the IBA Guidelines and their application will now have to be considered.

32. The IBA Guidelines have also been adopted in the V and VII Schedule to the Indian Arbitration Act and since the Award here is dated 27.09.2014, the IBA Guidelines of the year 2004 would be relevant and applicable. The working group of the IBA had determined the standards/guidelines to bring about clarity and uniformity of application and accordingly, the Red, Orange and Green lists were appended to the Guidelines, to ensure consistency and to avoid unnecessary challenges and withdrawals and removals of arbitrators. The IBA Guidelines require an arbitrator to refuse appointment in case of any doubts as to impartiality or independence. The Arbitrator is also expected to disclose such facts or circumstances to the parties which might compromise the arbitrator's impartiality or independence. In the event of any doubt on whether an arbitrator should disclose certain facts or circumstances, the issue should be resolved in favour of disclosure. This is because an arbitrator is not expected to serve in a situation of conflict of interest. An arbitrator is also under a duty to make reasonable enquiry to investigate any potential conflict of interest.

33. The relevant entries in the non-waivable Red list, the waivable Red list, the Orange list and the Green list would suggest that those were intended to ensure the fairness of the process and also make certain that the arbitrator is impartial and also independent of the parties. Such position of the arbitrator vis-à-vis the dispute should exist not only while accepting the appointment but must continue throughout the entire arbitration proceeding until it terminates.

34. In the impugned judgment, the High Court adverted to the IBA Guidelines in some detail and noticed that Mr. Christopher Lau (Chairman of the Arbitral Tribunal) was an independent non-executive Director of two companies – Wing Tai and Neptune. The learned judge then considered whether he ought to have disclosed such relationship before taking up the assignment of arbitration. The Court noticed that the Award Debtors raised an omnibus objection and had invoked the non-waivable Red list as well as the waivable Red list as also the Orange list of the IBA Guidelines to claim that the arbitrators were under a duty of disclosure. With such broad-based contentions, the appellants urged that Mr. Lau having failed to disclose the circumstances, the likelihood of bias was very strong and this would vitiate the foreign Award, sought to be enforced in India.

35. Adverting to the specific entries in the IBA Guidelines, pertaining to the alleged bias of Mr. Christopher Lau (the Chairman of the Arbitral Tribunal), the High Court reached the following conclusion:

    35.1. The circumstance alleged by the award debtor for arbitral bias is the business interaction between one of the group companies of the award holder with independent private companies i.e., Wing Tai and Neptune wherein Mr. Lau was an independent non-executive director. However, neither Wing Tai or Neptune fall within the definition of "affiliate" of the award holder as per the IBA Guidelines. It was therefore concluded that no reasonable third person would conclude that justifiable doubts arise about impartiality or independence of Mr. Lau. Thus, there exists no identity or conflict of interest between Mr. Lau and the award holder, or any of its affiliates including its holding company i.e. HSBC PLC (UK).

    35.2. While the award debtors' suggest their case implies a need for disclosure beyond the 'Red' or 'Orange' lists, and the inapplicability of the 'Green list, the 'reasonable third person' test is the measure for assessing conflict of interest. The High Court concluded that the award debtors have not established that an impartial observer, aware of all facts, would doubt Mr. Lau's impartiality or independence and consequently, the likelihood of bias of the arbitrator is not discernible.

    35.3. The award holder provided ample evidence countering the award debtors' claims about its affiliate's roles as book-runners

and underwriters with Wing Tai and Neptune, by showing joint participation of various other banks. The allegation of a significant shareholding by a wholly-owned subsidiary of the award holder's affiliate in Wing Tai and Neptune was found unsupported by evidence. The affiliate was one amongst many in the fund-raising and held the shares in trust during the course of business.

35.4. Even upon applying the subjective approach for disclosure, wherein the disclosure requirement is viewed from the Award Debtors' point of view, certain limitations apply, as per the Green list of the IBA Guidelines. Placing reliance upon Clauses, 4.5 and 4.53 of the Green list, the learned Judge of the High Court found no conflict of interest between the arbitrator and the award holder or its affiliates. In case, the circumstances alleged fall under the green list, no duty of disclosure is owed by the arbitrator.

36. The above discussion in the impugned judgment in our assessment correctly suggests that Mr. Christopher Lau neither had a duty to disclose nor did he fail to discharge his legal duty of disclosure in accepting the assignment as the Presiding Arbitrator. In the circumstances here, we cannot infer bias or likelihood of bias of the Presiding Arbitrator. Award Debtors therefore cannot claim that there is any violation of the public policy, which would render the foreign award unenforceable in India.

37. Nevertheless, it would also be appropriate to address one specific contention raised by the Award Debtors on the communication addressed by Mr. Christopher Lau to an enquiry made on 03.02.2016, by one Ms. Pauline. In his response, Mr. Lau refused to accept the suggested assignment stating that there is conflict of interest in his taking action against HSBC. The circumstances under which the above communication was addressed by Mr. Lau are explained in detail in Mr. Lau's letter dated 26.04.2016. A reading of the response would show the reason for the response to Ms. Pauline. It would also additionally confirm that Mr. Christopher Lau during the phase when he acted as the Presiding Arbitrator between the appellants and the respondent, was not subject to any conflict of interest. He is held to have duly complied with the disclosure obligation and no bias or improper conduct can be attributed to rendition of the Award dated 27.09.2014 by Mr. Lau, as the President of the Arbitral Tribunal.

38. Another point on the above aspect i.e. the timing of the communication would also need our attention. The communication by Ms. Pauline was made in the year 2016, much after the final Award was rendered on 27.09.2014. When the explanation of Mr. Christopher Lau in his communication dated 26.04.2016 is examined in the context of the roving query made by the third party, well beyond the Award, we have no hesitation to hold that there was no disability on the part of Mr. Lau to conduct the arbitral proceedings between the appellants and the respondent.

39. We, therefore, conclude that there is no bias factor operating against Mr. Lau that would violate the most basic notions of morality and justice or shock the conscience of the Court.

Onerous Travails

40. This case has unfortunately seen a protracted and arduous battle to enforce an award for over 10 long years, with multiple phases of litigation. The arbitration itself commenced in Singapore on 11.05.2012, when notice of arbitration was issued by the respondent. Then the SIAC Emergency Awards were rendered on 28.05.2012 and 29.05.2012. Proceedings were then initiated by the award holder under S. 9 of Indian Arbitration Act at the Bombay High Court, seeking deposit of security amount to the extent of their claims. In the meanwhile, the award debtors' objections on the grounds of jurisdiction were dismissed by the arbitral tribunal through a Final Partial Award on 17.12.2012. In the Section 9 proceedings, the appellants were directed to deposit a certain sum for enforcement of the award. The award debtor challenged the same before the Supreme Court, which was subsequently dismissed and culminated in an order to maintain the specified amount in the award debtor's account. However, the award debtors' failure to maintain their account to the ordered extent, led to the contempt proceedings before the Supreme Court, which were disposed of vide orders dated 02.09.2022 & 09.09.2022.

41. Meanwhile, the Final Award was issued on 27.09.2014, which was sought to be set aside by the award-debtor through an application under 34 of the Indian Arbitration Act before the High Court. The same was dismissed as not maintainable on 28.09.2015. An appeal against the same was filed & dismissed subsequently. Simultaneously the award holder sought to enforce the award through an Arbitration Petition before the High Court. As a result, the enforcement

proceedings culminated in the impugned orders dated 25.04.2023 of the High Court whereby the final award was rendered enforceable.

42. This long list of events points to a saga of the award-holder's protracted and arduous struggle to gather the fruits of the Award. The Award Debtors raised multiple challenges and also defied the Court's order. They had to serve jail time for such contemptuous actions. In this backdrop, the travails of Award holders suggest a Pyrrhic victory. It is not unlike the situation articulated by the playwright & author Oscar Wilde who commented - "*In this world, there are only two tragedies. One is not getting what one wants, and the other is getting it.*"[35] As can be noticed, in this case, despite the award being in their favour, the award-holders found themselves embroiled in multiple litigations in different forums by the concerted and unmerited action of the appellants. It will bear mention here, that in every forum the award debtors have lost and Courts' verdicts are in the favour of the award holders. Despite this, the benefit of the foreign award is still to reach the respondents. This sort of challenge where arbitral bias is raised at the enforcement stage, must be discouraged by our Courts to send out a clear message to the stakeholders that Indian Courts would ensure enforcement of a foreign Award unless it is demonstrable that there is a clear violation of morality and justice. The determination of bias should only be done by applying international standards. Refusal of enforcement of foreign award should only be in a rare case where, non- adherence to International Standards is clearly demonstrable.

43. The High Court in this matter has rightly held that the award-debtors have failed to substantiate their allegation of bias, conflict of interest or the failure by the Presiding Arbitrator to render disclosure to the parties, as an objection to the enforcement of the award. The award debtors have failed to meet the high threshold for refusal of enforcement of a foreign award under Section 48 of the Indian Arbitration Act. Accordingly, the decision given by the High Court for enforcement/execution of the foreign award stands approved. The appeals are found devoid of merit.

44. Even as the appeals filed by the award debtors are dismissed, the respondents, notwithstanding their victory in all the legal battles until

35 Oscar Wilde, Act III, Lady Windermere's Fan, 1893

now, must not be allowed to feel that theirs is a case of winning the battle but losing the war. In the circumstances, we emphasize the need for early enforcement of the foreign award by the competent forum, without showing any further indulgence to the award debtors. It is ordered accordingly. The appeals stand dismissed on these terms.

45. Pending application(s), if any, shall stand closed.

Headnotes prepared by: Ankit Gyan

Result of the case: Appeals dismissed.

[2024] 3 S.C.R. 994 : 2024 INSC 255

Bloomberg Television Production Services India Private Limited & Ors.
v.
Zee Entertainment Enterprises Limited

(Civil Appeal No. 4602 of 2024)

22 March 2024

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

Issue for Consideration

Matter pertains to the order of the High Court upholding the interim order passed by the trial judge directing the appellants-media platform to take down an article published on their online platform against the respondent as also restrained them from posting, circulating or publishing the article in respect of the respondent on any online or offline platform till the next date of hearing.

Headnotes

Defamation – Defamation suits against media platform and/or journalists – Interim relief/interim injunctions – Interim order by the trial judge directing the appellants-media platform, its editor, and the journalists to take down an article published on their online platform against the respondent as also restrained them from posting, circulating or publishing the article in respect of the respondent on any online or offline platform till the next date of hearing – Upheld by the High Court – Correctness:

Held: Order of the trial judge does not discuss, even cursorily, the prima facie strength of the plaintiff's case, the balance of convenience or the irreparable hardship that is caused – Trial judge needed to have analysed why such an ex parte injunction was essential – Such order amounts to unreasoned censorship and cannot be accepted – Grant of an ex parte interim injunction by way of an unreasoned order, definitely necessitates interference by the High Court – Impact of the injunction on the constitutionally protected right of free speech further warranted intervention – High Court ought to have *prima facie* assessed whether the test for the grant of an injunction was duly established after an evaluation of facts – Error committed by the trial judge perpetuated by the Single

* Author

Judge of the High Court – Merely recording that a prima facie case exists, that the balance of convenience is in favour of the grant of injunction and that an irreparable injury would be caused, would not amount to an application of mind to the facts of the case – In the absence thereof, orders of the trial judge and the Single Judge of the High Court set aside. [Paras 11-13]

Defamation – Defamation suits against media platform and/or journalists – Interim relief/interim injunctions – Grant of – Application of three fold test:

Held: Three-fold test is of establishing a prima facie case, balance of convenience and irreparable loss or harm, for the grant of interim relief – This test is equally applicable to the grant of interim injunctions in defamation suits – Three-fold test must not be applied mechanically, to the detriment of the other party and in the case of injunctions against journalistic pieces, often to the detriment of the public – While granting interim relief, the court must provide detailed reasons and analyze how the test is satisfied and how the precedents cited apply to the facts of the case – Also balancing the fundamental right to free speech with the right to reputation and privacy must be borne in mind – Constitutional mandate of protecting journalistic expression cannot be understated, and courts must tread cautiously while granting pre-trial interim injunctions – Courts should not grant ex-parte injunctions except in exceptional cases where the defence advanced by the respondent would undoubtedly fail at trial – In all other cases, injunctions against the publication of material should be granted only after a full-fledged trial is conducted or in exceptional cases, after the respondent is given a chance to make their submissions. [Paras 5, 7, 9]

Suits – 'SLAPP Suits'– Concept of :

Held: Term 'SLAPP' stands for 'Strategic Litigation against Public Participation' – It is an umbrella term used to refer to litigation predominantly initiated by entities that wield immense economic power against members of the media or civil society, to prevent the public from knowing about or participating in important affairs in the public interest – Grant of an interim injunction, before the trial commences, often acts as a 'death sentence' to the material sought to be published, well before the allegations have been proven – While granting ad-interim injunctions in defamation suits, the potential of using prolonged litigation to prevent free speech and public participation must also be kept in mind by courts. [Para 10]

Case Law Cited

Delhi Development Authority v. Skipper Construction Co. (P) Ltd [1996] Suppl. 2 SCR 295 **: (1996) 4 SCC 622;** *Morgan Stanley Mutual Fund v. Kartick Das* [1994] Suppl. 1 SCR 136 **: (1994) 4 SCC 225;** *R. Rajagopal v. State of Tamil Nadu* [1994] Suppl. 4 SCR 353 **: (1994) 6 SCC 632;** *Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel* [2006] Suppl. 5 SCR 521 **: (2006) 8 SCC 726;** *Shyam Sel & Power Ltd. v. Shyam Steel Industries Ltd.* [2022] 3 SCR 1173 : **(2023) 1 SCC 634 – referred to.**

Bonnard v. Perryman (1891) 95 All ER 965**;** *Holley v. Smyth* (1998) 1 All ER 853**;** *Fraser v. Evans* **(1969) 1 Q.B. 349 – referred to.**

Books and Periodicals Cited

Donson, F.J.L. 2000. Legal Intimidation: A SLAPP in the Face of Democracy. London, New York : Free Association Books – referred to.

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Media platform; Online platform; Defamation; Defamation suits; Interim relief/interim injunctions; Prima facie case; Balance of convenience; Irreparable hardship; Ex parte injunction; Ad-interim injunction; Unreasoned censorship; Discretionary power; Unreasoned order; Defamation proceedings against media platform; Injunction; Right of free speech; Right to reputation and privacy; Protection of journalistic expression; Pre-trial interim injunctions; Bonnard standard; Right to freedom of speech of the author; Public's right to know; 'SLAPP Suits'; 'Strategic Litigation against Public Participation'; Prolonged trials.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4602 of 2024

From the Judgment and Order dated 14.03.2024 of the High Court of Delhi at New Delhi in FAO No.79 of 2024

Bloomberg Television Production Services India Private Limited & Ors. v. Zee Entertainment Enterprises Limited

Appearances for Parties

Mukul Rohatgi, Neeraj Kishan Kaul, Dr. Menaka Guruswamy, Sr. Advs., Rohit Kochhar, Shiv Sapra, Samiron Borkataky, Ms. Ranjeet Rohatgi, Rajat Gava, Ikshvaaku Marwah, Vishal Singh, Sanskriti Shrimali, Keshav Sehgal, Dhruv Sharma,Raghav Agarwal, Utkarsh Pratap, Lavish Bhambhani, Harshvardhan Thakur, Ms. Suvangana Agrawal, Advs. for the Appellants.

Mahesh Agarwal, Ms. Madhavi Agarwal, Shashwat Singh, E.C. Agrawala, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

1. Leave granted.

2. On 01 March 2024, an *ex-parte* ad interim order was passed by the ADJ 05 of the South Saket Courts, New Delhi[1] directing the appellants (a media platform, one of its editors, and the concerned journalists) to take down an article dated 21 February 2024 published on their online platform within a week. The appellants were also restrained from posting, circulating or publishing the article in respect of the respondent-plaintiff on any online or offline platform till the next date of hearing.

3. The order of the trial Judge indicates that the discussion, after recording the submission of the respondent, commences at paragraph 7. The only reasoning which is found in the order of the trial Judge is in paragraphs 8-9, which read as follows:

> "8. I have noticed that in ***Dr. Abhishek Manu Singhvi*** (Supra), ***Chandra Kochar*** (Supra), ***Swami Ramdev*** (Supra), ex-parte ad interim injunction was passed, considering that the contents of the material in question was per se defamatory.
>
> 9. In my view, the plaintiff has made out a *prima facie* case for passing ad interim ex-parte orders of injunction, balance of convenience is also in favour of plaintiff and

1 "trial Judge"

> against the defendant and irreparable loss and injury may be caused to the plaintiff, if the injunction as prayed for is not granted. In view thereof, defendant no.1 and defendant no.2 are directed to take down the article dated 21.02.2024 (page 84 to 86 of the plaintiff's document) from online platform within one week of receipt of this order. The defendants are further restrained from posting, circulating or publishing the aforesaid article in respect of the plaintiff on any online or offline platform till the next date of hearing."

4. The order of the trial Judge has been upheld by a Single Judge of the High Court of Delhi by order dated 14 March 2024.[2] The Single Judge of the High Court seems to have had doubts about the maintainability of the appeal, but that point need not be laboured any further having regard to the provisions of Order XLIII of the Code of Civil Procedure 1908.

5. The three-fold test of establishing (i) a *prima facie* case, (ii) balance of convenience and (iii) irreparable loss or harm, for the grant of interim relief, is well-established in the jurisprudence of this Court. This test is equally applicable to the grant of interim injunctions in defamation suits. However, this three-fold test must not be applied mechanically,[3] to the detriment of the other party and in the case of injunctions against journalistic pieces, often to the detriment of the public. While granting interim relief, the court must provide detailed reasons and analyze how the three-fold test is satisfied. A cursory reproduction of the submissions and precedents before the court is not sufficient. The court must explain how the test is satisfied and how the precedents cited apply to the facts of the case.

6. In addition to this oft-repeated test, there are also additional factors, which must weigh with courts while granting an ex-parte ad interim injunction. Some of these factors were elucidated by a three-judge bench of this Court in **Morgan Stanley Mutual Fund v. Kartick Das**,[4] in the following terms:

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2 "Impugned Order"

3 Delhi Development Authority v. Skipper Construction Co. (P) Ltd., [1996] Suppl. 2 SCR 295 : (1996) 4 SCC 622, para 38.

4 [1994] Suppl. 1 SCR 136 : (1994) 4 SCC 225.

> "**36**. As a principle, ex parte injunction could be granted only under exceptional circumstances. The factors which should weigh with the court in the grant of ex parte injunction are—
>
> (a) whether irreparable or serious mischief will ensue to the plaintiff;
>
> (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
>
> (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
>
> (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
>
> (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
>
> (f) even if granted, the ex parte injunction would be for a limited period of time.
>
> (g) General principles like prima facie case, balance of convenience and irreparable loss would also be considered by the court."

7. Significantly, in suits concerning defamation by media platforms and/or journalists, an additional consideration of balancing the fundamental right to free speech with the right to reputation and privacy must be borne in mind.[5] The constitutional mandate of protecting journalistic expression cannot be understated, and courts must tread cautiously while granting pre-trial interim injunctions. The standard to be followed may be borrowed from the decision in **Bonnard v. Perryman**.[6] This standard, christened the 'Bonnard standard', laid down by the Court

5 R. Rajagopal v. State of Tamil Nadu, [1994] Suppl. 4 SCR 353 : (1994) 6 SCC 632.

6 (1891) 95 All ER 965.

of Appeal (England and Wales), has acquired the status of a common law principle for the grant of interim injunctions in defamation suits.[7] The Court of Appeal in **Bonnard** (supra) held as follows:

> "…But it is obvious that the subject-matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong. The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."
>
> (emphasis supplied)

8. In **Fraser v. Evans,** [8] the Court of Appeal followed the Bonnard principle and held as follows:

> "… in so far as the article will be defamatory of Mr. Fraser, it is clear he cannot get an injunction. The Court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it or to make fair comment on a matter of public interest. That has been established for many years ever since (Bonnard v. Ferryman 1891 2 Ch. 269). 'The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a Judge. But a better reason is the importance in the public interest that the truth should out. …"
>
> (emphasis supplied)

7 Holley vs. Smyth, (1998) 1 All ER 853.

8 [1969] 1 Q.B. 349.

9. In essence, the grant of a pre-trial injunction against the publication of an article may have severe ramifications on the right to freedom of speech of the author and the public's right to know. An injunction, particularly ex-parte, should not be granted without establishing that the content sought to be restricted is 'malicious' or 'palpably false'. Granting interim injunctions, before the trial commences, in a cavalier manner results in the stifling of public debate. In other words, courts should not grant ex-parte injunctions except in exceptional cases where the defence advanced by the respondent would undoubtedly fail at trial. In all other cases, injunctions against the publication of material should be granted only after a full-fledged trial is conducted or in exceptional cases, after the respondent is given a chance to make their submissions.

10. Increasingly, across various jurisdictions, the concept of 'SLAPP Suits' has been recognized either by statute or by courts. The term 'SLAPP' stands for 'Strategic Litigation against Public Participation' and is an umbrella term used to refer to litigation predominantly initiated by entities that wield immense economic power against members of the media or civil society, to prevent the public from knowing about or participating in important affairs in the public interest.[9] We must be cognizant of the realities of prolonged trials. The grant of an interim injunction, before the trial commences, often acts as a 'death sentence' to the material sought to be published, well before the allegations have been proven. While granting ad-interim injunctions in defamation suits, the potential of using prolonged litigation to prevent free speech and public participation must also be kept in mind by courts.

11. The order of the trial Judge does not discuss, even cursorily, the *prima facie* strength of the plaintiff's case, nor does it deal with the balance of convenience or the irreparable hardship that is caused. The trial Judge needed to have analysed why such an *ex parte* injunction was essential, after setting out the factual basis and the contentions of the respondent made before the trial Judge. The trial Judge merely states, in paras 7-8, that the court has "gone through the record available as on date" and noticed certain precedents

9 Donson, F.J.L. 2000. Legal Intimidation: A SLAPP in the Face of Democracy. London, New York: Free Association Books.

where an ad-interim injunction was granted. Without even cursorily dwelling on the merits of the plaint, the ad-interim injunction granted by the trial Judge amounts to unreasoned censorship which cannot be countenanced.

12. Undoubtedly, the grant of an interim injunction is an exercise of discretionary power and the appellate court (in this case, the High Court) will usually not interfere with the grant of interim relief. However, in a line of precedent, this Court has held that appellate courts must interfere with the grant of interim relief if the discretion has been exercised *"arbitrarily, capriciously, perversely, or where the court has ignored settled principles of law regulating the grant or refusal of interlocutory injunctions."*[10] The grant of an ex parte interim injunction by way of an unreasoned order, definitely falls within the above formulation, necessitating interference by the High Court. This being a case of an injunction granted in defamation proceedings against a media platform, the impact of the injunction on the constitutionally protected right of free speech further warranted intervention.

13. In view of the above, the High Court ought to have, in our view, also at least *prima facie* assessed whether the test for the grant of an injunction was duly established after an evaluation of facts. The same error which has been committed by the trial Judge has been perpetuated by the Single Judge of the High Court. Merely recording that a *prima facie* case exists, that the balance of convenience is in favour of the grant of injunction and that an irreparable injury would be caused, would not amount to an application of mind to the facts of the case. The three-fold test cannot merely be recorded as a mantra without looking into the facts on the basis of which an injunction has been sought. In the absence of such a consideration either by the trial Judge or by the High Court, we have no option but to set aside both the orders of the trial Judge dated 1 March 2024 and of the Single Judge of the High Court dated 14 March 2024. We do so accordingly.

14. Since the proceedings are now listed before the trial Judge on 26 March 2024, we direct that it would be open to the respondents to

10 Ramdev Food Products Pvt. Ltd. v. Arvindbhai Rambhai Patel, [2006] Suppl. 5 SCR 521 : (2006) 8 SCC 726, para 128; Shyam Sel & Power Ltd. v. Shyam Steel Industries Ltd., [2022] 3 SCR 1173 : (2023) 1 SCC 634, para 37.

renew their application for injunction, on which the trial Judge shall pass fresh orders after hearing the parties and bearing in mind the observations which are contained in the above segment of the judgment and order. All the rights and contentions of the parties are kept open in that regard. In the event that the appellants seek to contest the application for injunction, they shall file their reply before the trial Judge before the next date of listing.

15. It is clarified that the above segment of the judgment and order may not be construed as a comment on the merits of the present case. The purpose of the above segment is to provide the broad parameters to be kept in mind while hearing the application for an interim injunction.

16. The appeal is accordingly disposed of in the above terms.

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

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal disposed of.

[2024] 3 S.C.R. 1004 : 2024 INSC 263

State of Haryana
v.
Dr. Ritu Singh and Another

(Criminal Appeal No. 1791 of 2024)

22 March 2024

[Sudhanshu Dhulia and Rajesh Bindal,* JJ.]

Issue for Consideration

FIR against the accused-employee by the complainant, for defrauding the State-employer, if can be quashed on basis of a "compromise" between the complainant and the accused.

Headnotes

Code of Criminal Procedure, 1973 – s. 482 – Quashing of FIR – FIR against the accused-employee by the complainant for defrauding the State-employer – Allegations with reference to withdrawal of salary for the period the accused-employee was on unauthorized foreign trips and also withdrawal of salary by producing false medical certificates – FIR quashed by the High Court on basis of a "compromise" between the complainant and the accused – Sustainability:

Held: Order not legally sustainable – Allegations against the accused are of defrauding the State – Such a matter cannot be settled on the basis of a "compromise" between two private individuals – Perusal of the contents of the FIR would show that it was not the complainant who was the victim with reference to the allegations made in the complaint to the police, to enable the High Court to exercise the power to quash the FIR on the basis of compromise – When the FIR was quashed the matter was still being investigated by the police – After setting the criminal machinery into motion, which had relevance with the fraud allegedly committed by the employee with her employer, the complainant did not have any locus to compromise the matter with the accused when the FIR had been registered – Even the High Court failed to consider that aspect of the matter – Also the reply filed by the State to the quashing petition was not referred to – Submission that in the departmental proceedings initiated on the same ground, employee has already been exonerated is merely to be noticed – Thus, impugned order passed by the High Court set aside. [Paras 7-9]

* Author

State of Haryana v. Dr. Ritu Singh and Another

List of Acts

Code of Criminal Procedure, 1973.

List of Keywords

FIR; Quashing of FIR; Compromise between two private individuals; Defrauding the State.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1791 of 2024

From the Judgment and Order dated 27.02.2019 of the High Court of Punjab & Haryana at Chandigarh in CRMM No. 51493 of 2018

Appearances for Parties

Deepak Thukral, A.A.G., Gautam Sharma, Dr. Monika Gusain, Advs. for the Appellant.

Aayush Agarwala, M/S. PBA Legal, Nitin Saluja, Ms. Pranya Madan, Nischal Tripathi, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

1. The State has filed the present appeal impugning the order[1] passed by the High Court[2] whereby the petition[3] filed by the respondent no.1 seeking quashing of the FIR was allowed and the same was quashed on the basis of the compromise entered into between the complainant-respondent no.2 and the accused-respondent no.1.

2. Briefly stated, the facts available on record are that a complaint was filed by the respondent no.2 with the police alleging certain offences committed by the respondent no.1, on the basis of which FIR[4] in question was registered. Respondent no.1 at the relevant point of time was working as veterinary doctor in Policlinic, Sonipat

1 Dated 27.02.2019

2 High Court of Punjab and Haryana at Chandigarh

3 CRM-M-51493 of 2018

4 FIR No.0116 dated 12.05.2018, Police Station Barauda, Dist. Sonipat, Haryana

Animal Husbandry Department. Immediately, after registration of the FIR while the matter was still under investigation, the respondent no.1 filed a petition in the High Court seeking quashing thereof. A perusal of the impugned order passed by the High Court shows that respondent no.1-accused as well as respondent no.2-complainant submitted before the High Court that the matter in dispute has been amicably settled between the parties, hence, the FIR may be quashed on the basis of the compromise. Even though in the reply filed by the State to the quashing petition, the stand taken was that the FIR does not deserve be quashed as there are serious allegations against the respondent no.1-accused. However, still the High Court merely because the complainant had compromised the matter with the respondent no.1-accused, quashed the FIR. The aforesaid order is impugned by the State before this Court.

3. Learned counsel for the appellant submitted that once on the basis of a complainant, submitted to the Police, an FIR had been registered with the allegations that the respondent no.1 was involved in commission of serious offences during her service career and the matter was still under investigation, the High Court exceeded its jurisdiction in quashing the FIR, merely because the complainant-respondent no.2 had compromised the matter with the accused-respondent no.1. After the FIR was registered or even before that, it was not the complainant only who was the sufferer, rather it was an offence against the State. Allegation against the respondent no.1 was of defrauding the State, her employer. The FIR was registered as cognizable offence was found to have been committed by the respondent no.1. The stand taken by the State before the High Court was not even considered.

4. On the other hand, learned counsel for the respondent no.1 submitted that the respondent no.2-complainant had no locus to involve in the issue. He had filed a complaint to the police with certain allegations with regard to her service career referring to certain documents, which were not privy to him. Registration of FIR against respondent no.1 was merely to harass her, who had otherwise exposed various irregularities in the Animal Husbandry Department. Even in the departmental proceedings, the respondent no.1 has been exonerated after due enquiry. If FIR is allowed to be proceeded with, it will be nothing else but an abuse of process of law. The High Court has not committed any error in the exercise of jurisdiction to quash the FIR.

5. We have heard learned counsel for the parties and perused the paper book.

6. In the case in hand, on the basis of information received under the Right to Information Act, 2015 the respondent no.2 filed complaint to the police, on the basis of which FIR in-question was registered. The contents of the same are extracted below:

> "Sir, in concern to abovementioned subject, I draw your attention that Dr. Ritu Singh Veterinary Doctor Policlinic Sonipat Animal Husbandry Department was appointed in year 2013-2014 at Nizampur Gohana. Thereafter, Dr. Ritu Singh visited foreign countries 6-7 times without the permission of department. During these visits, she had shown her presence at State Veterinary Hospital Nizampur. During this period (Foreign Trips), showing false presence, self verified and withdraw the salary from Govt. Treasury. During this period, she also presented false medical certificates and intentionally, under a scheme, she withdrew the salary from Govt. Treasury and committed loss to Govt. Treasury. It is requested to you that this complaint be fairly investigated and legal action be taken against her. Enclosed: Information received under RTI. 26 Applicant: Satish Saroha S/o Sh. Lekhi Ram Village Veyapur, Sonipat."

6.1 Immediately after registration of FIR, respondent no.1 filed a petition before the High Court seeking quashing thereof, on the basis of the compromise with the complainant, which was allowed by the High Court.

7. A perusal of the contents of the FIR would show that it was not the complainant who was the victim with reference to the allegations made in the complaint to the police, to enable the High Court to exercise the power to quash the FIR on the basis of compromise. The allegations are with reference to withdrawal of salary for the period the respondent no.1 was on unauthorized foreign trips and also withdrawal of salary by producing false medical certificates[5]. When the FIR in-question was quashed the matter was still being

5 The victim was not the complainant but the State.

investigated by the police. It was even so submitted by the State in its reply to the quashing petition in the High Court.

8. In the facts of the present case after setting the criminal machinery into motion, which had relevance with the fraud allegedly committed by the respondent no.1 with her employer, the complainant did not have any *locus* to compromise the matter with the accused when the FIR had been registered. Even the High Court had failed to consider that aspect of the matter. Even though the reply filed by the State to the quashing petition was taken on record but without even referring to the stand taken therein, merely on the basis of compromise entered into between the complainant and the accused, the FIR was quashed. The order cannot be legally sustained. The allegations against the accused are of defrauding the State. How can such a matter be settled on the basis of a "compromise" between two private individuals? The simple answer is that it cannot be done.

   8.1 The argument raised by the learned counsel for the respondent no.1 that in the departmental proceedings initiated on the same ground, she has already been exonerated is merely to be noticed as this may be a defence of the accused, which was not at all the ground on the basis of which the FIR in-question was quashed, at the stage of investigation.

9. For the reasons mentioned above, the present appeal is allowed. The impugned order passed by the High Court is set aside. The petition filed by the respondent no.1 seeking quashing of the FIR in-question on the basis of compromise is dismissed. However, we make it clear that nothing said above will prejudice the case of the respondent no.1 for taking any defence in the proceedings against her at any appropriate stage. The limited issue considered by this Court was with reference to quashing of the FIR in-question on the basis of the compromise.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal allowed.

[2024] 3 S.C.R. 1009 : 2024 INSC 251

Haresh Shantilal Avlani & Anr.
v.
The New India Assurance Co. Ltd.

(Civil Appeal No. 4029-4030 of 2024)

12 March 2024

[Hima Kohli and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Matter pertains to fixing of the age of the deceased for applying a multiplier for the purposes of computing the compensation payable to the claimants.

Headnotes

Motor Vehicles Act, 1986 – Compensation – Determination of – Calculation of multiplier, on basis of the age of the deceased or the age of the dependents:

Held: It is the age of the deceased which ought to be taken into consideration and not the age of the dependents for arriving at the multiplier – High Court erred in returning findings to the effect that the age of dependents of the deceased ought to be the relevant consideration for arriving at the choice of the multiplier. [Para 5]

Case Law Cited

Sube Singh and Another v. Shyam Singh (Dead) and Others [2018] 1 SCR 636 **: (2018) 3 SCC 18;** *Munna Lal Jain and Another v. Vipin Kumar Sharma and Others* [2015] 7 SCR 207 **: (2015) 6 SCC 347;** *Reshma Kumari and Others v. Madan Mohan and Another* [2013] 2 SCR 706 **: (2013) 9 SCC 65;** *Sarla Verma (Smt.) and Others v. DTC and Another* [2009] 5 SCR 1098 **: (2009) 6 SCC 121;** *National Insurance Co. Ltd. v. Pranay Sethi and Other* [2017] 13 SCR 100 **: (2017) 16 SCC 680;** *Royal Sundaram Alliance Insurance Company Limited v. Mandala Yadagari Goud and Others* [2019] 6 SCR 941 **: (2019) 5 SCC 554 – relied on.**

List of Keywords

Compensation; Multiplier; Age of the deceased; Age of the dependents.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4029-4030 of 2024

From the Judgment and Order dated 19.10.2016 and 25.10.2016 of the High Court of Judicature at Bombay in FAN No. 756 of 2016

With

Civil Appeal No. 4031 of 2024

Appearances for Parties

Shantanu M. Adkar, Pravin Satale, Rishabh Jain, Rajiv Shankar Dvivedi, S K Sarkar, Shivaji M. Jadhav, Ms. Apurva, Adarsh Kumar Pandey, Vignesh Singh, Dipesh Singhal, M/S. S.M. Jadhav and Company, Advs. for the Appellants.

Anshum Jain, Rameshwar Prasad Goyal, Ranjan Kumar Pandey, K.K. Bhat, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. Leave granted.

2. The issue raised in these appeals relates to fixing of the age of the deceased for applying a multiplier for the purposes of computing the compensation payable to the claimants.

3. The appellants (parents of the deceased, Kartik Avlani) in Civil Appeals @ Petition for Special Leave to Appeal (Civil) No.13093 of 2017 are aggrieved by the judgement dated 19th October, 2016, passed by the learned Single Judge of the Bombay High Court, whereby the appeal filed by the respondent-Insurance Company challenging its liability to pay compensation was partly allowed and the compensation awarded by the Motor Accident Claims Tribunal, Mumbai[1], *vide* order dated 10th July, 2015, estimated as ₹20,70,000/- (Rupees Twenty Lakhs Seventy Thousand) with interest @ 7.5% per annum from the date of filing of the petition, till realization, was slashed to ₹12,82,500/- (Rupees Twelve Lakhs Eighty Two Thousand

1 For short the 'MACT'

and Five Hundred) on accepting the plea taken by the respondent – Insurance Company that in the case of an unmarried person, it is not the age of the deceased, but the age of the parents, who are the claimants, that should be relevant. In the instant case, the age of the deceased was 23 years at the time of the accident and it was proved that he was working as a Manager in an investment firm.

4. In Civil Appeal @ Petition for Special Leave to Appeal (Civil) No. 13072 of 2017, the age of the deceased (Nilesh Arun Patil) was 28 years. The claimants are the parents and brothers of the deceased. The MACT assessed the income of the deceased as ₹4,000/- (Rupees Four Thousand) per month and applied a multiplier of 17. After extending the benefit of future prospects and loss of dependency, the compensation awarded by the MACT was fixed at ₹6,37,000/- (Rupees Six Lakhs Thirty Seven Thousand) with interest @ 7.5 % from the date of filing of the claim petition till realisation. In an appeal preferred by the appellants before the High Court, *vide* impugned judgement dated 10th January, 2017, the High Court reassessed the income of the deceased and enhanced it to ₹12,194/- (Rupees Twelve Thousand One Hundred and Ninety Four) per month. However, the High Court interfered with the multiplier applied by the MACT and instead of applying the multiplier of 17, reduced it to 13. The reason for the High Court to have changed the multiplier from 17 to 13 was that the deceased was a bachelor and the claimants being his parents, the choice of multiplier had to be assessed on the basis of the age of the parents and not the age of the deceased. As a result, the amount awarded by the High Court was ₹14,29,000/- (Rupees Fourteen Lakhs Twenty Nine Thousand) with interest @ 7.5 % per annum.

5. We may note that the issue as to whether the age of the deceased that ought to be taken into consideration for calculation of the estimated compensation and not the age of the dependents, is no longer *res integra.* There are series of decisions of this Court in ***Sube Singh and Another v. Shyam Singh (Dead) and Others***[2], ***Munna Lal Jain and Another v. Vipin Kumar Sharma and Others***[3] and

2 [2018] 1 SCR 636 : (2018) 3 SCC 18

3 [2015] 7 SCR 207 : (2015) 6 SCC 347

Reshma Kumari and Others v. Madan Mohan and Another[4], where it has been held that it is the age of the deceased and not the age of the parents that would be the clinching factor for calculating the multiplier to be applied for estimating the compensation payable to the claimants. The aforesaid decisions were followed ***Sarla Verma (Smt.) and Others v. DTC and Another***[5]. The Constitution Bench in the case of ***National Insurance Co. Ltd. Vs. Pranay Sethi and Other***[6] has also been referred to in ***Sube Singh*** (supra) on the aspect of calculation of the multiplier applicable in such a case. A recent decision in the case of ***Royal Sundaram Alliance Insurance Company Limited Vs. Mandala Yadagari Goud and Others***[7] has reiterated the same position as observed in the cases cited above. We are, therefore, of the opinion that it is the age of the deceased which ought to be taken into consideration and not the age of the dependents for arriving at the multiplier and the High Court has erred in returning findings to the effect that the age of dependents of the deceased ought to be the relevant consideration for arriving at the choice of the multiplier.

6. Accordingly, the impugned judgment dated 19th October, 2016, in Civil Appeal @ Petition for Special Leave to Appeal (Civil) No.13093 of 2017, in respect of FAO No. 756 of 2016 is quashed and set aside and the judgement dated 10th July, 2015, passed by the learned MACT fixing the multiplier of 18 in the instant case is restored. The respondent–Insurance Company is directed to pay the balance amount along with up-to-date interest after adjusting the amounts already paid to the appellants. The said amount shall be deposited with the MACT within six weeks.

7. Similarly, the impugned judgment dated 10th January, 2017 in Civil Appeal @ Petition for Special Leave to Appeal (Civil) No.13072 of 2017 in respect of First Appeal No. 50 of 2016 is modified to the extent that the multiplier shall be applied as assessed by the MACT as 17. The MACT shall recalculate the amount payable by the respondent no.2-Insurance Company to the appellants by replacing

4 [2013] 2 SCR 706 : (2013) 9 SCC 65

5 [2009] 5 SCR 1098 : (2009) 6 SCC 121

6 [2017] 13 SCR 100 : (2017) 16 SCC 680

7 [2019] 6 S.C.R. 941 : (2019) 5 SCC 554

the multiplier from 13 to 17. After adjusting the amount already paid by the respondents the balance amount shall be deposited by the respondent no.2-Insurance Company within six weeks.

8. The appeals are allowed and disposed of on the above terms.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals disposed of.

[2024] 3 S.C.R. 1014 : 2024 INSC 232

Somnath
v.
The State of Maharashtra & Ors.

(Criminal Appeal No. 1717 of 2024)

18 March 2024

[Vikram Nath and Ahsanuddin Amanullah,* JJ.]

Issue for Consideration

Whether criminal proceedings should be initiated against a police officer who has committed excesses on individual in police custody?

Headnotes

Constitution of India – Article 142, 226 – Appellant verbally and physically assaulted in police custody – Appellant illegally detained for 4 hours despite being granted bail – Sub-divisional Police Officer's inquiry report found Respondent No. 2 responsible – Special Inspector General of Police imposed punishment of "strict warning" in departmental proceedings – High Court partly allowed Appellant's writ petition but declined to initiate criminal proceedings – Respondent No. 2 was directed to pay Rs. 75,000/- from his own pocket – Respondent No. 2 paid Rs. 1,75,000/- plus Rs. 25000/- – Respondent No.2 superannuated.

Held: Respondent No. 2 committed excesses against Appellant - Supreme Court refrained from initiating criminal proceedings in the peculiar facts – Under Article 226, High Court has power to award compensation – Zero tolerance approach to be taken by courts – Direction to police forces and similar agencies to adhere to all guidelines regarding arrest and police custody. [Paras 21-24]

Case Law Cited

Delhi Judicial Service Association v. State of Gujarat [1991] 3 SCR 936 **: (1991) 4 SCC 406;** *Sunil Gupta v. State of Madhya Pradesh* [1990] 2 SCR 871 **: (1990) 3 SCC 119;** *Prem Shankar Shukla v. Delhi Administration* [1980] 3 SCR 855 **: (1980) 3 SCC 526;** *Bhim Singh, MLA v. State of Jammu and Kashmir* **(1985) 4 SCC 677;** *D K Basu v. State of West Bengal* [1996] Supp.

* Author

10 SCR 284 : (1997) 1 SCC 416; *Sube Singh v. State of Haryana* **[2006] 2 SCR 67 : (2006) 3 SCC 178 – relied on.**

Nilabati Behera v. State of Orissa **[1993] 2 SCR 581 : (1993) 2 SCC 746 – referred to.**

List of Acts

Penal Code, 1860; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Maharashtra Police Act, 1951

List of Keywords

Individual dignity; Personal liberty; Excess use of force; Safeguards, arrest; Remand; Police custody; Treatment of detenu; Strict warning; Departmental inquiry; Criminal proceedings; Compensation, superannuated; Belated prosecution; Police officer; Colour of official duty; Commit excess; High-handed action.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1717 of 2024

From the Judgment and Order dated 08.10.2018 of the High Court of Judicature at Bombay at Aurangabad in CRWP No.215 of 2017

Appearances for Parties

Sandeep Sudhakar Deshmukh, Nishant Sharma, Tushar D.bhelkar, Akshay Jagtap, Advs. for the Appellant.

Aaditya Aniruddha Pande, Siddharth Dharmadhikari, Bharat Bagla, Sourav Singh, Aditya Krishna, Atul Babasaheb Dakh, Bitu Kumar Singh, Praveen Pandey, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Ahsanuddin Amanullah, J.

Leave granted.

2. Heard learned counsel for the parties.

3. The present appeal is directed against the Final Judgment and Order dated 08.10.2018 (hereinafter referred to as the “Impugned

Judgment") passed by the High Court of Judicature at Bombay, Bench at Aurangabad (hereinafter referred to as the "High Court") in Criminal Writ Petition No.215 of 2017 by which the writ petition filed by the appellant was partly allowed and the respondent no.2 was directed to pay a sum of Rs.75,000/- (Rupees Seventy Five Thousand only) from his own pocket to the appellant.

BRIEF FACTS:

4. A First Information Report[1] bearing Crime No.1-117 of 2015 for an offence punishable under Section 379[2] of the Indian Penal Code, 1860 (hereinafter referred to as the "IPC") was filed by one Mr. Madhukar Vikram Gayake on 14.06.2015 with Paithan Police Station, Taluka Paithan, District Aurangabad, State of Maharashtra (hereinafter referred to as the "PS") alleging that on 12.06.2015 the complainant had come to attend the last rites of his brother-in-law and was standing in a queue in the holy Nath Temple when some unknown persons took away Rs.30,000/- (Rupees Thirty Thousand only), which he was carrying in his pocket, which he realized only after coming out from the temple. The appellant was arrested at 08:30PM in connection with the said crime on 14.06.2015 on the basis of CCTV[3] footage showing the involvement of the appellant in the said crime.

5. On 15.06.2015, the appellant was produced before the Magistrate at 4PM and the investigating agency sought police remand on the ground that recovery had been made from the appellant. The request was granted by the Magistrate and he was remanded to police custody till 18.06.2015.

6. On 17.06.2015, the investigating agency prepared a memorandum under Section 27 of the Indian Evidence Act, 1872 showing recovery of Rs.30,000/- (Rupees Thirty Thousand) from the house of the appellant.

7. On 18.06.2015, the investigating agency produced the appellant before the Magistrate praying for further extension of police custody for two days and the same was granted till 20.06.2015. On 19.06.2015,

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1 FIR.

2 '***379. Punishment for theft.***—*Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.*'

3 Closed-Circuit Television.

the appellant was allegedly taken out of the lock-up by the respondent no.2, the then officiating Inspector of PS, in handcuffs and paraded half-naked with garland of footwear around his neck and is said to have been verbally abused with reference to his caste as also physically assaulted by the respondent no.2.

8. On 20.06.2015, the investigating agency did not ask for any further extension of police remand and thus the appellant was remanded to judicial custody till 04.07.2015. On the same day, the appellant filed an application for bail in the Court of Judicial Magistrate, First Class, Paithan, which was allowed on the condition that he would visit Police Station on every alternate day between 1000hrs to 1300hrs till filing of the Final Report. The appellant was not released pursuant to the order due to the respondent no.2 not allowing him to be released and instead had taken the appellant to the PS.

9. Mr. Rahul Raju Kamble, relative of the appellant filed application before the Judicial Magistrate, First Class, Paithan, narrating the chain of events and praying for directions to release the appellant and, *inter alia*, praying for issuance of Show-Cause Notice to the concerned police officer. Thereon, the Magistrate had directed the prosecution to file its reply. However, the appellant was finally released on 20.06.2015.

10. The Superintendent of Police, Aurangabad (Rural), on complaint made by the appellant and others, directed the Sub Divisional Police Officer, Paithan on 07.07.2015 to initiate inquiry on the entire issue and submit report. The Sub Divisional Police Officer, Paithan conducted inquiry relating to the complaint made against the respondent no.2, directing both the appellant and respondent no.2 and other Police officers/ constables to appear and submit their statements. In his report dated 11.09.2015, it was recorded that on 19.06.2015 the appellant was taken out from the lock-up by the respondent no.2 and paraded on the streets of the city of Paithan and was also physically assaulted during the said procession and held respondent no.2 responsible for this. It further narrated that despite grant of bail to the appellant he was illegally detained by respondent no.2 for four hours.

11. On 08.10.2015 and 09.10.2015, the sister of the appellant complained to various authorities including the Superintendent of Police, Aurangabad (Rural) and the President [*read* Chairperson], National Human Rights Commission (hereinafter referred to as

the "Commission") seeking initiation of departmental enquiry and criminal prosecution under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the "SC/ST Act").

12. On 25.12.2015, the appellant was charge-sheeted in connection with another FIR bearing Crime No.1-192/2015 punishable under Section 394[4], IPC and he was sought to be declared a Proclaimed Offender despite him being available in town and co-operating with the investigating agency. However, the appellant was arrested on 24.05.2016 and subsequently released on bail.

13. The Special Inspector General of Police, Aurangabad Range, Aurangabad, after perusing the Inquiry Report of the Sub Divisional Police Officer dated 11.09.2015 and not finding the explanation of respondent no.2 to be satisfactory, imposed punishment of "strict warning".

14. The appellant on 02.02.2017, approached the High Court by way of filing Writ Petition, *inter alia*, praying for initiation of departmental inquiry and criminal proceedings against respondent no.2 and also sought compensation. The writ petition was partly allowed by the Impugned Judgment by awarding Rs.75,000/- (Rupees Seventy Five Thousand only) to be payable to the appellant by respondent no.2 from his own pocket but declining to give any direction for initiating criminal action under the SC/ST Act.

SUBMISSIONS BY THE APPELLANT:

15. Learned counsel for the appellant submitted that it would be a travesty of justice if for such blatant violation of the personal liberty of the appellant and abuse of authority, the respondent no.2 is let off with just "strict warning" without any real effective punishment. It was submitted that the conduct of the respondent no.2 besides being unprovoked was also in the teeth of the judgments of this Court in ***D K Basu v State of West Bengal,*** **(1997) 1 SCC 416** and ***Sube Singh v State of Haryana*****, (2006) 3 SCC 178**, which have laid down the guidelines of how a detenu has to be treated

4 '***394. Voluntarily causing hurt in committing robbery.***—*If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting to commit such robbery, shall be punished with*[1]*[imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.*'

when in custody.

16. Learned counsel submitted that one of the grounds for not directing criminal prosecution of respondent no.2 by the High Court was that Section 161[5], Maharashtra Police Act, 1951 (hereinafter referred to as the "Police Act") gives protection to a police officer from any belated prosecution, the period being six months. It was submitted the same should not be so enforced particularly in the facts of the present case where the appellant belongs to a weaker section and is without the wherewithal to pursue prosecution of a police officer. It was submitted that respondent no.2 has in fact been let off without any punishment as "strict warning" does not translate into any effective punishment which is also one of the minimum/minor punishments contemplated, whereas the conduct of the respondent no.2 required inflicting major punishment upon him.

SUBMISSIONS BY THE STATE:

17. Learned counsel for the State submitted that it has initiated departmental proceeding against respondent no.2 and punishment has also been awarded to him pursuant thereto.

SUBMISSIONS BY THE RESPONDENT NO.2:

18. Learned counsel for respondent no.2 submitted that the incident is totally without any truth and only to browbeat, and to demoralise the police, the appellant, who is habitual offender, has lodged a false

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5 '*161. Suits or prosecutions in respect of acts done under colour of duty as aforesaid not to be entertained or to be dismissed if not instituted* ***within the prescribed period****.—(1) In any case of alleged offence by the Revenue Commissioner, the Commissioner, a Magistrate, Police officer or other person, or of a wrong alleged to have been done by such Revenue Commissioner, Commissioner, Magistrate, Police officer or other person, by any act done under colour or in excess of any such duty or authority as aforesaid, or wherein, it shall appear to the Court that the offence or wrong if committed or done was of the character aforesaid, the prosecution or suit shall not be entertained, or shall be dismissed, if instituted, more than six months after the date of the act complained of:*

Provided that, any such prosecution against a Police Officer may be entertained by the Court, if instituted with the previous sanction of the State Government within two years from the date of the offence.

(2) In suits as Aforesaid one month's notice of suit to be given with sufficient description of wrong complained of. In the case of an intended suit on account of such a wrong as aforesaid, the person intending to sue shall be bound to give to the alleged wrong-doer one month's notice at least of the intended suit with sufficient description of the wrong complained of, failing which such suit shall be dismissed.

(3) Plaint to set forth service of notice and tender of amends. The plaint shall set forth that a notice art aforesaid has been served on the defendant and the date of such service, and shall state whether any, and if any what tender of amends has been made by the defendant. A copy of the mid notice shall be annexed to the plaint endorsed or accompanied with a declaration by the plaintiff of the time and manner of service thereof.'

complaint, that too, much after the time prescribed under the Police Act. It was further submitted that respondent no.2 has already paid Rs.1,75,000/- (Rupees One Lakh Seventy Five Thousand only) to the appellant i.e., Rs.1,00,000/- (Rupees One Lakh only) beyond what was directed by the High Court and in terms of the order passed by this Court on 07.07.2023[6]. It was submitted that the appellant having been found committing the offence for which his prosecution began, from the CCTV footage, cannot claim innocence.

19. Learned counsel submitted that on 20.06.2015 at 3PM when he was produced before the Magistrate, the appellant did not allege any ill-treatment much less spoke about him having been subjected to parade in handcuffs and in a half-naked state with a garland of footwear around his neck. Even when relatives of the appellant had filed a complaint before the Magistrate on 20.06.2015, due to delay in release of the appellant despite grant of bail, there was no reference of any alleged instance of the appellant being paraded half-naked on 19.06.2015. Further, the report of the Sub Divisional Police Officer does not refer to the appellant having been paraded half-naked with a garland of shoes. It was submitted that due to the strained relationship of the respondent no.2 with the then Sub Divisional Police Officer, who had submitted the Report, adverse findings were recorded against the respondent no.2. Thus, it was submitted that the Special Inspector General of Police found the clarification submitted by the respondent no.2 to be satisfactory and that was the reason why a punishment of only "strict warning" was awarded. He submitted that pursuant to FIR bearing Crime No.1-192 of 2015, the appellant could not be traced and was declared a proclaimed offender under Section 82(4) of the Code of Criminal Procedure, 1973 on 25.12.2015. It was further contended that only on 03.02.2017, the appellant had filed the underlying Writ Petition before the High Court and for the first time agitating that the respondent

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6 '*Learned counsel for respondent No.2, on instructions, states that he will further compensate the petitioner by an amount of Rs.1,00,000/- (Rupees one lakh only) within a period of four weeks from today.*

Learned counsel for the petitioner may provide the bank details of the petitioner to the learned counsel for respondent No.2 within a week from today.

List the matter again on 22.08.2023.

If by the said date, the said amount is paid to the petitioner and the counsel for the parties make a statement, the matter may be considered for closure on the next date. '

no.2 paraded him half-naked with a garland of shoes.

20. Learned counsel submitted that in terms of Section 161 of the Police Act, prosecution against a police officer acting under colour of official duty after six months of the alleged act cannot be entertained and rightly the High Court has declined to direct any action on such prosecution.

ANALYSIS, REASONING AND CONCLUSION:

21. Having considered the facts and circumstances of the case, this Court finds that there is enough material to indicate that respondent no.2 did commit excesses against the appellant, as the same has also been found in an enquiry by the Commission as also relied upon by the High Court and such finding has not been varied or interfered with. Thus, the Court has no hesitation in strongly denouncing such high-handed action by the respondent no.2, who being in a position of power, totally abused his official position. However, in view of the fact that the respondent no.2 has superannuated and during the course of the present proceedings Rs.1,00,000/- (Rupees One Lakh only), apart from what was ordered by the High Court, has also been paid by the respondent no.2 from his own pocket to the appellant, which the appellant accepted, the Court finds that the matter now requires to be finally given a *quietus*. Be it noted, the appellant has additionally received Rs.25,000/- (Rupees Twenty Five Thousand only) as ordered by the Commission. We only add that the power of the High Court under Article 226 of the Constitution of India to award compensation is undoubtable, reference whereof can be made to ***Nilabati Behera v State of Orissa*, (1993) 2 SCC 746**.

22. Accordingly, the appeal stands disposed of by upholding the Impugned Judgment, with the modification that the respondent no.2 is held liable to pay a further sum of Rs.1,00,000/- (Rupees One Lakh only) to the appellant. However, as the same stands already complied with, no further steps are required to be taken by the respondent no.2.

23. Before parting, the Court would indicate that in such matters the Courts need to take a very strict view. A zero-tolerance approach towards such high-handed acts needs to be adopted as such acts, committed by persons in power against an ordinary citizen, who is in a non-bargaining position, bring shame to the entire justice delivery system. As such, we were considering resorting to Article 142 of the

Constitution of India to direct initiation of criminal proceedings, but only because of the fact that respondent no.2 has retired and has already paid a sum of Rs.1,75,000/- (Rupees One Lakh Seventy Five Thousand)[Rs.75,000/- (Rupees Seventy Five Thousand) as per the Impugned Judgment and Rs.1,00,000/- (Rupees one lakh) as per this Court's order dated 07.07.2023] in total to the appellant, who has also been paid Rs. 25,000/- (Rupees Twenty Five Thousand) as per the Commission's order, we refrain from so directing, in these peculiar facts and circumstances. We hold back noting that justice ought to be tempered with mercy.

POST-SCRIPT:

24. It is sad that even today, this Court is forced to restate the principles and directions in ***D K Basu*** (*supra*). Before ***D K Basu*** (*supra*), this Court had expressed its concern as to how best to safeguard the dignity of the individual and balance the same with interests of the State or investigative agency in ***Prem Shankar Shukla v Delhi Administration*****, (1980) 3 SCC 526**. In ***Bhim Singh, MLA v State of Jammu and Kashmir*****, (1985) 4 SCC 677**, this Court noted that police officers are to exhibit greatest regard for personal liberty of citizens and restated the sentiment in ***Sunil Gupta v State of Madhya Pradesh*****, (1990) 3 SCC 119**. The scenario in ***Delhi Judicial Service Association v State of Gujarat*****, (1991) 4 SCC 406** prompted this Court to come down heavily on excess use of force by the police. As such, there will be a general direction to the police forces in all States and Union Territories as also all agencies endowed with the power of arrest and custody to scrupulously adhere to all Constitutional and statutory safeguards and the additional guidelines laid down by this Court when a person is arrested by them and/or remanded to their custody.

Headnotes prepared by:
Aishani Narain, Hony. Associate Editor
(*Verified by:* Madhavi Divan, Sr. Adv.)

Result of the case:
Appeal disposed of.

[2024] 3 S.C.R. 1023 : 2024 INSC 213

Jaipur Vidyut Vitran Nigam Ltd. & Ors.
v.
Adani Power Rajasthan Ltd. & Anr.

Miscellaneous Application Diary No. 21994 of 2022
In
Civil Appeal Nos. 8625 – 8626 of 2019

18 March 2024

[Aniruddha Bose* and Sanjay Kumar, JJ.]

Issue for Consideration

When can a litigant apply for modification of a judgment or an order in a matter which stands finally concluded; and can a party file an application after disposal of the statutory appeal by invoking inherent powers of the Supreme Court.

Headnotes

SUPREME COURT RULES, 2013 - Order XII, Rule 3 – Scope thereof, explained – Filing of applications after disposal of the statutory appeal:

Held: Impermissible – A post disposal application for modification and clarification of an order shall lie only in rare cases, where the order passed by the Supreme Court is executory in nature and the directions of the Supreme Court have become impossible to be implemented because of certain subsequent events or developments – After disposal of an appeal / petition, the Supreme Court becomes functus officio and does not retain jurisdiction to entertain any application. [Para 20]

SUPREME COURT RULES, 2013 – Practice and Procedure – Application projected as an application for clarification, though it was registered as a miscellaneous application – Practice deprecated.

Code of Civil Procedure, 1908 – Order XXIII, Rule 1 – Scope thereof, explained.

Held: There are two Orders in the Supreme Court Rules, 2013 which permit review of a judgment or an order of the Supreme Court, Orders XLVII and XLVIII – The former Order, contained in

* Author

Part IV of the 2013 Rules, relates to "Review of a Judgment" and the latter relates to "Curative Petition" – There is no other provision in the 2013 Rules, whereby a litigant can apply for modification of a judgment or an order of the Supreme Court in a matter which stands finally concluded – By taking out a Miscellaneous Application, the applicant cannot ask for reliefs which were not granted in the main judgment itself. [Para 10]

Through this miscellaneous application, the applicant seeks a direction upon the Rajasthan Discoms for making payment of Rs.1376.35 crores – The present application has been captioned as "APPLICATION FOR DIRECTIONS ON BEHALF OF THE RESPONDENT NO.1/APPLICANT (ADANI POWER RAJASTHAN LIMITED)" in the said appeals which stood disposed of by a common judgment of a three-Judge Bench of the Supreme Court delivered on 31.08.2020 – Review petitions filed against this judgment by the Rajasthan Discoms stood dismissed on 02.03.2021. [Para 2]

In the course of hearing, it was projected as an application for clarification, though the same was registered as a miscellaneous application – The reliefs asked for in this application do not refer to any clarification. [Para 9]

The applicant had expressed its desire to withdraw the present application on the last date of hearing, i.e., 24.01.2024 – The Supreme Court, however, decided not to permit such simpliciter withdrawal – Even if an applicant applies for withdrawal of an application, in exceptional cases, it would be within the jurisdiction of the Supreme Court to examine the application and pass appropriate orders – So far as the present proceeding is concerned, an important question of law has arisen as regards jurisdiction of the Supreme Court to entertain an application taken out in connection with a set of statutory appeals which stood disposed of – Judgment of the Supreme Court in ***Supertech Limited v. Emerald Court Owner Resident Welfare Association & Others***, (2023) 10 SCC 817 deals with this question and the ratio of the said judgment would apply to the present proceeding as well. [Para 19]

The Supreme Court becomes functus officio and does not retain jurisdiction to entertain an application after the appeal was disposed of by the judgment of a three-Judge Bench of the Supreme Court – This is not an application for correcting any clerical or arithmetical error – Neither it is an application for extension of

time – A post disposal application for modification and clarification of the order of disposal shall lie only in rare cases, where the order passed by the Supreme Court is executory in nature and the directions contained in the judgment may become impossible to be implemented because of subsequent events or developments– The factual background of this Application does not fit into that description. [Para 20]

SUPREME COURT RULES, 2013 - Order XII, Rule 3 read with Rule 6 of Order LV – Filing of applications after disposal of the statutory appeal by invoking inherent powers of the Supreme Court – Held, impermissible.

Held: The maintainability of the present application cannot be explained by invoking the inherent power of the Supreme Court either – The applicant has not applied for review of the main judgment – In the contempt action, it failed to establish any wilful disobedience of the main judgment and order – Now the applicant cannot continue to hitchhike on the same judgment by relying on the inherent power or jurisdiction of this Court. [Para 13]

Code of Civil Procedure, 1908 – Section 152 read with Order XII, Rule 3 of the SUPREME COURT RULES, 2013 – Rectification of an arithmetic order – permissibility thereof.

Held: A miscellaneous application had been filed for modification of the content of judgment dated 1st September 2020 passed in M.A. (D) No. 9887 of 2020 in Civil Appeal Nos. 6328-6399 of 2015 – In the said proceeding, clarification was also sought on the aspect that the judgment did not bar the Union of India from considering and rectifying the clerical/arithmetical errors in computation of certain dues – This was an order permitting rectification of an arithmetic error, which is implicit in Section 152 of the CPC read with Order XII Rule 3 of the 2013 Rules. [Para 18]

Code of Civil Procedure, 1908 – Section 148 read with Section 112 - Power of the Supreme Court to extend time.

Held: The power to extend time beyond that fixed by a Court on a legitimate ground is incorporated in Section 148 of the CPC – If the time to do something requires to be extended, it would be within the inherent jurisdiction of the Supreme Court to go beyond the maximum period of 30 days prescribed in the aforesaid Section, after sufficient reason is shown – Section 112 of the Code itself provides that nothing contained in the CPC shall affect the inherent

powers of the Supreme Court under Article 136 or any other provision of the Constitution. [Para 17]

SUPREME COURT RULES, 2013 - Order XII, Rule 3 – Imposition of costs on filing of applications after disposal of the statutory appeal.

Held: The Supreme Court dismissed the present application and imposed costs of Rs. 50,000/- to be paid by the applicant to be remitted to the Supreme Court Legal Aid Committee as it was listed several times. [Para 23]

Case Law Cited

Ghanashyam Mishra & Sons Private Limited v. Edelweiss Asset Reconstruction Company Limited, [2021] 13 SCR 738 **: M. A. No. 1166 of 2021 in CA No. 8129 of 2019 – relied on.**

Supertech Limited v. Emerald Court Owner Resident Welfare Association & Others [2021] 10 SCR 569 **: (2023) 10 SCC 817 – Relied on.**

State (UT of Delhi) v. Gurdip Singh Uban and Others [2000] Suppl. 2 SCR 496 **: (2000) 7 SCC 296;** Sone Lal and Others v. State of Uttar Pradesh **(1982) 2 SCC 398;** *Ram Chandra Singh v. Savitri Devi and Others* [2003] Suppl. 4 SCR 543**; (2004) 12 SCC 713;** *Common Cause v. Union of India and Others* **(2004) 5 SCC 222;** *Zahira Habibullah Sheikh and Another v. State of Gujarat and Others* [2004] Suppl. 2 SCR 571 **: (2004) 5 SCC 353;** *P.N. Eswara Iyer and Others v. Registrar, Supreme Court of India* [1980] 2 SCR 889 **: (1980) 4 SCC 680;** *Suthendraraja alias Suthenthira Raja alias Santhan and Others v. State through DSP/CBI, SIT, Chennai* [1999] Suppl. 3 SCR 540 **: (1999) 9 SCC 323;** *Ramdeo Chauhan alias Raj Nath v. State of Assam* [2001] 3 SCR 669 **: (2001) 5 SCC 714;** *Devendra Pal Singh v. State (NCT of Delhi) and Another* [2002] Suppl. 5 SCR 332 **: (2003) 2 SCC 501;** *Rashid Khan Pathan in re* **(2021) 12 SCC 64 – referred to.**

Energy Watchdog v. Central Electricity Regulatory Commission and Others, **MA Nos. 2705 – 2706 of**

Jaipur Vidyut Vitran Nigam Ltd. & Ors. v.
Adani Power Rajasthan Ltd. & Anr.

2018 in Civil Appeal Nos. 5399 – 5400 of 2016; *Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. V. Adani Power (Mundra) Limited,* **MA (D) No. 18461 of 2023 in Civil Appeal No. 2908 of 2022;** *Kalpataru Properties Pvt. Ltd. v. Indiabulls Housing Finance Ltd.,* **MA No. 2064 of 2022 in Civil Appeal No. 7050 of 2022;** *Supertech Limited v. Emerald Court Owner Resident Welfare Association & Ors.,* **MA No. 1918 of 2021 in Civil Appeal No. 5041 of 2021;** *Union of India v. Association of Unified Telecom Service Providers of India and Ors.,* **MA No. 83 of 2021 in MA (D) No. 9887 of 2020 in Civil Appeal No. 6328-6399 of 2015] – distinguished.**

List of Acts

Code of Civil Procedure, 1908; Supreme Court Rules, 2013.

List of Keywords

Miscellaneous Application, Clarification Application, Modification Application, Costs, Inherent Powers, Maintainability, Post Dismissal Application.

Case Arising From

CIVIL APPELLATE JURISDICTION : Miscellaneous Application Diary No.21994 of 2022

In

Civil Appeal Nos.8625-8626 of 2019

From the Judgment and Order dated 31.08.2020 in C. A. Nos.8625-8626 of 2019 of the Supreme Court of India

Appearances for Parties

Dushyant Dave, Sr. Adv., Kartik Seth, Anshul Chowdhary, Prashanth R. Dixit, Ms. Arushi Rathore, Abhishek Kandwal, Amit Goyal, Mahesh Bhati, Saurabh Chaturvedi, M/s. Chambers of Kartik Seth, Advs. for the Appellants.

Dr. A.M. Singhvi, Sr. Adv., Mahesh Agarwal, Ms. Poonam Sengupta, Arshit Anand, Shashwat Singh, Ms. Sakshi Kapoor, Saunak Rajguru, Sidharth Seem, E. C. Agrawala, Advs. for the Respondents/Applicants.

Judgment / Order of the Supreme Court

Judgment

Aniruddha Bose, J.

The applicant, Adani Power Rajasthan Limited (APRL), is a generating company as per Section 2(28) of the Electricity Act, 2003 ("2003 Act"). It operates a thermal power plant in the State of Rajasthan. There were three appellants (1 to 3) in the main set of appeals, in connection with which the present application has been taken out, being the distribution licensees of the State of Rajasthan as per the provisions of the 2003 Act. They shall, henceforth in this judgment, be collectively referred to as "Rajasthan Discoms". Rajasthan Urja Vikas Nigam Limited was the 4th appellant in the main set of appeals. It appears to have been formed by the Government of Rajasthan for the purpose of coordination among the aforesaid three Discoms, as also other distribution licensees of the State.

2. Through this miscellaneous application, the applicant seeks a direction upon the Rajasthan Discoms for making payment of Rs.1376.35 crore towards Late Payment Surcharge ("LPS"). This claim has been raised by the applicant citing Article 8.3.5 of the Power Purchase Agreement dated 28.01.2010 ("PPA-2010") entered into between the Rajasthan Discoms and the applicant. The present application has been captioned as "APPLICATION FOR DIRECTIONS ON BEHALF OF THE RESPONDENT NO.1/APPLICANT (ADANI POWER RAJASTHAN LIMITED)" in the said appeals which stood disposed of by a common judgment of a three-Judge Bench of this Court delivered on 31.08.2020. Review petitions filed against this judgment by the Rajasthan Discoms stood dismissed on 02.03.2021.

3. The appeals arose out of a dispute involving certain additional payments claimed by the applicant as per the PPA-2010. Under the agreement, the applicant was to supply electricity to the Rajasthan Discoms, which had to be generated by the applicant. For this purpose, the PPA-2010 postulated domestic coal as the primary source of energy, while imported coal was to be used as a backup option. The applicant's complaint was that, due to non-availability of sufficient domestic coal, it could not be allocated a domestic coal linkage by the Government of India and it was compelled to rely on imported coal from Indonesia, which had a higher cost. Claim for compensation of loss, caused on account of non-supply of domestic

coal, was raised by the applicant before the Rajasthan Electricity Regulatory Commission ("RERC"), invoking the change in law clause of the PPA-2010. Change in law was one of the conditions under the PPA-2010, for which tariff adjustment payment could be made by the seller of electricity following the procedure stipulated in the aforesaid agreement. By an order dated 17.05.2018, RERC held that the applicant would be entitled to relief on account of change in law, which was held to be the difference between actual landed cost of alternative/imported coal (as certified by the auditor) and actual landed cost of domestic linkage coal. This was recorded in an order passed on 25.02.2022 by a Coordinate Bench of this Court in a contempt action brought by the applicant [Contempt Petition (Civil) No(s) 877-878 of 2021]. We shall refer to the said proceeding later in this judgment. We also need not delve into the question of eligibility of the applicant to get additional sum on account of change in law, as that question stands finally decided in the main judgment.

4. The applicant had also raised another claim for additional payment before the RERC, under the head of carrying cost which was disallowed by the RERC. Rajasthan Discoms, being aggrieved by the grant of change-in-law compensation, as also the applicant, being aggrieved by rejection of the claim for carrying costs appealed against the order of the RERC before the Appellate Tribunal for Electricity ("APTEL"). By a common decision dated 14.09.2019, the APTEL found that the applicant's claim based on "change in law" was valid and opined that the applicant was entitled to compensation for the loss caused to it because of change in law under a subsequent coal supply scheme, termed as the SHAKTI scheme, which failed to provide domestic coal linkage. The APTEL further found that the applicant would also be entitled for payment towards applicable carrying cost. The Rajasthan Discoms had appealed against the common decision of APTEL before this Court. The three-Judge Bench of this Court, by the judgement dated 31.08.2020, dismissed the appeals with the following observations and directions: -

> *"**66.** Considering the facts of this case and keeping in view that the RERC and APTEL have given concurrent findings in favour of the respondent with regard to change in law, with which we also concur, we may now deal with the question of liability of appellants-Rajasthan Discoms with regard to late payment surcharge. In this regard, the*

following Articles 8.3.5 and 8.8 of PPA, which are relevant for the present purpose, are extracted hereunder:

"8.3.5. In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill.

8.8 Payment of Supplementary Bill

8.8.1 Either Party may raise a bill on the other Party (supplementary bill) for payment on account of:

i) Adjustments required by the Regional Energy Account (if applicable):

ii) Tariff Payment for change in parameters, pursuant to provisions in Schedule 4; or

iii) Change in Law as provided in Article 10, and such Supplementary Bill shall be paid by the others party.

8.8.2 The Procurers shall remit all amounts due under a Supplementary Bill raised by the Seller to the Seller's Designated Account by the Due Date and notify the Seller of such remittance on the same day or the Seller shall be eligible to draw such amounts through the Letter of Credit. Similarly, the Seller shall pay all amounts due under a Supplementary Bill raised by Procurer(s) by the Due Date to concerned Procurer's designated bank account and notify such Procurer(s) of such payment on the same day. For such payments by the Procurer(s), Rebate as applicable to Monthly Bills pursuant to Article 8.3.6 shall equally apply.

8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due

Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 8.3.5.

8.9 The copies of all; notices/offers which are required to be sent as per the provisions of this Article 8, shall be sent by a party, simultaneously to all parties."

Liability of the Late Payment Surcharge which has been saddled upon the appellants is at the rate of 2% in excess of applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest) for each day of the delay. Therefore, there shall be huge liability of payment of Late Payment Surcharge upon the appellants-Rajasthan Discoms.

67. *With regard to the question of interest/late payment surcharge, we notice that the plea of change in law was initially raised by APRL in the year 2013. A case was also filed by APRL in the year 2013 itself raising its claim on such basis. However, the appellants-Rajasthan Discoms did not allow the claim regarding change in law, because of which APRL was deprived of raising the bills with effect from the date of change in law in the year 2013. We are, thus, of the opinion that considering the totality of the facts of this case and in order to do complete justice and to reduce the liability of the appellants-Rajasthan Discoms, payment of 2 per cent in excess of the applicable SBAR per annum with monthly rest would be on higher side. In our opinion, it would be appropriate to direct the appellants-Rajasthan Discoms to pay interest/late payment surcharge as per applicable SBAR for the relevant years, which should not exceed 9 per cent per annum. It is also provided that instead of monthly rest, the interest would be compounded per annum.*

68. *We accordingly direct that the rate of interest/late payment surcharge would be at SBAR, not exceeding 9 per cent per annum, to be compounded annually, and the 2 per cent above the SBAR (as provided in Article 8.3.5 of PPA) would not be charged in the present case.*

> ***69.*** *Before we part with the case, we may notice that Shri Prashant Bhushan, raised the submission with respect to over-invoicing. He attracted our attention to the investigation pending before the DRI. He has submitted that 40 importers of coal are under investigation by the DRI concerning alleged over-invoicing. The letter of rogatory was issued. However, learned counsel conceded that there is no ultimate conclusion in the investigation reached so far. Thus, we are of the opinion that until and unless there is a finding recorded by the competent court as to invoicing, the submission cannot be accepted. At this stage, it cannot be said that there is over-invoicing. We have examined the case on merits with abundant caution, and we find that there are concurrent findings of facts recorded by the RERC and the APTEL. With respect to the aspect that bid was premised on domestic coal, we find that findings recorded do not call for any interference."*

5. The applicant had filed contempt proceedings alleging disobedience of the said judgment and order, which were registered as Contempt Petition (C) Nos. 877-878 of 2021. We have already referred to this proceeding. In the contempt proceeding, the applicant's position gets reflected in the submissions of its learned senior counsel, recorded in paragraph 6 of the order passed on 25.02.2022 (One of us, Aniruddha Bose, J., was a party to this order). The relevant portion of that order is reproduced below:-

> *"**6.** Shri Abhishek Manu Singhvi, learned Senior Counsel appearing for the petitioner has submitted that the only dispute which was to be resolved by RERC, APTEL and this Court was with regard to the payment due because of "change in law", which was held to be the actual landed cost of alternate coal/imported coal as certified by the auditor minus landed cost of domestic linkage coal. There was no other dispute which was to be resolved by this Court. Learned Senior Counsel has submitted that it is now contended by the respondents that certain payments have been made by the respondents which, according to the learned Senior Counsel, was towards regular payment on the basis of domestic linkage coal and nothing else. Since, the "change in law" ground of the petitioner has been*

accepted by all the authorities i.e. RERC, APTEL and this Court and also confirmed by the dismissal of the Review Petition filed before this Court, the question cannot now be reopened at this stage. It is, thus, submitted that since the actual landed cost of alternate coal/imported coal as was submitted by the petitioner has been duly certified by the auditors, which has not been disputed by the respondents, the payment, as claimed, ought to have been made and since the same has not been paid, the respondents are liable for contempt. The further contention of the learned Senior Counsel of the petitioner is that the claim of the respondents that they had paid certain amount towards energy charges regularly month by month, which included certain amount of price of alternate coal/imported coal charges cannot be accepted, as at that stage i.e. in the year 2013, the respondents had not accepted the claim of the petitioner with regard to "change in law", and the assertion now being made by the respondents that they had paid certain amount after partially accepting the "change in law" theory cannot be accepted, as this issue had never been raised by respondents in any proceedings earlier, as the respondents had, in fact, throughout contested that the petitioner is not entitled to the "change in law" benefit."

6. The allegations of non-compliance with the judgment of the three-Judge Bench were dealt with by the Coordinate Bench in the aforesaid order passed on 25.02.2022. It was, inter-alia, observed and directed in the said order:-

*"**9.** Firstly, what we have to consider is only the effect of "change in law", which as per RERC, API'EL and this Court would be the actual landed cost of alternate coal/ imported coal minus the landed cost of domestic linkage coal. The question of any claim which the respondents may have against the petitioner, is not an issue before us. As per the principle laid down by RERC and affirmed up till this Court, the petitioner has claimed an amount of Rs.5344. 75 crores up to March, 2021. The said principle having been affirmed by the APTEL as well as by this Court and even in Review Petition, cannot be reopened now. It cannot be disputed that after March, 2021 also, the petitioner would be entitled*

to payment on the basis of the same calculation, which up to November, 2021 comes to Rs.130.69 crores. As such, the due amount up to November 2021 would be Rs.5344. 75 + Rs.130.69 = 54 75.44 crores. Out of this amount of Rs.54 75.44 crores, the petitioner has been paid a sum of Rs.2426.81 crores in terms of the interim order passed by this Court. Hence, as per the petitioner, the balance amount of Rs.3048.63 crores would remain due to be paid up to November, 2021. The interest at the maximum rate of 9% per annum, as capped by this Court vide its judgment and order dated 31.08.2020, is to be applied on the said amount, from the date the amount became due, till the date of actual payment. The further claim of late payment surcharge, amounting to Rs.2477.70 crores, as per the petitioner, would be a subject matter which the petitioner, if so advised, can claim before the appropriate forum, as the same is not the subject in question in the present proceedings, regarding which no directions have also been issued by this Court.

10. *As such, considering the totality of facts and circumstances of this case, prima face we are of the opinion that the respondents are liable for contempt for not complying this Court's order dated 31.08.2020. We, thus, direct the respondents to pay to the petitioner, the principal amount (as per the terms/norms laid down in the judgment of this Court dated 31.08.2020) minus Rs.2426.81 crores deposited by the respondents in terms of the interim order dated 29.10.2018 (which, as per the petitioner, the balance payable amount would be Rs.3048.63 crores) along with interest as per the applicable SBAR for the relevant years, which should not exceed 9% per annum (to be compounded annually), from the date the amount became due till the date of actual payment, within four weeks from today, failing which the respondents shall appear before this Court in person, on the next date, so as to enable this Court to frame charges."*

7. The contempt petitions were subsequently directed to be closed by another Coordinate Bench of this Court and order to that effect was passed on 19.04.2022. In this order, it was, inter-alia, observed:-

"With regard to the first question it may only be observed that by order dated 25.02.2022 passed in these contempt petitions, this court, in paragraph no. 9, has observed as under:

> *"The further claim of late payment surcharge, amounting to Rs.2477.70 crores, as per the petitioner, would be a subject matter which the petitioner, if so advised, can claim before the appropriate forum, as the same is not the subject in question in the present proceedings, regarding which no directions have also been issued by this Court."*

As such, since according to the respondent(s) the payment made is only towards the principal amount plus 9% interest per annum, we are not inclined to pass any further orders as we have already left the question of late payment surcharge open, which the petitioner, if so advised, can claim before the appropriate forum.

As regards the second question of the alleged non-compliance, by the respondents after November, 2021 of the judgment and order dated 31.08.2020, we would not like to make any observation as there is neither. any material before us with regard to that nor the same was in question when the contempt petitions were filed. As such, we leave this question open to be agitated by the petitioner, of it is so advised.

With regard to the last issue raised by the respondents, which is to the effect that the claim of the Rajasthan Utilities against the petitioner outside the judgment dated 31.08.2020 be permitted to be made, we would only like to observe that the same cannot be a matter to be considered in a contempt petition and as such neither we are inclined to grant any such relief nor stop them from raising any such issue, if the respondents are so advised and found entitled under the law. With the aforesaid observations, we close these contempt petitions."

8. After institution of the present application on 19.07.2022, it was heard from time to time and finally on 24.01.2024, when this matter was

called on for hearing, Dr. Abhishek Manu Singhvi, learned senior counsel, appearing for the applicant, sought leave to withdraw the application. Mr. Dushyant Dave, learned senior counsel appearing for the Rajasthan Discoms, however, opposed such prayer and his case was that the present application, having been taken out in an appeal which stood disposed of, did not lie and it should be dismissed on the ground that it is not maintainable. Mr. Dave drew our attention to paragraph 67 of the judgment of the three-Judge Bench, which we have quoted above. The issue of LPS has been dealt with by the three-Judge Bench in the said passage.

9. In the course of hearing, it was projected as an application for clarification, though the same was registered as a miscellaneous application. The reliefs asked for in this application do not refer to any clarification. We have referred to the substance of the reliefs prayed for in this application earlier in this judgment.

10. Order XII Rule 3 of the Supreme Court Rules, 2013 ("2013 Rules") framed in pursuance of Article 145 of the Constitution of India, stipulates:-

> *"**3.** Subject to the provisions contained in Order XLVII of these rules, a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission."*

There are, however, two chapters in the 2013 Rules which permit review of a judgment or order of this Court, being Order XLVII and XLVIII. The former Order, contained in Part IV of the 2013 Rules relates to "Review of a Judgment" and the latter relates to "Curative Petition". There is no other provision in the 2013 Rules, whereby a litigant can apply for modification of a judgment or an order of this Court in a matter which stands finally concluded. On rare occasions, a litigant may apply for clarification of an order if the same is ex-facie incomprehensible, but we do not expect any judgment or order to bear such a character. So far as the applicant is concerned, it did not apply for review of the judgment delivered by the three-Judge Bench. Neither in the contempt action initiated by the applicant, did this Court find that any case of willful disobedience of the judgment of the three-Judge Bench was made out on the question of LPS.

This would be apparent from the orders passed by this Court in the contempt petitions which have been reproduced earlier in this judgement. The judgment of the three-Judge Bench has already examined the question of LPS and by taking out a Miscellaneous Application, the applicant cannot ask for reliefs which were not granted in the main judgment itself.

11. In the case of **Ghanashyam Mishra & Sons Private Limited -vs- Edelweiss Asset Reconstruction Company Limited** [M.A. No. 1166 of 2021 in CA No. 8129 of 2019], a two-Judge Bench of this Court in its judgment delivered on 17th August 2022 observed and held:-

> "4. *Having heard learned senior counsel for the parties and having perused the relevant materials placed on record, we are of the considered view that the present applications are nothing else but an attempt to seek review of the judgment and order passed by this Court on 13th April 2021 under the garb of miscellaneous application.*
>
> ***5. We find that there is a growing tendency of indirectly seeking review of the orders of this Court by filing applications either seeking modifications or clarifications of the orders passed by this Court.***
>
> ***6. In our view, such applications are a total abuse of process of law. The valuable time of Court is spent in deciding such application which time would otherwise be utilized for attending litigations of the litigants who are waiting in the corridors of justice for decades together.****"*
>
> *(emphasis supplied)*

12. Subsequently in the judgment of this Court in the case of **Supertech Limited-vs- Emerald Court Owner Resident Welfare Association & Others** [(2023) 10 SCC 817], a two-Judge Bench of this Court examined the maintainability of miscellaneous applications "for clarification, modification or recall" and was pleased to observe the following in the context of that case:-

> *"12. The attempt in the present miscellaneous application is clearly to seek a substantive modification of the judgment of this Court. Such an attempt is not permissible in a miscellaneous application. While Mr Mukul Rohatgi, learned*

> *Senior Counsel has relied upon the provisions of Order LV Rule 6 of the Supreme Court Rules, 2013, what is contemplated therein is a saving of the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent an abuse of the process of the Court. Order LV Rule 6 cannot be inverted to bypass the provisions for review in Order XLVII of the Supreme Court Rules, 2013. The miscellaneous application is an abuse of the process."*

The authorities which were cited in the said Judgment by the Coordinate Bench are the cases of **State (UT of Delhi) -vs- Gurdip Singh Uban and Others** [(2000) 7 SCC 296], **Sone Lal and Others -vs- State of Uttar Pradesh** [(1982) 2 SCC 398], **Ram Chandra Singh -vs- Savitri Devi and Others** [(2004 12 SCC 713], **Common Cause -vs- Union of India and Others** [(2004) 5 SCC 222], **Zahira Habibullah Sheikh and Another -vs- State of Gujarat and Others** [(2004) 5 SCC 353], **P.N. Eswara Iyer and Others -vs- Registrar, Supreme Court of India** [(1980) 4 SCC 680], **Suthendraraja alias Suthenthira Raja alias Santhan and Others -vs- State through DSP/CBI, SIT, Chennai** [(1999) 9 SCC 323], **Ramdeo Chauhan alias Raj Nath -vs- State of Assam** [(2001) 5 SCC 714], **Devendra Pal Singh -vs- State (NCT of Delhi) and Another** [(2003) 2 SCC 501] and **Rashid Khan Pathan in re**, [(2021) 12 SCC 64]. These authorities broadly stipulate that multiple attempts to reopen a judgment of this Court should not be permitted. Hence, we do not consider it necessary to deal with these authorities individually.

13. Rule 6 of Order LV of the 2013 Rules stipulates: -

> *"6. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

The maintainability of the present application cannot be explained by invoking the inherent power of this Court either. The applicant has not applied for review of the main judgment. In the contempt action, it failed to establish any willful disobedience of the main judgment and order on account of non-payment of LPS. Now the applicant cannot continue to hitchhike on the same judgment by relying on the inherent power or jurisdiction of this Court.

14. Appearing on behalf of the applicant, Dr. Singhvi, learned Senior Counsel, relied on five orders of this Court in which post-disposal applications were entertained. The first one was an order dated 29.10.2018 in the case of **Energy Watchdog -vs- Central Electricity Regulatory Commission and Others**, [MA Nos.2705-2706 of 2018 in Civil Appeal Nos.5399-5400 of 2016]. In that case, an application for impleadment on behalf of the State of Gujarat was allowed, upon going through a High Power Committee's report, which was given after the judgment was delivered. The judgment disposing of the Civil Appeal was delivered on 11.04.2017, but in the miscellaneous application, the applicant was given liberty to approach the Central Electricity Regulatory Commission for approval of the proposed amendments to be made to a power purchase agreement. That was a case where this Court, after the judgment was delivered, considered certain events which accrued subsequently and had a bearing on the main decision. The subsequent event was taken into account for modifying the order but there was no substantive change in the judgment itself.

15. The next order, on which Dr. Singhvi placed reliance, was passed on 04.05.2023 in the case of **Uttar Haryana Bijli Vitran Nigam Ltd. & Anr. -vs- Adani Power (Mundra) Limited** [MA (D) No. 18461 of 2023 in Civil Appeal No.2908 of 2022]. The substantive part of the order is contained in Paragraph 2 thereof and this paragraph reads:-

> *"2. As agreed by the learned counsel for the parties, the words "As per the details given in the PPA, the mode of transportation is through railway" shown in paragraph 32 of the judgment dated 20.04.2023 passed in C.A. No. 2908 of 2022 be read as "As per the details given in the FSA, the mode of transportation is through railway".*

But this order appears to be in the nature of correcting an error which was clerical in nature and the Code of Civil Procedure, 1908 ("the Code") itself provides for such correction under Section 152 thereof, as also Order XII Rule 3 of the 2013 Rules.

16. The third order relied on by Dr. Singhvi was passed on 09.12.2022 in the case of **Kalpataru Properties Pvt. Ltd. -vs- Indiabulls Housing Finance Ltd**. [MA No.2064 of 2022 in Civil Appeal No.7050 of 2022]. The applicant therein had approached this Court contending that he was not heard when the civil appeal was decided. In that case, the

appellant had approached this Court against an Order passed by NCLAT in Company Appeal (AT)(Insolvency) No. 880/2021 and the said appellant sought to withdraw the appeal on deposit of certain amount by the first respondent in the said appeal. The request was accepted by this Court and by the Order passed on 26.09.2022, the appeal pending before the NCLAT was also disposed of by this Court. The applicant was an intervenor before the NCLAT and his submission was that in the appeal before the NCLAT which was disposed of, he also sought to raise some grievances before the NCLAT, in his capacity as an intervenor. His case was that he should have been given the liberty to be heard as an intervenor before the NCLAT. A Coordinate Bench of this Court entertained that application and held: -

> *"We do believe that this controversy should be resolved by the NCLAT itself i.e. whether on the appellants seeking to withdraw the appeal, there can be any impediment in withdrawal of the appeal and is the NCLAT really required to comment on the merits of the order of the NCLT at the behest of an intervener. We further make it clear that we are not expanding the array of parties before the NCLAT as a number of entities seems to have jumped into the picture as the matter has gone on before the Court. We make it clear that only the parties/existing interventionist before the NCLAT will have the right of hearing.*
>
> *In view of the orders passed in Civil Appeal No. 9062/2022, this appeal will also to be listed before the Bench presided over by the Chairman.*
>
> *In view thereof, the final picture which would emerge would be before the NCLAT and to that extent the order passed by us on 14.11.2022 would be kept in abeyance till the NCLAT resolves the issue."*

Again, this Order was in the nature of a review order by the applicant who was a party to the proceeding before the NCLAT. All the appeals before the NCLAT were disposed of without hearing him. The context is entirely different from the one in which the applicant has presently approached this Court.

17. The fourth order on which the present applicant relied was passed on 12.08.2022 in the case of **Supertech Limited -vs- Emerald**

Court Owner Resident Welfare Association & Ors. [MA No.1918 of 2021 in Civil Appeal No.5041 of 2021]. The Coordinate Bench of this Court granted extension of time, as sought by the applicant therein, in effecting demolition of two building towers which were approved by the Court while disposing of the civil appeal. The power to extend time beyond that fixed by a Court on a legitimate ground is incorporated in Section 148 of the Code. If the time to do something requires to be extended, it would be within the inherent jurisdiction of this Court to go beyond the maximum period of 30 days prescribed in the aforesaid Section, after sufficient reason is shown. Section 112 of the Code itself provides that nothing contained in the Code shall affect the inherent powers of the Supreme Court under Article 136 or any other provision of the Constitution.

18. The fifth order referred to by the applicant was passed on 23.07.2021 in the case of **Union of India -vs- Association of Unified Telecom Service Providers of India and Ors.** [MA No.83 of 2021 in MA (D) No. 9887 of 2020 in Civil Appeal No.6328-6399 of 2015]. A miscellaneous application had been filed for modification of the content of judgment dated 1st September 2020 passed in M.A. (D) No. 9887 of 2020 in Civil Appeal Nos. 6328-6399 of 2015. In the said proceeding, clarification was also sought on the aspect that the judgment did not bar the Union of India from considering and rectifying the clerical/arithmetical errors in computation of certain dues. This was again an Order, in substance, permitting rectification of an arithmetic error, which is implicit in Section 152 of the Code read with Order XII Rule 3 of the 2013 Rules.

19. We have indicated in the earlier part of this judgment that Dr. Singhvi had expressed his desire to withdraw the present application on the last date of hearing, i.e., 24.01.2024. Ordinarily, we would not have had set out the background leading to the filing of the present application and the course of the application that was taken before this Court in view of such submission. Any plaintiff would be entitled to abandon a suit or abandon part of the claim made in the suit at any time after institution of the suit, as provided in Rule 1 of Order XXIII of the Code. We, however, decided not to permit such simpliciter withdrawal, as the Rajasthan Discoms sought imposition of costs. Secondly, in our opinion, the provision which pertains to a suit would not ipso facto apply to a miscellaneous application invoking inherent powers of this Court, instituted in a set of statutory appeals which

stood disposed of. Even if an applicant applies for withdrawal of an application, in exceptional cases, it would be within the jurisdiction of the Court to examine the application and pass appropriate orders. So far as the present proceeding is concerned, an important question of law has arisen as regards jurisdiction of the Court to entertain an application taken out in connection with a set of statutory appeals which stood disposed of. Judgment of this Court in **Supertech Limited** (supra) deals with this question and in our opinion, the ratio of the said judgment would apply to the present proceeding as well.

20. We felt it necessary to examine the question about maintainability of the present application as we are of the view that it was necessary to spell out the position of law as to when such post-disposal miscellaneous applications can be entertained after a matter is disposed of. This Court has become functus officio and does not retain jurisdiction to entertain an application after the appeal was disposed of by the judgment of a three-Judge Bench of this Court on 31.08.2020 through a course beyond that specified in the statute. This is not an application for correcting any clerical or arithmetical error. Neither it is an application for extension of time. A post disposal application for modification and clarification of the order of disposal shall lie only in rare cases, where the order passed by this Court is executory in nature and the directions of the Court may become impossible to be implemented because of subsequent events or developments. The factual background of this Application does not fit into that description.

21. Our attention was drawn to an order passed on 14.12.2022 in which a Coordinate Bench was of the prima facie opinion that the applicant may be entitled to LPS as per Article 8.3.5 of PPA-2010, at least from 31.08.2020, till the actual payment was made pursuant to the order passed by this Court in the contempt proceedings. This prima facie view was expressed in the course of hearing of the present application only. We have examined the issue in greater detail. As we have already indicated, the applicant, after the three-Judge Bench decision was delivered, did not file any petition for review. On the other hand, it was the Rajasthan Discoms that had filed the review petitions which stood dismissed. In the contempt action instituted by the applicant, the question concerning payment of LPS was raised, but the Bench of this Court found that the same was not the subject in question in the contempt proceedings regarding which no direction

had been issued by this Court. Hence the Coordinate Bench decided not to address that question in the contempt proceedings. In this judgement, we have already quoted the observations regarding the question of LPS made by the Contempt Court on 25.02.2022 and 19.04.2022. Despite that question being left open by the Contempt Court, we are of the view that a miscellaneous application is not the proper legal course to make demand on that count. A relief of this nature cannot be asked for in a miscellaneous application which was described in the course of hearing as an application for clarification.

22. So far as the observations made in the order passed in the present proceedings on 14.12.2022 are concerned, they were made only at a prima facie stage and do not have binding effect at the hearing stage. Moreover, the question whether such a prayer could be made in an application labeled as a "Miscellaneous Application" taken out in connection with a set of appeals which have been finally decided, does not appear to have been considered by this Court at the time of making of the order dated 14.12.2022. The order of this Court does not reflect any discussion on the issue of maintainability of the present application. It also does not appear to us that the maintainability issue was raised at that stage. Thus, mere making of such observations cannot be construed to mean that this Court found such application to be maintainable.

23. We, accordingly, dismiss the present application. This application was listed before us on several occasions and for that reason we impose costs of Rs. 50,000/- to be paid by the applicant to be remitted to the Supreme Court Legal Aid Committee.

Headnotes prepared by:
Raghav Bhatia, Hony. Associate Editor
(*Verified by:* Abhinav Mukerji, Sr. Adv.)

Result of the case:
Application dismissed

[2024] 3 S.C.R. 1044 : 2024 INSC 321

Deccan Value Investors L.P. & Anr.
v.
Dinkar Venkatasubramanian & Anr.

(Civil Appeal No. 2801 of 2020)

06 March 2024

[Sanjiv Khanna and Dipankar Datta, JJ.]

Issue for Consideration

Whether the judgment dated 07.02.2020 passed by the National Company Law Appellate Tribunal which upholds the order dated 27.09.2019 passed by the National Company Law Tribunal is legally flawed and unsustainable; Whether the reasons or grounds taken by the successful resolution applicants in the instant case qualify and can be treated as a fraud on the part of the resolution professional.

Headnotes

Insolvency and Bankruptcy Code, 2016 – s. 62 – On facts and to justify withdrawal, it was submitted that in the instant case, the successful resolution applicants were prevented, and were handicapped because of lack of information or rather fraud on the part of the resolution professional – Propriety:

Held: The Supreme Court in Ebix Singapore Private Limited, has *inter alia* held that the resolution applicant cannot withdraw or modify the resolution plan, after the same is approved by the Committee of Creditors – It is immaterial that post approval by the Committee of Creditors, there is consideration under Section 31(1) of the Code by the adjudicating authority for final approval – The judgment in Ebix Singapore Private Limited elaborates and sets out several reasons why the resolution applicant cannot be permitted to withdraw or modify the resolution plan after approval by the Committee of Creditors, and before an order under Section 31(1) of the Code is passed – These reasons include delay, consequences of the delay and the uncertainty and complexities that would arise in the Corporate Insolvency Resolution Process, which are unacceptable and not contemplated in law – Even the terms of the resolution plan, will not permit withdrawal or modification in the absence of a

statutory provision, that allow withdrawal or amendment in the resolution plan after approval by the Committee of Creditors – The reasons or grounds taken by the successful resolution applicants in the instant case do not qualify and cannot be treated as a fraud on the part of the resolution professional – This is not a case where misinformation or wrong information was given to the resolution applicants – The impugned judgment dated 07.02.2020 passed by the NCLAT, upholding the order passed by the NCLT, dated 27.09.2019 is set aside – The resolution plan, as submitted by the successful resolution applicants is approved. [Paras 4, 5, 8, 17]

Insolvency and Bankruptcy Code, 2016 – Resolution Plan – Preparation of:

Held: Resolution plans are not prepared and submitted by lay persons – They are submitted after the financial statements and data are examined by domain and financial experts, who scan, appraise evaluate the material as available for its usefulness, with caution and scepticism – Inadequacies and paltriness of data are accounted and chronicled for valuations and the risk involved – It is rather strange to argue that the superspecialists and financial experts were gullible and misunderstood the details, figures or data – The assumption is that the resolution applicant would submit the revival/resolution plan specifying the monetary amount and other obligations, after in-depth analysis of the fiscal and commercial viability of the corporate debtor – Pointing out the ambiguities or lack of specific details or data, post acceptance of the resolution plan by the Committee of Creditors, should be rejected, except in an egregious case were data and facts are fudged or concealed – Absence or ambiguity of details and particulars should put the parties to caution, and it is for them to ascertain details, and exercise discretion to submit or not submit resolution plan. [Para 15]

Case Law Cited

Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another [2021] 14 SCR 321 **: (2022) 2 SCC 401 – relied on.**

List of Acts

Insolvency and Bankruptcy Code, 2016.

List of Keywords

Resolution Plan; Withdrawal or modification of resolution plan; Misinformation or wrong information; Financial experts; Inadequacies and paltriness of data; Revival/resolution plan; Principle of "clean slate"; Fiscal and commercial viability.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2801 of 2020

From the Judgment and Order dated 07.02.2020 of the National Company Law Appellate Tribunal, New Delhi in Company Appeal (AT) (Insolvency) No. 1281 of 2019

With

Civil Appeal Nos. 2642 and 2432 of 2020

Appearances for Parties

Dr. A.M. Singhvi, Guru Krishna Kumar, Shyam Divan, Sr. Advs., Mahesh Agarwal, Rishi Agrawala, Rohan Dakshni, Ms. Nikita Mishra, Himanshu Satija, Ms. Geetika Sharma, Nidhi Ram Sharma, Ms. Aakansha Kaul, E. C. Agrawala, S. S. Shroff, Ms. Misha, Anoop Rawat, Siddhant Kant, Saurav Panda, Nikhil Mathur, Prithviraj Oberoi, Ms. Anannya Ghosh, Brian Henry Moses, Rohan Talwar, Ms. Nidhi Ram Shrama, Ms. Nidhi Ram Sharma, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Order

1. This order would decide the cross-appeals under Section 62 of the Insolvency and Bankruptcy Code, 2016[1] filed by the successful resolution applicants – Deccan Value Investors L.P. and DVI PE (Mauritius) Ltd.; the Committee of Creditors of Metalyst Forgings Limited; and Dinkar Venkatasubramanian - the Resolution Professional of Metalyst Forgings Limited.

2. The company in question, the corporate debtor, is Metalyst Forgings Ltd.

1 "the Code" for short

3. In our opinion, the impugned judgment dated 07.02.2020 passed by the National Company Law Appellate Tribunal[2], New Delhi, which upholds the order dated 27.09.2019 passed by the National Company Law Tribunal[3], Mumbai Bench, Mumbai, is legally flawed and unsustainable in view of the judgment of this Court in "*Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and Another*"[4].

4. This Court in *Ebix Singapore Private Limited* (supra), has *inter alia* held that the resolution applicant cannot withdraw or modify the resolution plan, after the same is approved by the Committee of Creditors. It is immaterial that post approval by the Committee of Creditors, there is consideration under Section 31(1) of the Code by the adjudicating authority for final approval.

5. The judgment in *Ebix Singapore Private Limited* (supra) elaborates and sets out several reasons why the resolution applicant cannot be permitted to withdraw or modify the resolution plan after approval by the Committee of Creditors, and before an order under Section 31(1) of the Code is passed. These reasons include delay, consequences of the delay and the uncertainty and complexities that would arise in the Corporate Insolvency Resolution Process, which are unacceptable and not contemplated in law. Even the terms of the resolution plan, will not permit withdrawal or modification in the absence of a statutory provision, that allow withdrawal or amendment in the resolution plan after approval by the Committee of Creditors. The resolution plan approved by the Committee of Creditors is a creature of the Code and not a pure contract between two consenting parties.

6. During the course of arguments, our attention was drawn to the *proviso* to Section 31(1) of the Code, which postulates that the adjudicating authority, before passing an order for approval of the resolution plan, must satisfy itself that the resolution plan has provisions for its effective implementation. *Ebix Singapore Private Limited* (supra) did examine this provision but rejected the argument on several grounds, including absence of legislative mandate to direct unwilling Committee of Creditors to re-negotiate or agree to withdrawal of the

2 "NCLAT" for short

3 "NCLT" or "adjudicating authority", for short

4 [2021] 14 SCR 321 : (2022) 2 SCC 401

resolution plan at the behest of the resolution applicant. The effect of approval by the adjudicating authority under Section 31(1) of the Code makes the resolution plan binding on all stakeholders, even those who are not members of the Committee of Creditors. The scrutiny by the adjudicating authority for grant of approval in terms of Section 31(1), read with other provisions of the Code, is limited and restricted. It does not allow or permit the resolution applicant to unilaterally amend/modify, or withdraw the resolution plan post approval by the Committee of Creditors.

7. On facts and to justify the withdrawal, it was submitted that in the present case, the successful resolution applicants were prevented, and were handicapped because of lack of information or rather fraud on the part of the resolution professional. Four aspects were highlighted: -

   (a) It was concealed that 70 per cent of the revenue of the corporate debtor came from trading, and not from manufacturing.

   (b) The Mott Macdonald Report dated 30.09.2016 is factually incorrect and flawed.

   (c) Misleading and false statement was made with regard to the uninstalled imported components of 12,500 M.T. Press, which were stored in the land of a sister concern – Clover Forging and Machining Pvt. Ltd.

   (d) The successful resolution applicants were misled in view of the non-reliability of financial data. There was ongoing financial/forensic audit.

8. The aforesaid reasons or grounds taken by the successful resolution applicants do not qualify and cannot be treated as a fraud on the part of the resolution professional. This is not a case where misinformation or wrong information was given to the resolution applicants.

9. We have been taken through the information memorandum, as well as, the data in the virtual data room, access to which was granted to the prospective resolution applicant(s), before they had submitted their resolution plan(s).

10. We have also been taken through the documents, which would show the manufacturing output, as well as the capacity of realisation of the

four units of the corporate debtor. The excise returns, as well as the VAT returns etc., were available in the virtual data room.

11. The Mott Macdonald Report was submitted by the said consultants in September, 2016 at the behest of the erstwhile promoters/directors of the corporate debtor. The report itself is hedged with conditions and disclaimers. Value and worth of the report, the data and projections were for the prospective resolution applicants to evaluate.

12. On the aspect of 12,500 M.T. Press, it was clearly stated and noted that the said Press after import, was stored in the shed belonging to Clover Forging and Machining Pvt. Ltd.

13. Submission regarding the non-availability of Floor Space Index (FSI) at the plant in Aurangabad, was made with reference to the statement made by an employee of the corporate debtor. We are not inclined to accept this version of the successful resolution applicant. The corporate debtor has four units, three units in Maharashtra and one unit in Himachal Pradesh. False projection was not made.

14. The resolution plan submitted by the successful resolution applicants refers to the transaction audits being undertaken and acknowledges appropriation of the proceeds, if any available, to the resolution professional on the recoveries being made for prior period. The principle of "clean slate" is well established and known.

15. Resolution plans are not prepared and submitted by lay persons. They are submitted after the financial statements and data are examined by domain and financial experts, who scan, appraise evaluate the material as available for its usefulness, with caution and scepticism. Inadequacies and paltriness of data are accounted and chronicled for valuations and the risk involved. It is rather strange to argue that the superspecialists and financial experts were gullible and misunderstood the details, figures or data. The assumption is that the resolution applicant would submit the revival/resolution plan specifying the monetary amount and other obligations, after in-depth analysis of the fiscal and commercial viability of the corporate debtor. Pointing out the ambiguities or lack of specific details or data, post acceptance of the resolution plan by the Committee of Creditors, should be rejected, except in an egregious case were data and facts are fudged or concealed. Absence or ambiguity of details and particulars should put the parties to caution, and it is for them to

ascertain details, and exercise discretion to submit or not submit resolution plan.

16. Records of corporate debtor, who are in financial distress, may suffer from data asymmetry, debatable or even wrong data. Thus, the provision for transactional audit etc, but this takes time and is not necessary before information memorandum or virtual data room is set up. Financial experts being aware, do tread with caution. Information memorandum is not to be tested applying "the true picture of risk" obligation, *albeit* as observed by the NCLAT the resolution professional's obligation to provide information has to be understood on "best effort" basis.

17. In view of the aforesaid position, we set aside the impugned judgment dated 07.02.2020 passed by the NCLAT, upholding the order passed by the NCLT, dated 27.09.2019. In other words, we accept the present appeals and it is held that the resolution plan, as submitted by the successful resolution applicants – Deccan Value Investors L.P. and DVI PE (Mauritius) Ltd., is approved.

18. To cut short the delay, parties are directed to appear before the NCLT on 09.04.2024, when further proceedings will take place.

19. Recording the aforesaid, the appeals are allowed in the above terms.

20. 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. 1051 : 2024 INSC 243

Union of India
v.
M/s Indian Oil Corporation Ltd.

(Civil Appeal Nos. 1891-1966 of 2024)

21 March 2024

[J.B. Pardiwala* and Sandeep Mehta, JJ.]

Issue for Consideration

It is the case of the respondent company herein that at the time of booking the consignments, from Baad to Hisar via Palwal, the notified chargeable distance for calculating freight as per the Local Distance Table was 444 km, and accordingly the respondent company paid the same from time to time. However, subsequently, the appellant railways vide its letter dated 05.07.2005 changed the chargeable distance to 334 km in the revised Local Distance Table and the said revised table was to apply prospectively. The respondent's case is that the very chargeable distance of 444 km as per the old local distance table was wrong and demanded refund of the difference of 110 km in the freight charges. The High Court directed the railway administration to refund the difference of approx. 110 km that was illegally levied towards the freight charges. The following questions arise for consideration: (i) What is the scope of Section 106 sub-section (3) of the Railways Act, 1989; In other words, what constitutes an "overcharge" within the meaning of Section 106 sub-section (3) of the Railways Act, 1989; What is the difference between an "Overcharge" and an "Illegal Charge"; (ii) Whether, the claim towards the refund of difference of 110 km in freight charges is covered by Section 106 sub-section (3) of the Railways Act, 1989; In other words, whether the claim is for a refund of an 'overcharge'; (iii) Whether, the difference of 110 km in freight is liable to be refunded; In other words, whether the notified chargeable distance of '444 km' was an Illegal Charge or not?

Headnotes

Railways Act, 1989 – s. 106 – Scope of:

Held: Section 106 deals with notice for claim of compensation and refund of overcharge – Section 106 of the Act, 1989 is in two-parts

* Author

and deals with and encompasses two distinct types of claims that may be made or sought against the railway administration by way of a notice: - (i) First¸ the claims towards the 'compensation' from the railway administration which has been provided u/s.106 sub-section (1) – The compensation may be sought in respect of any loss or damage or destruction caused to the goods which were being carried by the railway – (ii) Secondly, the claims towards the refund of any 'overcharge' that has been levied in respect of any goods which were being carried by the railways, and this has been provided u/s. 106 sub-section (3) – Thus, Section 106 of Act, 1989 contains the statutory provisions that enables any person to make a claim from the railway administration, either for (i) compensation OR for (ii) refund of overcharge, in respect of any goods which were being carried by the railway by sending a notice of claim – A statutory time-period of 6-months has been provided for making a notice of claim u/s. 106 of the Act, 1989, and if the notice of claim is not made within the stipulated period, then the claim becomes time-barred.[Paras 34, 35, 36, 39]

Railways Act, 1989 – s. 106 (3) – Meaning of Overcharge – Notice for Claim for Refund of Overcharge – Conditions:

Held: The term "overcharge" has neither been defined in the Act, 1989 nor the erstwhile Act, 1890 – The term "overcharge" is derived from the word 'charge' prefixed by the word 'over' and means "something more than the correct amount or more than a certain limit" – The Supreme Court in Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr. explained that an overcharge is something in excess of what is due according to law, an overcharge must be of the same genus or class as a charge, and it does not include a sum that was collected but was not due – The Supreme Court as-well as various High Courts have consistently held that the rigours of Section 106(3) of the Act, 1989 will only be applicable where the claim is for a refund of an 'overcharge' – Where the claim for refund is for anything but an 'overcharge', Section 106(3) of the Act, 1989 will not apply, and no notice of claim is required – When it comes to a Notice for Claim for Refund of Overcharge under Section 106(3) of the Act, 1989 the following conditions must be fulfilled: - a) Claim must be for refund of an 'Overcharge'; b) Overcharge must have been paid to the Railway Administration in respect of the goods carried by the railway; c) Notice must be issued within 6-months from the date of payment or delivery of

goods for which overcharge was paid; d) Notice must be served to the concerned railway administration to whom the overcharge was paid – Thus, the rigours of Section 106 sub-section (3) i.e., the 6-month time period for making a notice of claim, is only attracted, when the refund is for an overcharge. [Paras 43, 44, 45, 53, 59]

Railways Act, 1989 – What is the difference between an "Overcharge" and an "Illegal Charge":

Held: As to what would be an 'overcharge', the Supreme Court and the various High Courts have consistently held that an 'overcharge' is any sum charged in excess or more than what was payable as per law – Whereas an illegal charge is any sum which is impermissible in law – For an excess sum to be an "overcharge" the sum paid must partake the same character as the basic charge, or must belong to the same genus of charge which was payable or required to be paid by law – Whereas, for an illegal charge, the sum must not have been payable by law – Another very fine but pertinent distinction between an 'overcharge' and an 'illegal charge' is that, an 'overcharge' is generally inter-se the specific parties involved and in its peculiar facts – Whereas an 'illegal charge' is illegal for everyone irrespective of the parties or facts. [Paras 60, 70, 71]

Railways Act, 1989 – Whether, the claim towards the refund of difference of 110 km in freight charges is covered by Section 106 sub-section (3) of the Railways Act, 1989; In other words, whether the claim is for a refund of an 'overcharge':

Held: The respondent company has undisputedly paid the freight charges as per the notified chargeable distance, and nothing more has been charged than what was at the time of booking of the consignment required to be charged as per the law prevailing i.e., as per the old local distance table – The case of the respondent company is not that it has paid anything in excess of what was at the time of booking of the consignment required by law, rather, the respondent's case is that the charge which was required to be paid by the law as prevailing at the time of booking of the consignment was wrong – In other words, the respondent's case is that the very chargeable distance of 444 km as per the old local distance table was wrong, and not that the distance for which the respondent has been charged is incorrect in terms of the chargeable distance that was notified at that time – Since admittedly, what was charged from the respondent was as per the chargeable

distance notified and required to be payable by law at that time with nothing in excess, and since the respondent has challenged the very basis or genus of the charge i.e., primary challenge is to the chargeable distance of 444 km in itself and not the incidental quantum of freight levied on the distance of 444 km, and because the same was admittedly charged as per the prevailing law and not due to any misapplication or mistake i.e., as per the old local distance table, this clearly is not a case of overcharge and would not fall within the four corners of Section 106(3) of the Act, 1989. [Paras 104, 105, 107]

Railways Act, 1989 – Whether the notified chargeable distance of '444 km' was an Illegal Charge or not?

Held: In the instant case, prima-facie it appears that under both; the Old Distance Table and the New Distance Table, the actual engineering difference was being taken into consideration, and the only difference between the two methodologies lies in the rounding-off – The effect of the change in methodology on the chargeable distance would not have resulted in a huge difference of 110 km – There had been neither any change in the route by way of addition of new station nor change in the physical track length of the said route – The letter dated 05.07.2005 itself indicates that the change in the chargeable distance of 444 km was due to an error, and has no bearing with the Ministry of Railway's letter dated 07.04.2004 introducing the new methodology – There was failure of the appellant in establishing that the chargeable distance of 444 km was the correct chargeable distance as per the law – There is a concurrent findings of both, the Railway Claims Tribunal and the High Court on the limited aspect of the actual distance being 333.18 km – Thus, the said chargeable distance of 444 km was illegal – No infirmity in the judgment and order passed by the High Court. [Paras 126, 136, 137, 138]

Words and Phrases – Charge, Over, Illegal – discussed. [Para 61]

Interpretation of Statutes – Reasonableness or unreasonableness of any provision:

Held: It is a settled law that in interpreting a statute or a rule, the court must bear in mind that the legislature does not intend what is unreasonable or impossible – If a rule leads to an absurdity or manifest injustice from any adherence to it, the court can step

in – A statute or a rule ordinarily should be most agreeable to convenience, reason and as far as possible to do justice to all – A law/rule should be beneficial in the sense that it should suppress the mischief and advance the remedy – In interpreting a rule, it is legitimate to take into consideration the reasonableness or unreasonableness of any provision – Gross absurdity must always be avoided in a statute/rule – The expression reasonable means rational, according to the dictate of reason and not excessive or immoderate. [Para 82]

Railways Act, 1989 – s. 106 (3) – Hohfeld's scheme of jural relations:

Held: As per Hohfeld's scheme of jural relations conferring of a right on one entity must entail vesting of a corresponding duty in another – Under Section 106(3) of the Act, 1989, the right of consignee to seek a refund of an overcharge arises only when there is a corresponding duty on the railway administration to grant such refund i.e., when the notice of claim is made to it within the statutory period – To seek a refund, certain condition precedents need to be satisfied by the consignee before the right can be said to accrue, namely, a) An overcharge has been paid by the consignor to the Railway administration; b) A notice has been served by the consignor to the Railway administration to which overcharge has been paid; c) The consignor has served the said notice within six months from the date of such payment or the date of delivery of such goods at the destination station, whichever is later – Thus, once the aforesaid conditions are satisfied, the consignee's "right to get a refund" can be said to have as its jural correlative the "duty to grant refund" of the Railway administration. [Paras 84, 84.1]

Railways Act, 1989 – Claim of refunds – Cautioning the courts and the railway claims tribunal:

Held: Where the court or tribunal whilst examining a claim for refund finds that a particular charge for which refund is sought is not an overcharge, they must not jump to the conclusion that the said charge then is an illegal charge – There may be situations, where a charge for which refund is sought may not be an overcharge or even an illegal charge and rather would be a lawful charge perfectly valid in the eyes of law, or a charge though valid but in the extant of equity may be refundable, the same has to be determined upon appraisal of the entire facts of

the case – The courts and tribunal must be mindful of the fact that, the question as to what is the nature of a particular charge, be it overcharge or illegal charge or valid charge etc. is for ultimately determining whether it is liable for refund or not, without jumping to any conclusion. [Paras 95 and 96]

Case Law Cited

Mafatlal Industries Ltd. & Ors. v. Union of India [1996] Suppl. 10 SCR 585 **: (1997) 5 SCC 536 – followed.**

Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr. [2004] 2 SCR 642 **: (2004) 3 SCC 458 – relied on.**

Hindustan Petroleum Corp. Ltd. v. Union of India **(2018) 17 SCC 729;** *Birla Cement Works v. G.M. Western Railways & Anr.* [1995] 1 SCR 5 **: (1995) 2 SCC 493;** *Rajasthan State Electricity Board v. Union of India* [2008] 7 SCR 1025 **: (2008) 5 SCC 632 – referred to.**

Shah Raichand Amulakh v. Union of India & Ors. reported in **(1971) 12 GLR 93;** *Union of India & Ors. v. Steel Authority of India Ltd.* **(1996) SCC OnLine Ori 60;** *Union of India v. Mansukhlal Jethalal* **(1974) SCC OnLine Guj 12;** *Rajasthan State Electricity Board v. Union of India* **AIR (2001) Bom 310;** *J.K. Lakshmi Cement Ltd. v. General Manager & Anr.* **(2014) SCC OnLine Raj 2340;** *Union of India v. Mineral Enterprises* **(2019) SCC OnLine Kar 1971;** *M/s National Aluminium Co. Ltd. v. Union of India, FAO No.* **306 of 2022 (Orissa High Court);** *Suresh Kumar v. Board of Trustees for the Port of Calcutta* **(1988) SCC OnLine Cal 420 – referred to.**

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List of Acts

Railway Act, 1890; Railway Act, 1989.

List of Keywords

Freight; Notified chargeable distance; Revised Local Distance Table; Refund of the difference in the freight charges; Overcharge; Illegal charge; Refund of overcharge; Claim of compensation; Change in methodology on the chargeable distance; Reasonableness or unreasonableness of any provision; Hohfeld's scheme of jural relations; Right to get a refund; Duty to grant refund; Charge; Over; Illegal.

Case Arising From

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1891-1966 of 2024

From the Judgment and Order dated 23.02.2018 of the High Court of Judicature at Allahabad in FAFO Nos.726, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 765, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791 792, 793, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 825, 826, 829, 830, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 844, 845, 846, 847, 848, 850, 851, 852, 853, 854 and 855 of 2014

Appearances for Parties

Amrish Kumar, Nachiketa Joshi, Raghav Sharma, Mrs. Rukhmini Bobde, Varun Chugh, Advs. for the Appellant.

Ms. Meenakshi Arora, Sr. Adv., Ms. Mala Narayan, Shashwat Goel, Ms. Nanakey Kalra, Ms. Isha Ray, Advs. for the Respondent

Judgment / Order of the Supreme Court

Judgment

J.B. Pardiwala, J.

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

INDEX*

1. This batch of 76 appeals is at the instance of the Union of India being the unsuccessful respondent before the High Court and is directed against the common set of judgements and orders dated 23.02.2018 passed by the High Court of Allahabad in FAO Nos. 726, 730-739, 765, 772-793, 798-814, 825-826, 829-830, 833-842,

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

844-848, and 850-855 respectively of 2014, by which the High Court allowed all the abovementioned appeals filed by the respondent herein (original appellant) and directed the railway administration to refund the difference of approx.. 110 km that was illegally levied towards the freight charges.

A. FACTUAL MATRIX

2. The respondent company herein had booked various consignments of furnace oil between the years 2002 & 2005 via railway from Baad to Hisar route. Indisputably the freight for the same was calculated by the appellant on the basis of a total chargeable distance of 444 km. as per the then prevailing distance table plying for the said route.

3. On 07.04.2004, the Ministry of Railways vide its Letter No. TCR/2043/2002/2, decided to rationalize the method of calculating the 'chargeable distance' between the pairs of station routes by way of rounding off the aggregate of the 'actual engineering distance' to the next higher kilometre only once at the end. The said letter is reproduced below: -

"Rates Circular No. 14 of 2004

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS (RAIL MANTRALAYA)
RAILWAY BOARD

No. TCR/2043/2000/2

New Delhi, Dt. 07.04.2004

To,

The General Managers (Comml.).
All Indian Railways, NCR

SUB: Rounding off of Chargeable Distance: Rationalization of fares and freight.

REF: Board's letter no. TCR/2043/2002/4 dated 05.02.2003

Reference is invited to Board's above cited letter wherein Zonal Railways were asked to print their new Local Distance Tables (LD1) and Junction Distance Tables (JDT) effective from April 1, 2003, indicating the actual engineering

distances of the various sections upto two decimal places. Board desire confirmation in this regard and that these books have been printed and circulated to other railways also.

It was also indicated in the letter under reference that the method of "rounding off" to be adopted for arriving at the 'chargeable distance' shall be communicated in due course. The Ministry of Railways have now decided in rationalize the method for arriving at the 'chargeable distance' between a specific pair of originating and destination points. The actual engineering distances upto two decimal places of the various sections from originating station to destination station will be added up and the distance so aggregated would be finally rounded off to the next higher kilometre for deriving the chargeable distance. It may be ensured that for deriving the "chargeable distance", the summation of individual sectional distances be "rounded off" ***only once at the end****. This rationalization is aimed at ensuring uniformity in the method of deriving the distance of charging fares and freight for all customers across the Indian Railways.*

In order to have a uniform date of implementation, all railways shall change over to the rationalized procedure with effect from 01.06.2004. As these instructions have prospective effect and may result in variation in fares and freights when compared with the existing fares and freight, neither would any undercharges be raised by the railways nor would the railways refund charges collected in past cases. Rail users may be intimated of the proposed changes well in advance and staff may also be made well conversant with the changes contemplated.

This issues in consultation with C&IS Directorate and with the concurrence of Finance Directorate in the Ministry of Railways.

Sd/-
(L. Venkataraman)
Director, Traffic Comml. (Rates)
Railway Board"

4. This new methodology was being adopted in order to ensure uniformity in deriving the chargeable distance for fares and freight across the Indian Railways, and pursuant to it, the various zonal railways were required to revise their respective distance tables accordingly.

5. The letter as referred to above specifically stipulated that, the change over to the new 'rationalized procedure' shall take place w.e.f. 01.06.2004 and further that as the aforementioned change might result in variation in the fares and freights in comparison to the then existing charges / rates, the said change would not entitle either the Railways or the end-users to recover or seek any under-charge or excess charge that was already paid prior to the implementation of the said policy.

6. However, since many zonal railways were yet to print and make available their revised local distance tables and junction tables at their respective stations by the scheduled date of implementation, the Ministry of Railways vide its letter dated 24.09.2004 changed and moved the date of implementation of the aforesaid new methodology to 01.01.2005. It was further clarified that till the revised guidelines were implemented, the chargeable distance would continue to be calculated as per the earlier prevailing methodology and procedure as applicable. The said letter reads as under: -

"Rates Circular No. 14 of 2004

GOVERNMENT OF INDIA (BHARAT SARKAR)
MINISTRY OF RAILWAYS (RAIL MANTRALAYA)
RAILWAY BOARD

No. TCR/2043/2000/2

New Delhi, Dt. 24.09.2004

To,
The General Managers (Comml.)
Al Indian Railways, NCR

Managing Director,
Konkan Railway Corporation,
Belapur Bhavan, Sector-11, CBD Belapur,
New Mumbai – 400614

The Chief Administrative Officer/ FOIS
Camp: CRIS, Chanakyapuri,
New Delhi – 21

SUB: *Rounding off of Chargeable Distance: Rationalization of fares and freight.*

Please refer to Board's message dated 25.06.2006 wherein it was communicated that the revised procedure of charging fares and freight by rounding off the actual engineering distance only once at the end shall come into force from 01.10.2004. As all the Zonal Railways have not printed their local distance tables and junction distance tables by the target time, it has been decided that the revised procedure of charging fares and freight by rounding off the actual engineering distance only once at the end shall come into force from 01.01.2005 i.e., First January two thousand five.

It has also been decided that till the implementation of revised guidelines, the earlier procedure for calculating the chargeable distance on the basis of old distance tables should be followed by Zonal Railways. Moreover, the receipt of LDTs/JDTs prepared on the basis of Board's guidelines by concerned Railways should be intimated to this office.

Sd/-
(PURAN CHAND)
Deputy Director, Traffic Comml. (R)
Railway Board"

7. On 05.07.2005, the Chief Commercial Manager of the North Central Railway Zone addressed a letter bearing No. DRM/CLAOG/RAD/ Distance Table/2004/20 to the Chief Goods Supervisor (CGS), Baad *inter-alia* stating that the earlier chargeable distance of 444 km from the Refinery Baad to Hisar as per the old distance table should be changed to 334 km as per the new junction table, and that the "*correct distance should be charged*". The said letter reads as under:

"NORTH CENTRAL RAILWAY

Dated: 05.07.2005

No. DRM/CLAOG RAD/Distance Table/2004/20
Chief Commercial Manager (M&R)
North Central Rail
Allahabad

SUB: *Charging of FO HPS Book from IOC BAAD to Hissar (HSR):*

As per old distance table prior to formation of Zone and Division, the distance, Refinery to HSR via TKD was being charged as under: -

1.	*Refinery BAAD to BAAD station*	*04 Km*
2.	*BAAD to TKD*	*145 Km*
3.	*TKD to HSR*	*295 Km*
Total		***444 Km***

As revised distance table of NCR, NR were not received, hence the charging was as per the earlier practice of 444 Km. These all the distance tables were critically reviewed from revised distance tables of NCR and the distance from IOC BAAD to HSR should be as under: -

(A) The distance from IOC BAAD to HSR via PWL is as under:		
1.	*Refinery BAAD to BAAD station*	*04 Km*
2.	*BAAD to TKD*	*93.62 Km*
3.	*TKD to HSR*	*235.56 Km*
Total		***333.18 Km***

(B) The distance from HSR via AWR is as under:		
1.	*Refinery BAAD to BAAD station*	*04 Km*
2.	*BAAD to MTJ*	*10.22 Km*
3.	*AWR to RE*	*74.21 Km*
4.	*RE to HSR*	*142.56 Km*
Total		***354.17 Km***

As the traffic of FO and HPS is moving via PWL, hence the chargeable distance should be 334 Km.

CGS has been instructed to change the distance of HSR according to the new junction distance table i.e., 334 Km.

CGS BAAD has been instructed that the other disputed distance should also be corrected as per the new junction distance table and the correct distance should be charged.

Sd/-
(P.K. PANDEY)
Sr. Divl. Comml. Manager
Agra"

8. The respondent upon learning about the aforesaid letter dated 05.07.2005 changing the chargeable distance from 444 km to 334 km for the route from Refinery Baad to Hisar, made further inquiries with the concerned Railway office & came to learn that, although there had been no change in the physical track length for the said route and that the actual distance from Baad to Hissar via Palwal was in fact 333.18 km, yet the appellant was charging freight at a wrong chargeable distance of 444 km for the same route.

9. In view of the aforesaid, the respondent company sent a notice of claim dated 07.11.2005 under Section 78B of the erstwhile Railways Act, 1890 (for short, the "**Act, 1890**") to the appellant demanding refund of the difference of 110 km in the freight charges that had been erroneously charged on the basis of the wrong chargeable distance which was subsequently changed.

10. The respondent vide the aforesaid notice of claim had demanded refund for a total of 122 consignments for which freight had been levied on the basis of a chargeable distance of '444 km'. However, the appellant herein rejected all of the claims and declined to refund the 110 km difference in freight charges.

B. PROCEEDINGS BEFORE THE RAILWAY CLAIMS TRIBUNAL

11. Aggrieved by the same, the respondent in all filed 122 claim applications under Section(s) 13(1)(b) r.w. 16(1) of the Railway Claims Tribunal Act, 1987 (for short, the "**RCT Act**") for refund towards the difference of 110 km in freight charges, with the lead application being the OA/(III)/229/20006/Mathura before the Railway Claims Tribunal, Ghaziabad ("**RCT**").

12. During the pendency of the aforesaid claim applications, the respondent company held meetings with the appellant more particularly the General Manager, North Central Railway, Allahabad, who upon scrutinizing the matter allowed refund for inasmuch as

45 (sic) claims (approx..), which had been made within the statutory time period of 6-months under Section 78B of the Act, 1890 – now Section 106 of the Railways Act, 1989 (for short, the "**Act, 1989**").

13. The Railway Claims Tribunal, Ghaziabad vide its common final judgement and order dated 26.12.2013, dismissed the remaining 77 claim applications of the respondent as being time-barred. The said decision of the RCT is in two parts: -

(i) *First,* the RCT observed that though the chargeable distance was only 334 km still the freight charges had been levied for a distance of 444 km. This according to the Tribunal was a case of excess payment of freight, and thus the refund that was sought was for an 'overcharge'. The relevant observations read as under: -

> "18. [...] In this case, the goods were booked from 'A' to 'B', showing the chargeable distance as 444 Kms. and payment was given by the applicant company for the same distance, but later on, Railways reworked the chargeable distance as only 333.18 Kms. The consignment in question was carried through the same route. So, it is clear that the payment was to be made for 333.18 Kms., whereas it was made for 444 Kms. In this way, the applicant company had to pay for 444 Kms, instead of 333.18 Kms. Hence, the present case is for the refund of this excess payment of freight, which can only be termed as refund of overcharge and nothing else and so, the notice under Section 106(3) of the Railways Act, 1989 is necessary."
>
> (Emphasis supplied)

(ii) *Secondly,* since the case at hand was one for refund of an overcharge and the notice of claim had not been sent within the prescribed time-period of 6-months as required under Section 106(3) of the Act, 1989, the claim application was time-barred. The relevant observations read as under: -

> "24. [...] Furthermore, perusal of the record shows that the applicant company had served a notice on 07.11.2005 upon the Respondent Railway, but the

> date of booking of the consignment in question was 25.08.2002. Hence, it has been revealed that the said notice was time barred as per the provisions of the aforesaid Section 106(3) of the Railways Act, 1989, which had been well within the knowledge of the applicant company also as per the aforesaid letter dated 28.01.2009. In this context, Ld. Counsel for the Respondent has placed reliance on the case law, titled as Birla Cement Works v. G.M., Western Railways & Anr., 1995 SCC (2) 493. We have carefully perused the said case law and it supports the contention of the Respondent Railway.
>
> *xxx* *xxx* *xxx*
>
> 26. In view of the above, it has been held the applicant company has not served a valid and legal notice on the Respondent Railway within the statutory period under the provisions of Section 106(3) of the Railways Act, 1989. As such, the applicant company is not entitled for any compensation. [...]"
>
> (Emphasis supplied)

14. Thus, the RCT, whilst dismissing the respondent's claim applications held that, the respondent's claim was for a refund of an overcharge and since the notice of claim was not served in terms of Section 106(3) of the Act, 1989, the claim was time-barred.

C. IMPUGNED ORDER

15. Aggrieved with the aforesaid, the respondent went in appeal under Section 23 of the RCT Act before the High Court of judicature at Allahabad. In all 76 First Appeals from Order were filed, with the lead appeal being the FAO No. 843 of 2014 wherein the High Court vide its judgement & order dated 23.02.2018 allowed the aforesaid appeal, by placing reliance on the decision of this Court in ***Hindustan Petroleum Corp. Ltd. v. Union of India*** reported in ***(2018) 17 SCC 729***. The High Court took the view that since in the case at hand the freight had been paid as per the notified chargeable distance which was later found to be incorrect, it was a case of "illegal charge" and not that of "overcharge". The relevant observations read as under: -

"[...] In this case, the freight was paid by the appellant as per the notified distance and freight charges were paid accordingly. However, later on it was revealed that the distance was less and that is how the appellants had claimed the amount. This was one of the facts on which the Apex Court held in favour of the appellant (Hindustan Petroleum) and this was a question of illegal realisation of freight and not of over charging as submitted by the counsel for the respondent. [...]

The finding of fact by the Tribunal dismissing the claim of the claimant is bad in the eye of law as held by the Apex Court in ***Hindustan Petroleum (Supra)****, there was no need for issuance of notice. I am fortified in my view by both the decisions of the Apex Court in* ***Hindustan Petroleum (Supra)*** *and* ***West Coast Paper Mills*** ***(Supra)****. Hence, this is not a case of over charge at all as the freight was paid as per the rates notified for certain distance. No other view can be taken in this matter.*

The judgment in ***Hindustan Petroleum (Supra)*** *will enure for the benefit of the appellant in this case also.*

In view of the above, the appeal is allowed. The respondents to calculate the difference within 12 weeks from today and pay the appellant."

(Emphasis supplied)

16. Accordingly, the High Court vide the aforesaid judgement & order dated 23.02.2018 disposed of the lead appeal of FAO No. 843 of 2014, and thereafter by a batch of common orders disposed of the other 75 appeals in terms of its findings recorded in the final judgement and order passed in the lead appeal.

17. The aforesaid order dated 23.02.2018 as passed in FAO No. 843 of 2014 i.e., the lead appeal was challenged and carried upto this Court by way of the special leave petition being SLP (C) No. 3987 of 2021. This Court vide its order dated 04.03.2021 refused to interfere with the order dated 23.02.2018 passed in FAO No. 843 of 2014 as the claim amount was very low. Thus, the said Special Leave Petition came to be dismissed by this Court, however the question of law was kept open. The relevant portion reads as under: -

"O R D E R

We decline to interfere in this Special Leave Petition, as we find that the claimed amount is very low. The Special Leave Petition is dismissed accordingly, leaving the question of law open."

18. In view of the aforesaid, the appellant herein being aggrieved, has challenged the final orders passed by the High Court in the other 75 appeals involving a total sum of Rs. 1,55,03,652/- (approx.).

D. SUBMISSIONS ON BEHALF OF THE APPELLANT

19. Mrs. Rukhmini Bobde, the learned counsel appearing for the appellant in her written submissions has stated thus: -

*"**WRITTEN SUBMISSIONS ON BEHALF OF THE APPELLANT***

1. The present Appeal has been filed against the final judgement of the Hon'ble High Court of Allahabad a batch of First Appeals, whereby the Hon'ble High Court has allowed all the abovementioned appeals filed by the Respondent-IOCL while relying upon the judgment dated 23.02.2018 passed in First Appeal from Order No. 843 of 2014 (@pg. 79 of the present Appeal) which is illegal and perverse as the Hon'ble High Court has ignored to answer the questions of law. It is submitted that the order dated 23.02.2018 in First Appeal from Order No. 843 of 2014 was challenged by the Appellant-Union before this Hon'ble Court and the said petition bearing SLP(C) No. 3987 of 2021 was dismissed by this Hon'ble Court on 04.03.2021 on the ground that claim amount was very low. It is however submitted that the claim amount of all the batch matters herein comes to approximately Rs. 1,55,03,652/-.

2. The facts of the lead case herein are that the Respondent-IOCL had sent a legal notice dated 07.11.2005 under Section 106 of the Railway Act, 1989 to the Appellant-Union for refund of excess freight charges with respect to a consignment dated 25.08.2022, due to change in methodology, having

been applied prospectively from 01.01.2005 which resulted in variation in fares and freights when compared with the then existing fares and freight. It is submitted that the present Appeal is not a case of error in the existing notified freight change.

3. *The case of the Appellant-Union is that Section 106 of the Railway Act, 1989 does not apply to the present case at all since as per the circulars dated 07.04.2004 and 24.09.2004 (@page 141 and 144 of the Appeal respectively) issued by the Appellant-Union, the change in distance happened due to rationalization of the distances, aimed at ensuring uniformity in the method of deriving the distance of charging fates and freight for all customers across Indian Railways. The rationalization was also directed to be applied prospectively (from 01.01.2005 onwards) and the date of transport of consignment was on 25.08.2002 i.e. more than 2 years before application of the circular. It is further submitted that the Appellant-Union in its circular dated 07.04.2004 had specifically stated that the Appellant-Union would not be raising any issue of undercharges due to the variation nor was the Petitioner going to refund the charges collected in past cases, thus ensuring balance of convenience. Therefore, the question of overcharging does not arise at all as the Respondent-IOCL has been charged the freight charges as per the then prevailing existing fares and freights of the time and consequently, the Respondent-IOCL cannot raise any claim for compensation under Section 106 of the Railway Act, 1989.*

4. *Even assuming and without admitting to the case of the Respondent-IOCL, if the Respondent-IOCL is able to present a case for being overcharged and thus Section 106 of the Railways Act, 1989 to be applicable, the case of the Respondent-IOCL is barred from raising any claim as per the provisions of Section 106 of the Railways Act, 1989 on the ground of delay.*

5. It is also pertinent to take a close look at the facts of the following case laws:

***a. In Birla Cement Works v. G.M., Western Railways and Another'**, the Petitioner earlier used to transport through metre-gauge from the railway siding at Chanderia. However, after conversion into broad-gauge the railway siding was at Difthkola Chittor Broad-Gauge Rail Link, which lead to an increase of 34 km, which was added to the freight charges. The Petitioner had belatedly raised its claim under Section 78-B of the Railway Act, 1890 (pari materia to Section 106 of the Railways Act, 1989) and were thus barred by limitation.*

The principal contention raised by the Petitioner was that it had discovered the mistake when the railway authorities confirmed by their letter that they had committed a mistake in charging excess freight on wrong calculation of distance. The limitation started running from the date of discovery and therefore stands excluded and that Section 78-B of the Railway Act, 1890 had no application to the facts. However, this Hon'ble Court held that since admittedly the claims of the Petitioner were made under Section 78-B of the Railway Act, 1890 beyond a period of six months, the claim had become barred by limitation.

*It should be mentioned that the facts of **Birla Cement** would have only been applicable in the present Petition if there was a case of overcharging. However, as the Respondent had booked according to the prevailing freight charges at that time, the facts of **Birla Cement** does not arise at all.*

***b.** In **Union of India and Others v. West Coast Paper Mills Ltd and Another** **(III),** the Respondents were being charged a flat rate irrespective of the commodity carried and were*

not given the benefit of telescopic system of rates which was allowed by the Railways to others. This led to a scenario wherein the Respondents had to pay freight on certain goods at three times compared to what would have been payable in case the benefit of telescopic system of rates was allowed to them. This was construed to be an illegal and unreasonable charge. Reference is made to paragraph 20 of the Judgement:

> *"20. In the case at hand, the freight rates notified by the Railway Administration in exercise of its statutory power to do so, so long as they were not declared illegal and unreasonable by the Tribunal under Section 41 of the Act, were legal and anyone carrying the goods by rail was liable to pay the freight in accordance with those rates. The freight paid by the respondents was as per the rates notified. Thus the present one is not a case of overcharge at all. It is a case of illegal recovery of freight on account of being unreasonable and in violation of Section 28 of the Act, consequent upon such determination by the Tribunal and the decision of the Tribunal having been upheld by this Court. A case of "illegal charge" is distinguishable from the case of "overcharge" and does not attract the applicability of Section 78-B of the Railways Act."*

The facts are different from the present case as the Respondent-IOCL in the present case was only being charged the notified rates as per the prevailing rules at the time of booking. The Respondent-IOCL was aware of the freight charges at the time of booking.

c. *In* ***Hindustan Petroleum Corporation Limited v. Union of India'****, the facts were different from the present case as the Railways had migrated to a computerized railway freight charges system from a manual system, which lead to decrease in the distance notified between Asaudah Railway Station, District Rohtak, Haryana and Partapur, District Meerut, Uttar Pradesh.*

It is submitted that this Hon'ble Court had correctly held that there was no overcharge and therefore Section 106 of the Railways Act, 1989 is not applicable. However, it is most humbly and respectfully submitted that as on merits there is no discussion in law as to whether any refund is payable dehors Section 106 of the Railways Act, 1989.

In the present case, the Appellant-Union had stated as per the circulars dated 07.04.2004 and 24.09.2004 that it would not be raising any issue of undercharging nor would be providing any refund and that the charges are prospective.

6. Therefore, it is requested to allow the present Appeal and reverse the judgement of the Hon'ble High Court."

E. SUBMISSIONS ON BEHALF OF THE RESPONDENT

20. Mr. Shashwat Goel, the learned counsel appearing for the respondent in his written submissions has stated thus: -

"WRITTEN SUBMISSIONS ON BEHALF OF THE RESPONDENT - M/S INDIAN OIL CORPORATION LTD

A. RESPONDENT'S CASE/ ARGUMENTS IN BRIEF

1. It is respectfully submitted that the present matter pertains to 'illegal charge' / 'illegal realization' of the freight amount by the Petitioner (i.e. the Railways) from the Respondent oil company. Admittedly, the Petitioner herein has charged the freight amount from the Respondent for a distance of 444 km, instead of

333.18 km between 'Baad' (BAD) station to 'Hissar' (HSR) station. This is nothing but 'illegal realization' of freight from the Respondent and it cannot be termed as 'overcharge'. It is submitted that there is a difference between 'illegal realization'/ 'illegal charge' and 'overcharge' of freight amount. An 'overcharge' is something which is in excess of that what is due according to law and is paid by a party on account of mistake of fact. Whereas, 'illegal realization' / 'illegal charge' is excess realization of charges due to change in 'notified' distance or rates.

2. *It is submitted that the Petitioner has been calculating the freight amount for a distance of 444 km as it was 'notified' in the old distance table. Therefore, this cannot be termed as overcharge. Admittedly, upon realizing that the said distance was wrongly calculated, the appropriate authority of the Petitioner 'critically reviewed' the old distance tables and thereafter notified the corrected distance/ rate between BAD to HSR as 333.18 km on 05.07.2005 (i.e. Annexure P-3 @ Pg. 146 of SLP). This notification of corrected distance made the earlier realization of freight for 444 km under the erstwhile notified rates, illegal. Further, the cause of action for recovery of such illegal realization' of freight arose on 05.07.2005, when the corrected distance was notified by the Petitioner. Immediately, the Respondent filed its claim petitions on 07.11.2005 for recovery of excess amount for the extra distance which was illegally realized by the Petitioner.*

3. *The present case is squarely covered by a judgment of this Hon'ble Court passed in the matter of Hindustan Petroleum Corporation Limited v. Union of India, (2018) 17 SCC 729 (attached herewith). In the said case, the Petitioner therein (i.e. Hindustan Petroleum Corpn.) paid freight to the Railways (i.e. Petitioner herein) for the notified distance of 125 km, between the period 01.04.2008 to 30.09.2010. Subsequently, the said distance of 125 km was corrected by the*

Railway to 100 km on 27.02.2011. Immediately, HPCL filed its claim petitions on 30.03.2011, which were rejected as being time barred U/s 106(3) of the Railways Act, 1989 by the Railways; Railways Tribunal & the High Court. When the said matter reached this Hon'ble Court, the Railways (i.e. the Petitioner herein) placed reliance on the judgment of this Hon'ble Court in Birla Cement Works, (1995) 2 SCC 493 to buttress its argument that the claims filed by HPCL were barred U/s 106(3) of the Railways Act. It is submitted that the said judgment of Birla Cement Works was distinguished by this Hon'ble Court and it was held that excess realization of freight by the Railways from HPCL was 'illegal' and therefore HPCL's claims were allowed. It was further held that there was no requirement of giving any notice under Section 106 of the Railways Act as there was no overcharge by the Railways. The findings of this Hon'ble Court in HPCL's case are as follows:

> *"8. Birla Cement Works [Birla Cement Works v. Western Railways, (1995) 2 SCC 493] was a case where the petitioner therein (i.e. Birla Cement Works) came to know of the alleged excess amount of freight on wrong calculation of distance through a letter dated 12-10-1990 issued by the Railway authorities. This primary fact is conspicuously absent in the present case. In the present case what was paid was as per the fixed rate on the basis of notified distance which subsequently was corrected by another Notification upon introduction of the Terminal Mechanism System (TMS) at Asaudah Railway Station, District Rohtak, Haryana.*

9. On the other hand, in West Coast Paper Mills Ltd. [Union of India v. West Coast Paper Mills Ltd., (2004) 3 SCC 458] this Court in para 20 of the said Report took the view that as the freight paid was as per the rates notified

the case would not be one of overcharge at all. If that is the view taken by this Court on an interpretation of the pari materia provision in the erstwhile Act i.e. the Railway Act, 1890 (i.e. Section 78-B) we do not see why, in the facts of the present case which are largely identical, we should be taking any other view in the matter.

10. Consequently and in the light of the above, we allow the present appeals, set aside the order of the High Court as well as that of the Railway Claims Tribunal, Chandigarh and allow the claims of the appellant which will be paid forthwith on due and proper calculation."

B. SUBMISSIONS ON THE ISSUES FRAMED BY THIS HON'BLE COURT

Issue No.1 - What is the scope of Section 106 of the Railway Act, 1989, and if the said provision is applicable to the present case at hand?

(i) *It is submitted that Section 106 of the Railways Act, 1989 stipulates that a 'Notice has to be sent to the Railways within six months for : (a) 'claim for compensation' (under sub-section (1) & (2)); & (b) for 'refund of overcharge' (under sub-section (3)). It is clear from a bare reading of this section that a notice cannot be sent to the Railways for any other purpose/ for raising a claim under any other head which is not mentioned in the said section. The term(s) 'illegal charge' / 'illegal realization of freight' is not mentioned in S.106. Therefore, there is no legal requirement of sending a notice under S.106 for raising a claim on account of 'illegal charge' / 'illegal realization' of freight. It is pertinent to mention here that a claim of illegal charge' will not fall under the category of overcharge as undisputedly, there is a difference between the terms - 'overcharge' and 'illegal charge'.*

(ii) *In this regard, reliance is placed upon a judgment of this Hon'ble Court passed in the matter of Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr. (III),*

(2004) 3 SCC 458 (attached herewith). In the said case, an interpretation of the pari materia provision (like S.106) in the erstwhile Act i.e. the Railway Act, 1890 (i.e. Section 78-B) was done by this Hon'ble Court. While considering the distinction between an 'overcharge' and 'illegal charge' for the purposes of Section 78-B of the Railways Act, 1890 (i.e. same as Section 106 of the Railways Act, 1989), it was held by this Hon'ble Court that :

"20. ..... A case of "illegal charge" is distinguishable from the case of "overcharge" and does not attract the applicability of Section 78-B of the Railways Act."

It is pertinent to mention here that this Hon'ble Court has also analysed in detail the meaning of the term 'overcharge' in Para 19 of the above-mentioned judgment.

(iii) It is reiterated that the present matter pertains to 'illegal charge' / 'illegal realization' and not of overcharge' of the freight amount. Therefore, in view of the aforesaid submissions, it is submitted that the provision of Section 106 of the Railways Act, 1989 is not applicable upon the present case. In this regard, reliance is also placed upon paras 8-10 of the judgment of this Hon'ble Court passed in Hindustan Petroleum Corporation Limited's case (supra).

Issue No.2 - Whether the decision of this Court in Birla Cement Works vs. G.M. Western Railways (1995) is applicable to the case at hand?

(i) It is respectfully submitted that the decision of this Hon'ble Court in Birla Cement Works is not applicable upon the present case. Pertinently, the said decision has already been distinguished by this Hon'ble Court in the subsequent case of Hindustan Petroleum Corporation Limited (supra), which is identical to the present case.

(ii) The case of Birla Cement Works pertains to refund of 'overcharge' which was made by the Railways.

Whereas, the present case is that of recovery of 'illegally realized' freight from the Railways.

(iii) In the case of Birla Cement Works, the Railways had charged excess freight from the Petitioner therein (i.e. Birla Cement), than what was stipulated in distance table (i.e. overcharge). Whereas, in the present case, the Railways (i.e. the Petitioner) had realized the freight amount from the Respondent on the basis of the distance, i.e. 444 km, that was notified in the erstwhile distance table which subsequently got corrected & was notified by the Railways as 333.18 km (i.e. illegal realization of freight).

(iv) In the case of Birla Cement Works, the Petitioner therein (i.e. Birla Cement) came to know of the alleged excess amount of freight on account of wrong calculation of distance through the letter issued by the Railways. It was not the case where the distance was corrected and re-notified by the Railway authorities. In Birla Cement Works, there was a mistake by the Railways in calculating the freight amount by wrongly taking into account the distance that was stipulated in the distance table in that case. It is submitted that the said mistake/ error was of such a nature that even the Petitioner therein (i.e. Birla Cement) could have also found, had it been diligent. Instead, it kept paying the freight charges to the Railways and filed its claim only when the Railways informed it that the same was wrongly calculated. Whereas, in the present case, the Respondent has paid the freight charges as per the distance of 444km notified in the erstwhile distance table, which later on stood corrected; notifying the distance as 333.18 km. In the present case, Respondent was not sleeping over its rights. The Respondent filed its claims soon after the corrected distance was notified by the Petitioner herein and the Respondent came to know about the illegal charge. There is no sort of lack of vigilance or bona fides of the Respondent in the present case.

Issue No.3 - What was the reason for revising the freight charges? In other words, whether the revision of freight charges was done pursuant to a new methodology being adopted or due to an error in the existing notified freight charges?

(i) It is submitted that the freight charges/ the distance between BAD station to HSR station was revised / corrected by the Petitioner vide its notification dt.05.07.2005 (Annexure P-3 @Pg.146 of the SLP). The said revision/ correction was carried out after 'critically reviewing' the old distance tables with the revised distance tables of the North Central Railways (NCR). It is clearly stated in the said notification that the earlier notified distance of 444 km was used for calculating the freight as the revised distance table of NCR, despite being available, was not received earlier. This clearly shows lapses on part of the Petitioner. Despite being aware that the revised distance tables had come for the NCR, the same were not considered and the Petitioner continued calculating the freight as per the old distance, which is illegal.

(ii) It is further submitted that there is no change in the tracks or route from BAD to HSR. It appears that the wrong distance was notified in the old table, that is why there was a need to critically review the same before notifying the corrected distance.

4. It is pertinent to mention here that the Petitioner has made a subtle attempt to mislead this Hon'ble Court by introducing circulars dt.07.04.2004 & 24.09.2004 in its SLP. The Petitioner has used the said circulars to erroneously allege that the change of distance was to be applied prospectively from date mentioned in the said circulars. In this regard it is submitted that the said circulars do not pertain to change of distance. The said circulars stipulate the guidelines for rounding off the chargeable distance upto two decimal places. Even the file no. of the said circulars is completely

different from the notification issued on 05.07.2005, whereby the corrected rates were notified between BAD & HSR. The file no. of the circulars dt. 07.04.2004 & 24.09.2004 is TCR/2043/2000/2, whereas, for the notification dt.05.07.2005, it is DRM/CLAOG RAD/ Distance Table/2004/20. It is submitted that this fact in itself makes it clear that the subject matter of the circulars dt. 07.04.2004 & 24.09.2004 and notification dt.05.07.2005 are totally distinct and separate and the said circulars have no bearing upon the present case.

5. *It is also pertinent to mention here that there is an unexplained delay of 661 days in filing the SLP by the Petitioner.*

In the light of the aforementioned submissions, it is humbly prayed that the present SLP filed by the Petitioner be dismissed."

F. ANALYSIS

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

I. What is the scope of Section 106 sub-section (3) of the Railways Act, 1989? In other words, what constitutes an "overcharge" within the meaning of Section 106 sub-section (3) of the Railways Act, 1989? What is the difference between an "Overcharge" and an "Illegal Charge"?

II. Whether, the claim towards the refund of difference of 110 km in freight charges is covered by Section 106 sub-section (3) of the Railways Act, 1989? In other words, Whether the claim is for a refund of an 'overcharge'?

III. Whether, the difference of 110 km in freight is liable to be refunded? In other words, whether the notified chargeable distance of '444 km' was an Illegal Charge or not?

i. Relevant Statutory Scheme and Provisions

22. Earlier, in India the law pertaining to the railways was scattered into several enactments and executive orders, each regulating different aspects of the railways throughout the country. The reason behind

the multiple different legislations on the railways was the number of changes that were rapidly taking place due to the expansion and establishment of various railway corridors across the country.

23. The Indian Railways Act, 1890 was the first prominent legislation to be passed to consolidate the law and embody all important provisions relating to the railways. The Act, 1890 since its enactment remained the sole substantive legislation for regulating railways in India for nearly half a century.

24. Despite being amended several times, the Act, 1890 was not able to keep pace with the changes that were rapidly taking place in the Indian railway infrastructure and network. Over the course of time, several committees were constituted with a view to streamline the functioning of Indian Railways and meet the challenges of changing times. Various recommendations were made to the Government by these committees, with the most significant one being the complete reorganization of the railway into several operational zones.

25. Due to large and sweeping nature of the changes recommended, the Act, 1890 required an extensive revision, something which could not be done by amendment, and thus, a new exhaustive Act was required for the consolidation and nationalization of the Indian Railways.

26. Accordingly, the Railways Act 1989 came to be enacted with a view to amend and consolidate the legislation relating to the Railways and to replace the erstwhile Indian Railways Act, 1890. The statement of objects and reasons of the Act, 1989 reads as under: -

"STATEMENT OF OBJECTS AND REASONS

The Indian Railways, Act, 1890 was enacted at a time when the railways in India were mostly managed by private companies. The Government of India primarily played the role of a coordinating and regulating authority in various matters, such as inter-railway movement of traffic, fixation of rates, sharing of revenue, earnings of through traffic, apportionment of claims liability amongst the railways, providing reasonable facilities to passenger and goods traffic, etc. This role was accordingly reflected in the Act. But now, except for a very small portion of the railways, the entire railway system has become part of the Government of India. To give effect to the changes

in the railway system from time to time, the Act had also undergone changes number of times since its enactment in 1890. In addition, as some of the original provisions enacted in 1890 had continued without any change, a need for their replacement by new provisions more responsive to the needs of the present day was felt and some other provisions have become redundant. There has also been a demand, both within and outside Parliament, for the re-enactment of the Act so as to reflect the large number of changes that have occurred in the railways. It has, therefore, become necessary to consolidate and amend the law relating to railways by a new act.

2. The Bill, while giving effect to the changes that are necessary due to the change of circumstances, provides, among other things, for the following matters, namely: -

(i) The railways are being administered by zonal railways. This position had not been given effect to in the Act. The Bill provides for the constitution of railway zones, abolition of existing zones and appointment of General Managers as heads of these railways administrations.

(ii) Power has been given to the Central Government to fix the rates for the carriage of passengers and goods over the railways instead of the existing provisions to fix only the maximum and minimum rates for such carriage and leaving the fixation of specific rates to the railway administrations. In addition, the railway administrations are also being authorised to specify lump sum rates for the carriage of goods.

(iii) In accordance with certain judicial pronouncements, the Bill provides for statutory recognition of the railway receipt as a negotiable instrument.

(iv) The Bill specifically provides for limiting the monetary liability of railway administrations in respect of payment of compensation of loss, damage, etc. of goods. Provision has, however been made for full liability subject to the condition that the consignor while entrusting the goods to a railway administration

for carriage, should declare the value of the goods and pay a percentage charge on such value.

(v) The offences included in the Act have been rationalised and a few new offences have also been included in the Bill. Punishment for some of the offences had not been changed since the enactment of the Act. Penalties provided for the offences under the Act have been made more stringent which would include, among other things, a minimum punishment for many of the offences.

3. The Bill seeks to achieve the aforesaid objects."

(Emphasis supplied)

27. The Act, 1989 is a consolidating and amending legislation relating to the Railways which received assent and came into force on 03.06.1989 replacing the erstwhile Act, 1890 by virtue of the repealing provision contained in Section 200 of the Act, 1989. The Act, 1989 is divided into 16 Chapters and 200 Sections. Chapter XI of the Act, 1989 sets out the provisions (Section(s) 93 to 112) relating to the Responsibilities of Railway Administration as Carriers, and it deals with claims for refund and compensation in respect of the goods carried by railway.

28. In addition to the aforesaid statute, the Railway Claims Tribunal Act, 1987 was also enacted for the establishment of the Railway Claims Tribunal with a view to provide the procedural framework and forum for inquiry, determination and adjudication of claims against the railway administration. The statement of objects and reasons of the RCT Act reads as under: -

"STATEMENT OF OBJECTS AND REASONS

An Act to provide for the establishment of a Railway Claims Tribunal for inquiring into and determining claims against a railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried by railway or for the refund of fares or freight or for compensation for death or injury to passengers occurring as a result of railway accidents or untoward incidents] and for matters connected therewith or incidental thereto."

29. Section 13 of the RCT Act provides that the Railway Claims Tribunal shall *inter-alia* exercise powers and jurisdiction under Chapter VII of the erstwhile Act, 1890 (now Chapter XI of the Act, 1989) pertaining to inquiry and determination of claims for compensation for loss, destruction, damage etc. and claims for refund of freight etc. in respect of goods carried by railway. The said provision reads as under: -

> ***"13. Jurisdiction, powers and authority of Claims Tribunal. –***
>
> *(1) The Claims Tribunal shall exercise, on and from the appointed day, all such jurisdiction, powers and authority as were exercisable immediately before that day by any civil court or a Claims Commissioner appointed under the provisions of the Railways Act, —*
>
> *(a) relating to the responsibility of the railway administrations as carriers under Chapter VII of the Railways Act in respect of claims for —*
>
> *(i) compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to a railway administration for carriage by railway;*
>
> *(ii) compensation payable under section 82A of the Railways Act or the rules made thereunder; and*
>
> *(b) in respect of the claims for refund of fares or part thereof or for refund of any freight paid in respect of animals or goods entrusted to a railway administration to be carried by railway.*
>
> *(1A) The Claims Tribunal shall also exercise, on and from the date of commencement of the provisions of section 124A of the Railways Act, 1989 (24 of 1989), all such jurisdiction, powers and authority as were exercisable immediately before that date by any civil court in respect of claims for compensation now payable by the railway administration under section 124A of the said Act or the rules made thereunder.*

(1B) The Claims Tribunal shall also exercise, on and from the commencement of Part XIV of Chapter VI of the Finance Act, 2017 (7 of 2017), the jurisdiction, powers and authority conferred on the Tribunal under Chapter VII of the Railways Act,1989 (24 of 1989).

(2) The provisions of the Railways Act, 1989 (24 of 1989) and the rules made thereunder shall, so far as may be, be applicable to the inquiring into or determining, any claims by the Claims Tribunal under this Act."

(Emphasis supplied)

30. Section 15 of the RCT Act bars the jurisdiction of courts and other authorities from entertaining or exercising any power in respect of matters referred to in Section 13 of the RCT Act. The said provision reads as under: -

"15. Bar of jurisdiction. —

On and from the appointed day, no court or other authority shall have, or be entitled to, exercise any jurisdiction, powers or authority in relation to the matters referred to in sub-sections (1), (1A) and (1B) of section 13."

31. Section 16 of the RCT Act provides that an application may be made to the Railway Claims Tribunal for any claim of compensation or refund from the railway administration as provided under Section 13 of the said Act. The said provision reads as under: -

"16. Application to Claims Tribunal. —

(1) A person seeking any relief in respect of the matters referred to in sub-section (1) or sub-section (1A) of section 13 may make an application to the Claims Tribunal.

(2) Every application under sub-section (1) shall be in such form and be accompanied by such documents or other evidence and by such fee in respect of the filing of such application and by such other fees for the service or execution of processes as may be prescribed:

Provided that no such fee shall be payable in respect of an application under sub-clause (ii) of clause (a) of sub-

section (1) or, as the case may be, sub-section (1A)] of section 13."

32. Section 23 of the RCT provides for a statutory appeal on both a question of fact and law, to the High Court against any order passed by the Railway Claims Tribunal. The said provision reads as under: -

> ***"23. Appeals. —***
>
> *(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie from every order, not being an interlocutory order, of the Claims Tribunal, to the High Court having jurisdiction over the place where the Bench is located.*
>
> *(2) No appeal shall lie from an order passed by the Claims Tribunal with the consent of the parties. (3) Every appeal under this section shall be preferred within a period of ninety days from the date of the order appealed against."*

33. Section 17 sub-section (2) of the RCT Act *inter-alia* provides that no application for claim of compensation or refund from the railway administration shall be entertained by the tribunal, until the expiry of three-months from the date on which the notice of claim was made in accordance with Section 78B of the erstwhile Act, 1890 (now Section 106 of the Act, 1989). The said provision reads as under: -

> ***"17. Limitation. —***
>
> *(1) The Claims Tribunal shall not admit an application for any claim—*
>
> *(a) under sub-clause (i) of clause (a) of sub-section (1) of section 13 unless the application is made within three years from the date on which the goods in question were entrusted to the railway administration for carriage by railway;*
>
> *(b) under sub-clause (ii) of clause (a) of sub-section (1) 3[or, as the case may be, sub-section (1A)] of section 13 unless the application is made within one year of occurrence of the accident;*

(c) under clause (b) of sub-section (1) of section 13 unless the application is made within three years from the date on which the fare or freight is paid to the railway administration:

Provided that no application for any claim referred to in sub-clause (i) of clause (a) of sub-section (1) of section 13 shall be preferred to the Claims Tribunal until the expiration of three months next after the date on which the intimation of the claim has been preferred under section 78B of the Railways Act.

(2) *Notwithstanding anything contained in sub-section (1), an application may be entertained after the period specified in sub-section (1) if the applicant satisfies the Claims Tribunal that he had sufficient cause for not making the application within such period."*

ii. Scope of Section 106 of the Railways Act, 1989

34. In the present *lis,* we are concerned with Section 106 of the Act, 1989, which is *pari-materia* to Section 78B of the erstwhile Act, 1890. Section 106 deals with notice for claim of compensation and refund of overcharge. The said provision reads as under: -

*"**106. Notice of claim for compensation and refund of overcharge. –***

(1) A person shall not be entitled to claim compensation against a railway administration for the loss, destruction, damage, deterioration or non-delivery of goods carried by railway, unless a notice thereof is served by him or on his behalf,—

(a) to the railway administration to which the goods are entrusted for carriage; or

(b) to the railway administration on whose railway the destination station lies, or the loss, destruction, damage or deterioration occurs.

within a period of six-months from the date of entrustment of the goods.

(2) Any information demanded or enquiry made in writing from, or any complaint made in writing to, any of the

railway administrations mentioned in sub-section (1) by or on behalf of the person within the said period of six months regarding the non-delivery or delayed delivery of the goods with particulars sufficient to identify the goods shall, for the purpose of this section, be deemed to be a notice of claim for compensation.

(3) A person shall not be entitled to a refund of an overcharge in respect of goods carried by railway unless a notice therefor has been served by him or on his behalf to the railway administration to which the overcharge has been paid within six months from the date of such payment or the date of delivery of such goods at the destination station, whichever is later."

35. A close reading of the aforesaid provision would indicate that Section 106 of the Act, 1989 is in two-parts and deals with and encompasses two distinct types of claims that may be made or sought against the railway administration by way of a notice: -

(i) *First*¸ the claims towards the 'compensation' from the railway administration which has been provided under Section 106 sub-section (1). The compensation may be sought in respect of any loss or damage or destruction caused to the goods which were being carried by the railway.

(ii) *Secondly,* the claims towards the refund of any 'overcharge' that has been levied in respect of any goods which were being carried by the railways, and this has been provided under Section 106 sub-section (3).

36. Thus, Section 106 of Act, 1989 contains the statutory provisions that enables any person to make a claim from the railway administration, either for **(i)** compensation **OR** for **(ii)** refund of overcharge, in respect of any goods which were being carried by the railway by sending a notice of claim.

37. Apart from containing the enabling provision for making a claim, Section 106 further provides when such a claim may be made. Section 106 sub-section (1) provides that a claim for compensation may be made where there has been a loss or damage or destruction or deterioration or non-delivery of the goods that were being carried by the railway. Whereas, Section 106 sub-section (2) provides that a

claim for refund may be made where there has been an overcharge in respect of the goods carried and the said overcharge was paid to the railway administration.

38. Lastly, Section 106 also provides how a claim may be made and the mode & manner in which the notice must be made by stipulating a pre-condition in the form of a prescribed time-limit for making any claim thereunder: -

    (i) Section 106 sub-section (1) prescribes twin-conditions for a Notice of Claim for Compensation and provides that such notice must be made within a period of 6-months from the date of entrustment of goods **AND** the notice must be served to the Railway Administration to whom the goods were entrusted.

    (ii) Similarly, Section 106 sub-section (3) also stipulates twin-conditions for making a Notice of Claim for Refund of Overcharge and provides that such notice must be made within a period of 6-months from either the date of payment of such overcharge or the date of delivery of the goods in respect of which the overcharge was paid **AND** that the notice must be served to the railway administration to whom the overcharge was paid.

39. Thus, a statutory time-period of 6-months has been provided for making a notice of claim under Section 106 of the Act, 1989, and if the notice of claim is not made within the stipulated period, then the claim becomes time-barred.

40. The High Court of Gujarat in its decision in ***Shah Raichand Amulakh v. Union of India & Ors.*** reported in (1971) 12 GLR 93 had observed that the object behind the time-limit prescribed under Section 78B of the 1890 Act (now Section 106 of the Act, 1989) is to prevent stale or dishonest claims from being made, which if otherwise allowed would make it difficult to enquire into their merits due to lapse of time. The relevant observations read as under: -

> *"3. [...] the object of service of notice under this provision clearly is to enable the railway administration to make an inquiry and investigation as to whether the loss, destruction or deterioration was due to the consignor's laches or to the wilful neglect of the railway administration and its servants and further to prevent stale and possibly dishonest claims being made when, owing to delay, it may be practically*

impossible to trace the transaction or check the allegations made by the consignor or the consignee. It is, therefore, apparent that the provision requiring that notice of claim must be given within six months even where the claim is for refund of an overcharge in respect of animals or goods carried by railway is intended to prevent stale and perhaps dishonest claims being made when, by reason of lapse of time, it may not be possible to inquire and find out whether the claim made is well-founded or not. [...]"

(Emphasis supplied)

41. ***Shah Raichand Amulakh*** (supra), further held that the term "*overcharge in respect of carriage of goods*" used in Section 78B of the 1890 Act (now Section 106 of the Act, 1989) means and includes all such charges that are related to the railway's carrier business and those which are incidental to the carriage of the goods by railway irrespective of whether they are incurred prior to or subsequent to the railway transit, and thus would include loading and unloading of goods. The relevant observations read as under: -

"3. [...] To bring the claim for refund within the mischief of the section, the overcharge must be in respect of goods carried by railway. The words "carried by railway" qualify goods and if any overcharge is recovered in respect of goods which satisfy this description, it would be "overcharge" by the railway administration in respect of demurrage and wharfage charges, it is according to the plain and natural meaning of the words, an overcharge in respect of goods which are carried by railway. 1 do not think it is possible to limit the ambit and coverage of the section by reading the words "overcharge in respect of goods carried by railway" as indicating that the overcharge must be in respect of carriage of the goods. To read these words in such a manner would be to refuse to give effect to their plain natural meaning and to rewrite the section by substituting some such words as "overcharge in respect of carriage of goods." That would be clearly impermissible under any cannon of construction.

4. [...] Demurrage and wharfage charges are thus clearly terminal charges and though it is true that they

are charges in respect of the period subsequent to the completion of the transit, all the same, they are incidental to the business of the railway administration as a carrier. These charges are, therefore, not unrelated to the business of a carrier carried on by the railway administration. The railway administration makes these charges because there is delay in unloading the wagon or removing the goods from the platform. These are clearly charges in respect of the goods carried by railway as much as freight and other charges. If, therefore, there is any overcharge made by the railway administration in respect of demurrage and wharfage charges, a claim for its refund would clearly come within the scope and ambit of Section 77. It would be a claim for refund of an overcharge in respect of goods carried by railway within the meaning of that section."

(Emphasis supplied)

42. The Orissa High Court in ***Union of India & Ors. v. Steel Authority of India Ltd.*** reported in (1996) SCC OnLine Ori 60, while examining Section 78B of the Act, 1890, made the following pertinent observations which are reproduced as under: -

"12. [...] *What this section provides for is, apart from claim for compensation for the loss, a claim for refund of overcharge to a person in respect of animals or goods carried by the Railways. The condition precedent for making such a refund is that the person should have preferred a claim in writing for such overcharge or compensation within six months of the date of delivery of the animals or goods for being carried by the Railway*."

(Emphasis supplied)

43. Thus, it can be seen from above that when it comes to a Notice for Claim for Refund of Overcharge under Section 106(3) of the Act, 1989 the following conditions must be fulfilled: -

a. Claim must be for refund of an 'Overcharge',

b. Overcharge must have been paid to the Railway Administration in respect of the goods carried by the railway

c. Notice must be issued within 6-months from the date of payment or delivery of goods for which overcharge was paid, and

d. Notice must be served to the concerned railway administration to whom the overcharge was paid.

44. Thus, the rigours of Section 106 sub-section (3) i.e., the 6-month time-period for making a notice of claim, is only attracted, when the refund is for an overcharge. Whenever, an application is made under Section 16 of the RCT Act for refund, what needs to be seen is whether the same is for a refund of an overcharge or not? If the claim is for an overcharge, Section 106 sub-section (3) would be applicable.

a. What is meant by an "Overcharge"?

45. At this stage, it would be apposite to understand what is meant by the term "overcharge" used in Section 106 of the Act, 1989. The term "overcharge" has neither been defined in the Act, 1989 nor the erstwhile Act, 1890. The term "overcharge" is derived from the word 'charge' prefixed by the word 'over' and means "something more than the correct amount or more than a certain limit". The Black's Law Dictionary has defined "overcharge" as follows [See: Henry Campbell Black on '*Black's Law Dictionary*', 4th Edn., 1968 at Pg. 1610]: -

> "*an exaction, impost, or incumbrance beyond what is just and right or beyond one's authority or power.*"

46. The Law Lexicon has defined the term "overcharge" as "*a charge of a sum, more than is permitted by law*". [See, P. Ramanatha Aiyar on '*The Law Lexicon'*, 2nd Edn., 1997 at Pg. 1389].

47. The term "overcharge" as used in Section 78B of the Act, 1890 (now Section 106 of the Act, 1989) was first interpreted by the Gujarat High Court in ***Shah Raichand Amulakh*** (supra) to mean any charge in excess of what is prescribed or permitted or due by law. It was further held, that for a sum to be an overcharge, it must be of the same character as the charge itself or of the same genus of charge. Accordingly, the High Court held that the demurrage and wharfage charges that had been levied on a consignment in excess of what was permissible under the law was an overcharge under Section 78B. The relevant observations read as under: -

> *"2. […]* "*Overcharge" is not a term of Article It is an ordinary word of the English language which according*

to its plain natural sense means any charge in excess of that prescribed or permitted by law. To be an overcharge, a sum of money must partake of the same character as the charge itself or must be of the same genus of or class as a charge; it cannot be any other kind of money such as money recovered where nothing is due. Overcharge is simply a charge in excess of that which is due according to law."

(Emphasis supplied)

48. In yet another decision of the Gujarat High Court in ***Union of India v. Mansukhlal Jethalal*** reported in (1974) SCC OnLine Guj 12 the scope of Section 78B of the Act, 1890 (now Section 106 of the Act, 1989) came to be examined. In the said case, the Railway besides the freight was levying new charge in the form of shunting charges etc. It was contended that since, the freight encompassed the terminal charges for shunting, the additional charges being levied was arbitrary and illegal. The High Court held that since the additional charges were not being levied in excess of the prescribed charges, but were an altogether a different charge, the same could not be termed as an overcharge and thus, Section 78B of the Act, 1890 was not attracted and no notice of claim was required. The relevant observations read as under: -

"2. The trial Court has held that it has got jurisdiction to entertain this suit. It is also held that no claim notice as contemplated under Section 78-B of the Indian Railways Act, 1890 (which will be hereinafter referred to as "the Act"), was necessary as it was not a case of recovery of over charges. Non-giving of such a notice, therefore, was not fatal to the suit. The material averments made in the plaint are, that the plaintiff booked salt from Kuda Salt Siding Station, on the line of Western Railway Administration, owned and represented by the Union of India (original defendant), to salt merchants at Dhrangadhra and at various other stations. That the said salt consignments are booked in wagon loads from Kuda Salt Siding Station. In para 12 it is averred that since 1-6-1961 the Western Railway Administration, in addition to charging usual freight on goods, traffic from and to Kuda Salt Siding

Station, wrongly, illegally, arbitrarily and unreasonably levied an additional new charge by- way of siding charges or shunting charges or placement of wagon charges or removal of wagon charges. In paras 13 to 18, reference is made regarding the increases made, in those charges from time to time and such collections made. In para 26, it *is averred that the, defendant Western Railway Administration charged freight on the wagon load salt consignment of the plaintiff from Kuda Salt Siding Station to destination and the said freight includes terminal charges for shunting, placement and removal of wagons at the place where, the salt, to be loaded, is stacked and hence the defendant-Western Railway Administration, in addition to freight, is not entitled to levy new charge with effect from 1-6-61 either as siding charges or as shunting charges or as placement charges or as removal charges or under the pretext of any other charge and the levy of the said new charge from the plaintiff with effect from 1-6-61 is wrong all the arbitrary, unauthorised and unreasonable and excessive and the plaintiff is entitled to the refund of this new charge paid by him to the defendant-Western Railway Administration. This also amounts to double taxation. In para 28 of the plaint, plaintiff actually refers to the total amount recovered in that manner. In the relief clause 33 prayer made is to recover the suit amount which includes the amount it paid by way of new charges as said earlier, and the notice charges, and it is in terms stated that it is a claim for refund of new charger by way of siding charges, shunting charges, placement charges received by the defendant Western Railway Administration from the plaintiff.*

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27. In the instant case, it is not the opponent's case that charges in excess of the prescribed charges were recovered from him and he wants refund of such charges. What he claims is that the railway administration had collected such charges illegally, arbitrarily and unreasonably. These charges referred to as 'new charges' were levied by the railway administration from time to time and such collections made in the past are challenged on the aforesaid grounds.

In my opinion, they cannot be termed 'overcharges', so as to attract the provisions of Section 78-B [...]"

(Emphasis supplied)

49. In ***Birla Cement Works v. G.M. Westerm Railways & Anr.*** reported in (1995) 2 SCC 493, this Court held that the excess freight charged by mistake due to a wrong calculation of distance was an overcharge and thus, was covered by Section 78B of the 1890 Act (now Section 106 of the Act, 1989). The relevant observations read as under: -

"2. The principal contention raised by the petitioner is that it had discovered the mistake when the railway authorities confirmed by their letter dated 12-10-1990 that they had committed a mistake in charging excess freight on wrong calculation of distance. The limitation starts running from the date of discovery of mistake and, therefore, stands excluded, by operation of Section 17(1)(c) of the Limitation Act, 1963 (Act 21 of 1963) and that Section 78-B has no application to the facts in this case. In consequence, the High Court and the Tribunal have committed error of law in rejecting the claim for refund. We find no force in the contention.

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4. [...] Section 78-B of the Act provides that a person shall not be entitled to refund of overcharge or excess payment in respect of animals or goods carried by Railway unless his claim to the refund has been preferred in writing by him or on his behalf to the Railway Administration to which the animals or goods were delivered to be carried by Railway etc. within six months from the date of the delivery of the animals or goods for carriage by Railway. The proviso has no application to the facts of this case. An overcharge is also a charge which would fall within the meaning of Section 78-B of the Act. Since the claims were admittedly made under Section 78-B itself but beyond six months, by operation of that provision in the section itself, the claim becomes barred by limitation. Therefore, the Tribunal and the High Court have rightly concluded that the petitioner is not entitled to the refund of the amount claimed."

(Emphasis supplied)

50. In ***Steel Authority of India Ltd.*** (supra), the goods were booked to be carried through a longer-route and the freight was accordingly charged for the long route. However, the goods instead were dispatched through the shorter route. The Orissa High Court held that overcharge is anything charged in excess of what is actually to be charged for a particular thing. The High Court observed that as the goods had been booked for the longer route, the freight was also payable for the longer route. Since, no freight in excess of what was payable was realized, the High Court held that the claim for refund of the difference in freight charges was not one of overcharge. The relevant observations read as under: -

> *"4.* [...] *the coal imported at Visakhapatnam Port for carriage to Rourkela Steel Plant was required to be booked and carried by the longer route covering 1082 kilometres instead of by the shorter route of 667 kilometres. According to the plaintiff, in view of the rationalisation scheme and the general order, it had no choice but to pay freight for the longer route, as booking could not be for carriage over the shorter route.*
>
> *5. It is the further case of the plaintiff that in or about April, 1987, an officer came to know that some of the rakes booked were despatched to Rourkela by the shorter route (covering a distance of 667 kilometres) though weight charges were recovered for carriage by the longer rationalised route (covering a distance of 1082 kilometres). On further enquiry made at different junctions, it was gathered that during the period 15-4-1986 to 28-11-1986 and 5-1-1987 to 28-2-1987, a large quantity of imported coal booked from Visakhapatnam to Bondamunda had in fact been carried, not by the rationalised route but by the shorter route. On coming to know about the aforesaid fact, alleges the plaintiff, it lodged a demand for refund of the differential amount of Rs. 1,32,87,749/-, but the same was turned down. [...]*
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> *xxx xxx xxx*
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> *13-A. The word "overcharge" has not been defined in the Act. Therefore, the common parlance meaning has to be taken to explain its meaning. In common parlance, the*

simple meaning of "overcharge" is anything charged in excess of what is actually to be charged for a particular thing. Taking this to be the meaning of "overcharge", it has to be seen as to whether the claim of the respondent is or is not for refund of overcharge. Admittedly, the goods were booked for being carried over the rationalised route which covers a distance of 1082 kilometres. It is neither the respondent's case nor the appellants' case that what was charged towards freight was in excess of what was payable for the distance of 1082 kilometres. In other words, the respondent was not "overcharged" because no freight in excess of what was payable for 1082 kilometres was realised.

14. To appreciate the meaning of "overcharge", as illustration from the facts of the present case would, I feel, be appropriate. Say for example, 'A' had booked the coal for being carried by the shorter route covering a distance of 667 kilometres but freight was charged from him for the longer route covering a distance of 1082 kilometres. Here, since the coal was booked to be carried by the shorter route, freight ought to have been determined accordingly. So, any amount recovered from 'A' towards freight in excess of what was legally payable for the distance of 667 kilometres would be an 'overcharge' because what was recovered from him was over and above what was actually payable for the distance of 667 kilometres over which goods were booked. Alternatively, if 'A' had booked the goods over the longer route covering a distance of 1082 kilometres and freight was charged for such distance but carriage was over the shorter route covering distance of 667 kilometres, in such a situation, if 'A', on coming to know that though he had booked the goods to be carried over the longer route and had paid the freight accordingly yet as the goods were carried over the shorter route, claims for a refund, this claim would not be one for "overcharge" for the simple reason that he had booked the goods by a particular route and paid the freight that was payable for that distance. The claim of the respondent in the present case is of a like nature. Thus, under no stretch

of imagination can it be said that its claim is for refund of over-charge. The contention of the learned counsel for the appellants that the claim made by the respondent for refund of overcharge, therefore, must fail."

(Emphasis supplied)

51. In ***Rajasthan State Electricity Board v. Union of India*** reported in AIR 2001 Bom 310, the freight was initially being charged on an inflated distance rate as fixed by the Central Government. Later the freight was fixed to be charged on the actual distance, however, the railway continued charging freight as per the old inflated distance under a mistaken belief that the same was still applicable. The High Court *prima-facie* was of the view that the refund of the difference in freight was an overcharge and thus barred by Section 106(3) of the Act, 1989. However, the High Court relegated the petitioners therein to avail the statutory remedy and dismissed the writ petition leaving all issues open for determination by the Railway Claims Tribunal. The relevant observations read as under: -

"2. The facts of the case, which are not in dispute, are:— Petitioners, Rajasthan State Electricity Board, are an autonomous public body, wholly owned and controlled by the State Government of Rajasthan. For the generation of electricity at their Thermal Power Station at Kota (Rajasthan), coal is transported from collieries situate in areas covered by the Eastern and South Eastern Railways to a station called Gurla, situate in Kota Division of the Western Railway. Between the 4th March, 1992 and 31st December, 1992, the Petitioners booked 248 rakes for carrying coal to Gurla. The routes on which these wagons were transported include a section of Central Railway, viz., Katni-Singrauli. In exercise of powers under section 71 of the Railways Act, 1989, the Central Government had imposed, for movement of coal wagons over this section "inflated distance rate" of freight. Consequently, for the coal wagons moved by the petitioners, the freight included the inflated distance rate for this particular section of Katni-Singrauli. For the wagons booked by the petitioners, freight was paid at Gurla Station of Kota Division of the Western Railway. The Railway Authorities charged the petitioners

freight on the basis of inflated distance rate over Katni-Singrauli section upto 31st December, 1992, but from the 1st January, 1993, the Railways started charging freight on the basis of actual distance for Katni-Singrauli section, instead of inflated distance rate, and the petitioners paid the charges on that basis.

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9. It was submitted on behalf of the Petitioners that sub-section (3) of section 106 of the Railways Act, 1989 is not attracted in the facts of this case-inasmuch as there was no dispute regarding the over-charge. The instant case was a case of collection of inflated distance charge without authority of law. It was submitted that there is a distinction between over-charge and a wrong charge. It was, therefore, submitted that the Petitioners were not required to give notice as contemplated by sub-section (3) of section 106 of the Railways Act, 1989, since the claim was not a claim for refund of an overcharge in respect of goods carried by railway. On the other hand, the respondents contend that this clearly a case where the Petitioners claim refund of an over-charge in respect of goods carried by railway, and, therefore, admittedly, the Petitioners claim that they have been charged more than what they should have been charged because the circular under which inflated distance charge was levied had been withdrawn, and was not operative during the period in question. Despite this, the Petitioners were compelled to pay the inflated distance charge.

10. In our view, the submission urged on behalf of the respondents must prevail, and the same is clearly supported by the principles laid down by the Apex Court in Birla Cement Works v. G.M., Western Railways, (1995) 2 SCC 493 : AIR 1995 SC 1111. The petitioner therein manufacturer of Cement at Chittorgarh in Rajasthan, had transported cement to various destinations through railway carriages. Prior to 3rd May, 1989, the Petitioner got the cement transported through meter gauge from the railway siding at Chanderia. After conversion into broad gauge the railway siding was at Difthkola Chittor Broad Gauge Rail

Link. Consequently, 34 kilometres' distance was added to levy freight charges. Thereafter, between May-June, 1989 and March, 1990 the Petitioner had booked various consignments of cement and transported them to diverse destinations and paid the freight charges. Later, on January 21, 1991, the Petitioner had sent a notice to the Western Railway under section 78-B of the Indian Railway Act, 1890, claiming refund of different amounts. Since it was rejected, the Petitioner laid a claim under section 16 of the Act before the Railway Claims Tribunal, which dismissed the petition holding the same to be barred under section 78-B of the Indian Railway Act, 1890.

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16. [...] Having regard to the scheme of the Act, we are satisfied that it provides a complete mechanism for correcting any error, whether of fact or law, and that not only a remedy is provided by way of claim before a Tribunal, but also a further appeal to this Court, which is a Civil Court. It would, therefore, not be appropriate for this Court, in exercise of its writ jurisdiction, to give relief, which authority, in law, has been vested in the Claims Tribunal under section 13 of the Railway Claims Tribunal Act, 1987.

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18. We, therefore, find no merit in this Writ Petition, and the same is accordingly dismissed, and Rule discharged, but without prejudice to the right of the petitioners to seek remedy before the appropriate forum, if so advised."

(Emphasis supplied)

52. The aforesaid decision of the Bombay High Court came to be challenged before this Court. A 2-Judge Bench of this Court in ***Rajasthan State Electricity Board v. Union of India*** reported in (2008) 5 SCC 632, set-aside the High Court's order and held the appellant therein to be entitled to refund of the freight charges. The relevant observations read as under: -

"4. In the present case between 4-3-1992 and 31-12-1992 the appellant had booked rakes for carrying coal to Gurla.

A sum of Rs. 3,56,69,671 which had been collected from the appellant over a period of time by mistake. That the mistake has been committed is admitted by the respondent herein and it is has duly been noted by the High Court. However, the High Court, in our view, erroneously rejected the claim on the ground of availability of alternative remedy. On the aforesaid premises the High Court dismissed the wirt petition with the direction to the appellant to approach the Railway Claims Tribunal for alternative remedy provided under Section 13 of the Railway Claims Tribunal Act, 1987 (hereinafter "the Act").

5. We are clearly of the view that as the respondent Union of India has clearly admitted the liability, the High Court ought not to have relegated the appellant to its alternative remedy and should not have dismissed the writ petition on that count. There is no disputed question of fact in this case. As already noted, in the present case the respondent had admitted its liability and, therefore, the question raised before the High Court being an admitted fact the High Court ought not to have directed the appellant to resort to its alternative remedy under the Act.

6. In the aforesaid premises, we set aside the impugned order of the High Court. This appeal is allowed. No costs. The respondents are directed to pay the admitted liability along with interest at the rate of 6% p.a. with effect from 6-1-1993 till payment is made within three months from today."

(Emphasis supplied)

53. In ***Union of India & Ors. v. West Coast Paper Mills Ltd. & Anr.*** reported in (2004) 3 SCC 458, the prescribed rate that was being charged as per law by the railways had been declared to be illegal. This Court held that any claim of refund of such charge which is illegal cannot be said to be an overcharge and thus does not attract Section 78B of the Act, 1890. This Court explained that an overcharge is something in excess of what is due according to law, an overcharge must be of the same genus or class as a charge, and it does not include a sum that was collected but was not due. The relevant observations read as under: -

"*19. The term overcharge is not defined in the Act. In its dictionary meaning "overcharge" means "a charge of a sum, more than is permitted by law" (see: Aiyar, P. Ramanatha: The Law Lexicon, 1997 Edn., p. 1389). The term came up for the consideration of the High Court of Gujarat in Shah Raichand Amulakh v. Union of India. Chief Justice P.N. Bhagwati (as His Lordship then was) interpreted the term by holding that "overcharge" is not a term of art. It is an ordinary word of the English language which according to its plain natural sense means any charge in excess of that prescribed or permitted by law. To be an overcharge, a sum of money must partake of the same character as the charge itself or must be of the same genus or class as a charge; it cannot be any other kind of money such as money recovered where nothing is due. Overcharge is simply a charge in excess of that which is due according to law.*

20. In the case at hand, the freight rates notified by the Railway Administration in exercise of its statutory power to do so, so long as they were not declared illegal and unreasonable by the Tribunal under Section 41 of the Act, were legal and anyone carrying the goods by rail was liable to pay the freight in accordance with those rates. The freight paid by the respondents was as per the rates notified. Thus the present one is not a case of overcharge at all. It is a case of illegal recovery of freight on account of being unreasonable and in violation of Section 28 of the Act, consequent upon such determination by the Tribunal and the decision of the Tribunal having been upheld by this Court. A case of "illegal charge" is distinguishable from the case of "overcharge" and does not attract the applicability of Section 78-B of the Railways Act."

(Emphasis supplied)

54. In ***J.K. Lakshmi Cement Ltd. v. General Manager & Anr.*** reported in (2014) SCC OnLine Raj 2340, the Rajasthan High Court held that the freight charged mistakenly on a wrong calculation of distance between the two stations was an overcharge and not an illegal charge. The High Court observed that an overcharge is an excess sum having

the same character as the basic charge which otherwise is payable, and thus, any other kind of levy unrelated to the basic charge would not be an overcharge. Since the excess freight that was charged due to mistake on part of the railway booking staff related to 'freight charges' which otherwise was payable, the same was held to be an overcharge. The relevant observations read as under: -

> *"[...] The facts of the case are that the appellant-Company dispatched 5 racks of 4100 M.T. levy cement from its Banas siding to be carried and delivered at Thiyat Hamira Railway Station. The distance between two stations is stated to be only 511 Kms, and the Railways alleged to had charged freight for distance of 946 Kms. Calculating the distance via Rewari. It was stated that because of this mistake in the calculation of the distance from the appellant-Company's Banas siding to Thiyat Hamira Railway Station, railway freight was charged in excess @ Rs. 21.44 per qtl. Instead of the applicable rate of Rs. 13.11 per qtl. and paid under mistake. Consequently Rs. 3,69,775/- was overpaid. This excess realisation was according to the appellant-Company on the face of it arbitrary, unauthorized and illegal and thus refundable by the Railways with interest.*
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> *xxx xxx xxx*
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> *[...] Further, a bare look at the judgement of the Hon'ble Gujarat High Court in Mansukhlal Jethalal (Supra) as also the judgement of the Hon'ble Supreme Court in West Coast Paper Mills Ltd. (Supra) makes it clear that an overcharge of freight would mean "a charge of sum more than permitted in law". Overcharge of a sum of money for a purpose partakes the same character as the underlying charge and belongs to the same genus or class the basic charge. Any other kind of levy of money unrelated to the basic charge would, as held by the Gujarat High Court and the Hon'ble Supreme Court, indeed would not take the character of an overcharge. In the Gujarat High Court case the overcharge related to a charge relating to the use of sidings of the Railways and it did not entail an excess charge on the freight as in the instant case. So to in the case before the Hon'ble Supreme Court. In my considered*

opinion, from the very enunciation of law by the Hon'ble Gujarat High Court in Mansukhlal Jethalal (Supra) and the Hon'ble Supreme Court in West Coast Paper Mills Ltd. (Supra) it is evident that the charge levied over the appellant-Company was qua the freight and movement of goods and nothing more excessive though it is alleged to be. It did not have a character different from the basic change. In fact the appellant-Company itself averred of realisation of an excess freight and specifically in para 6 of the plaint had itself averred that due to mistake in calculating of distance excess freight was realised at the rate of Rs.21.44 per qtl. instead of Rs.13.11 per qtl.. Further in the notice under Section 78B of the Act of 1890 R/w Section 80 CPC issued by the appellant-Company prior to the filing of the suit for recovery of money before the District Judge, Sirohi, it was submitted that due to mistake on the part of the booking staff of the Railways incorrect distance was computed from Banas siding to Thiyat Hamira railway station against the correct chargeable distance of 511 KMs and the distance was worked out to 946 KMs. which was the chargeable via Rewari. In para 4 of the suit it was stated that on the part of the Railway enhanced rate (emphasis mine) @ Rs.21.44 per qtl. was charged. In my considered opinion as also held by the learned Tribunal, the case set up by the appellant-Company makes it evidently clear that the refund was sought of the excess freight realized allegedly illegally and unauthorizedly. The excess freight without doubt related to freight otherwise payable for the movement / transportation of goods by the Railways and therefore was obviously an overcharge. Consequently, Section 78B of the Act of 1890 attracted to the claim petition filed. Admittedly notice with regard to the freight paid between 07.12.1985 and 11.02.1986 was issued on 17.02.1988 quite clearly beyond the period of six months as statutorily mandated. The Tribunal was right in so holding."

(Emphasis supplied)

55. Furthermore, the contention that retainment of excess freight by the railway due to the claim applications being time-barred would amount

to unjust enrichment of the Railway came to be negatived by the Rajasthan High Court in ***J.K. Lakshmi Cement*** (supra). The High Court observed that equity cannot defeat the statutory provision and thus, if any excess freight realized by the railway is held to be an unjust enrichment it would result in the statutory time-period under Section 78B of the Act, 1989 being rendered otiose and redundant. The relevant observations read as under: -

> *"Mr. S.R. Joshi has finally submitted that in the event this Court were to uphold the impugned order dated 15.05.1990, passed by the Tribunal, it would entail unjust enrichment of the Railway as admittedly the distance over which its goods were transported was 511 KMs and not 946 KMs (between Banas siding and Thiyat Hamira railway station) and further that rate charged was Rs.21.44 per qtl. instead of Rs.13.11 per qtl. Limitation under Section 78B of the Act of 1989 has been statutorily provided for. A misplaced argument of unjust enrichment cannot be misapplied, removed from the context it has been developed by courts of equity and turned on its head and be agitated to circumvent the provisions of statutory limitation and for the matter, the Limitation Act. Were it to be so, the provisions of the law limitation under the Act of 1963 or otherwise would be rendered otiose and redundant. Equity to defeat pubic policy encapsulated in the statutes of limitation cannot be visualised*."
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> (Emphasis supplied)

56. In another decision of this Court in ***Hindustan Petroleum Corporation Ltd. v. Union of India***, reported in (2018) 17 SCC 729, the freight had been paid as per the notified chargeable distance. Subsequently when a computerized system for generating railway receipts was introduced, the chargeable distance was reduced and re-notified. This Court relying upon ***West Coast Paper Mills*** (supra) held that since the freight had been paid as per the notified rate which was later found to be incorrect, the case would be of an illegal charge and not an overcharge. The relevant observations reads as under: -

> "*2. The core facts that will be required to be noticed are as follows: the appellant, a public sector organisation, had dispatched various petroleum products through Railway*

Tank Wagons of the respondent from Asaudah Railway Station, District Rohtak, Haryana to Partapur, District Meerut, Uttar Pradesh and to some other destinations located in different parts of the country. The freight was paid by the appellant as per the notified distance i.e., 125 Km, so notified by the Chief Goods Supervisor, the competent authority at the relevant point of time. The dispatch of the petroleum products continued for a long period between the year 2008 and 2011 and the freight charges were paid according to the distance between the destinations as notified by the competent authority of the respondent. When the manual system of generating railway receipts was discontinued and the respondent had installed computerised railway freight charges system called Terminal mechanism System (TMS) at Asaudha Railway Station, the distance between Asaudah Railway Station, District Rohtak, Haryana and Partapur District Meerut (Uttar Pradesh was notified as 100 km instead of 125 km. This was on 27-2-2011.

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8. Birla Cement Works was a case where the petitioner therein (i.e., Birla Cement Works) came to know of the alleged excess amount of freight on wrong calculation of distance through a letter dated 12-10-1990 issued by the Railway Authorities. This primary fact is conspicuously absent in the present case. In the present case what was paid was as per the fixed rate on the basis of notified distance which subsequently was corrected by another Notification upon introduction of the Terminal Mechanism System (TMS) at Asaudah Railway Station, District Rohtak, Haryana.

9. On the other hand, in West Coast Paper Mills Ltd., this Court in para 20 of the said Report took the view as the freight paid was as per the rates notified the case would not be one of overcharge at all/ If that is the view taken by this Court on an interpretation of the pari materia provision in erstwhile Act i.e., the Railway Act, 1890 (i.e., Section 78-B) we do not see why, in the facts of the present case

which are largely identical, we should be taking any other view in the matter."

(Emphasis supplied)

57. In ***Union of India v. Mineral Enterprises*** reported in (2019) SCC OnLine Kar 1971, the Karnataka High Court was dealing with a matter where the actual distance between the two stations was less than what was charged by the railways. The Karnataka High Court in the said case held that the excess freight collected by the railways on a chargeable distance more than the prescribed distance was an overcharge within the meaning of Section 106 of the Act, 1989. The relevant observations read as under: -

"3. [...] The facts briefly stated are that the respondent M/s Mineral Enterprises Pvt. Ltd., was transporting the minerals through the appellant railways from Ammasandra to Panamburu as per the rates fixed for transportation of the consignment. The distance from Ammasandra Railway Station to Panamburu was calculated as 365 Kms. and freight was charged as per the rate fixed by the railways. The freight charges were dependent on the distance between the place of loading and unloading of consignment. Later, on enquiry it was learnt that the actual distance between Ammasandra Railway Station to Panamburu post is only 359 Kms. and not 365 Kms. as charged by the appellant railways. Therefore, the respondent Company made correspondence with the railways through letters dated 3.10.2006, 5.5.2007 and 20.07.2007 requesting to take corrective action. [...]

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14. It is and admitted fact that the respondent Company had transported the irone ore fines / minerals through the railways for the period from 25.05.2006 to 04.01.2007 at the rates fixed by the railway. The main controversy was in respect of refund of excess freight charges said to have been collected by the railways than the prescribed rates fixed on the basis of distance. In that connection the respondent Company had sought for clarification about the actual distance for which the appellant railways gave the reply. As could be seen from the records the actual

distance between Ammasandra to Panamburu is 358 kms., whereas the railways had calculated the distance as 365 kms., but they have collected the rates applicable for the distance above 360 Kms. It is an admitted fact that after clarification regarding actual distance, the railways had settled some of the claims of the respondent Company regarding excess charges which were within the limitation period. Some of the claims to an extent of Rs.8,85,000/- were rejected on the reason that they were barred by limitation. Under these circumstances, it is necessary to ascertain whether the repudiation of claims regarding Rs.8,85,000/- was justified.

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23. The learned counsel for the appellant railways has relied on a decision in the case of Birla Cement Works vs. G M, Western Railways and another reported in (1995) 2 SCC 493, wherein the Hon'ble Supreme Court has held under:

"Railways - Railways Act, 1890 - S.78.B - Railway Claims Tribunal Act, 1987 - S 16 - Limitation - Computation of - Claim to refund of excess freight notified under S.78- B beyond the statutory time-limit on discovering the mistake from railway authorities' letter - Rightly held by the Tribunal and the High Court to be time- barred - Further held, provision in.

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4. Section 78-B of the Act provides that a person shall not be entitled to refund of overcharge or excess payment in respect of animal or goods carried by Railway unless his claim to the refund has been preferred in writing by him or on his behalf to the Railway Administration to which the animals or goods were delivered to be carried by Railway etc. within six months from the date of the delivery of the animals or goods for carriage by railway the proviso has no application to the fact of this case. An overcharge is also a charge which would fall within the meaning of Section 78-B of the Act. Since the claims were admittedly made under Section 78-B itself

but beyond six months, by operation of that provision in the section itself, the claim becomes barred by limitation. Therefore, the Tribunal and the High Court have rightly concluded that the petitioner is not entitled to the refund of the amount claimed. "

24. In the aforesaid case the principal contention raised by the petitioner was that the claimant had discovered the mistake when the railway authorities confirmed by their letter that they had committed a mistake in charging excess freight on wrong calculation of distance. As such, the limitation starts running from the date of discovery of mistake and therefore stands excluded by the operation of Section 17(i)(c) of Limitation Act and that Section 78(B) has no application to the facts in this case. But it was held that Section 17(i)(c) of Limitation Act, 1963, would apply only to a suit instituted or an application made in that behalf in the civil suit but whereas the Tribunal is the creature of statute, therefore it is not a civil court nor the limitation act has application, even though it may be held that the petitioner discovered the mistake committed in paying the over charges, the limitation is not saved by operation of Section 17(i) (c) of the Limitation Act.

25. The facts of the case on hand are exactly similar to that of the facts involved in the aforesaid decision. The Hon'ble Supreme Court in the said situation has held that the claims made under Section 78(B) are barred by limitation. As such, they cannot be entertained. The aforesaid decision was not at all referred or considered in the decisions relied on by the counsel for the claimant - respondent. The doctrine of binding precedent is of utmost importance in the administration of judicial system. It brings certainty and consistency in judicial decisions. The judicial consistency promotes confidence in the system. The ratio laid down in the aforesaid decision ((1995) 2 SCC 493) is aptly applicable to the facts of this case. As such, the claims which are barred by limitation in view of Section 106 of the Railways Act (78(B) of the Old Act) cannot be entertained."

(Emphasis supplied)

58. In yet another decision of the Orissa High Court in ***M/s National Aluminium Co. Ltd. v. Union of India*** FAO No. 306 of 2022, the goods were booked to be carried by a longer-route and freight was accordingly charged for the long route. However, the goods instead were dispatched by the shorter route. The High Court placing reliance on ***Steel Authority of India Ltd.*** (supra) which involved similar facts, held that since what was charged was prescribed by law, the refund was not for an overcharge, and Section 106(3) of the Act, 1989 would not be attracted. The relevant observations read as under: -

> *"8. Mrs. Rath contends that the Tribunal has misconceived the claim for refund of additional freight charges received by the railways with the term 'overcharges' and in this regard she relies on a decision of this Court reported in AIR 1997 Orissa 77 (Union of India and others vrs. Steel Authority of India Limited).*
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> *9. The above referred case is involving similar issues where SAIL filed a suit before the Sub-Judge, Rourkela praying for refund of excessive charges received by the railways under the rationalization scheme relating to the old Act, i.e. Indian Railways Act, 1890. Section 78-B of the old Act is same to the present Section 106 in the Railways Act, 1989. This Court while deciding with the issue that, whether the claim for refund of overcharge is maintainable for want of notice under Section 78-B, have held that the claim is not one for 'overcharge' for the simple reason that the goods were booked by a particular route and paid the freight that was payable for that distance*. [...]
>
> *10. In view of the above, no second opinion can be there to treat the claim of refund of additional freight charges beyond 'overcharges' and no prior notice under Section 106 of the Railways Act is required to be sent. Undisputedly, no such notice has been sent by NALCO as per the submissions made by Mrs. Rath in course of hearing and the admitted fact remains that several intimations seeking refund of such amount from the railways have been sent by NALCO in those letters annexed to the claim application, as seen from the copy of the claim application produced in course of hearing. So, no further discussions on the facts*

of the present case is needed here on the requirement of notice under Section 106."

(Emphasis supplied)

59. What can be discerned from the above is that this Court as-well as various High Courts have consistently held that the rigours of Section 106(3) of the Act, 1989 will only be applicable where the claim is for a refund of an 'overcharge'. Where the claim for refund is for anything but an 'overcharge', Section 106(3) of the Act, 1989 will not apply, and no notice of claim is required.

b. Concept of an 'Overcharge' and an 'Illegal Charge'

60. As to what would be an 'overcharge', this Court and the various High Courts have consistently held that an 'overcharge' is any sum charged in excess or more than what was payable as per law. Whereas an illegal charge is any sum which is impermissible in law.

61. Since the underlying difference in the dictionary meaning of both the expressions; "overcharge" and "illegal charge" is that of the prefix "over" and "illegal", used in conjunction with the word "charge", it would be apposite to first understand the meaning of the term "charge".

(i) "**CHARGE**"

P Ramanatha Aiyar's '*The Law Lexicon*' (Vol I, 6th Edn., 2019 at pg. 886) defines "Charge" as: -

> *"it is the price* ***required or demanded*** *for services rendered."*
>
> (Emphasis supplied)

L.P. Singh and P.K. Majumdar's '*Judicial Dictionary*' (2nd Edn., 2005 at pg. 460) defines "charge" as under: -

> "***any sum fixed by law*** *for services of public officers or for use of a privilege under control of government*"
>
> (Emphasis supplied)

Henry Campbell Black in '*Black's Law Dictionary*' (4th Edn., 1968 at pg. 295) defines "Chargeable" as: -

> "*something* ***capable*** *or liable to be charged*".
>
> (Emphasis supplied)

(ii) "**OVER**"

The term "over" as a prefix has been defined by L.P. Singh and P.K. Majumdar's '*Judicial Dictionary*' (2nd Edn., 2005 at pg. 996) as under: -

> "*excessive or beyond a* ***an agreed or desirable limit***".
>
> (Emphasis supplied)

P Ramanatha Aiyar's '*The Law Lexicon*' (Vol III, 6th Edn., 2019 at pg. 3990) states that "Over" as a prefix denotes something: -

> "s*omething excessive or excessively"*
>
> (Emphasis supplied)

Henry Campbell Black on '*Black's Law Dictionary*' (4th Edn., 1968 at pg. 1256) defines it as something: -

> "more than or in excess of"
>
> (Emphasis supplied)

(iii) "**ILLEGAL**"

Whereas the term "illegal" is defined by Henry Campbell Black in '*Black's Law Dictionary*' (4th Edn., 1968 at pg. 882) as something: -

> "***not authorized by law or contrary to law or unlawful***" or "*something which* ***lacks authority of or support from law***"
>
> (Emphasis supplied)

P Ramanatha Aiyar's '*The Law Lexicon*' (Vol II, 6th Edn., 2019 at pg. 2605) defines it as: -

> "s*omething that is* ***against the law***" or "*something which is* ***contrary to or forbidden by law***"
>
> (Emphasis supplied)

L.P. Singh and P.K. Majumdar's '*Judicial Dictionary*' (2nd Edn., 2005 at pg. 749) defines it as: -

> "*something which is* ***prohibited by law***"
>
> (Emphasis supplied)

62. Thus, in its plain meaning, the use of words "*capable*" and "i*mposed by law*" shows that the term "charge" means something which in the eyes of law is permissible and payable, and therefore the term "overcharge" which is a conjunction of "over" and "charge" would mean something more than or beyond what is payable in the eyes of law. Same way, an "illegal charge" would mean a charge which is contrary to the law or lacks the authority of law or *simplicter* is unlawful.

63. L.P. Singh and P.K. Majumdar's '*Judicial Dictionary*' (2nd Edn., 2005 at pg. 888) defines 'over-charge' in the context of Section 106 of the Act, 1989 as follows: –

> "*The expressions "charge" and "over charge" are properly employed only with reference to* ***actual quantum of liability****, and they cannot be applied to relate to rates of charges. There will be an over charge if Railway applies* ***higher rate than appropriate*** *and there can also be an over charge where even at a rate* ***which itself is not open to objection****, there is yet an excessive liability foisted by the railway. It is not possible to restrict the expression over charge only to former kind of cases where the railway* ***applies a higher rate*** *than that* ***which the law allows****.*"
>
> (Emphasis supplied)

64. Thus, in the context of Section 106 sub-section (3) of the Act, 1989, an "overcharge" would be any sum which has been paid in excess or over and above or more than what was payable by law / required by law. It pertains to only the actual quantum of liability. Furthermore, merely, because an incorrect or rather higher slab-rate has been applied, will not make it an illegal charge, as long as the charge was not itself open to objection i.e., not incorrect.

65. It is pertinent to note, that the term "payable by law" should not be conflated with the term "permissible by law", this is because although something maybe paid in excess than what was required by law, yet the same would by no means automatically become an "overcharge". This is further fortified from the fact that, "charge" as above-stated is defined to mean something which is either required **OR** demanded to be paid.

66. For illustration; say 'A' booked certain goods to be carried by railway, and the railway charged 'A' loading charges for the goods, even-though, there was no loading of goods involved. Here, although the law allows railway to levy loading charges i.e., the loading charges are permissible by law, and even-though the sum paid by 'A' towards loading charges can be said to be in excess of what was required (i.e., in excess of Nil loading charges as no loading was involved), this would not be an "overcharge" but would be an "illegal charge".

67. We say so because, the very basic charge or in other words the genus or basis of the charge i.e., the loading charge in itself was not required to be paid. Thus, when the very basis or genus of the charge was not payable as per law then any sum which is collected in respect of the same will not be an overcharge but would be an illegal charge. Since the very class of the charge was not required to be payable by law.

68. Conversely, say for example, 'A' again booked certain goods to be carried by railway, and the railway charged 'A' loading charges for the goods, and this time loading of goods was involved in the consignment, but the railway mistakenly charged 'A' Rs. 100/- more towards the loading charges than what was required by the rate applicable. Here the basis or genus of this excess charge of Rs. 100/- i.e., the loading charges itself was payable by law. Any sum charged in excess of the loading charges as required by law would be an 'overcharge'.

69. For another illustration, say 'A' booked the carriage of iron ore by the railway, however, instead of being charged for the rate applicable for iron, the railway by mistake charged 'A' for steel. Now the rate which is applicable for steel is permissible by law, but here since iron was being carried, the rate applicable for steel though permissible by law is not payable by law, as the consignment was not for steel. Thus, any sum paid although is in excess of what was required, and the charge towards which it was paid was also permissible by law, the sum cannot be said to have been paid in excess of what was payable by law.

70. Thus, for an excess sum to be an "overcharge" the sum paid must partake the same character as the basic charge, or must belong to the same genus of charge which was payable or required to be paid by law. Whereas, for an illegal charge, the sum must not have been payable by law.

71. Another very fine but pertinent distinction between an 'overcharge' and an 'illegal charge' is that, an 'overcharge' is generally *inter-se* the specific parties involved and in its peculiar facts. Whereas an 'illegal charge' is illegal for everyone irrespective of the parties or facts.

72. For illustration, say 'A' booked 10 boxes to be carried by railway, however, he was erroneously charged for 12 boxes. Here the excess amount that has been charged for 12 boxes instead of 10 is an overcharge qua these specific facts for 'A' alone. If 'B' books 12 boxes to be carried by railway, the said charge which was an overcharge qua 'A' will not be an overcharge qua 'B'. For that matter even if 'A' in a different consignment books 12 boxes and is charged for 12 boxes, it will not constitute an overcharge. This will not be an illegal charge because, it is not illegal for Railway to levy charge for 12 boxes *ipso-facto* (whenever a consignment is booked for 12 boxes, the Railway can levy that charge), but rather it is erroneous to levy charge for 12 boxes when in fact only 10 boxes were carried. Here whether the sum charged is an overcharge or not is largely dependent upon the peculiar facts, more particularly the number of boxes being booked for carriage. Thus, it can be safely said, that in case of an overcharge, the issue lies in the "charging" whereas in case of an illegal charge, the issue lies in the "charge" itself.

73. Conversely for example, say for a particular route, the chargeable distance as per the law was 100 km, but the railways incorrectly showed the chargeable distance as 120 km in its local rate list. Now 'A' books a consignment of iron ore and 'B' books a consignment of steel, over the same 120 km distance. Irrespective of the type of goods or the quantity of goods being carried or by whom the consignment has been booked, any amount charged in respect of this incorrect chargeable distance of 120 km is an illegal charge. Here the sum charged as an illegal charge is not dependent upon either the peculiar facts or the parties thereof, the charge is illegal solely because the very charge itself i.e., the chargeable distance of 120 km was in contravention of the law.

74. An Overcharge is effectively concerned with the error in the quantum of what was or should be payable, whereas an illegal charge is solely concerned with whether a particular thing was payable by the law / in conformity with the law or not.

75. Another aspect that distinguishes the two is that, an 'overcharge' often stems due to a clerical mistake or mis-interpretation or misapplication of law in a particular case, whereas an 'illegal charge' stems from a patent error or inherent error in the charge i.e., in contravention of the law and principles of fair play. In other words, in overcharge, the mistake is in the levying of the charge, whereas in illegal charge the error lies in the very substance of the charge itself which is in contravention of the law, even though the charge per-se is permissible by law.

76. In ***West Coast Paper Mills*** (supra), the concerned railway zone therein was charging freight at a flat rate without giving any telescopic benefits to the consignees, which the other railway zones were providing. This denial of telescopic benefit was found to be unreasonable, arbitrary and against fair-play. Thus, the same was held to be illegal by this Court even-though the said charge was payable as per the notified rate.

77. To illustrate, say the chargeable distance as measured by the concerned Zonal Railway Authority for a particular route is 100 km. However, the Station Master whilst making the local distance table records the said distance as 110 km due to a clerical mistake. Thus, because of an error in indicating the actual chargeable distance in the table, the freight for the said route becomes chargeable for 110 km. Although the mistake here is a clerical one, yet because of such mistake, an inherent error has crept into the local distance table. Thus, the notified rate would be an illegal charge and not an overcharge. This is because the error here lies in the very substance or genesis of the charge that was notified i.e., the charge which is sanctioned and permitted to be levied by the law, but in contravention of the law i.e., in contravention of the Zonal Authority's calculation.

78. We are conscious of the fact that this Court in ***Rajasthan State Electricity Board*** (supra) had directed the refund of excess freight charged by misapplication of the law despite the claim being time-barred under Section 106(3), however, a closer reading would reveal that the refund had been directed in view of the peculiar facts and circumstances of the case. Even otherwise, the court in the said decision whilst directing the refund completely missed to advert to either the bar under Section 106(3) or whether the excess freight would be an 'overcharge'. Nevertheless, the distinction between an

'overcharge' and an 'illegal charge' has been acknowledged by this Court in its subsequent decisions in ***West Coast Paper Mills*** (supra) and ***Hindustan Petroleum Corporation*** (supra), thus, we need not dwell any further on the decision of ***Rajasthan State Electricity Board*** (supra).

79. Further, a sum paid in excess of what was required to be payable as per law, must assume the character of an 'overcharge' on the date when the payment was made or when the charge was levied. To explain this in detail we may refer to the decision of the Calcutta High Court in ***Suresh Kumar v. Board of Trustees for the Port of Calcutta*** reported in (1988) SCC OnLine Cal 420.

79.1 In the said decision, the issue pertained to the provision of Section 55 of the Major Port Trusts Act, 1963 (for short, the "**Ports Act**"), which is analogous to Section 106(3) of the Act, 1989, inasmuch as both the provisions provide that for a claim of refund of an 'overcharge' a notice of claim must be made within 6-months from the date of payment.

79.2 The facts of ***Suresh Kumar*** (supra) were as follows: there was a delay in custom clearance, because of which the goods had to be warehoused at the port. Due to this, the goods incurred heavy demurrage charges. The petitioner therein requested the custom authorities that since the delay was to no fault of its own, he may be issued an exemption certificate for the said demurrages. During this period, since the goods continued incurring demurrage charges, the petitioner therein paid the same under protest. Subsequent to the payment of the said charges, he was issued exemption certificates, whereby a portion of the demurrage charges stood abated. Accordingly, a claim for refund was made, however the same *inter-alia* came to be rejected in view of being time-barred as per Section 55 of the Ports Act.

79.3 The Calcutta High Court observed that, although this was in essence a refund for an overcharge, as by virtue of the exemption certificates, a sum excess than what was required by law had been paid, yet, it would not be hit by Section 55 of the Ports Act, as the excess sum only assumed a character of an overcharge, subsequent to the date of payment, when the exemption certificates were issued. The High Court held

that the time-period under Section 55 of the Ports Act would only apply to a case where payment and overcharging would synchronize i.e., on the facts and circumstances as prevailing on the date of payment, the sum should be an overcharge. The relevant observations read as under: -

> *"5. Because of the inordinate delay [in] the release of the said goods after completing all Customs formalities, the said goods suffered heavy demurrage charges. Accordingly the petitioner represented before the Customs authorities for allowing warehousing of the said goods, pending completion of the Customs formalities [...]*
>
> *7. Due to the aforesaid delay in allowing clearance of the said goods by the Customs authorities, the said goods incurred heavy demurrage due to no fault of the petitioner. In the circumstances, the petitioner prayed before the Customs authorities for issuance of necessary wharf rent exemption certificate in order to enable the petitioner to clear the consignment without payment of demurrages from the Port authorities. After several reminders on or about March 25, 1985 the Customs authorities handed over a wharf rent exemption certificate dated March 23, 1985 to the petitioner covering part of the period of detention, that is from November 28, 1984 to March 1, 1985 in respect of consignment arrived per Vessel "Batara Dua" and from January 22, 1985 to March 1, 1985 in respect of the consignments arrived per vessel "Vishwa Yash".*
>
> *8. Thereupon the petitioner again requested the Customs authorities for issuance of wharf rent exemption certificate for the entire period of detention, that is, upto March 25, 1985. Meanwhile, however, as the goods were continuing to incur demurrage, the petitioner had no other alternative but to make payment of the demurrage charges to the Port authorities under protest and take clearance of the said goods. In respect of the said consignments, the*

petitioner paid a total sum of Rs. 8,43,995 as purported demurrage charges for the period November 28, 1984 to March 25, 1985 in respect of vessel "Batara Dua" and for the period January 15, 1985 to March 25, 1985 in respect of vessel "Vishwa Yash".

9. Thereafter, on or about February 3, 1986 the Customs authorities issued another wharf rent exemption certificate for the uncovered period from March 2, 1985 to March 25, 1985 in respect of the said goods.

10. In the premises, by a letter dated 15th February, 1986, the petitioner filed an application before the Financial Adviser and Chief Accounts Officer, Post and Railway Audit Section, Calcutta Port Trust enclosing therewith the bills issued by the Port Trust authorities levying and realising demurrage charges as also the said wharf rent exemption certificates. By the said application the petitioner claimed refund for the sum of Rs. 8,43,995 paid by him under protest as aforesaid as purported demurrage/wharf rent charges. The petitioner drew the attention of the said Financial Adviser and Chief Accounts Officer to the fact that in view of the said Wharf Rent Exemption Certificate the petitioner was not/could not be made, liable for payment of the said demurrage/wharf rent charges.

11. In or about March 1986 the petitioner's representative received a purported communication dated 22nd February, 1986 issued by the Financial Adviser and Chief Accounts Officer whereby the petitioner was informed that "no refund was due" to the petitioner as all claims were "time-barred as per Section 55 of the Major Port Trusts Act, 1963".

14. It is also contended that the petitioner could have and should have submitted the refund claim within the time limit prescribed under Section 55 of the Major Port Trust Act, 1963 but the claim for refund was submitted by the petitioner on 26th March, 1985

and 27th March, 1985. The claim for refund of the petitioner is statutorily time-barred.

15. The contention is that while taking delivery of the said consignments the petitioner paid the port charges, that is to say, wharf rent and demurrage and did not produce any certificate from the Customs authority covering the period between the 2nd March, 1985 and 25th March, 1985 to the concerned shed of the Calcutta Port in order to enable himself to obtain the concession on any rent charges in accordance with the scale of rates. The port rent and demurrage were paid in full and the wharfage exemption certificate was produced subsequently for refund. The payment made to the Port Trust while taking delivery of the cargo from its custody was an overcharge for which a claim should have been preferred within the time prescribed in Section 55 of the said Act.

16. *The first question which calls for determination is whether Section 55 of the Major Port Trusts Act, 1963 has any application on the facts and in the circumstances of this case. Section 55 provides as follows:*

"No person shall be entitled to a refund of an overcharge made by a Board unless his claim to the refund has been preferred in writing by him or on his behalf to the Board within six months from the date of payment duly supported by all relevant documents. Provided that a Board may of its own motion remit overcharges made in its bills at any time."

17. It is contended by the learned counsel for the petitioner that in the instant case there is or can be no "overcharges" being made by the Port Trust Authorities. In the absence of Wharf Rent Exemption Certificate, the Port Trust Authorities had sought to realise Wharf Rent payable in respect of the subject goods. In view of the said Wharf Rent Exemption Certificate no wharf rent is payable by the petitioner and/or realisable by Port Trust Authorities from the

> *petitioner. Thus the entire realisation of wharf rent in respect of the said goods is without authority of law as the said amount is not payable by the petitioner at all. Seeking of refund of such money cannot come within the purview of Section 55 of the said Act*.
>
> *18. This contention has substance. Section 55 will only apply to a case where payment and overcharging would synchronise : In other words, on the facts and in the cirumstances prevailing at the date of payment, Board should have overcharged the rent. In this case, on the date payment was made by the petitioner, the payment did not and could not assume the character of overcharging. It only assumed such character when the second set of exemption certificates had been issued on 3rd February, 1986*."
>
> (Emphasis supplied)

80. Section 106 of the Act, 1989, sub-section (3) specifically uses the words "*paid*" and "*date of payment*". This clearly fortifies the above observations, that for a sum to be an "overcharge" within the meaning of Section 106(3) of the Act, 1989, it must be an overcharge on the date when such sum was paid. If on the date when the payment was made, the sum in question was not an overcharge, it will not become an 'overcharge" due to intervention of subsequent events at-least in terms of Section 106 of the Act, 1989.

81. Otherwise, the same would lead to a very chilling effect, whereby a particular sum which at the time of payment was not an overcharge but due to subsequent events (not attributable to any mistake or lack of diligence) happens to become an overcharge after the lapse of the statutory time-period under Section 106(3) of the Act, 1989 i.e., 6-months after the date of payment, even then the said sum would not be refundable because no notice was made within 6-months. Thus, the claim for refund of an "overcharge" in such case would become time-barred owing to an impossibility i.e., making the notice within the time-period which could not have been made, as at the relevant point of time it was not an overcharge.

82. It is a settled law that in interpreting a statute or a rule, the court must bear in mind that the legislature does not intend what is unreasonable

or impossible. If a rule leads to an absurdity or manifest injustice from any adherence to it, the court can step in. A statute or a rule ordinarily should be most agreeable to convenience, reason and as far as possible to do justice to all. A law/rule should be beneficial in the sense that it should suppress the mischief and advance the remedy. In interpreting a rule, it is legitimate to take into consideration the reasonableness or unreasonableness of any provision. Gross absurdity must always be avoided in a statute/rule. The expression reasonable means rational, according to the dictate of reason and not excessive or immoderate.

83. Thus, keeping in mind the aforesaid view, and the specific language used in Section 106(3) of the Act, 1989 particularly the words "*paid*" and "*date of payment*", the aspects of "payment" and "overcharging" must synchronize in order to fall within the rigours of Section 106(3) of the Act, 1989.

84. This aforesaid aspect may be looked at from one another angle, by making use of the Hohfeld's analysis of jural relations. As per Hohfeld's scheme of jural relations conferring of a right on one entity must entail vesting of a corresponding duty in another. Under Section 106(3) of the Act, 1989, the right of consignee to seek a refund of an overcharge arises only when there is a corresponding duty on the railway administration to grant such refund i.e., when the notice of claim is made to it within the statutory period. To seek a refund, certain condition precedents need to be satisfied by the consignee before the right can be said to accrue, namely: -

    a) An overcharge has been paid by the consignor to the Railway administration

    b) A notice has been served by the consignor to the Railway administration to which overcharge has been paid

    c) The consignor has served the said notice within six months from the date of such payment or the date of delivery of such goods at the destination station, whichever is later.

    84.1 Thus, once the aforesaid conditions are satisfied, the consignee's "right to get a refund" can be said to have as its jural correlative the "duty to grant refund" of the Railway administration.

85. Now the consignee's duty to make the notice of claim for refund will only arise if the sum was an overcharge within the statutory time-period, if it is not, then it could not be said that there was any

duty to make the notice of claim. Similarly, if the right of consignee to claim a refund for an overcharge, accrues when the sum was an overcharge on the date of payment, the corresponding duty of consignor to refund it will also arise when the sum was an overcharge.

86. Thus, if on the date of payment, the sum was not an overcharge, neither is the right to claim refund emanating in terms of Section 106(3) nor is the corresponding duty i.e., neither the right nor the duty could be said to have arisen on the date of payment. Both the right to claim refund and the corresponding duty to refund must arise in synergy in terms of Section 106(3) of the Act, 1989 (emphasis). It would be too much to say that, although no overcharge was made in terms of Section 106(3), yet when the sum actually became an overcharge, the duty to seek refund will only be in terms of Section 106(3) of the Act, 1989.

87. For illustration, say, goods were booked and freight was charged at the rate of Rs. 100 per km, and accordingly freight was paid. Subsequently, 7-months later the Railways decides as a matter of policy to reduce it to Rs 50 per km with retrospective effect. Now though the reduction is taking place retrospectively, but intimated 7-months after when the payment was made, and further even-though, this is an overcharge (because Rs. 50 has been paid in excess of what was payable), it would not mean that in order to seek refund of the excess sum, the notice ought to have been made within 6-months as per Section 106(3) of the Act, 1989, when the payment was made. Such a case, although of an overcharge, cannot be said to be one of "overcharge" within the meaning of Section 106(3) of the Act, 1989, thus no notice of claim would be required in such cases.

88. Another peculiar aspect which must be borne in mind, is that the subsequent event which makes a particular charge an overcharge, must take place subsequent to the date of payment. For illustration, say freight on goods carried was charged by mistake at Rs. 100 instead of Rs. 50. Now this aspect comes to the knowledge of the parties 6-months after the date of payment. This would not mean that at the time when freight was being paid it was not an overcharge, as the excess sum was realized due to a mistake committed on the date of payment irrespective of subsequent knowledge. It cannot be said that due to a *bona-fide* mistake neither party was under the

impression that this is an overcharge. This is reinforced from the decision of this Court in ***Birla Cement Works*** (supra). Thus, whilst deciding the applicability of Section 106(3) of the Act, 1989 what has to be seen is whether the very sum that was levied was an overcharge or not on the date of payment. Mere lack of knowledge will not postpone the accrual of cause of action to apply under Section 106(3) of the Act, 1989.

89. This distinction drawn between a claim for refund of an 'overcharge' and an 'illegal charge' is not imaginary or superfluous, but is well-founded from the landmark decision of a 9-Judge Bench of this Court in ***Mafatlal Industries Ltd. & Ors. v. Union of India*** reported in (1997) 5 SCC 536, wherein this Court observed that a claim of refund for any excise or custom duty levied will broadly fall into three categories, and the relevant observations read as under: -

> *"290. Broadly, the basis for the various refund claims can be classified into 3 groups or categories: -*
>
> *(I) The levy is unconstitutional — outside the provisions of the Act or not contemplated by the Act.*
>
> *(II) The levy is based on misconstruction or wrong or erroneous interpretation of the relevant provisions of the Act, Rules or Notifications; or by failure to follow the vital or fundamental provisions of the Act or by acting in violation of the fundamental principles of judicial procedure.*
>
> *(III) Mistake of law — the levy or imposition was unconstitutional or illegal or not exigible in law (without jurisdiction) and, so found in a proceeding initiated not by the particular assessee, but in a proceeding initiated by some other assessee either by the High Court or the Supreme Court, and as soon as the assessee came to know of the judgment (within the period of limitation), he initiated action for refund of the tax paid by him, due to mistake of law."*
>
> (Emphasis supplied)

90. We see no reason as to why the above-mentioned distinction and categories should only be restricted to claims for refund pertaining to excise and custom levied and not extend to refund of charges

levied by the Railway as-well. Thus, applying the aforesaid dictum, the three-categories can broadly be stated to be as follows: -

(i) **Category 1 – "Illegal Charge"** that is a levy which is outside or beyond the law. It is a charge which though may be notified in law as a lawful charge but at its core is *stricto-sensu* in contravention of the law, as explained by us in the preceding paragraphs of this judgement.

(ii) **Category 2 – "Overcharge"** that is a levy based on misconstruction or misinterpretation or failure to follow the fundamental provisions / principle. It is a charge that is in excess of beyond what was required by the law i.e., by the notified or applicable charge, as illustrated in the preceding paragraphs of our discussion.

(iii) **Category 3 – "Nullified Charge"** a levy which has been declared or struck-down as unconstitutional or illegal by a court on principles of arbitrariness, unreasonableness or fair-play. This too would be in the nature of an "Illegal Charge" enunciated in Category 1 with the only difference being that, the courts found the law to be untenable in the eyes of law even though it may not be in contravention of the statutory provisions. Such as the charge levied by the arbitrary denial of telescopic benefits which was held to be illegal in ***West Coast Paper Mills*** (supra).

91. Another reason, as to why this distinction assumes importance is in view of the intention behind the rigours of Section 106(3) of the Act, 1989. The purpose behind incorporating the stricter and shorter time-period envisaged under Section 106(3) of the Act, 1989 for refund of an overcharge is in view of its nature.

92. An 'overcharge' as discussed by us above emanates due to a clerical or arithmetical mistake or misapplication of the law or charge prescribed or notified by the law, qua the peculiar facts of an individual case. Such mistakes are easily discoverable by exercising due-diligence; thus, a 6-month time period is stipulated to ensure that claimants are vigilant and prompt in bringing such errors to the notice of the railway. Due to the fact specific nature of such claims by way of errors at the very grass-root level, timely enquiries by railway to ascertain the mistake becomes a necessity. Thus, the intention of Section 106(3) of the Act, 1989 is to ensure that when the claim is made, a timely enquiry into such factual errors is possible **AND**

to bring *quietus* to stale and false claims of refunds made belatedly due to the laches & lack of vigilance on part of the claimant.

93. The true purport of Section 106(3) of the Act, 1989 is by no stretch to render even those claims of refunds as time-barred which despite the best of efforts and diligence could not have been discovered by the claimants on their own accord. 'Illegal Charges' are by their nature prescribed, sanctioned and notified by law as a lawful levy even-though they may be inherently wrong or in contravention of the law. Thus, despite the exercise of a reasonable degree of diligence, there could be no real reason to doubt their legality. A consignee cannot be reasonably expected to be capable of discovering such patent or perverse error in the very genesis of the charge. It is something which only the authority that calculates, determines and notifies the levy of the charge could be said to know or at the very least ought to have known. Thus, Section 106(3) of the Act, 1989 cannot be said to encompass even "Illegal Charges" which are beyond the intention and object of the said provision, and the applicability of the prescribed time-limit must be confined only to claims for an 'overcharge'.

94. Therefore, a distinction has been envisaged between an 'overcharge' and an 'illegal charge', where the former relates to any excess sum paid due to a mistake which was capable of being discovered by exercise of proper vigilance and thus, ought to have been claimed within a period of 6-months.

95. Lastly, we must also caution the courts and the railway claims tribunal of one another aspect, which is that where the court or tribunal whilst examining a claim for refund finds that a particular charge for which refund is sought is not an overcharge, they must not jump to the conclusion that the said charge then is an illegal charge. The purpose of the above discussion was only to bring clarity over what would be an 'overcharge' for the purposes of Section 106 sub-section (3) of the Act, 1989.

96. There may be situations, where a charge for which refund is sought may no be an overcharge or even an illegal charge and rather would be a lawful charge perfectly valid in the eyes of law, or a charge though valid but in the extant of equity may be refundable, the same has to be determined upon appraisal of the entire facts of the case. The courts and tribunal must be mindful of the fact that, the question as to what is the nature of a particular charge, be it overcharge or

illegal charge or valid charge etc. is for ultimately determining whether it is liable for refund or not, without jumping to any conclusion.

97. This is evinced from the decisions of ***Steel Authority of India Ltd.*** (supra) and ***National Aluminium Co. Ltd.*** (supra), where as per the mandate of the Central Government's policy, the goods in question were required to be carried only over the longer route. Accordingly, the goods were booked and freight was also realized for the longer route, but the railways dispatched the goods by the shorter-route due to logistical issues. Even though the High Court found nothing wrong with either the policy or the freight charge realized, and held both to be lawful, yet it directed refund in view of principles of equity by taking recourse to Section 72 of the Indian Contract Act, 1872.

98. Thus, from the above discussion, it is abundantly clear that there exists a very fine & clear distinction between an overcharge and an illegal charge, and that Section 106 sub-section (3) of the Act, 1989 only applies when the claim is for a refund of an overcharge, for all other charges, be it illegal or not, the said provision will have no application whatsoever.

iii. Whether the present case is one of 'Overcharge' or 'Illegal Charge'?

a. Applicability of Section 106(3) of the Railways Act, 1989.

99. Now coming to the facts of the present case at hand, it is the case of the respondent company herein that at the time of booking the consignments, from Baad to Hisar via Palwal, the notified chargeable distance for calculating freight as per the Local Distance Table was 444 km, and accordingly the respondent company paid the same from time to time.

100. However, subsequently, the appellant railways vide its letter dated 05.07.2005 changed the chargeable distance to 334 km in the revised Local Distance Table and the said revised table was to apply prospectively. It is undisputed that, at the time when the respondent company had booked its consignment, the notified chargeable distance was 444 km for Baad to Hisar, and any consignment booked for the said route was to be charged as per the said rate.

101. The respondent company has contended that a change in the notified chargeable distance due to a change in policy was held to be illegal by this Court in ***Hindustan Petroleum Corp Ltd.*** (supra). The High

Court too whilst passing the impugned order has placed reliance on the said decision and held that the present case is squarely covered by the ratio of ***Hindustan Petroleum Corp Ltd.*** (supra).

102. However, we are not in agreement with the same. In ***Hindustan Petroleum Corp Ltd.*** (supra), the notified chargeable distance was 125 km, subsequently by the introduction of the Terminal Mechanism System (TMS) which was a computerized railway receipt system, the notified chargeable distance was reduced to 100 km. A close reading of the said decision would reveal that the change in the notified distance was attributable to a computerized receipt system, which had no bearing on the actual calculation of distance, in other words a receipt system had nothing to do with determining a chargeable distance. Thus, when the chargeable distance subsequent to the introduction of the said receipt system got altered and came out to be 100 km, this Court had no hesitation to hold that the initial notified distance of 125 km was illegal, and only upon the introduction of the TMS system, the said glaring patent error came into light.

103. However, in the instant case, the change in the policy is in respect to the change in the methodology for calculation of chargeable distance, which has a direct bearing on the chargeable distance payable as per law. Thus, a mere change in policy which results in the change of a charge payable as per law, will not render the original charge illegal, regard must be had to the nature of the policy and its effect. Thus, on this score, the High Court committed an error.

104. The respondent company has also undisputedly paid the freight charges as per the notified chargeable distance, and nothing more has been charged than what was at the time of booking of the consignment required to be charged as per the law prevailing i.e., as per the old local distance table.

105. The case of the respondent company is not that it has paid anything in excess of what was at the time of booking of the consignment required by law, rather, the respondent's case is that the charge which was required to be paid by the law as prevailing at the time of booking of the consignment was wrong. In other words, the respondent's case is that the very chargeable distance of 444 km as per the old local distance table was wrong, and not that the distance for which the respondent has been charged is incorrect in terms of the chargeable distance that was notified at that time.

106. We are *seisin* of the fact that in ***J.K. Lakshmi*** (supra) and ***Mineral Enterprises*** (supra) the freight charged due to an incorrect chargeable distance was held to be an overcharge.

106.1 However, a close reading of ***J.K. Lakshmi*** (supra) would reveal, that it was not a case where the notified chargeable distance was incorrect, but rather was a mistake of miscalculation on the part of the booking staff i.e., it was a clerical mistake and not a mistake attributable to a charge permitted and notified under the law. It does not appear that the said case was dealing with a situation where the notified or prescribed rate / chargeable distance was wrong, in fact the distance averred to be wrong is not a chargeable distance that has been notified in any manner. The relevant observations read as under: -

> "*[...] The distance between two stations is stated to be only 511 KMs and the Railways alleged to had charged freight for distance of 946 KMs calculating the distance via Rewari. It was stated that because of this mistake in the calculation of the distance from the appellant-Company's Banas siding to Thiyat Hamira Railway Station, railway freight was charged in excess @ Rs.21.44 per qtl. instead of the applicable rate of Rs.13.11 per qtl. and paid under mistake. Consequently Rs.3,69,775/- was overpaid. This excess realisation was according to the appellant-Company on the face of it arbitrary, unauthorized and illegal and thus refundable by the Railways with interest.*
>
> *xxx xxx xxx*
>
> *He submitted that the factum of the realisation of excess charge in an arbitrary and unauthorized manner by the Railway came to the notice of the appellant-Company only on or about 30.12.1987 when in the course of Government of India audit of the accounts of the appellant-Company with regard to supply of rakes of levy cement from its factory, it transpired that the excess freight had been unauthorizedly realized by the Railway*

in miscalculating the distance between Banas siding of the appellant-Company and place of delivery at Thiyat Hamira Railway station by wrongly measuring the distance as 946 KMs as against the actual distance of 511 KMs between the two stations. Counsel submitted that no sooner the letter dated 30.12.1987 was received by the appellant-Company requisite notice were issued to the respondent-Railway on 17.02.1988.[...]

xxx xxx xxx

[...] In fact the appellant-company itself averred of realisation of an excess freight and specifically in para 6 of the plaint had itself averred that due to "mistake" in calculating of distance, excess freight was realised at the rate of Rs.21.44 per qtl. instead of Rs.13.11 per qtl.. Further in the notice under Section 78B of the Act of 1890 R/w Section 80 CPC issued by the appellant-Company prior to the filing of the suit for recovery of money before the District Judge, Sirohi, it was submitted that due to mistake on the part of the booking staff of the Railways incorrect distance was computed from Banas siding to Thiyat Hamira railway station against the correct chargeable distance of 511 KMs and the distance was worked out to 946 KMs. which was the chargeable via Rewari. In para 4 of the suit it was stated that on the part of the Railway enhanced rate (emphasis mine) @ Rs.21.44 per qtl. was charged. In my considered opinion as also held by the learned Tribunal, the case set up by the appellant-Company makes it evidently clear that the refund was sought of the excess freight realizedallegedly illegally and unauthorizedly. The excess freight without doubt related to freight otherwise payable for the movement / transportation of goods by the Railways and therefore was obviously an

overcharge. Consequently, Section 78B of the Act of 1890 attracted to the claim petition filed. Admittedly notice with regard to the freight paid between 07.12.1985 and 11.02.1986 was issued on 17.02.1988 quite clearly beyond the period of six months as statutorily mandated. The Tribunal was right in so holding."

(Emphasis supplied)

106.2 Similarly in ***Mineral Enterprises*** (supra), the wrong chargeable distance was in respect to the railway receipts which were issued that showed 365 km instead of 359 km. It was not a case of the notified rates being wrong i.e., the charge that has been made payable under law. This is further evinced by the fact that the High Court itself observed that the excess freight was charged than the "prescribed distance". Thus, it appears that the mistake related to one in the "calculation of the distance" at the time of booking and doesn't appear to be a mistake in the "prescribed distance". Similarly, even in the said decision, it is nowhere mentioned that, 365 km was a "notified chargeable distance", thus, even this decision does not come in aid of the appellants herein.

"14. It is an admitted fact that the respondent Company had transported the iron ore fines/ minerals through the railways for the period from 25.05.2006 to 04.01.2007 at the rates fixed by the railways. The main controversy was in respect of refund of excess freight charges said to have been collected by the railways than the prescribed rates fixed on the basis of distance. In that connection the respondent Company had sought for clarification about the actual distance for which the appellant railways gave the reply. As could be seen from the records the actual distance between Ammasandra to Panamburu is 358 kms., whereas the railways had calculated the distance as 365 kms., but they have collected the rates applicable for the distance above 360 Kms. It is an admitted fact that after clarification regarding actual distance,

> *the railways had settled some of the claims of the respondent Company regarding excess charges which were within the limitation period. Some of the claims to an extent of Rs.8,85,000/- were rejected on the reason that they were barred by limitation. Under these circumstances, it is necessary to ascertain whether the repudiation of claims regarding Rs.8,85,000/- was justified.*
>
> *xxx xxx xxx*
>
> *24. In the aforesaid case the principal contention raised by the petitioner was that the claimant had discovered the mistake when the railway authorities confirmed by their letter that they had committed a mistake in charging excess freight on wrong calculation of distance*. [...]"
>
> (Emphasis supplied)

106.3 We do not propose to dwell any further on the decisions of ***J.K. Lakshmi*** (supra) and ***Mineral Enterprises*** (supra), and leave it at rest with just one observation that, as long as there is no error or patent illegality in the very genesis or core of a charge that has been notified i.e., the charge that has been made permissible or applicable by sanction of a law, it will not be an illegal charge.

107. In view of the above, since admittedly, what was charged from the respondent was as per the chargeable distance notified and required to be payable by law at that time with nothing in excess, and since the respondent has challenged the very basis or genus of the charge i.e., primary challenge is to the chargeable distance of 444 km in itself and not the incidental quantum of freight levied on the distance of 444 km, and because the same was admittedly charged as per the prevailing law and not due to any misapplication or mistake i.e., as per the old local distance table, this clearly is not a case of overcharge and would not fall within the four corners of Section 106(3) of the Act, 1989.

b. Whether the chargeable distance of 444 km was correct or not?

108. The respondent company herein has challenged the very validity or correctness of the notified chargeable distance of 444 km which was

payable as per the old local distance table. At this stage, it would be apposite to understand on what basis, the respondent company has challenged the said chargeable distance of 444 km.

109. The respondent company has contended that, initially the chargeable distance for the route from Refinery Baad to Hisar was 444 km as provided in the old local distance table. Subsequently, the appellant vide its letter dated 05.07.2005 changed and reduced the chargeable distance to 334 km. The respondent enquired and found out that, there was neither any change in the actual route nor any change in the physical track length between the Refinery Baad and Hisar stations.

110. On such basis, the validity of the old chargeable distance of 444 km has come under cloud, and the respondent company has questioned how the chargeable distance came to be reduced by a difference of 110 km without there being any change in the actual distance in the route from Refinery Baad to Hisar.

111. The appellant railways, submitted that pursuant to the Ministry of Railway's letter dated 07.04.2004, a new methodology of 'Rationalization and Rounding-off" was adopted by the railways for calculating the chargeable distance between any two pair of stations. As per the new methodology, the chargeable distance was now to be calculated on the basis of the actual engineering distance of the various stations reckoned upto two decimal points. For determining the chargeable distance, the actual entering distance (upto two decimal) of each station in the route is first added up, and then the aggregate is rounded-off to the next kilometre only once at the end.

112. Furthermore, the new methodology had been adopted in order to bring uniformity in the procedure for determining chargeable distance throughout the railway, and the policy itself contemplated that the change in methodology would likely result in variation from the existing freights and fares being levied under the old methodology.

113. The appellants have contended that owing to this change in policy and methodology, the earlier chargeable distance of 444 km came to be reduced to 334 km. The appellants have further submitted that the aforesaid letter dated 07.04.2004, specifically stipulates that the said change would only apply prospectively and that any variation from the old fares and freights will not be entitled to any refund.

114. We have gone through the aforesaid letter. Since the question before this Court pertains to the validity or correctness of the old chargeable distance of 444 km as per the old methodology and not one of refund of past freight charges solely on basis of a subsequent change in methodology. Thus, the prospective application of the change in methodology as per the letter dated 07.04.2004 has no bearing whatsoever, with the question that is before this Court.

115. The appellant railways has contended that the old chargeable distance of 444 km was valid and correct as per the old methodology and distance table that was prevailing at that time, and thus, the respondent company is not entitled to a refund.

116. Before, we proceed to determine the validity of the old chargeable distance of 444 km, we must try to understand the stance of the appellant railway in the present litigation, as discernible from their pleadings, which has left us quite perplexed. The argument of the appellant railways is twofold: -

    (i) *First,* that the respondent company is not entitled to any refund whatsoever, since the change in chargeable distance was due to a change in the methodology, and that the old chargeable distance was correct as per the old methodology and distance table.

    (ii) *Alternatively*, it has been contended that, in the event this Court finds that the respondent is entitled to refund of the difference in chargeable distance, the same would at best be a case of 'overcharge' and the claim could be said to be time-barred in terms of Section 106(3) of the Act, 1989.

117. Thus, the primary thrust of the appellant's contention is that this is neither a case of overcharge nor an illegal charge, as the old chargeable distance was valid as per the old methodology and distance table, thus, the respondent company is not entitled to any refund whatsoever.

118. However, interestingly, despite maintaining the aforesaid stance that no case is made out for a refund, the appellant railway itself during the pendency of the matter before the Railway Claims Tribunal, Ghaziabad granted refund to the respondent company in approx. 45 claims that were made within the 6-month statutory time period

119. *Prima-facie* since the refund was not made by any adjudicatory authority it would have no bearing in the case of the appellant before this Court, however we should be mindful, that the appellant remarkably in its entire pleadings has nowhere explained why the refund was granted in the first place or even remotely indicated that the same had been granted due to a mistake.

120. The appellant despite contending that the old chargeable distance of 444 km was correct and valid as per the old methodology and the old distance table, the appellant has neither provided the complete old distance table nor explained what was the old methodology being used that resulted in a 110 km difference in the chargeable distance.

121. As discussed by us above in this judgement, when a charge is alleged to be illegal, it would be too much to expect a consignee such as the respondent herein to prove that a particular charge is illegal or not. It is only the authority who formulated and prescribed a particular charge that may be capable of establishing that a particular charge is valid or not. The threshold of the 'burden of proof' if we may use that term that is required to be discharged, when challenging a particular charge as an "illegal charge", is only on the preponderance of probabilities, upon which the onus will shift on the authorities to establish how the particular charge is valid.

122. In the instant case, the respondent whilst challenging the validity of the chargeable distance of 444 km has submitted as follows: -

    a. That, the notification / communication whereby the chargeable distance was reduced from 444 km to 334 km had no bearing with the change in policy in the methodology for calculating the chargeable distance as alleged by the appellants herein.

    b. Further, the said communication shows that the chargeable distance was a matter of "correction" made after "critically reviewing" the old distance tables, and thus, indicating that the chargeable distance of 444 km was illegal.

    c. The respondent, upon enquiry from the concerned railway office came to learn, that there been no change in either the physical tracks or the route to warrant a change in the chargeable distance from 444 km to 334 km.

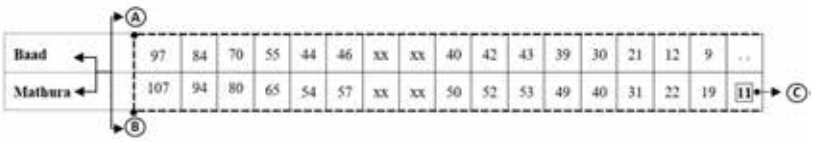
123. The respondents have more than sufficiently showcased, how and why the chargeable distance of 444 km appears to be illegal. However,

in response to the same the appellants herein have stated that, the chargeable distance of 444 km was correct as per the old distance table and the old methodology as prevailing, but have not been in a position to explain nor provide any documents to substantiate how the same was correct. Thus, except for a bald assertion, no other foundation has been laid for offering such a claim.

124. Despite the aforesaid, we ourselves have undertaken the pains of examining the validity of the chargeable distance of 444 km. A close reading of the Ministry of Railway's letter dated 07.04.2004 regarding the new rationalization methodology and a careful analysis of a small portion of the old distance table that was prevailing vis-à-vis the current distance table would give some insight and clarity over the old methodology that was being used to calculate the chargeable distance. For the purposes of explanation, the said distance tables are reproduced below: -

Figure 1: Distance Table as per the Old Methodology

STATIONS	Dhaulpur	Mania	Jaju	Bhandai	Agra Cantt	Raja Ki Mandi	Bilochpur	Runkunta	Kitham	Farah	Bad	Mathura
Dhaulpur	..											
Mania	13	..										
Jaju	27	15	..									
Bhandai	43	30	16	..								
Agra Cantt	53	41	26	11	..							
Raja-Ki-Mandi	57	44	30	15	4	..						
Bilochpura	58	46	31	16	6	3	..					
Runkunta	67	55	41	25	15	11	9	..				
Kitham	76	64	49	34	24	20	19	11	..			
Farah	88	75	61	46	35	31	30	21	12	..		



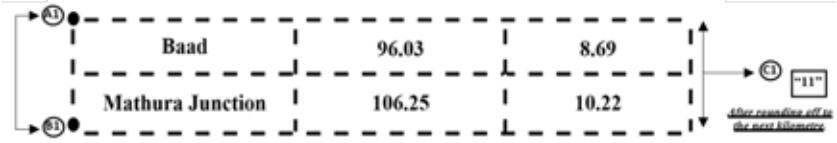
In the above distance table: -

- "**. .**" indicates the Originating Point, i.e., the station of origin from which the goods are booked / loaded for carriage.
- Chargeable Distance from one station to another is calculated by the aggregate of the distance of all stations between the Originating Station and the Destination Station.

- For example, the chargeable distance from Baad to Mathura is calculated by the actual engineering distance between the two pair of stations.
- "**(A)**" to "**(B)**" indicates the actual engineering distance between Baad and Mathura.
- "**(C)**" indicates the chargeable distance which is calculated by adding the distance between **(A)** & **(B)** and thereafter rounding off the aggregate to the next kilometre.

Figure 2: Distance Table as per the New Methodology

STATIONS	CUMULATIVE DISTANCE	INTER DISTANCE
Dhaulpur	0.0	0
Mania	12.45	12.45
Jajau	26.84	14.39
Bhandai	42.18	15.34
Agra Cantt	52.46	10.28
Raja ki Mandi	56.34	3.88
Bilochpura	57.79	1.45
Runkunta	66.86	9.07
Kitham	75.84	8.98
Farah	87.34	11.50
Baad	96.03	8.69
Mathura	106.25	10.22



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125. The striking difference between the Old Distance Table in Figure 1 and the New Distance Table in Figure 2 is that under the old methodology the distance between each station is being rounded-off, whereas in the new methodology the distance between each station is not rounded-off, and rather is indicated up-to two decimal points. Thus, in the Old Distance Table the chargeable distance between **(A)** Baad and **(B)** Mathura comes out to be **(C)** 11 km whereas under the New Distance Table distance between **(A1)** Baad and **(B1)** Mathura distance is indicated as 10.22 and upon rounding it off, the chargeable distance would come out to **(C1)** 11Km.

126. Thus, *prima-facie* it appears that under both; the Old Distance Table and the New Distance Table, the actual engineering difference was being taken into consideration, and the only difference between the two methodologies lies in the rounding-off. Under the old methodology, the actual engineering distance for every station was being rounded-off to the next kilometre, whereas under the new methodology this was done away, and only the cumulative distance is being rounded-off only once at the very end to the next kilometre.

127. Thus, when calculating the chargeable distance for a specific route under the old methodology, each station that exists in-between the route would at best add 1 km each. Thus, the extent to which the cumulative chargeable distance for a route would get inflated will roughly correspond to the number of stations it has in its route, with each intervening station increasing the chargeable distance by a maximum of 1 km.

128. This is further evinced from the fact that, the Ministry of Railway's letter dated 07.04.2004 by which the new methodology was introduced, itself in the subject uses the words "*Rounding off of Chargeable Distance: Rationalization of fares and freight*". This indicates that both methodologies utilized actual engineering distance with the only underlying difference between both of the them being in respect of rounding-off and nothing more.

129. Furthermore, in the letter dated 05.07.2005 issued by the Chief Goods Supervisor (CGS), Northern Railway, whereby the chargeable distance from Refinery Baad to Hisar was reduced from 444 km to 334 km, it is nowhere mentioned that the same was done pursuant to the new methodology of "Rationalization of Rounding Off" or by virtue of the Ministry of Railway's letter dated 07.04.2004 whereby the new methodology was introduced for the first time.

130. The aforesaid letter dated 05.07.2005 of the CGS only goes so far as to say that the old distance tables were "critically reviewed" and that now the chargeable distance should be 334 km. In fact, the aforesaid letter further instructs CGS Baad that "*the other disputed distance should also be corrected as per the new junction table and the correct distance should be charged*". The use of the words "*disputed*" and *"corrected"* used in the said letter clearly indicates that the distance of 444 km was incorrect in itself, and that the change in the chargeable distance had nothing to do with the new methodology of 'Rounding Off'.

131. We are conscious of the fact that in the aforesaid letter dated 05.07.2005, it was indicated that the chargeable distance of 444 km was being levied as per the old distance table, and that the same was corrected as per the revised distance table. However, it must be borne in mind, that merely because the chargeable distance of 444 km was correct as per the old distance table will not *ipso-facto* make the chargeable distance of 444 km correct.

132. The correctness of a chargeable distance is dependent upon the correct application of the methodology prescribed by law and correct calculation of the same pursuant to the methodology. A distance table, is a public document, which is available and displayed at each station, whenever a consignment is to be booked, the chargeable distance is calculated as per that distance table, had the distance table been incorrect, the respondent company would have disputed the same the very first moment when the consignment was probably being booked.

133. We have no reason to doubt that the chargeable distance as calculated by the old distance table would have come out to 444 km, had it not, it would have been pointed out by the respondent company then and there. But merely because the calculation of the chargeable distance as per the old distance table is correct would not make the distance table correct as-well.

134. The case of the respondent is that the calculation and application of the old methodology used for the formation of the distance table was incorrect, due to which inherent error has crept into the said distance table, thus it is the distance table which is incorrect and by its extension the chargeable distance of 444 km which is required to be payable by the law i.e., the notified distance table.

135. Remarkably, even the Railway Claims Tribunal in its order had observed that the "**actual distance**" (emphasis) from Baad to Hissar was 334 km (sic 333.18 km), and the sole reason why the RCT rejected the claims of the appellant was on the ground of being time-barred by Section 106(3) of the Act, 1989, which we have already stated, is not applicable in the instant case. The relevant observations read as under: -

> *"18. [...] In this case, the goods were booked from 'A' to 'B', showing the chargeable distance as 444 Kms. and payment was given by the applicant company for the same*

distance, but later on, Railways reworked the chargeable distance as only 333.18 Kms. The consignment in question was carried through the same route. So, it is clear that the payment was to be made for 333.18 Kms, whereas it was made for 444 Kms. So, it is clear that the payment was to be made for 333.18 Kms., whereas it was made for 444 Kms.

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22. [...] from the facts of the present case in hand, as in the present case, the applicant company was well within the knowledge of the ***actual distance from Baad to Hisar was 333.16 Kms****, instead of 444 Kms."*

(Emphasis supplied)

136. As afore-stated, since the only tangible difference between the old methodology and the new methodology is of rounding-off, the effect of change in methodology upon the chargeable distance would have at best been limited or confined to a difference of 1 km for each corresponding intervening station. The route from Refinery Baad to Hisar has about 48 stations (approx..). It is not the case of the Appellant that there was any change in either the route by way of addition of new station or any change in the physical track length of the said route. Thus, a mere change in methodology would not have resulted in a difference of 110 km in the chargeable distance.

G. CONCLUSION

137. Thus, we are of the considered opinion, that the chargeable distance of 444 km was illegal, for the following reasons: -

(i) That, the effect of the change in methodology on the chargeable distance would not have resulted in a huge difference of 110 km,

(ii) That, there had been neither any change in the route by way of addition of new station nor change in the physical track length of the said route,

(iii) The letter dated 05.07.2005 itself indicates that the change in the chargeable distance of 444 km was due to an error, and has no bearing with the Ministry of Railway's letter dated 07.04.2004 introducing the new methodology.

(iv) The factum of the appellants themselves granting refund without explaining the reason for the same, despite their stance that the respondent is not entitled to any refund.

(v) The failure of the appellant in establishing that the chargeable distance of 444 km was the correct chargeable distance as per the law.

(vi) Concurrent findings of both, the Railway Claims Tribunal and the High Court on the limited aspect of the actual distance being 333.18 km.

138. Thus, for all the foregoing reasons, we have reached to the conclusion that the said chargeable distance of 444 km was illegal. We find no infirmity with the impugned judgement and order passed by the High Court.

139. In the result, the appeals filed by the appellant railway fails, and are hereby dismissed.

140. The parties shall bear their own costs.

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

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals dismissed.

[2024] 3 S.C.R. 1141 : 2024 INSC 277

The State of Gujarat & Anr.
v.
Paresh Nathalal Chauhan

(Civil Appeal No 4618 of 2024)

12 March 2024

[Pamidighantam Sri Narasimha* and Aravind Kumar, JJ.]

Issue for Consideration

Matter pertains to expunction of the observation by the High Court in an interim order that statutory protection contemplated u/s. 157 of the GST Act, in the nature of a good faith clause, not available to the officers of the State conducting search as their conduct, "may not" justify protection.

Headnotes

Central Goods and Services Tax Act, 2017 – s. 157 – Protection of action taken under this Act – Interim order by the High Court, criticising the prolonged stay of the search party at the residence of the respondents as unauthorized and illegal – Observation by the High Court that statutory protection contemplated u/s. 157, in the nature of a good faith clause, may not be available to the officers of the State conducting search as their conduct, "may not" justify protection – Challenged to:

Held: Statutory functionary is equally entitled to take a defense of good faith – It is for the court to adjudicate and decide – High Court was not conducting a suit, prosecution, or other legal proceeding against a statutory functionary – High Court was conscious of the principles governing good faith clauses and thus, couched its displeasure and distress by stating that such officials "may not" be protected or that it "may be difficult" to accept the contention of good faith – Observations were in the nature of advance rulings, because even before the initiation of a suit, prosecution or legal proceeding, the High Court expressed a tentative opinion – If such observations remain, they would affect the integrity and independence of that adjudication, compromising the prosecution and the defence equally – Observation of the High Court is expunged since the context as well as the conclusions of the High Court were wrong. [Paras 9-12]

* Author

Words and phrases – Good faith – Scope and ambit of:

Held: Good faith clauses in statutes, explained in the vocabulary of the rights and duties regime, can be said to be a provision of immunity to a statutory functionary – Such provisions are in recognition of public interest in protecting a statutory functionary against suits, prosecution or legal proceedings against officials exercising statutory power– This immunity is limited – It is confined to acts done honestly and in furtherance of achieving the statutory purpose and objective – s. 3(22) explains 'good faith' as an act done honestly, whether it is done negligently or not – Good faith clause in a statute will be a defense – If successfully pleaded, it not only legitimises the action but also protects the statutory functionary from any legal action – If statutory functionary invokes the defence of good faith, it is for the court or a judicial body to adjudicate and determine whether the action was done in good faith or not – Such scrutiny or examination is done only in a proceeding against the statutory functionary, which would depend upon the facts and circumstances of each case – General Clauses Act,1897 – s. 3(22) – Central Goods and Services Tax Act, 2017 – s. 157. [Paras 8, 9]

Case Law Cited

Goondla Venkateswarlu v. State of AP [2008] 12 SCR 608 **: (2008) 9 SCC 613;** *Army Headquarters v. CBI* [2012] 5 SCR 599 **: (2012) 6 SCC 228 – referred to.**

List of Acts

Central Goods and Services Tax Act, 2017; General Clauses Act, 1897.

List of Keywords

Expunction; Expunction of the observation by the High Court; Interim order; Statutory protection; Good faith clause; Statutory functionary; Tentative opinion; Rights and duties regime; Immunity to a statutory functionary; Defence of good faith.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.4618 of 2024

From the Judgment and Order dated 24.12.2019 of the High Court of Gujarat at Ahmedabad in SCA No. 18463 of 2019

Appearances for Parties

Ms. Deepanwita Priyanka, Adv. for the Appellants.

Rahul Narayan, Ms. Harshita Malik, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. Leave granted.

2. We are called upon to expunge a portion from the interim order of the High Court and dispose of the appeal as it is represented to us that the respondent is not interested in initiating proceedings against the officers in the present matter. We have accepted the request and hereby dispose of the appeal.

3. The portion sought to be expunged is the observation of the High Court that the *good faith clause* in Section 157 of the GST Act[1], may not be available to the officers of the State as their conduct, according to the High Court, "may not" justify protection. We have expunged that portion of the order because the context as well as the conclusions of the High Court are wrong. We will explain this after indicating the relevant facts.

4. This civil appeal arises out of an interim order passed by the High Court of Gujarat[2] in a writ petition filed by the respondent seeking a direction for protection from arrest under section 69 read with section 132 of the GST Act. The High Court is still examining the writ petition, but by the interim order impugned herein, it criticised the prolonged stay of the search party at the residence of the respondents as unauthorized and illegal. We need not deal with the merits of the issue as the matter is still pending before the High Court, more so when the respondent has submitted that he is not

1 "***157. Protection of action taken under this Act.—****(1) No suit, prosecution or other legal proceedings shall lie against the President, State President, Members, officers or other employees of the Appellate Tribunal or any other person authorised by the said Appellate Tribunal for anything which is in good faith done or intended to be done under this Act or the rules made thereunder.*

(2) No suit, prosecution or other legal proceedings shall lie against any officer appointed or authorised under this Act for anything which is done or intended to be done in good faith under this Act or the rules made thereunder."

2 In Special Civil Application No. 18463 of 2019, order dated 24.12.2019.

interested in proceeding against the officers and seeks a quietus to the issue.

5. In fact, while issuing notice in the appeal on 16.07.2021, this Court passed the following order. The order is indicative of the limited scrutiny sought to be made by this Court and it is evident from the following:

> "*Without in any manner condoning the conduct of the officers which has been commented upon, what persuades us to issue notice is the fact that there are observations to the effect that the statutory protection available to the officers would not be a defence in case proceedings were to be initiated against those officers by the original petitioners or their family members and such an observation has been made in the absence of the officers.*
>
> *Issue notice limited to the aforesaid aspect returnable in six weeks.*"

6. The relevant portion in the order of the High Court that the statutory protection should not be made available to the officers is in paragraph 28 and it is relevant for us to extract the same.

> "*28. Lastly the court may sound a word of caution to the authorities exercising powers under the GST Acts. Sub-section (2) of section 157 of the GST Acts says that no suit, prosecution or other legal proceedings shall lie against any officer appointed or authorized under the Act for anything which is done or intended to be done in good faith under the Act or the rules made thereunder. An action like the present one which is not contemplated under any statutory provision and which infringes the fundamental rights' of citizens under article 21 of the Constitution of India may not be protected under this section. An action taken may be said to be in good faith if the officer is otherwise so empowered and he exceeds the scope of his authority. However, in a case like the present one where the authorization was for search and seizure of goods liable to confiscation, documents, books or things and the concerned officer converted it into a search for a person and in investigation, which is not otherwise backed by any statutory provision, it may be difficult to accept that*

> *such action was in good faith. Protection of such action under section 157 of the GST Acts may unleash a regime of terror insofar as the taxable persons are concerned.*"

7. In the above-referred paragraph, the High Court was of the view that the protection contemplated under section 157 of the GST Act, which is in the nature of a good faith clause, "may not" be available to the officers. This is the issue with which we are concerned, and we will dwell upon it.

8. A good faith clause, explained in the vocabulary of the *rights and duties regime*, can be said to be a provision of immunity to a statutory functionary. Such provisions are in recognition of public interest in protecting a statutory functionary against prosecution or legal proceedings. This immunity is limited. It is confined to acts done honestly and in furtherance of achieving the statutory purpose and objective. Section 3(22) of the General Clauses Act, 1897 best explains 'good faith' as *an act done honestly, whether it is done negligently or not*.[3] Good faith clauses in statutes providing immunity against suits, prosecution or other legal proceedings against officials exercising statutory power are therefore limited by their very nature, *that far*, *and no further*. The scope and ambit of good faith has been explained in a number of decisions of this Court,[4] which need not be elaborated herein again.

9. A good faith clause in a statute will therefore be a defense. If successfully pleaded, it not only legitimises the action but also protects the statutory functionary from any legal action. If a statutory functionary invokes the defence of good faith in a suit, prosecution or other legal proceedings initiated against him, it is for the court or a judicial body to consider, adjudicate, and determine whether the claim that the action was done in good faith is made out or not. Such a scrutiny, enquiry, or examination is done only in a proceeding against the statutory functionary. This Court has held that the scrutiny

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3 Section 3(22) of the General Clauses Act, 1897 defines 'good faith' as follows:

> *"**3. Definitions**.—In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context,—*
>
> *(22) a thing shall be deemed to be done in "good faith" where it is in fact done honestly, whether it is done negligently or not;"*

4 See *Goondla Venkateswarlu v. State of AP*, [2008] 12 SCR 608 : (2008) 9 SCC 613, paras 22 and 23; *Army Headquarters v. CBI* [2012] 5 SCR 599 : (2012) 6 SCC 228, paras 69-78

whether the act is done in good faith or not would depend upon the facts and circumstances of each case.[5]

10. It is in the above referred context that we have examined the observations made by the High Court in Paragraph 28 extracted hereinabove. The High Court was not conducting a suit, prosecution, or other legal proceeding against a statutory functionary. We have no doubt that the High Court was conscious of the principles governing good faith clauses and therefore couched its displeasure and distress by stating that such officials "may not" be protected or that it "may be difficult" to accept the contention of good faith. We are of the opinion that these observations are in the nature of advance rulings. This is because even before the initiation of a suit, prosecution or legal proceeding, the High Court expressed a tentative opinion. If such observations remain, they will affect the integrity and independence of that adjudication, compromising the prosecution and the defence equally.

11. We say no more than reiterate that a citizen of this country has a right of accountability, for which he is entitled to initiate and adopt such legal remedies as are available to him, and in such proceedings the statutory functionary is equally entitled to take a defense of good faith. It is for the court to adjudicate and decide.

12. In view of the above, we expunge paragraph 28 and dispose of the appeal.

Headnotes prepared by: Nidhi Jain

Result of the case: Appeal disposed of.

5 See, for example, *Army Headquarters* (supra), paras 76-78.

[2024] 3 S.C.R. 1147 : 2024 INSC 223

Apoorva Arora & Anr. Etc.
v.
State (Govt. of NCT of Delhi) & Anr.

(Criminal Appeal No. 1694-1695 of 2024)

19 March 2024

[A.S. Bopanna and Pamidighantam Sri Narasimha,* JJ.]

Issue for Consideration

Whether the use of expletives and profane language in the titles and content of the episodes of the web-series 'College Romance' constitutes an offence of publication and transmission of obscene and sexually explicit content u/ss.67 and 67A of the Information Technology Act, 2000.

Headnotes

Information Technology Act, 2000 – ss.67, 67A – Penal Code, 1860 – s.292 – "obscenity" – Test for – Complaint filed that Season 1, Episode 5 of the web-series 'College Romance', titled 'Happily F**d Up', had vulgar and obscene language in its title and various portions constituting offence *inter alia* u/ss.292, 294, 509, Penal Code, 1860 and ss.67, 67A, IT Act – High Court dismissed the petition filed by appellants (actors, creators etc. of the web-series) for quashing the orders of ACMM and ASJ directing registration of FIR against them, and directed registration of FIR u/ss.67 and 67A, IT Act – Correctness:**

Held: High Court purportedly applied the community standard test – However, it incorrectly framed the question for inquiry as to whether the language employed in the episode was contemporarily used by the youth and whether it met the threshold of decency – Enquiry u/s.292, IPC or under s.67, IT Act does not hinge on whether the language or words are decent, or whether they are commonly used in the country – Rather, the inquiry is to determine whether the content is lascivious, appeals to prurient interests, or tends to deprave and corrupt the minds of those in whose hands it is likely to fall – High Court found that the language was full of swear words, profanities, and vulgar expletives that could not be heard in open court and held that the content was obscene as it would affect and tend to deprave and corrupt impressionable

* Author

minds – Specific material which it found to be obscene, was "foul, indecent and profane" language – High Court equated profanities and vulgarity with obscenity, without undertaking a proper or detailed analysis into how such language, by itself, could be sexual, lascivious, prurient, or depraving and corrupting – Vulgarity and profanities do not *per se* amount to obscenity – Obscenity relates to material that arouses sexual and lustful thoughts, which is not at all the effect of the abusive language or profanities employed in the episode – While the literal meaning of the terms used may be sexual in nature and refer to sexual acts, their usage does not arouse sexual feelings or lust in any viewer of ordinary prudence and common sense – Rather, the common usage of these words is reflective of emotions of anger, rage, frustration, grief, or perhaps excitement – By taking the literal meaning of these words, High Court failed to consider the specific material (profane language) in the context of the larger web-series and by the standard of an "ordinary man of common sense and prudence" – When the use of such language is noticed in the context of the plot and theme of the web-series, a light-hearted show on the college lives of young students, it is clear that the use of these terms was not related to sex and did not have any sexual connotation – Neither did the creator of the web-series intend for the language to be taken in its literal sense nor is that the impact on a reasonable viewer – There was a clear error in the legal approach adopted by the High Court in analysing and examining the material to determine obscenity – Standard for determination cannot be an adolescent's or child's mind, or a hypersensitive person susceptible to such influences – High Court incorrectly used the standard of "impressionable minds" to gauge the effect of the material and thus erred in applying the test for obscenity correctly – No offence made out u/ss.67, 67A, IT Act – Judgment of High Court set aside – FIR registered against appellants u/ss.67 and 67A, IT Act, quashed. [Paras 33-35, 37, 39, 48 and 49]

Information Technology Act, 2000 – ss.67 – Penal Code, 1860 – s.292 – "obscenity" defined in s.292 and s.67 – Difference:

Held: "Obscenity" has been similarly defined in s.292 and s.67 as material which is lascivious; or appeals to the prurient interest; or its effect tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it – However, the difference between them is only that s.67 is a special provision that applies

when the obscene material is published or transmitted in the electronic form – Since, in the present case, the alleged offending material is a web-series, the case is considered u/s.67, IT Act but the same test for obscenity as laid down u/s.292 will apply since the provisions are similarly worded in that respect. [Para 12]

Penal Code, 1860 – s.292 – "Obscenity" – Material if obscene – Process and method to objectively judge – Discussed.

Information Technology Act, 2000 – s.67A – 'sexually explicit act or conduct' – s.67A when not attracted:

Held: Facts of the present case do not attract s.67A as the complainant's grievance was about excessive usage of vulgar expletives, swear words, and profanities – There was no allegation of any 'sexually explicit act or conduct' in the complaint and as such, s.67A does not get attracted – High Court did not give any reason whatsoever on how s.67A was attracted to the facts of the present case – Offence of s.67A not made out. [Para 45, 46]

Penal Code, 1860 – s.292 – "Obscenity" – Hicklin test; "Community Standard Test" – Discussed – Precedents on s.292 traced.

Information Technology Act, 2000 – ss.67A, 67 – "explicit", "act", "conduct" – 'obscenity':

Held: s.67A criminalises publication, transmission, causing to publish or transmit in electronic form any material that contains sexually explicit act or conduct – Though the three expressions "explicit", "act", and "conduct" are open-textured and are capable of encompassing wide meaning, the phrase may have to be seen in the context of 'obscenity' as provided in s.67 – Thus, there could be a connect between s.67A and s.67 itself – For example, there could be sexually explicit act or conduct which may not be lascivious – Equally, such act or conduct might not appeal to prurient interests – On the contrary, a sexually explicit act or conduct presented in an artistic or a devotional form may have exactly the opposite effect, rather than tending to deprave and corrupt a person. [Para 47]

Case Law Cited

Sharat Babu Digumarti v. Government (NCT of Delhi) **[2016] 8 SCR 1015 : (2017) 2 SCC 18 : 2016 INSC 1131**; *Aveek Sarkar v. State of West Bengal* **[2014] 2**

SCR 263 : (2014) 4 SCC 257 : 2014 INSC 75; *Samaresh Bose v. Amal Mitra* [1985] Suppl. 3 SCR 17 : (1985) 4 SCC 289 : 1985 INSC 205; *Bobby Art International v. Om Pal Singh Hoon* [1996] Suppl. 2 SCR 136 : (1996) 4 SCC 1 : 1996 INSC 595; *K.A. Abbas v. Union of India* [1971] 2 SCR 446 : (1970) 2 SCC 780 : 1970 INSC 200; *Ramesh s/o Chotalal Dalal v. Union of India* [1988] 2 SCR 1011 : (1988) 1 SCC 668 : 1988 INSC 44; *Sakshi v. Union of India* [2004] Suppl. 2 SCR 723 : (2004) 5 SCC 518 : 2004 INSC 383; *Sanjay Dutt v. State through CBI, Bombay (II)* [1994] Suppl. 3 SCR 263 : (1994) 5 SCC 410 : 1994 INSC 371; *Girdhari Lal Gupta v. D.H. Mehta* (1971) 3 SCC 189 : 1970 INSC 164; *Union of India v. Rajiv Kumar* [2003] Suppl. 1 SCR 597 : (2003) 6 SCC 516 : 2003 INSC 320; *US Technologies International (P) Ltd. v. Commissioner of Income Tax* [2023] 4 SCR 382 : (2023) 8 SCC 24 : 2023 INSC 329; *Devidas Ramachandra Tuljapurkar v. State of Maharashtra* [2015] 7 SCR 853 : (2015) 6 SCC 1 : 2015 INSC 414; *Ranjit D. Udeshi v. State of Maharashtra* [1965] 1 SCR 65 : AIR 1965 SC 881, 1964 INSC 171; *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra* [1970] 2 SCR 80 : (1969) 2 SCC 687 : 1969 INSC 202; *Director General, Directorate General of Doordarshan v. Anand Patwardhan* [2006] Suppl. 5 SCR 403 : (2006) 8 SCC 433 : 2006 INSC 558; *Ajay Goswami v. Union of India* [2006] Suppl. 10 SCR 770 : (2007) 1 SCC 143 : 2006 INSC 995; *S. Khushboo v. Kanniammal* [2010] 5 SCR 322 : (2010) 5 SCC 600 : 2010 INSC 247; *N. Radhakrishnan v. Union of India* [2018] 11 SCR 1 : (2018) 9 SCC 725 : 2018 INSC 784; *NS Madhanagopal v. K. Lalitha* [2022] 15 SCR 649 : 2022 SCC OnLine SC 2030 : 2022 INSC 1323 – **referred to**.

Vijesh v. State of Kerala **2021 SCC OnLine Ker 854**; *Pramod Anand Dhumal v. State of Maharashtra* **(2021) SCC OnLine Bom 34**; *Majeesh K. Mathew v. State of Kerala* **2018 SCC OnLine Ker 23374;** *Ritesh Sidhwani v. State of U.P.* **2021 SCC OnLine All 856**; *Jaykumar Bhagwanrao Gore v. State of Maharashtra* **2017 SCC OnLine Bom 7283**; *G. Venkateswara Rao v. State of AP* **Writ Petition 1420 of 2020**; *Jaykumar Bhagwanrao*

Gore v. State of Maharashtra **2017 SCC OnLine Bom 7283**; *Pramod Anand Dhumal v. State of Maharashtra* **2021 SCC OnLine Bom 34**; *Ekta Kapoor v. State of MP* **2020 SCC OnLine MP 4581 – referred to.**

Roth v. United States **354 US 476 (1957);** *R v. Butler* **(1992) 1 SCR 452 – referred to.**

List of Acts

Information Technology Act, 2000; Penal Code, 1860; Code of Criminal Procedure, 1973; Indecent Representation of Women (Prohibition) Act, 1986.

List of Keywords

Web-series; Publication and transmission of obscene and sexually explicit content; Obscenity; Expletives; Vulgar expletives; Profane language; Profanities; Sexually explicit content; Obscene language; Swear words, Foul indecent language; Hicklin test; "Community standard test"; Quashing.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1694-1695 of 2024

From the Judgment and Order dated 06.03.2023 of the High Court of Delhi at New Delhi in CRLMC Nos. 2399 and 2215 of 2020

With

Criminal Appeal Nos. 1697, 1696 and 1698 of 2024

Appearances for Parties

K.M.Nataraj, A.S.G., Mukul Rohatgi, Sajan Poovayya, Mrs. Madhavi Divan, Harish Salve, Sr. Advs., Ameet Naik, Mahesh Agarwal, Ankur Saigal, Ms. Madhu Gadodiaya, Ms. S. Lakshmi Iyer, Chirag Nayak, Ms. Sanjanthi Sajan Poovayya, Abhishek Kakker, Devansh Srivastava, Ms. Raksha Agarwal, Ms. Kajal Dalal, E. C. Agrawala, Ms. Madhu Gadodia, Harshvardhan Jha, Raghav Shankar, Mrs. Yugandhara Pawar Jha, Sujoy Mukherjee, Ms. Tarini Kulkarni, Aman Pathak, Ms. Pallavi Mishra, Shreekant Neelappa Terdal, Sharath Nambiar, Sanjay Kr.Tyagi, Sridhar Potaraju, Ms. Nidhi Khanna, Karthik Jasra, Dr. Arun Kumar Yadav, Arvind Singh, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. Leave granted.

2. The appellants/accused are the actors, casting director, script writers, creator of the web-series 'College Romance'[1], and the media company that owns the YouTube channel on which the web-series was hosted[2]. They are sought to be investigated and prosecuted for production, transmission, and online publication of obscene and sexually-explicit material under Sections 67 and 67A of the Information Technology Act, 2000[3]. The appellants' petition under Section 482 of the Code of Criminal Procedure, 1973[4] for quashing the orders of the Additional Chief Metropolitan Magistrate and Additional Sessions Judge directing registration of FIR against them was dismissed by the High Court by the order impugned before us.[5] Having considered the matter in detail and for the reasons to follow, we have allowed the appeal, set aside the judgment of the High Court, and quashed the FIR bearing number 403/2023 dated 16.04.2023 at PS Mukherjee Nagar, Delhi against the appellants under Sections 67 and 67A of the IT Act.

3. *Facts*: The short facts leading to filing of the present appeal are as follows:

   3.1 A complaint was filed by respondent no. 2 before the Assistant Commissioner of Police that Season 1, Episode 5 of the web-series, titled 'Happily F****d Up', has vulgar and obscene language in its title and various portions of the episode, constituting an offence under Sections 292, 294 and 509 of the Indian Penal Code[6], Sections 67 and 67A of the IT Act, and Sections 2(c) and 3 of the Indecent Representation of Women

1 TVF Media Labs Private Ltd.

2 Contagious Online Media Network Pvt Ltd.

3 'IT Act' hereinafter.

4 'CrPC' hereinafter.

5 In Criminal Miscellaneous Case No. 2399 of 2020, Criminal Miscellaneous Case No. 2215 of 2020 and Criminal Miscellaneous Case No. 2214 of 2020, judgment dated 06.03.2023 ('Impugned judgment' hereinafter).

6 'IPC' hereinafter.

(Prohibition) Act, 1986[7]. On 13.03.2019, the complainant filed an application under Section 200 read with Section 156(3) of the CrPC before the ACMM seeking registration of FIR. The Investigating Officer conducted an enquiry and filed an Action Taken Report on 09.04.2019 stating that no cognisable offence is made out and in fact, there is no obscenity in the allegedly offending content.

3.2 However, the ACMM, by order dated 17.09.2019, allowed the complainant's application and directed the registration of an FIR against the appellants under Sections 292 and 294 of the IPC and Sections 67 and 67A of the IT Act as the vulgar language used is prima facie capable of appealing to prurient interests of the audience and is hence obscene.

3.3 The appellants filed a revision petition before the Additional Sessions Judge, who by order dated 10.11.2020 partially modified the order of the ACMM and directed the registration of FIR only under Sections 67 and 67A of the IT Act by relying on the decision of this Court in *Sharat Babu Digumarti v. Government (NCT of Delhi)*[8].

3.4 The appellants then filed a petition under Section 482 CrPC before the High Court for quashing the above-mentioned orders, which came to be dismissed by the judgment dated 06.03.2023, impugned herein. Against the dismissal and the consequent direction to register FIR under Sections 67 and 67A of the IT Act, the present appeals are filed by all the accused/appellants.

3.5 Pursuant to the directions of the High Court, an FIR was registered under Sections 67 and 67A of the IT Act against the appellants on 16.04.2023.

4. *Reasoning of the High Court:* The High Court, while dismissing the petition for quashing, held that the object of Sections 67 and 67A of the IT Act is to punish the publication and transmission of obscene and sexually explicit material in the cyber space. It relied on the 'community standard test' to determine whether the material is obscene, as laid

7 'IRWP Act' hereinafter.

8 [2016] 8 SCR 1015 : (2017) 2 SCC 18 : 2016 INSC 1131

down by this Court in *Aveek Sarkar v. State of West Bengal*[9] and followed in decisions of various High Courts[10]. By applying this test, the High Court held as follows: *First*, applying the standard of a common prudent man, it found that the episode did not use civil language and there was excessive use of profanities and vulgar expletives, and a clear description and reference to sexually explicit acts. The determination of how the content impacts a common man must be determined in the Indian context, as per Indian morality, keeping in mind contemporary standards of civility and morality.[11] In the allegedly offending portion (in Season 1, episode 5 from 5:24 to 6:40 minutes and 25:28 to 25:46 minutes), the male protagonist in a conversation with the female protagonist uses terms describing male and female genitalia and sexual acts, thereby making them sexually explicit and arousing prurient feelings. While the female protagonist is heard objecting to the language and expressing disgust over it, she does so by repeating the same to the male protagonist. The male protagonist then uses more vulgar expletives and indecent language, which is repeated by the female protagonist in a later part of the episode. The High Court held that the depiction of a sexually explicit act is not necessarily through filming but can also be through spoken language. It was found that the persons who are likely to be affected or persons whom such content can deprave or corrupt are impressionable minds in the present case, as there is no disclaimer or warning that classifies the web-series as being suitable only for persons who are 18 years or above. The content crossed the threshold of decency considering its availability to the public, including children. Further, the Court felt that the episode could not be heard in the courtroom without shocking or alarming the people and to maintain the decorum of language.

5. *Second*, a representation that the language used in the episode is the one used in the country and by its youth in educational institutions is not protected under the guarantee of freedom of speech under Article 19(1)(a). *Third*, that the online content curator and the intermediaries

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9 [2014] 2 SCR 263 : (2014) 4 SCC 257 : 2014 INSC 75

10 *G. Venkateswara Rao* v. *State of AP* in Writ Petition 1420 of 2020; *Jaykumar Bhagwanrao Gore* v. *State of Maharashtra* 2017 SCC OnLine Bom 7283; *Pramod Anand Dhumal* v. *State of Maharashtra* 2021 SCC OnLine Bom 34; *Ekta Kapoor* v. *State of MP* 2020 SCC OnLine MP 4581, as cited in paras 23-26 of the impugned judgment.

11 In para 37 of the impugned judgment, the High Court relied on *Samaresh Bose v. Amal Mitra* [1985] Suppl. 3 SCR 17 : (1985) 4 SCC 289 : 1985 INSC 205 where it was held that the regard must be given to contemporary morals and national standards in judging whether content is obscene.

are in violation of the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 as the content has not been correctly classified as 'A-rated' and there is no warning regarding the use of profanities and expletives. *Lastly*, the Court took note that vulgar language, profanities, and swear words must be regulated in the public domain and on social media platforms as they are a threat to impressionable minds like children of tender age. Further, a representation that the use of such language in general parlance is the "*new normal*" is a distortion of facts as it is still not spoken in the presence of the elderly, women and children, or at religious places. To maintain linguistic morality, the sanctity and reverence of languages must be protected.

6. The High Court also rejected the appellants' contention that the mandatory procedure under Section 154(3) of the CrPC, which is an important procedural safeguard, was not followed before resort to Section 156(3). The High Court preliminarily negatived this submission by holding that Section 154(3) only uses the term "may" and not "shall", and that the complainant anyways approached the ACP, Cyber Cell, North District, who is the authority higher to the SHO.

7. *Submissions of the Appellants:* We heard Mr. Mukul Rohatgi, Mr. Harish Salve, Ms. Madhavi Divan, Mr. Sajan Poovayya, Sr. Advocates. Learned senior counsels for the appellants have argued that the allegedly offending portions of Season 1, Episode 5 of the web-series do not meet the threshold for obscenity and that the High Court has erred in characterising the material as obscene. Further, these portions do not contain any sexually explicit act and as such no offence under Sections 67 or 67A of the IT Act is made out. Elaborating their submissions, the appellants' argued:

   7.1 Section 67 of the IT Act, that criminalises the publication and transmission of obscene material in electronic form, covers material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it. As per *Aveek Sarkar* (supra), the determination of whether some material is obscene must be made by the 'community standard test' by considering the work as a whole and then looking at the specific material that has been alleged to be obscene in

the context of the whole work. The web-series is a romantic comedy that traces the life of a group of friends who are in college. Its intention is to paint a relatable picture of college life in a cosmopolitan urban setting. There are two specific portions that have been alleged to be obscene. The first segment is where the male protagonist, named Bagga, indiscriminately uses expletives that are heard by the female protagonist, named Naira. Naira objects to the use of such language and points out that the literal meaning of the terms is absurd. Bagga states that these terms are not meant to be taken literally and are a part of common parlance. Naira reiterates her disapproval and threatens Bagga with consequences if he continues to speak in such a manner. Bagga 'inadvertently' uses another expletive, due to which Naira leaves from there. In the second segment, Naira and Bagga are with a wider group of friends where Naira is incensed by the statements of another friend and angrily uses the same expletives as Bagga, at which Bagga is delighted. Learned senior counsel has argued that when these scenes are considered individually and in the context of the web-series as a whole, they are not obscene. They only portray the absurdity of the literal meaning of these terms and show their inevitable presence in common language, including by those who disapprove of their use.

7.2 Relying on *Samaresh Bose v. Amal Mitra*[12] and *Bobby Art International v. Om Pal Singh Hoon*[13], learned senior counsel has argued that while the alleged portions are vulgar, vulgarity does not equate to obscenity. Mere words cannot amount to obscenity unless they involve lascivious elements that arouse sexual thoughts and feelings, which is not the effect of the scenes in the present case.

7.3 The effect of the words must be tested from the standard of an "ordinary man of common sense and prudence"[14], "reasonable, strong-minded, firm and courageous" person and not from the perspective of a hypersensitive person or a weak and vacillating

12 [1985] Suppl.. 3 SCR 17 : (1985) 4 SCC 289 : 1985 INSC 205

13 [1996] Suppl. 2 SCR 136 : (1996) 4 SCC 1 : 1996 INSC 595

14 *K.A. Abbas* v. *Union of India* [1971] 2 SCR 446 : (1970) 2 SCC 780 : 1970 INSC 200

mind[15]. The terms used in the allegedly offending portions do not refer to any sexually explicit act and are not obscene as per the community standard test. Therefore, no offence of obscenity is made out under Section 67 of the IT Act.

7.4 Learned senior counsel has also argued that the scenes do not contain any sexually explicit act or conduct, as is required for an offence under Section 67A. Relying on various cases by this Court,[16] they argue that the words in a penal provision must be strictly interpreted. The term 'sexually explicit act or conduct' does not cover profanities/ expletives/ swear words, even if the literal meaning of these terms refers to sexual acts. The literal meaning is not intended through the common usage of these words. Rather, they are an expression of emotions such as frustration, rage, and anger.

7.5 Learned senior counsel has also relied on the 50th Standing Committee Report on the 2006 Amendment Bill to the IT Act that introduced the provision, and various High Court decisions,[17] to argue that the intention of Section 67A is to criminalise the publication and transmission of pornographic material that depicts sexual acts or contains sexually explicit conduct that falls short of actual depiction of sexual acts. Since the alleged segments in this case only contain expletives and do not contain any explicit visual or verbal depiction of sexual activity, there is no offence under Section 67A.

7.6 It is of course rightly argued that the right to freedom of speech under Article 19(1)(a) protects artistic creativity and expression.

7.7 Lastly, the learned senior counsel has argued that a higher threshold of tolerance must apply in the present case as the web-series is a form of "pull media". In pull media, the consumer

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15 *Ramesh s/o Chotalal Dalal* v. *Union of India* [1988] 2 SCR 1011 *:* (1988) 1 SCC 668 : 1988 INSC 44

16 *Sakshi* v. *Union of India* [2004] Suppl. 2 SCR 723 : (2004) 5 SCC 518 : 2004 INSC 383; *Sanjay Dutt* v. *State through CBI, Bombay (II)* [1994] 3 SCR 263 : (1994) 5 SCC 410 : 1994 INSC 371; *Girdhari Lal Gupta* v. *D.H. Mehta*, (1971) 3 SCC 189 : 1970 INSC 164; *Union of India* v. *Rajiv Kumar* [2003] Suppl. 1 SCR 597 : (2003) 6 SCC 516 : 2003 INSC 320; *US Technologies International (P) Ltd.* v. *Commissioner of Income Tax* [2023] 4 SCR 382 : (2023) 8 SCC 24 : 2023 INSC 329

17 *Vijesh* v. *State of Kerala*, 2021 SCC OnLine Ker 854; *Pramod Anand Dhumal* v. *State of Maharashtra*, (2021) SCC OnLine Bom 34; *Majeesh K. Mathew* v. *State of Kerala*, 2018 SCC OnLine Ker 23374; *Ritesh Sidhwani* v. *State of U.P.*, 2021 SCC OnLine All 856; *Jaykumar Bhagwanrao Gore* v. *State of Maharashtra*, 2017 SCC OnLine Bom 7283

has more choice in deciding whether or not they wish to view some particular content. Unlike television or radio, where obscene material may be publicly broadcasted and there is little to no choice to the users in terms of what content is made available, the consumption of pull media over the internet gives the viewer complete control and decision-making over what they watch. Therefore, the web-series is only available and accessible to those persons who wish to view it, and hence a higher threshold of obscenity must be applied to "pull content".

8. *Submissions of the complainant*: We have heard learned counsel Mr. Arvind Singh, advocate-in-person, who is the complainant (respondent no. 2). He has argued that the present case is not fit for quashing. The alleged content of the web-series falls within the purview of Sections 67 and 67A of the IT Act and also offends Sections 3 and 4 of the Indecent Representation of Women (Prohibition) Act, 1986, which the High Court has failed to consider. Relying on the community standard test and the judgments of this Court in *Aveek Sarkar* (supra) and *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*[18], learned counsel has argued that the abovementioned portions of the web-series are obscene and sexually explicit. *First*, the material appeals to prurient interest in sex, as determined by the average person applying contemporary community standards. The titles of the episodes and the plot revolves around college students engaging in sexual activity. The content of the episodes also uses sexually explicit language and expletives, which cannot be termed as the "new normal". *Second*, the material portrays sexual conduct in a patently offensive way. *Third*, the material lacks serious literary, artistic, political or scientific value. *Fourth*, the material tends to arouse sexually impure thoughts. *Fifth*, the material is not in the larger interest of public good or in the interest of art, literature, science and therefore, the obscenity is not justified. Learned counsel has also pointed out that the material in the present case is freely available on the internet and is accessible to any person, including children and hence must be regulated in the interests of public order, morality, and decency.

9. *Analysis*: The central issue is whether the use of expletives and

18 [2015] 7 SCR 853 : (2015) 6 SCC 1 : 2015 INSC 414

profane language in the titles and content of the episodes of the web-series 'College Romance' constitutes an offence of publication and transmission of obscene and sexually explicit content under Sections 67 and 67A of the IT Act. We will examine each of these provisions in the context of 'obscenity' for the purpose of Section 67 and 'sexually explicit material' for the purpose of Section 67A.

A. *Whether the material is 'obscene'*:

10. We will first deal with the contention that the material is obscene. Section 67 of the IT Act is as follows:

> "***67. Punishment for publishing or transmitting obscene material in electronic form****.–Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.*"

11. This Court has laid down the meaning, test, standard, and method for determining whether some material is obscene in the context of Section 292 of the IPC.

12. Section 292 defines 'obscene' as a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object that is lascivious, appeals to the prurient interest, or has such effect, if taken as a whole, that tends to deprave and corrupt persons who are likely to read, see or hear the matter contained in it. The provision criminalises the sale, distribution, public exhibition, circulation, import, export, etc of obscene material. The provision excludes such material when the publication is justified as being for public good on the ground that it is in the interest of science, art, literature, or learning or other objects of general concern; such material is kept or used for bona fide religious purposes; it is sculptured, engraved, painted or

represented on or in ancient monuments and temples. The relevant portion of Section 292 has been extracted for reference:

> ***"292. Sale, etc., of obscene books, etc.**—(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.*"

It is evident that "obscenity" has been similarly defined in Section 292 and Section 67 as material which is:

i. lascivious; or

ii. appeals to the prurient interest; or

iii. its effect tends to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

However, the difference between them is only that Section 67 is a special provision that applies when the obscene material is published or transmitted in the electronic form.[19] Since the alleged offending material is a web-series, the case must be considered under Section 67 of the IT Act[20] but the same test for obscenity as laid down under Section 292 will apply since the provisions are similarly worded in that respect. In this context we will examine how obscenity is understood.

13. *Recounting the development through judicial precedents:* This Court upheld the constitutional validity of Section 292 as a reasonable restriction on free speech and applied the *Hicklin* test[21] to determine whether the book 'Lady Chatterley's Lover' was obscene in the decision of *Ranjit D. Udeshi v. State of Maharashtra.*[22] As per the

19 *Sharat Babu Digumarti* (supra)

20 ibid.

21 (1868) LR 3 QB 360

22 [1965] 1 SCR 65 : AIR 1965 SC 881 : 1964 INSC 171

Hicklin test, a material is obscene if it has the tendency to deprave and corrupt the minds of those who are open to such immoral influences and into whose hands the publication is likely to fall:[23]

> "*… I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall … it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure and libidinous character.*"

14. This test lays emphasis on the potentiality of the material to deprave and corrupt by immoral influences.[24] To determine this, the Court must apply itself to consider each work at a time. It must take an overall view of the obscene matter in the setting of the whole work but also consider the obscene matter by itself and separately to find out whether it is so grossly obscene and it is likely to deprave and corrupt. A mere stray word or insignificant passage would not suffice to qualify the material as obscene.[25] The Court also clarified that sex and nudity in art and literature cannot in and of themselves be regarded as evidence of obscenity without something more.[26] Sex must be treated in manner that is offensive to public decency and morality, when judged by our national standards, and must be likely to pander to lascivious, prurient, sexually precocious minds, and appeal to or have the tendency to appeal to the "carnal side of human nature" for it to be obscene.[27]

15. The Court also emphasised its role in maintaining a delicate balance between protecting freedom of speech and artistic freedom on the one hand, and public decency and morality on the other. It held that when art and obscenity are mixed, the art must be so preponderating that the obscenity is pushed into the shadows or is trivial and

23 ibid, para 14

24 ibid, para 19

25 ibid, 20, 21

26 ibid, para 16

27 ibid, paras 21 and 22

insignificant and can be overlooked.[28] Similarly, if the matter has a preponderating social purpose and gain that overweighs the obscenity of the content (such as medical textbooks), then such material is constitutionally protected by freedom of speech and cannot be criminalised as obscene.[29]

16. The Court followed the *Hicklin* test and *Ranjit Udeshi* (supra) in *Shri Chandrakant Kalyandas Kakodkar v. State of Maharashtra*[30] but it also introduced certain caveats and refined the test to some extent. Considering the material in that case, a Marathi short story *Shama*, the Court held that the story read as a whole does not amount to pornography or pander to the prurient interest. Even if the work is not of high literary quality and is immature and of bad taste, there was nothing that could deprave or corrupt those in whose hands it is likely to fall, including adolescents.[31] The Court also cautioned that the standard for the artist or the writer is not that the adolescent mind must not be brought in contact with sex or that the work must be expunged of all references to sex, irrespective of whether it is the dominant theme.[32] The test for obscenity was stated as: "*What we have to see is that whether a class, not an isolated case, into whose hands the book, article or story falls suffer in their moral outlook or become depraved by reading it or might have impure and lecherous thoughts aroused in their minds.*"[33]

17. In *KA Abbas* v. *Union of India*[34] the Court summarised the test and process to determine obscenity as follows:

> *"(1) Treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.*
>
> *(2) Comparison of one book with another to find the extent of permissible action is not necessary.*

28 ibid, para 21

29 ibid, paras 9, 22, and 29

30 [1970] 2 SCR 80 : (1969) 2 SCC 687 : 1969 INSC 202

31 ibid, paras 9 and 10

32 ibid, para 12

33 ibid, para 12

34 (1970) 2 SCC 780, para 48

(3) The delicate task of deciding what is artistic and what is obscene has to be performed by courts and in the last resort, by the Supreme Court and so, oral evidence of men of literature or others on the question of obscenity is not relevant.

(4) An overall view of the obscene matter in the setting of the whole work would of course be necessary but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity is so decided that it is likely to deprave or corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.

(5) The interests of contemporary society and particularly the influence of the book, etc., on it must not be overlooked.

(6) Where obscenity and art are mixed, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and can be overlooked.

(7) Treating with sex in a manner offensive to public decency or morality which are the words of our Fundamental Law judged by our national standards and considered likely to pender to lescivious, pourlent or sexually precocious minds must determine the result.

(8) When there is propagation of ideas, opinions and informations or public interests or profits, the interests of society may tilt the scales in favour of free speech and expression. Thus books on medical science with intimate illustrations and photographs though in a sense immodest, are not to be considered obscene, but the same illustrations and photographs collected in a book form without the medical text would certainly be considered to be obscene.

(9) Obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech or expression. Obscenity is treating with sex

in a manner appealing to the carnal side of human nature or having that tendency. Such a treating with sex is offensive to modesty and decency.

(10) Knowledge is not a part of the guilty act. The offender's knowledge of the obscenity of the book is not required under the law and it is a case of strict liability."

18. In *Samaresh Bose* (supra), which has been relied on by the appellants, this Court differentiated vulgarity from obscenity. The material in question in this case was a Bengali novel titled 'Prajapati'. The Court noted that while slang and unconventional words had been used in the book along with suggestions of sexual acts, there was no description of any overt act of sex. The words are vulgar and create a feeling of disgust and revulsion and may shock the reader but this does not necessarily amount to obscenity, which is the tendency to deprave and corrupt.[35] It held that the use of slang and unconventional words; an emphasis on sex; a description of female bodies; and narrations of feelings, thoughts and actions in vulgar language in the novel do not render the material obscene.[36] Further, a mere reference to sex is insufficient for obscenity and does not make a material unsuitable for adolescents.[37]

19. The Court also summarised the process that must be followed to objectively assess whether some material is obscene. It held that the judge must first place himself in the position of the author to understand his perspective and what he seeks to convey and whether it has any literary or artistic value. The judge must then place himself in the position of a reader of every age group in whose hands the book (or material) is likely to fall and determine the possible effect or influence of the material on the minds of such persons. The relevant portion reads:

> "*29. …As laid down in both the decisions of this Court earlier referred to, "the question whether a particular article or story or book is obscene or not does not altogether depend on oral evidence, because it is the duty of the court*

35 *Samaresh Bose* (supra), para 35

36 ibid, para 35

37 ibid, para 35

to ascertain whether the book or story or any passage or passages therein offend the provisions of Section 292 IPC". In deciding the question of obscenity of any book, story or article the court whose responsibility it is to adjudge the question may, if the court considers it necessary, rely to an extent on evidence and views of leading literary personage, if available, for its own appreciation and assessment and for satisfaction of its own conscience. The decision of the court must necessarily be on an objective assessment of the book or story or article as a whole and with particular reference to the passages complained of in the book, story or article. The court must take an overall view of the matter complained of as obscene in the setting of the whole work, but the matter charged as obscene must also be considered by itself and separately to find out whether it is so gross and its obscenity so pronounced that it is likely to deprave and corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall. Though the court must consider the question objectively with an open mind, yet in the matter of objective assessment the subjective attitude of the Judge hearing the matter is likely to influence, even though unconsciously, his mind and his decision on the question. A Judge with a puritan and prudish outlook may on the basis of an objective assessment of any book or story or article, consider the same to be obscene. It is possible that another Judge with a different kind of outlook may not consider the same book to be obscene on his objective assessment of the very same book. The concept of obscenity is moulded to a very great extent by the social outlook of the people who are generally expected to read the book. It is beyond dispute that the concept of obscenity usually differs from country to country depending on the standards of morality of contemporary society in different countries. In our opinion, in judging the question of obscenity, the Judge in the first place should try to place himself in the position of the author and from the viewpoint of the author the Judge should try to understand what is it that the author seeks to convey and whether what the author conveys has any literary and artistic

> *value. The Judge should thereafter place himself in the position of a reader of every age group in whose hands the book is likely to fall and should try to appreciate what kind of possible influence the book is likely to have in the minds of the readers. A Judge should thereafter apply his judicial mind dispassionately to decide whether the book in question can be said to be obscene within the meaning of Section 292 IPC by an objective assessment of the book as a whole and also of the passages complained of as obscene separately. In appropriate cases, the court, for eliminating any subjective element or personal preference which may remain hidden in the subconscious mind and may unconsciously affect a proper objective assessment, may draw upon the evidence on record and also consider the views expressed by reputed or recognised authors of literature on such questions if there be any for his own consideration and satisfaction to enable the court to discharge the duty of making a proper assessment*."

20. The Court then applied this test to the novel in question. By placing themselves in the position of the author and judging the work from his perspective, the Court found that his intention was to expose social evils and ills, for which the author has used his own technique. Similarly, the Court placed itself in the position of the readers who are likely to read the book. It held that the book was likely to be read by readers of "both sexes and all ages between teenagers and the aged" and found that while it may create a sense of shock and disgust, no reader would be depraved, debased, or encouraged to lasciviousness by reading the book.[38]

21. In *Bobby Art International* (supra) the question before the Court was whether certain scenes from the film 'Bandit Queen' that depicted rape and nudity were obscene. Here, obscenity was not considered under Section 292 but under the 1991 Guidelines for Censor Board certification under the Cinematograph Act, 1952.[39] The Court did not

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38 ibid.

39 The relevant guidelines, as extracted in *Bobby Art International* (supra), are as follows:

> "***15.*** *The guidelines earlier issued were revised in 1991. Clause (1) thereof reads thus:*
>
> *"1. The objectives of film certification will be to ensure that—*
>
> *(a) the medium of film remains responsible and sensitive to the values and standards of society;*

cite or follow the *Hicklin* test as laid down in *Ranjit Udeshi* (supra) and *Chandrakant Kalyandas* (supra). Instead, it relied on the Guidelines and laid down the test for obscenity as follows:

> *"22. The guidelines aforementioned have been carefully drawn. They require the authorities concerned with film certification to be responsive to the values and standards of society and take note of social change. They are required to ensure that "artistic expression and creative freedom are not unduly curbed". The film must be "judged in its entirety from the point of view of its overall impact". It must also be judged in the light of the period depicted and the contemporary standards of the people to whom it relates, but it must not deprave the morality of the audience. Clause 2 requires that human sensibilities are not offended by vulgarity, obscenity or depravity, that scenes degrading or denigrating women are not presented and scenes of sexual violence against women are avoided, but if such scenes are germane to the theme, they be reduced to a minimum and not particularised.*"

22. The Court first considered the plot and theme of the film as a whole and then considered the individual scenes of nudity and rape. Judging the work as a whole and the alleged offending material specifically, the Court held that the scenes are likely to evoke tears, pity, horror, and shame. Only a perverted mind might be aroused in such a situation,

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(b) artistic expression and creative freedom are not unduly curbed;
(c) certification is responsive to social change;
(d) the medium of film provides clean and healthy entertainment; and
(e) as far as possible, the film is of aesthetic value and cinematically of a good standard."

Clause (2) states that the Board of Film Censors shall ensure that—

"2. (vii) human sensibilities are not offended by vulgarity, obscenity or depravity;

*****

(ix) scenes degrading or denigrating women in any manner are not presented;
(x) scenes involving sexual violence against women like attempt to rape, rape or any form of molestation or scenes of a similar nature are avoided, and if any such incident is germane to the theme, they shall be reduced to the minimum and no details are shown;

****"*

Clause (3) reads thus:

"3. The Board of Film Certification shall also ensure that the film—
(i) is judged in its entirety from the point of view of the overall impact; and
(ii) is examined in the light of the period depicted in the film and the contemporary standards of the country and the people to which the film relates, provided that the film does not deprave the morality of the audience."

and the purpose of censorship is not to protect the pervert or assuage the susceptibilities of the over-sensitive.[40] Further, the use of swear words and expletives that are heard everyday was also held to be harmless.[41] The Court rather emphasised the overarching social purpose and message of the film – to condemn rape and violence against women by showing the trauma and emotional turmoil of a victim of rape and to evoke sympathy for her and disgust for the rapist.[42] Thus, the material was held as not being obscene.

23. Similarly, in *Director General, Directorate General of Doordarshan v. Anand Patwardhan*[43], the Court applied the test of 'contemporary community standards' to determine whether a documentary is obscene for the purpose of certification and telecast on Doordarshan. A three-prong test for obscenity was formulated as follows:

> *"(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest;*
>
> *(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and*
>
> *(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."*[44]

24. The Court relied on *Ramesh v. Union of India*,[45] where it was held that the effect of the words must be judged from the standards of a reasonable, strong-minded, firm and courageous person, and not from the perspective of weak and vacillating minds or those who sense danger in every hostile point of view.[46] Considering the documentary as a whole to determine its message, which cannot be conveyed by watching only certain bits, it was held that the film portrays social evils and does not seek to cater to the prurient interests of any person.[47]

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40 ibid, paras 27 and 28

41 ibid, para 29

42 ibid, paras 28, 31, 33

43 [2006] Suppl. 5 SCR 403 : (2006) 8 SCC 433 : 2006 INSC 558

44 ibid, para 32

45 [1988] 2 SCR 1011 : (1988) 1 SCC 668 : 1988 INSC 44

46 *Directorate General of Doordarshan* (supra), para 37

47 ibid, para 38

25. The law on determining obscenity has been summarised and reiterated in *Ajay Goswami v. Union of India*[48] where the Court cited both Indian precedent and American jurisprudence. The principles that can be culled out from the judgment are as follows:

    i. Obscenity must be judged with regard to contemporary mores and national standards.[49]

    ii. The work must be judged as a whole and the alleged offending material must also be separately examined to judge whether they are so grossly obscene that they are likely to deprave and corrupt the reader or viewer.[50] There must be a clear and present danger that has proximate and direct nexus with the material.[51]

    iii. All sex-oriented material and nudity per se are not always obscene.[52]

    iv. The effect of the work must be judged from the standard of *an average adult human being*.[53] Content cannot be regulated from the benchmark of what is appropriate for children as then the adult population would be restricted to read and see only what is fit for children.[54] Likewise, regulation of material cannot be as per the standard of a hypersensitive man and must be judged as per an "ordinary man of common sense and prudence".[55]

    v. Where art and obscenity are mixed, it must be seen whether the artistic, literary or social merit of the work overweighs its obscenity and makes the obscene content insignificant or trivial. In other words, there must be a preponderating social purpose or profit for the work to be constitutionally protected as free speech. Similarly, a different approach may have to be used when the material propagates ideas, opinions, and information of public interest as then the interest of society will

48 [2006] Suppl. 10 SCR 770 : (2007) 1 SCC 143 : 2006 INSC 995

49 ibid, para 67

50 ibid, para 68

51 ibid, para 70

52 ibid, paras 7 and 61

53 ibid, para 7

54 ibid, para 62

55 ibid, para 71

tilt the balance in favour of protecting the freedom of speech (for example, with medical textbooks).[56]

vi. The Court must perform the task of balancing what is artistic and what is obscene. To perform this delicate exercise, it can rely on the evidence of men of literature, reputed and recognised authors to assess whether there is obscenity.[57]

26. In *S. Khushboo v. Kanniammal*,[58] the issue pertained to quashing of FIR filed against the appellant, inter alia under Section 292 of the IPC, for an interview in a magazine where she called for the social acceptance of premarital sex, especially in live-in relationships, and cautioned women to take adequate protection to prevent unwanted pregnancies and sexually transmitted infections. The Court held that no offence was made out under Section 292 as the content is not lascivious (i.e., expressing or causing sexual desire); does not appeal to the prurient interest (i.e., excessive interest in sexual matters); and does not have the effect of tending to deprave and corrupt persons who are likely to read, hear, or see the material.[59] It was reiterated that mere reference to sex does not make the material obscene without examining the context of such reference.[60] The Court held that obscenity must be gauged with respect to "*contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person.*"[61] In this case, the appellant had not described any sexual act or said anything that arouses sexual desire in the mind of a reasonable and prudent reader to make the content obscene.[62] Hence the FIR was quashed by this Court.

27. A Division Bench of this Court in *Aveek Sarkar* (supra) also quashed an FIR under Section 292 against the magazine cover of *Sports World* and *Anandbazar Patrika* that carried the image of Boris Becker, a tennis player, posing nude with his fiancée, who are an interracial couple. The Court held that while judging a photograph, article or

56 ibid, para 66

57 ibid, para 69

58 [2010] 5 SCR 322 : (2010) 5 SCC 600 : 2010 INSC 247

59 ibid, para 24

60 ibid, para 25

61 ibid, para 27

62 ibid, para 28

book to be obscene, "*regard must be had to the contemporary mores and national standards and not the standard of a group of susceptible or sensitive persons*".[63] The Court held that the *Hicklin* test must not be applied as it "*judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults*."[64] Even in the United States, where the test was first formulated, the courts no longer apply the *Hicklin* test and instead apply the test formulated in *Roth* v. *United States*[65] where the US Supreme Court held that sex-related material is obscene only when it has the tendency of exciting lustful thoughts when judged from the perspective of an average person by applying the community standards test. Similarly, in Canada, the dominant test is the 'community standards problem test' as per which a work qualifies as obscene when the exploitation of sex is its dominant characteristic and such exploitation is undue.[66] Taking note of these jurisprudential developments, the Court in *Aveek Sarkar* markedly moved away from the *Hicklin* test to the "community standard test" where the material is considered as a whole to determine whether the specific portions have the tendency to deprave and corrupt.[67]

28. Applying this test, it was held that a picture of a nude/semi-nude woman is not per se obscene unless it arouses sexual desire or overtly reveals sexual desire or has the tendency of exciting lustful thoughts.[68] In the present case, the posture and the background of the woman posing with her fiancée, whose photograph was taken by her father, does not have the tendency to deprave or corrupt those in whose hands the magazine would fall when considered in light of the broader social message of the picture against apartheid, racism, and to promote love and marriage across race.[69] We may note that this Court followed the community standards test in *Devidas Ramachandra Tuljapurkar* (supra).

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63 *Aveek Sarkar* (supra), para 18

64 ibid, para 20

65 354 US 476 (1957)

66 *R v. Butler*, (1992) 1 SCR 452 (Can SC) as cited in *Aveek Sarkar* (supra), para 22

67 *Aveek Sarkar* (supra), para 23

68 ibid, para 23

69 ibid, paras 27 and 28

29. Lastly, in *N. Radhakrishnan v. Union of India*,[70] it was again held that the Court must not be guided by the sensitivity of a pervert viewer and the setting of the whole work, its purpose, and the constituent elements of the character must be kept in mind while judging for obscenity.[71]

30. *Application of the principles in the above-referred precedents to the facts of the present case:* The purpose of elaborately tracing the precedents on Section 292 is to identify the essential content of the offence of obscenity, the test and the standard by which the allegedly offending material must be judged, and the oral and documentary evidences and the process that the court must rely on and follow for arriving at its conclusion.

31. For applying the test for obscenity to the allegedly offending portions of the web-series, it is important to take note of the approach adopted by the High Court.

32. The High Court purportedly applied the community standard test as laid down in *Aveek Sarkar* (supra) to arrive at its conclusion.[72] It correctly states the position of law that to determine whether certain content is obscene, the standard of determination is that of an ordinary common person and not a hypersensitive person.[73]

33. *Wrong question, wrong answer:* However, the High Court has incorrectly framed the question for inquiry. The issue framed by the High Court is whether the language employed in the episode is contemporarily used by the youth and whether it meets the threshold of decency. The High Court has framed the question for inquiry in the following terms:

> "*29. As stated above, this Court had watched a few episodes of the web series "College Romance" and the episode in question to decide the case more effectively and fairly. The intent behind watching the said web series was to analyze fairly as to whether the contention raised on behalf of the petitioners that the language used in the*

70 [2018] 11 SCR 1 : (2018) 9 SCC 725 : 2018 INSC 784

71 ibid, para 33

72 Impugned judgment, paras 21 and 22

73 ibid, para 28

> *web series is "in language", or is "language used by new generation in colleges", or "the students in law colleges and the younger generation in colleges uses this language only", is without merit or not.*
>
> *30. This Court also wanted to test/examine the test of a common prudent man in practicality, acting itself as a common prudent person, so as to check as to whether such language, in fact, can be heard by a common prudent man without being embarrassed or finding it against decency or against the concept of decency…"*
>
> (emphasis supplied)

34. From a plain reading of Section 67 and the material that is characterised as 'obscene' therein, it is clear that the High Court posed the wrong question, and it has naturally arrived at a wrong answer. At the outset, the enquiry under Section 292 of the IPC or under Section 67 of the IT Act does not hinge on whether the language or words are decent, or whether they are commonly used in the country. Rather, from the plain language of the provision, the inquiry is to determine whether the content is lascivious, appeals to prurient interests, or tends to deprave and corrupt the minds of those in whose hands it is likely to fall.[74] The High Court embarked on a wrong journey and arrived at the wrong destination.

35. *Profanity is not per se obscene*: The *second* threshold error is in the finding of the High Court that the language is full of swear words, profanities, and vulgar expletives that could not be heard in open court and also that it is not the language of the youth. Based on this finding, the High Court has held that the content is obscene as it "will affect and will tend to deprave and corrupt impressionable minds". In its own words, the High Court held:

> *"30. …this Court found that the actors/protagonists in the web series are not using the language used in our country i.e. civil language. The Court not only found excessive use of "swear words", "profane language" and "vulgar expletives" being used, it rather found that the web series had a series of such words in one sentence*

74 Section 67, IT Act; *Ranjit Udeshi* (supra)

> *with few Hindi sentences here and there. In the episode in question, there is clear description and reference to a sexually explicit act. The Court had to watch the episodes with the aid of earphones, in the chamber, as the profanity of language used was of the extent that it could not have been heard without shocking or alarming the people around and keeping in mind the decorum of language which is maintained by a common prudent man whether in professional or public domain or even with family members at home. Most certainly, this Court notes that this is not the language that nation's youth or otherwise citizens of this country use, and this language cannot be called the frequently spoken language used in our country.*
>
> *36. When the entire content of the series is seen in the light of above, it would lead any common person to a conclusion that the language used in the web series is foul, indecent and profane to the extent that it will affect and will tend to deprave and corrupt impressionable minds. Therefore, on the basis of this finding it can be held that the content of the web series will certainly attract the criminality as envisaged under Section 67 of the Information Technology Act.*"
>
> (emphasis supplied)

The specific material which the High Court found to be obscene, i.e., that which tends to deprave and corrupt impressionable minds, was "foul, indecent and profane" language. Nothing more. The High Court has equated profanities and vulgarity with obscenity, without undertaking a proper or detailed analysis into how such language, by itself, could be sexual, lascivious, prurient, or depraving and corrupting. It is well-established from the precedents cited that vulgarity and profanities do not per se amount to obscenity.[75] While a person may find vulgar and expletive-filled language to be distasteful, unpalatable, uncivil, and improper, that by itself is not sufficient to be 'obscene'. Obscenity relates to material that arouses sexual and lustful thoughts, which is not at all the effect of the abusive language

75 *Samaresh Bose* (supra), para 35; *Bobby Art International* (supra), para 29; *NS Madhanagopal* v. *K. Lalitha*, [2022] 15 SCR 649 : 2022 SCC OnLine SC 2030 : 2022 INSC 1323

or profanities that have been employed in the episode. Rather, such language may evoke disgust, revulsion, or shock.[76] The reality of the High Court's finding is that once it found the language to be profane and vulgar, it has in fact moved away from the requirements of obscenity under Section 67 of the IT Act. The High Court failed to notice the inherent contradiction in its conclusions.

36. *No objective consideration*: *Third*, the High Court has erred in the legal approach followed by it while assessing whether the material is obscene. In *Samaresh Bose* (supra), this Court has laid down, in great depth and detail, the process and method that must be followed to objectively judge whether the material is obscene.[77] The court must consider the work as a whole and then the specific portions that have been alleged to be obscene in the context of the whole work to arrive at its conclusion.[78] Further, the court must first step into the position of the creator to understand what he intends to convey from the work and whether it has any literary or artistic value. It must then step into the position of the reader or viewer who is likely to consume the work and appreciate the possible influence on the minds of such reader.[79] However, the High Court has not followed this judicial process before arriving at its conclusion, which is as follows:

> "*43. Coming back to case at hand, the specific complaint of petitioner is that in Episode 05 of Season 01, airtime starting from 5 minutes and 24 seconds onwards upto 6 minutes and 40 seconds as well as from 25 minutes and 28 seconds upto 25 minutes and 46 seconds, the language of male and female protagonist is full of obscenity, vulgar words and expletives, without there being any warning or filter imposing restriction of age of viewers to whom the content should be visible. The language used in Episode 05 of Season 01 was heard by this Court, and the level of obscenity of the language and sentences used was such that this Court cannot reproduce it in the judgment*

76 *Samaresh Bose* (supra), para 35

77 *Samaresh Bose* (supra), para 29

78 ibid; *Ranjit Udeshi* (supra), paras 20 and 21

79 *Samaresh Bose* (supra), para 29

itself for the purpose of adjudication. The language used in the web series at the abovementioned time referred to a sexually explicit act in spoken language. It is not just an expletive, but is profane and vulgar language being used referring to a sexually explicit act which certainly cannot be termed common or commonly accepted language. Rather the female protagonist in the series itself is heard objecting to the male protagonist and expressing her disgust over use of this language by repeating the same language herself to the male protagonist. In answer to that, the male protagonist further uses more vulgar expletives and indecent language which is bound to disgust a normal prudent man, if heard in public. Later in the said episode, the female protagonist uses the same obscene, sexually explicit language to others and the male protagonist is seen enjoying and appreciating her conduct. The male protagonist uses words describing male and female genitalia and sexual act, thus by words, painting pictures of sexually explicit act which brings it under ambit of arousing prurient feelings by so doing. There's no escape from the same by saying that the said act was not done, shown or filmed. Depiction does not connote filming alone but conveying by a medium, which in this case is spoken language. Therefore, the content as discussed above will attract the criminality as laid down under Section 67 as well as 67A of IT Act."

(emphasis supplied)

37. It is evident from the above passages that the High Court has taken the meaning of the language in its literal sense, outside the context in which such expletives have been spoken. While the literal meaning of the terms used may be sexual in nature and they may refer to sexual acts, their usage does not arouse sexual feelings or lust in any viewer of ordinary prudence and common sense. Rather, the common usage of these words is reflective of emotions of anger, rage, frustration, grief, or perhaps excitement. By taking the literal meaning of these words, the High Court failed to consider the specific material (profane language) in the context of the larger web-series and by the standard of an "ordinary man of common sense and prudence". When we notice the use of such language in the context

of the plot and theme of the web-series, which is a light-hearted show on the college lives of young students, it is clear that the use of these terms is not related to sex and does not have any sexual connotation. Neither did the creator of the web-series intend for the language to be taken in its literal sense nor is that the impact on a reasonable viewer who will watch the material. Therefore, there is a clear error in the legal approach adopted by the High Court in analysing and examining the material to determine obscenity.

38. Furthermore, the objectivity with which a judicial mind is expected to examine the work in question was completely lost when the High Court evidently could not extricate itself from the courtroom atmosphere. The sensitivity and discomfort of the High Court is evident when it held:

> "*29. …The Court had to watch the episodes with the aid of earphones, in the chamber, as the profanity of language used was of the extent that it could not have been heard without shocking or alarming the people around and keeping in mind the decorum of language which is maintained by a common prudent man whether in professional or public domain or even with family members at home…*"

39. *Application of wrong standard*: The *last* issue is that of the standard or perspective used by the High Court to determine obscenity. It is well-settled that the standard for determination cannot be an adolescent's or child's mind, or a hypersensitive person who is susceptible to such influences.[80] However, the High Court has incorrectly used the standard of "impressionable minds" to gauge the effect of the material and has therefore erred in applying the test for obscenity correctly.[81]

40. The High Court has made several remarks on the need to maintain linguistic purity, civility, and morality by retaining the purity of language and deprecating the representation of expletives-filled language as the "new normal". The real test is to examine if the language is in anyway obscene under Section 67 of the IT Act. The approach adopted by the High Court, as explained earlier, is based on irrelevant considerations.

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80 *Chandrakant Kalyandas* (supra), para 12; *Samaresh Bose* (supra), para 35; *Ajay Goswami* (supra); *Aveek Sarkar* (supra), para 20

81 Impugned judgment, paras 35, 36 and 74

41. Similarly, the metric to assess obscenity and legality of any content cannot be that it must be appropriate to play in the courtroom while maintaining the court's decorum and integrity. Such an approach unduly curtails the freedom of expression that can be exercised and compels the maker of the content to meet the requirements of judicial propriety, formality, and official language. Here again, the High Court committed a serious error in decision-making.

42. The High Court has also expressed concern and anxiety about the free availability of the web-series on the internet to the youth and that it was not classified as being restricted to those above the age of 18 years. While such anxiety is not misplaced, the availability of content that contains profanities and swear words cannot be regulated by criminalising it as obscene. Apart from being a non-sequitur, it is a disproportionate and excessive measure that violates freedom of speech, expression, and artistic creativity.

43. For the reasons stated above, we are of the opinion that the High Court was not correct in its conclusion that the web-series has obscene content and that therefore the provisions of Section 67 of the IT Act are attracted.

B. *Whether the material is 'sexually explicit' for the purpose of Section 67A*:

44. Section 67A of the IT Act criminalises the publication and transmission of sexually explicit content. The provision is as follows:

> "***67A. Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form***.–*Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees.*"

45. The High Court has not given any reason whatsoever on how Section 67A is attracted to the facts of the present case. In our opinion, the offence of Section 67A is not at all made out.

46. The facts of the present case certainly do not attract Section 67A as the complainant's grievance is about excessive usage of vulgar expletives, swear words, and profanities. There is no allegation of any '*sexually explicit act or conduct*' in the complaint and as such, Section 67A does not get attracted.

47. Section 67A criminalises publication, transmission, causing to publish or transmit – in electronic form – any material that contains sexually explicit act or conduct. Though the three expressions "explicit", "act", and "conduct" are open-textured and are capable of encompassing wide meaning, the phrase may have to be seen in the context of '*obscenity'* as provided in Section 67. Thus, there could be a connect between Section 67A and Section 67 itself. For example, there could be sexually explicit act or conduct which may not be lascivious. Equally, such act or conduct might not appeal to prurient interests. On the contrary, a sexually explicit act or conduct presented in an artistic or a devotional form may have exactly the opposite effect, rather than tending to deprave and corrupt a person.

C. *Quashing the FIR:*

48. No offence of publication or transmission of any material in electronic form, which is obscene, lascivious, or appealing to prurient interest, and/or having the effect of tending to deprave and corrupt persons, as provided under Section 67 of the IT act, is made out. Equally, no case of publication or transmission of material containing sexually explicit act or conduct, as provided under Section 67A, is made out from the bare reading of the complaint. It is settled that a court must exercise its jurisdiction to quash an FIR or criminal complaint when the allegations made therein, taken prima facie, do not disclose the commission of any offence.[82]

49. In view of the above, we allow the appeals against the judgment of the High Court dated 06.03.2023 in Criminal Miscellaneous Case No. 2399 of 2020, Criminal Miscellaneous Case No. 2215 of 2020 and Criminal Miscellaneous Case No. 2214 of 2020, and set aside the judgment of the High Court, and quash FIR 403/2023 registered

82 *State of Haryana* v. *Bhajan Lal*, (1992) SCC Supp (1) 335, 1992 INSC 357; *State of AP* v. *Golconda Linga Swamy*, (2004) 6 SCC 522, 2004 INSC 404; *Zandu Pharmaceutical Works Ltd* v. *Mohd Sharaful Haque*, (2005) 1 SCC 122, 2004 INSC 628

at Police Station Mukherjee Nagar, Delhi dated 16.04.2023 under Sections 67 and 67A of the IT Act against the appellants herein.

50. Pending applications, if any, shall stand disposed of.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeals allowed.

[2024] 3 S.C.R. 1181 : 2024 INSC 239

Nenavath Bujji Etc.
v.
The State of Telangana and Ors.

(Criminal Appeal Nos 1738-39 of 2024)

21 March 2024

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

Issue for Consideration

High Court, if erred in affirming the order of preventive detention passed by the Detaining Authority against the detenu and his associates for committing offence of gold chain snatching creating lot of fear and panic in the minds of the women folk.

Headnotes

Telangana Prevention of Dangerous Activities of BootLeggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 – s. 3(2) – Preventive detention under – Proposed detenu along with his associates habitually committing robberies, property theft offences and gold chain snatchings from women folk by using criminal force on public roads in broad day light continuously – Registeration of four FIRs against the detenue for the said offence, however, the Detaining Authority took into consideration only two FIRs registered within its territorial jurisdiction – Order of preventive detention passed – Division Bench of the High Court upheld the order – Correctness:

Held: Habituality of committing offence cannot, in isolation, be taken as a basis of any detention order; rather it has to be tested on the matrices of "public order" – It is only those cases where such habituality has created disturbance of public order that they could qualify as a ground to order detention – Inability on the part of the state's police machinery to tackle the law and order situation

* Author

should not be an excuse to invoke the jurisdiction of preventive detention – On facts, mere registration of the two FIRs for the alleged offences of robbery etc could not have been made the basis to invoke the provisions of the Act 1986 for the purpose of preventively detaining the detenue on the assumption that he is a "GOONDA" as defined u/s. 2(g) – What has been alleged against the detenu could be said to have raised the problems relating to law and order but it is difficult to say that they impinged on public order – Nothing to indicate that any such statements of people, more particularly the women of the concerned locality, were recorded so as to arrive at the subjective satisfaction that the nefarious activities of the detenu created an atmosphere of panic and fear in the minds of the people of the concerned locality – Furthermore, in none of the FIRs the name of the detenu has been disclosed as one of the accused persons – Detaining Authority could be said to have taken into consideration something extraneous – Thus, the order of detention passed against the detenu and co-detenu quashed and set aside – Impugned judgment and order passed by the High Court set aside. [Paras 31, 33, 36, 40, 64, 65]

Telangana Prevention of Dangerous Activities of BootLeggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 – ss. 9-12 – Role and duty of the Advisory Board:

Held: Advisory Board(s) under preventive detention legislations, are one of the primary constitutional safeguards available to the detenu against an order of detention – Advisory Board performs the most vital duty of independently reviewing the detention order, after considering all the materials placed before it, or any other material which it deems necessary – When reviewing the detention order, the Advisory Board must form an opinion as to the sufficiency of the cause for warranting detention, then only an order of detention passed under the Act, 1986 can be confirmed – Framers of the Constitution have specifically put in place safeguards within Art. 22 through the creation of an Advisory Board, to ensure that any order of preventive detention is only confirmed upon the evaluation

and scrutiny of an independent authority which determines and finds that such an order for detention is necessary – Preventive detention being a draconian measure, any order of detention as a result of a capricious or routine exercise of powers must be avoided – Advisory Board must consider whether the detention is necessary not just in the eyes of the detaining authority but also in the eyes of law – Requirement of having persons who have been or are qualified to be High Court judges in the Advisory Board is not an empty formality, it is there to ensure that, an order of detention is put to robust scrutiny and examined as it would have been by any ordinary court of law – Thus, it is imperative that whenever an order of detention is placed before an Advisory Board, it duly considers each and every aspect, not just those confined to the satisfaction of the detaining authority but the overall legality as per the law that has been laid down by this Court – Entire purpose behind creation of an Advisory Board is to ensure that no person is mechanically or illegally sent to preventive detention. [Paras 50, 55-63]

Telangana Prevention of Dangerous Activities of BootLeggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 – ss – 9 and 10 – Constitution and composition of an Advisory Board – Reference to Advisory Board and its functions and procedure – Stated. [Paras 51-54]

Telangana Prevention of Dangerous Activities of BootLeggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 – Scope and object – Explained. [Paras 19-21, 23]

Preventive detention – Concept of – Preventive detention vis-a-vis criminal conviction:

Held: Concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it – Basis of detention is the satisfaction of the executive about the likelihood of the detenu acting in a manner, similar to his past acts, which is likely to affect adversely the maintenance of public order and, thereby prevent him, by an order of detention, from doing the same – Criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence – There is no parallel between the prosecution in a Court of law and a detention order – One is a punitive action and the other is a preventive act – In one case a person is punished on proof of his guilt, and the standard is proof beyond the reasonable doubt, whereas in the other a person is detained with a view to prevent him from doing such act(s) as may be specified in the Act authorizing preventive detention – Power of preventive detention is qualitatively different from punitive detention – Power of preventive detention is a precautionary power exercised in reasonable anticipation. [Paras 24, 25]

Preventive detention – Order of preventive detention – Legality of – Principles to be adhered to :

Held: Detaining Authority should take into consideration only relevant and vital material to arrive at the requisite subjective satisfaction – Detention order requires subjective satisfaction of the detaining authority which, ordinarily, cannot be questioned by the court for insufficiency of material – Nonetheless, if the detaining authority does not consider relevant circumstances or considers wholly unnecessary, immaterial and irrelevant circumstances, then such subjective satisfaction would be vitiated – While making a detention order, the authority should arrive at a proper satisfaction which should be reflected clearly, and in categorical terms, in the order of detention – Satisfaction cannot be inferred by mere statement in the order that "it was necessary to prevent the detenu from acting in a manner prejudicial to the maintenance of public order" – Rather the detaining authority will have to justify the detention order from the material that existed before him and the process of considering the said material should be reflected in the order of detention while expressing its satisfaction – Inability on the part of the state's police machinery to tackle the law and order situation should not be an excuse to invoke the jurisdiction of

preventive detention – To arrive at a proper satisfaction warranting an order of preventive detention, the detaining authority must examine the material adduced against the prospective detenu to satisfy itself and, if the said satisfaction is arrived at, it must further consider whether it is likely that the said person would act in a manner prejudicial to the public order in near future unless he is prevented from doing so by passing an order of detention. [Para 43]

Words and phrases – Expression 'law and order' and 'public order' – Distinction between:

Held: Expression 'law and order' is wider in scope inasmuch as contravention of law always affects order – 'Public order' has a narrower ambit, and could be affected by only such contravention, which affects the community or the public at large – Distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach, of the act in question on society not merely in the nature or quality of the act – It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order – If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only – Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions – In one case it might affect specific individuals only, and thus, touches the problem of law and order only, while in another it might affect public order – Act by itself, thus, is not determinant of its own gravity – In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different. [Para 32]

Judicial deprecation – Order of preventive detention passed by the State of Telangana under the provisions of the Act 1986 in a routine and mechanical manner:

Held: State of Telangana to pass orders of preventive detention taking the judgments pronounced by this Court seriously, and see to it that the orders of preventive detention are not passed in a routine manner without any application of mind. [Para 47, 48]

Writs – Writ of 'Habeas Corpus' – Meaning and purpose – Issuance of writ of 'Habeas Corpus', when – Stated. [Paras 29-30]

Case Law Cited

Pushkar Mukherjee v. State of West Bengal [1969] 2 SCR 635 **: (1969) 1 SCC 10;** *Haradhan Saha v. The State of W.B.* [1975] 1 SCR 778 **: (1974) Cri LJ 1479;** *Union of India v. Amrit Lal Manchanda* [2004] 2 SCR 422 **: (2004) 3 SCC 75;** *Ameena Begum v. State of Telangana and Others* [2023] 11 SCR 958 **: (2023) 9 SCC 587;** *Khaja Bilal Ahmed v. State of Telangana and Others* [2019] 18 SCR 1174 **: (2020) 13 SCC 632;** *Shibban Lal Saksena v. State of Uttar Pradesh and Others* [1954] 1 SCR 418 **: (1953) 2 SCC 61;** *Shaik Nazeen v. State of Telangana and Others* **(2023) 9 SCC 633;** *Mallada K Sri Ram v. State of Telangana* [2022] 3 SCR 5 (2023) **: 13 SCC 537 – referred to.**

Books and Periodicals Cited

Halsbury's Laws of England; Constitutional and Administrative Law by Hood Phillips & Jackson - referred to.

List of Acts

Telangana Prevention of Dangerous Activities of BootLeggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986; Constitution of India.

List of Keywords

Preventive detention; Order of preventive detention; Detaining Authority; Territorial jurisdiction; Habituality of committing offence; Public order; Law and order; Goonda; Advisory Board; Capricious or routine exercise of powers; Criminal conviction; Punitive detention; Precautionary power; Subjective satisfaction; Routine and mechanical manner; Writ; Writ of 'Habeas Corpus'.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1738-1739 of 2024

From the Judgment and Order dated 16.11.2023 of the High Court for the State of Telangana at Hyderabad in WP Nos. 26941 and 26886 of 2023

Appearances for Parties

P. Mohith Rao, Ms. J. Akshitha, Advs. for the Appellants.

Ms. Devina Sehgal, Kumar Vaibhav, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

J. B. Pardiwala, J.

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

INDEX*

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

1. Leave granted in both the captioned appeals.

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

3. For the sake of convenience, the Criminal Appeal No. ……. of 2024 @ SLP (Cri) No. 3390 of 2024 is treated as the lead matter.

4. This appeal is at the instance of a detenu, preventively detained under Section 3(2) of the Telangana Prevention of Dangerous Activities of Boot-Leggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders Land-Grabbers, Spurious Seed Offenders, Insecticide Offenders, Fertiliser Offenders, Food Adulteration Offenders, Fake Document Offenders, Scheduled Commodities Offenders, Forest Offenders, Gaming Offenders, Sexual Offenders, Explosive Substances Offenders, Arms Offenders, Cyber Crime Offenders and White Collar or Financial Offenders Act, 1986 (for short, the "**Act 1986**") and is directed against the judgment and order passed by a Division Bench of the High Court for the State of Telangana at Hyderabad (Special Original Jurisdiction) dated 16.09.2023 in Writ Petition No. 26941 of 2023 filed by the appellant herein by which the Division Bench rejected the writ petition and thereby declined to interfere with the order of preventive detention passed by the Commissioner of Police Rachakonda Commissionerate, State of Telangana dated 12.09.2023 in exercise of his powers under Section 3(2) of the Act 1986.

A. FACTUAL MATRIX

5. The order of detention dated 12.09.2023 passed by the respondent No. 2 herein reads thus:

> ***"ORDER OF DETENTION***
>
> *ORDER OF DETENTION UNDER SUB SECTION (2) OF SECTION 3 OF THE "TELANGANA PREVENTION OF DANGEROUS ACTIVITIES OF BOOTLEGGERS, DACOITS, DRUG-OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS, LAND-GRABBERS, SPURIOUS SEED OFFENDERS, INSECTICIDE OFFENDERS, FERTILISER OFFENDERS, FOOD ADULTERATION OFFENDERS, FAKE DOCUMENT OFFENDERS,*

SCHEDULED COMMODITIES OFFENDERS, FOREST OFFENDERS, GAMING OFFENDERS, SEXUAL OFFENDERS, EXPLOSIVE SUBSTANCES OFFENDERS, ARMS OFFENDERS, CYBER CRIME OFFENDERS AND WHITE COLLAR OR FINANCIAL OFFENDERS ACT, 1 OF 1986 (AMENDMENT ACT NO. 13 OF 2018)".

WHEREAS, information has been placed before me that the offender "Nenavath Ravi S/o. Nenavath Jagan, Age: 23 years, Occ: Coolie, R/o. Indiranagar Colony, Chandrayanagutta, Hyderabad, N/o. Padamati Thanda village, Neredugumma Mandal, Nalongda Dist" is a "Goonda" as defined in clause (g) of Section 2 of the "Telangana prevention of dangerous activities of bootleggers, dacoits, drug-offenders, goondas, immoral traffic offenders, land-grabbers, spurious seed offenders, insecticide offenders, fertilizer offenders, food adulteration offenders, fake document offenders, scheduled commodities offenders, forest offenders, gaming offenders, sexual offenders, explosive substances offenders, arms offenders, cyber crime offenders and white collar or financial offenders Act, 1 of 1986 (Amendment Act No. 13 of 2018)" and that he has been habitually engaging himself in unlawful acts and indulging in committing of Robberies, Property theft offences and Gold Chain Snatchings including sacred Mangalsutras from women folk by using criminal force on Public roads in broad day light continuously, repeatedly in one Police Station limits of Madgul PS, Rachakonda Commissionerate & Other PSs of Nalgonda District, thereby creating large scale fear and panic among the General public especially women and thus his activities are prejudicial to the maintenance of Public Order and affected society adversely.

In the recent past, during the year 2023, in quick succession, the proposed detenu along with his associates was involved in (04) offences under penal sections covered by Chapter-XVII of Indian Penal Code, 1860, vide Cr.Nos 1) 129/2023 U/s 379 IPC of PS Chinthapally, 2) 39/2023 U/s 394 IPC of Madgul P.S. 3) 106/2023 U/s 356, 379 IPC of Chinthapally P.S. and 4) 107/2023 U/s 392 IPC of Madgul P.S. of Rachakonda Commissionerate.

Among the above offences, (02) offences vide Cr. Nos. 1) 129/2023 and 2) 106/2023 were reported to be out of this Commissionerate limits and as above (02) offences committed by the proposed detenu are referred to as criminal history of the proposed detenu and not relied upon.

The remaining (02) offences pertaining to this Commissionerate vide Cr Nos: 1) 39/2023, 2) 107/2023 of Madgul P.S. are considered as grounds for his detention.

The offender/proposed detenu committed all the above Property theft offences/gold chain snatching offences continuously, repeatedly in quick succession and fall within proximity period and committed in one police station limits i.e. Madgul PS.

The offender/proposed detenu along with his associates has been committing offences continuously, and repeatedly in order to earn easy money to lead lavish life, which are punishable under chapter XVII of Indian Panel Code. He is also committing illegal acts (thefts) involving breach of peace and public tranquility. The continuous presence of the offender in the area is detrimental to the maintenance of Public Order, apart from disturbing the peace, tranquility and social harmony in the society.

WHEREAS, I, D.S. Chauhan, IPS, Commissioner of Police, Rachakonda, am satisfied from the material placed before me that the offender Nenavath Ravi, is a Goonda as defined in clause (g) of Section 2 of the "Telengana prevention, detention Act, 1 of 1986 (Amendment Act No. 13 of 2018)"

As per the clause (g) of section 2 of the "Telangana prevention, detention Act, 1 of 1986 (Amendment Act No. 13 of 2018)" a "Goonda" means "a person, who either by himself or a member of or leader of gang, habitually commits or attempts to commit or abets the commission of offences, which are punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code".

All the offences committed by the offender punishable under penal sections of Chapter XVII of the Indian Penal Code, 1860". As such, criminal activities of the offender

fall within the ambit of sec. 2(g) of the Act 1 of 1986 to term him as a "Goonda" from Madgul PS of Rachakonda Commissionerate.

WHEREAS, I D.S. Chauhan, I.P.S., Commissioner of Police, Rachakonda, am aware that the Police Madgul arrested the offender/proposed detenu Nenavath Ravi on 12-18-2023 at 1230 hours in Cr.No. 107/2023 of PS Madgul and produced before the Hon'ble JFCM at Amangal for judicial remand and lodged in Central Prison Cherlapally. In remaining ground case, he was produced before the Court by executing PT warrant on 24.08.02023 and lodged in the jail.

In pursuance of his confession, Police seized stolen booty i.e. 1) Honda Shine Motor Cycle Br No: TS 05 EZ 6413 pertaining to Cr No. 129/2023 of PS Chintapally from the house of his relative in Manneguda village at his instance in the presence of mediators.

Further, the investigating Officer seized 1) One Auto bearing No: TS 12 UA 7860, 2) One Splendor Plus bike bearing No.: TS 05 FK 9086 which were used for commission of offences have also been seized from the possession of his associates at his instance. In addition, Gold jewellery in all cases totaling 11.7 tolas was also seized from the possession of his associate Munavath Ramesh (A-1) at the instance of this proposed detenu and other associates.

WHEREAS, I am aware that the offender/proposed detenu field 1st bail petition in Cr No: 107/2023 of PS Madgul before the Hon'ble JFCM at Amangal on 17-08-2023 vide Crl MP No: 285/2023. Police filed counter and prosecution opposed not to grant bail to him. Accordingly, the bail petition was dismissed on 24-08-2023.

The proposed detenue again filed fresh bail petition in two ground cases vide Cr Nos: 1) 39/2023 of PS Madgul, 2) 107/2023 of PS Madgul before the Hon'ble JFCM at Amangal. Police filed counters opposing to grant bail. Even though, both the bail petitions were allowed by granting conditional bail to the proposed detenu on 05-09-2023 vide

Crl MP Nos: 1) 337/2023, 2) 307/2023. Consequently, he was released in two ground cases vide release order Dis Nos: 1) 1741/2023, 2) 1742/2023 respectively. He was also granted bail in all other remaining history cases and consequently released from jail after furnishing sureties.

The conditions imposed by the Court in two ground cases are i) The offender/proposed detenu shall not tamper the witnesses/victim during the course of further investigation, ii) he is directed to appear before the Court as and when directed without fail, iii) He is directed not to leave the State without permission of the Court.

I have perused all the above conditions of the bail and however, those conditions do not affect of passing the order of detention on this proposed detenu.

On account of his antecedents, bail orders granted therein and consequently released from jail, the way he was indulging in committing chain snatching offences including sacred mangal sutras (Nuptial Chains) continuously from the neck of women folk forcibly having felt that the cases registered against him under the ordinary law have no deterrent effect in curbing his prejudicial activities, and having believed strongly that he is not amenable to ordinary law and as such, having satisfied that there is an imminent possibility of the proposed detenu indulging in similar prejudicial activities against, which would be prejudicial to the maintenance of Public Order, unless he is prevented from doing so by an appropriate order of detention.

Now therefore, in exercise of the powers conferred on me under sub section (2) of Section 3 of the "Telangana prevention, detention Act 1 of 1986 (Amendment Act No. 13 of 2018)" R/w G.O. Rt. No. 792, General Administration (Spl. Law & Order) Department, Dated : 29-05-2023, I do hereby order that the accused/proposed detenu Nenavath Ravi, who is a "Goonda" be detained from the date of service of this order on him and lodge in Central Prison, Cherlapally Medchal Dist."

6. The grounds of detention dated 12.09.2023 furnished to the appellant herein along with the order of detention referred to above read thus: -

"GROUNDS FOR DETENTION IN RESPECT OF NENAVATH RAVI UNDER THE "TELANGANA PREVENTION OF DANGEROUS ACTIVITIES OF BOOTLEGGERS, DACOITS, DRUG-OFFENDERS, GOONDAS, IMMORAL TRAFFIC OFFENDERS, LAND-GRABBERS, SPURIOUS SEED OFFENDERS, INSECTICIDE OFFENDERS, FERTILISER OFFENDERS, FOOD ADULTERATION OFFENDERS, FAKE DOCUMENT OFFENDERS, SCHEDULED COMMODITIES OFFENDERS, FOREST OFFENDERS, GAMING OFFENDERS, SEXUAL OFFENDERS, EXPLOSIVE SUBSTANCES OFFENDERS, ARMS OFFENDERS, CYBER CRIME OFFENDERS AND WHITE COLLAR OR FINANCIAL OFFENDERS ACT, 1 OF 1986 (AMENDMENT ACT NO. 13 OF 2018)"

You, Nenavath Ravi S/o. Nenavath Jagan, Age: 23 years, Occ: Coolie, R/o Indiranagar Colony, Chandrayanagutta, Hyderabad, N/o. Padamati Thanda village, Neredugumma Mandal, Nalongda District are a "Goonda" as defined in clause (g) of section 2 of the "Telangana prevention of dangerous activities of bootleggers, dacoits, drug-offenders, goondas, immoral traffic offenders, land-grabbers, spurious seed offenders, insecticide offenders, fertilizer offenders, food adulteration offenders, fake document offenders, scheduled commodities offenders, forest offenders, gaming offenders, sexual offenders, explosive substances offenders, arms offenders, cyber crime offenders and white collar or financial offenders Act 1 of 1986 (Amendment Act no. 13 of 2018)" and that you have been habitually engaging yourself in unlawful acts and indulging in committing of Property Offences, Robberies/Gold Chain Snatching offences including sacred Mangalasutras by using criminal force on women folk in Public streets continuously, repeatedly in one localised area in Madgul PS limits and thereby, creating widespread fear, panic among the general public and thus your activities are prejudicial to the maintenance of Public Order and adversely affecting the society.

Thus, in the recent past, during the year 2023, in quick succession, you along with your associates were involved in (04) offences under penal sections covered by Chapter

XVII of Indian Penal Code, 1860, vide Cr.Nos.) 129/2023 U/s 379 IPC of PS Chinthapally, 2) 39/2023 U/s 394 IPC of Madgul P.S. 3) 106/2023 Us 356, 379 IPC of Chinthapally PS and 4) 107/2023 U/s 392 IPC of Madgul P.S.

Among the above offences, (02) offences vide Cr Nos: 1) 129/2023, 2) 106/2023 were reported to be out of this Commissionerate limits and as such the above (02) offences committed by you are referred to as criminal history and not relied upon..

The remaining (02) offences committed by in Rachakonda Commissionerate limits vide Cr Nos: 1) 39/2023, 2) 107/2023 of Madgul P.S. are considered as grounds for your detention.

You had committed all the above property theft offences including gold chain snatching offences continuously, repeatedly and in quick succession which are falling within proximity period.

Thus, you have been committing offences continuously, and repeatedly in order to earn easy money to lead lavish life, which are punishable under Chapter XVII of Indian penal Code. You are also committing illegal acts (thefts) involving breach of peace and public tranquility. Your continuous presence in the area is detrimental to the maintenance of public order apart from disturbing the peace, tranquility and social harmony in the society.

THE FACTS OF THE FOLLOWING (02) ROBBERIES, THEFTS/CHAIN SNATCHING OFFENCES COMMITTED BY YOU IN THE RECENT PAST WHICH AMPLY DEMONSTRATE YOUR HABITUAL NATURE OF COMMITTING CRIME CREATING LARGE SCALE FEAR IN THE MINDS OF WOMEN COMMUNITY THEREBY RESTRAINING THEM FROM FREELY MOVING ON PUBLIC STREETS EVEN DURING BROAD DAY LIGHT AND YOUR ACTIVITIES ARE PREJUDICIAL TO THE MAINTENANCE OF PUBLIC ORDER

1) Cr.No. 39/2023 U/s 394 IPC of Madgul Police Station Dt: 20-03-20223

Facts of the case are that on 20.03.2023 at 19.45 hrs received a complaint from the complainant/victim Kuntala Laxmamma S/o Anjaiah, Age 55 years, Occ: Sweeper, R/o Kolkulapally (V), Madgul (M), R.R (D) in which she stated that on 20.03.2023 at about 1800 hrs, while the complainant was on her way laid from her work place in Sri Mahalaxmi Rice Mill at Kolkulapally Gate, en-route near Jaanam well, three unknown persons aged about 25-30 years followed from her behind and started pretending as searching for Toddy, and thus, they suddenly pounced on her, pasted a plaster on her mouth and tried to remove her silver cups (vendi Kadiyalu) from her legs. But, they could not succeed and as such they robbed Rs. 7550/- from her tiffin carrier box and fled away from the place. Further, she added that she can identify them if she sees them again. Hence, she requested to take necessary action against the persons.

Basing on the above contents, a case in Cr No: 39/2023 U/s 394 IPC has been registered and taken up investigation.

During the course of investigation, the IO visited the scene of offence and recorded the details of the scene of offence observation in Crime Details Form (CDF). IO examined the complainant, other witnesses who got panicked on seeing the incident in broad day light and recorded their detailed statements.

While the investigation was in progress, it was detected by arresting the accused/proposed detenu in Cr No. 107/2023 u/s 392 IPC of Madgul PS on 12-08-2023. During the examination, he confessed his guilt of offence of the above case and other offences as well. The offender/propose detenu confessed that they spent entire booty for their lavish expenses.

Role & participation of this proposed detenu:-

It was made out that the offender/proposed detenu Nenavath Ravi (A-3) was sitting in rear side seat of the auto along with A-4 and they noticed a lady near Kolakulapalli village outskirts, Madgul after passing some distance A-1 Ramesh was driving the auto they forcibly took her into the bushes and when A-4 Munavath Naresh caught

her legs and then proposed detenu A-3 Nenavath Ravi caught her hands and A-1 tried to rob her silver anklets but A-1 could not remove the same and as last resort, he committed theft of Rs. 7,550/- from the complainant tiffin box and fled away into the auto. They spend entire booty for their lavish expenses.

As such, he was produced before the Hon'ble Court by executing PT warrant on 24-08-2023 and thus regularized his arrest in the case. The case is UI for collecting further evidence.

2) Cr. No. 107/2023 U/s 392 of Madgul Police Station, Dt: 01-08-2023

Facts of the case are that on 01-08-2023 at 1700 hours received a complaint from the complainant Smt. Nutanaganti Pullama W/o late Rama Lingaiah Age: 80 years R/o Madgul (V) & (M), R.R (D) in which she stated that on 01.08.2023 at about 1430 hours when she was sitting in front of her house and in the meantime one unknown person age about 20-30 years came to her by foot and all of a sudden he robbed her two rows Gold Nuptial Chain weighing about 03 tolas and fled away on the bike on which another unknown person was already waiting and both of them escaped on the bike towards Mall route. The person who robbed her gold chain had worn yellow colour shirt and while she raised screams, her neighbour Gandikota Jangaiah came there, but at the time both the persons escaped away from there. The complainant further stated that she can identify them if she sees them again. Hence the complainant requested to take necessary action.

Basing on the above contents, a case in CR No. 107/2023 U/s 356, 379 IPC has been registered and subsequently altered to Section 392 IPC.

During the course of Investigation, Police visited the scene of offence and recorded the details of the scene of offence observations in Crime Details Form (CDF). The IO examined the complainant and other witnesses and recorded their detailed statements.

Further, collected CC footages from the vicinity of crime scene analysed the same and through which it was identified the offender Munavath Ramesh and his associate while they were having a recce. Upon that the IO setup informants and deputed search parties to locate the offenders.

While the investigation was in progress, the police Madgul arrested the offender/proposed detenu Nenavath Ravi on 12-08-2023 at 1230 hours Cr. No. 107/2023 of PS Madgul and produced before the Hon'ble JFCM at Amangal for judicial remand and lodged in Central Prison Cherlapally.

In pursuance of his confession, police seized stolen booty i.e. 1) Honda Shine Motor Cycle BR No: TS 05 EZ 6413 pertaining to Cr No. 129/20232 of PS Chintapally from the house of his relative in Manneguda village at his instance in the presence of mediators.

Further, the investigating Officer seized 1) One Auto bearing No: TS 12 UA 7860, 2) One Splendor Plus bike bearing No: TS 05 FK 9086 which were used for commission of offences have also been seized from the possession of his associates at his instance. In addition, Gold jewellery in all cases totaling 11.7 tolas was also seized from the possession of his associate Munavath Ramesh (A-1) at the instance of this proposed detenu and other associates. The case is UI for collecting further evidence.

Linking Evidence:

i) *In pursuance of his confession, Police seized stolen booty i.e. Gold pusthelathadu weighing about (03) tolas from the position of his associate Munnavat Ramesh A-1 at his instance.*

ii) *CC footages collected from the vicinity of crime scene. It can be seen his associates while they were having recce. The above evidence establishes the involvement of proposed detenu.*

Role & participation of this proposed detenu:

In this case, while the proposed detenu along with A4 Munavath Naresh was waiting on Sagar Highway, the offenders A-1, A2 went near the victim and forcibly robed her gold nuptial chain weighing about (03) tolas from the neck of victim woman and reached to A-3 (propose detenu) and A-4. They gave stolen booty to A-3 and A-4 and disbursed from the spot on their vehicles.

As per clause (g) of section 2 of the "Telangana prevention, detention Act 1 of 1986 (Amendment Act No. 13 of 2018)" a "Goonda" means "a person who either by himself or as a member of or leader of gang, habitually commits or attempts to commit or abets the commission of offences, which are punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code".

You have been indulging in the offences falling under chapter XVII of IPC and you are habitually indulging in criminal activities in a manner prejudicial to the maintenance of Public Order and enforcement of ordinary penal laws could not prevent you from indulging in such activities.

After having come to know about criminal activities of proposed detenu through media and on account of chain snatching offences that were taken place in a small village of Madgul in the Commissionerate limits in recent past, the General Public especially women folk those who are going for work on daily wages in the area got panicked and apprehended fear of coming out of their houses by wearing even their sacred Gold Nuptial Threads which is sentiment to large section of Indian women. Thus, the incidents created panic in the minds of general public living in Madgul village and thereby your criminal activities are adversely affecting the Public Order and leaving large section of people under the grip of fear and shock. Therefore, your activities are required to be prevented by an appropriate detention order.

WHEREAS, I am aware that you have filed 1st bail petition in Cr No.: 107/2023 of PS Madgul before the Hon'ble JFCM

at Amangal on 07-08-20 23 vide Crl MP No. 285/2023. Police filed counter and prosecution opposed not to grant bail to you. Accordingly, the bail petition was dismissed on 24-08-2023.

You have again filed fresh bail petitions in two ground cases vide CR Nos: 1) 39/2023 of PS Madgul, 2) 107/2023 of PS Madgul before the Hon'ble JFCM at Amangal. Police filed counters opposing to grant bail. Even though, the bail petitions were allowed by granting conditional bail to you on 05-09-2023 vide Crl Mp Nos: 1) 337/2023, 2) 307/2023. Consequently, you were released in two ground cases vide release order Dis Nos: 1) 1741/2023, 2) 1742/2023 respectively. You were also granted bail in all other remaining history cases and consequently released from jail after furnishing sureties.

The conditions imposed by the Court in two ground cases are i) The offender/proposed detenu shall not tamper the witnesses/victim during the course of further investigation, ii) he is directed to appear before the court as and when directed without fail, iii) He is directed not to leave the state without permission of the Court.

I have perused all the above conditions of the bail and however, those conditions do not affect of passing the order of detention

On account of your antecedents, bail orders granted therein and consequently released from jail, the way you were indulging in committing chain snatching offences including sacred mangal sutras (nuptial chains) continuously from the neck of women folk forcibly, having felt that the cases registered against you under the ordinary law have no deterrent effect in curbing your prejudicial activities and having believed strongly that you are not amenable to ordinary law and as such, having satisfied that there is an imminent possibility of indulging in similar prejudicial activities again, which would be prejudicial to the maintenance of Public Order unless you are prevented from doing so by an appropriate order of detention.

Hence, I am satisfied that a detention Order under the provisions of the "Telangana prevention, detention Act 1 of 1986 (Amendment Act no. 13 of 2018) should be invoked against you, and you should be detained under sub-section (2) of section 3 of Act No. 1 of 1986 (Amendment Act No. 13 of 2018)" R/w G.O. Rt. No. 792, General Administration (Spl. Law & Order) Department, Dated 29-05-2023 with a view to prevent you from acting in any manner prejudicial to the maintenance of public order

You have a right to represent against this order of Detention to the 1) Detaining authority i.e. the Commissioner of Police, Rachakonda, 2) The Principal Secretary to Government (Political) General Administration Dep. Telangana, Hyderabad and 3) The Advisory Board or if you choose to make any representation, you may submit your representation with sufficient number of copies to the Jail Superintendent for onward transmission. You also have a right to appear before the Advisory Board and also to avail the assistant of a person other than a lawyer to represent your case."

7. Thus, from the aforesaid it is evident that the respondent No. 2 herein was subjectively satisfied based on the materials on record that the activities of the appellant detenu were prejudicial to the maintenance of public order. According to the Detaining Authority, i.e., the respondent No. 2, the appellant is a "GOONDA" as defined under Section 2(g) of the Act 1986 and with a view to preventing him from acting in any manner prejudicial to the maintenance of public order, it was felt necessary that the appellant be preventively detained.

B. IMPUGNED JUDGMENT OF THE HIGH COURT

8. The appellant detenu being aggrieved by the order of preventive detention preferred Writ Petition No. 26941 of 2023 in the High Court for the State of Telangana at Hyderabad seeking a writ of Habeas Corpus. The High Court vide its impugned judgment and order declined to interfere and accordingly rejected the writ petition.

9. The High Court while rejecting the writ application filed by the appellant detenu made the following observations: -

"16.While passing the detention order, the detaining authority not only considered the commission of offences committed by the detenus and their associates, but also considered its impact disturbing 'public order' and also the modus operandi adapted by them in commission of offences. Therefore, in order to prevent the detenus from committing similar offences, the impugned detention order was passed.

xxx xxx xxx

21. As discussed above, the detenus have committed the aforesaid two (02) offences of robbery and chain snatchings and creating panic and scare among the public, especially in women folk. Thus, they have engaged in unlawful activities by committing the said bodily and property offences, which are serious and grave in nature, and thereby acting in a manner prejudicial to the maintenance of 'public order' as it disturbs peace and tranquility in the society. Further, the police also seized motorbikes used in commission of the offences.

22. In view of the same, it is clear that the said acts committed by the detenus would certainly create large scale panic in general public, more particularly women folk. All the said aspects were considered by the detaining authority while passing detention order. The aspects of modus operandi and the acts committed by the detenus and their associates in commission of offences and filing of petitions by the police seeking cancellation of bail granted to the detenus were also considered by the detaining authority while passing detention order. Therefore, viewed from any angle, we are of the considered view that there is no error in impugned detention orders dated 12.09.2023 passed by the respondent No. 2 and the consequential approval orders passed by respondent No. 1 vide G.O.Rt. NOs. 1305 and 1306 dated 20.09.2023 respectively. Thus, the writ petitions fail and the same are liable to be dismissed."

10. Thus, the plain reading of the aforesaid line of reasoning adopted by the High Court would indicate that as the appellant detenu had

engaged himself in unlawful activities of serious nature he could be said to have acted in a manner prejudicial to the maintenance of public order. The line of reasoning as above gives an impression that what weighed with the High Court are the allegations of chain snatching creating lot of fear and panic in the minds of the women folk. This according to the High Court was sufficient to reach to the conclusion that the alleged antisocial activities of the appellant detenu are prejudicial to the maintenance of the public order.

11. In such circumstances referred to above, the appellant detenu is here before this Court with the present appeal.

C. SUBMISSIONS ON BEHALF OF THE APPELLANTS

12. Mr. P. Mohith Rao, the learned counsel appearing for the appellant detenu made the following submissions:

a. Mere registration of FIRs for the offences punishable under Chapter XVII of the Indian Penal Code ("**IPC**") is not sufficient to label or brand any individual as a "GOONDA" as defined under Section 2(g) of the Act 1986. In other words, mere registration of the FIRs for the offences of theft, robbery etc. is not sufficient to arrive at the subjective satisfaction that the alleged activities of the appellant detenu are prejudicial to the maintenance of public order.

b. As per the explanation to Section 2(a) of the Act 1986, the activities in question must cause "harm, danger or alarm or a feeling of insecurity among the general public or any section thereof to be prejudicial to public order".

c. The criminal cases which have been registered against the appellant detenu involve the ordinary "law and order" problems or situations. The appellant detenu was granted bail in all the FIRs registered against him after giving an opportunity of hearing to the State. If it is the case of the State that the appellant detenu continued to indulge in the anti-social activities, the State ought to have approached the concerned court for cancellation of bail. Issuance of a preventive detention order which drastically curtails the appellant's right to liberty under Article 21 of the Constitution is certainly neither the most suitable nor the least restrictive method of preventing the appellant from engaging in any further criminal activities.

d. The impugned order of preventive detention suffers from the vice of total non-application of mind. The impugned order of detention could be said to have been vitiated on account of the extraneous matters being considered by the Detaining Authority. In the impugned order of detention the detaining authority has stated that the appellant detenu is a habitual offender as many FIRs have been registered against him, however, the Detaining Authority thought fit to take into consideration only two FIRs out of the four FIRs as the other two FIRs were registered outside the Commissionerate limits of the Detaining Authority. In other words, the offences alleged with respect to the two FIRs (not taken into consideration) were not committed within the Commissionerate limits of the Detaining Authority. This is suggestive of the fact that the detaining authority took into consideration the "history-sheet" of the detenu without recording any subjective satisfaction that such habituality has created a "public disorder". Merely, because the appellant detenu has been charged for multiple offences it cannot be said that he is in the habit of committing such offences. Habituality of committing offences cannot, in isolation, be taken as a basis of any detention order; rather it has to be tested on the matrices of public order.

13. In such circumstances referred to above, the learned counsel prayed that the impugned judgment and order passed by the High Court be set side and as a consequence, the impugned order of preventive detention may also be quashed and set aside and the authorities concerned may be directed to release the appellant detenu forthwith from the detention.

D. SUBMISSIONS ON BEHALF OF THE RESPONDENTS

14. Mr. Kumar Vaibhav, the learned counsel appearing for the respondent made the following submissions:

a. No error much less an error of law could be said to have been committed by the High Court in passing the impugned judgment and order.

b. The order of preventive detention came to be passed by the Detaining Authority after due consideration of the entire material placed before him in the form of FIRs, CCTV camera footage, statements of various witnesses recorded in the course of the investigations, confessions of the appellant detenu before the

police as regards the alleged crime, etc. It cannot be said that there was no material worth the name before the Detaining Authority to arrive at the subjective satisfaction that the activities of the appellant detenu are prejudicial.

c. Indulging repeatedly, in the activity of snatching of gold chains from the necks of women folk has created an atmosphere of panic and **s**care in the locality.

15. In such circumstances referred to above, the learned counsel prayed that there being no merit in this appeal, the same may be dismissed.

E. ANALYSIS

16. Having heard the learned counsel appearing for the parties and having gone through the materials on record the only question that falls for our consideration is whether the High Court committed any error in rejecting the writ petition filed by the appellant detenu and thereby affirming the order of preventive detention passed by the Detaining Authority?

17. Section 2(a) of the Act 1986 reads thus:

> *"**(a) "acting in any manner prejudicial to the maintenance of public order**" means when a boot-legger, a dacoit, a drug-offender, a goonda, an immoral traffic offender, Land-Grabber, a Spurious Seed Offender, an Insecticide Offender, a Fertiliser Offender, a Food Adulteration Offender, a Fake Document Offender, a Scheduled Commodities Offender, a Forest Offender, a Gaming Offender, a Sexual Offender, an Explosive Substances Offender, an Arms Offender, a Cyber Crime Offender and a White Collar or Financial Offender is engaged or is making preparations for engaging, in any of his activities as such, which affect adversely, or are likely to affect adversely, the maintenance of public order:*
>
> ***Explanation:-** For the purpose of this clause public order shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely inter alia, if any of the activities of any of the persons referred to in this clause directly, or indirectly, is causing or calculated to cause any harm, danger or alarm or a feeling of insecurity among the general public or any section thereof or a grave wide-spread danger to life or public health"*

18. Section 2(g) of the Act 1986 defines the term "GOONDA":

> *"(g) "goonda" means a person, who either by himself or as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the Indian Penal Code;"*

19. The Act 1986, has been enacted with a clear object to prevent crime and to protect the society from the anti-social elements and dangerous characters by placing them under detention for such a duration as would disable them from resorting to undesirable criminal activities. The provisions of the Act 1986 are intended to deal with habitual criminals, dangerous and desperate outlaws, who are so hardened and incorrigible that the ordinary provisions of the penal laws and the mortal/moral fear of punishment for crime are not sufficient deterrence for them.

20. The law is well settled that the power under any enactment relating to preventive detention has to be exercised with great care, caution & restraint. In order to pass an order of detention under the Act 1986 against any person, the Detaining Authority must be satisfied that he is a "GOONDA" within the meaning of Section 2(g) of the Act 1986, who either by himself or as a member of or a leader of a gang habitually commits or attempts to commit or abets the commission of offences punishable under Chapter XVI or Chapter XVII or Chapter XXII of the IPC as according to the explanation to Section 2(a) of the Act 1986, it is such a "GOONDA" who for the purpose of Section 2 of the Act 1986 shall be deemed to be a person "acting in any manner prejudicial to the maintenance of public order" and against whom an order of detention may lawfully be made.

21. Further, sub-section (1) of Section 3 confers power on the State Government and a District Magistrate or a Commissioner of Police as the case may be under the direction of the State Government to detain a person on being satisfied that it is necessary to do so with a view to prevent him from acting in any manner prejudicial to the maintenance of "public order".

22. In the aforesaid context, we may refer to a decision of this Court in ***Pushkar Mukherjee v. State of West Bengal*** *reported* in (1969) 1 SCC 10:

"13. …Does the expression "public order" take in every kind of infraction of order or only some categories thereof. It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act. …"

(Emphasis supplied)

23. The explanation attached to Section 2(a) of the Act 1986 reproduced above contemplates that 'public order' shall be deemed to have been affected adversely or shall be deemed likely to be affected adversely, inter alia if any of the activities of any person referred to in Section 2(a) directly or indirectly, are causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or public health. The Explanation to Section 2(a) also provides that for the purpose of Section 2, a person shall be deemed to be "acting in any manner prejudicial to the maintenance of public order" when such person is a "GOONDA" and engaged in activities which affect adversely or are likely to affect adversely the maintenance of public order. It, therefore, becomes necessary to determine whether besides the person

being a "GOONDA" his alleged activities are such which adversely affected the public order or are likely to affect the maintenance of public order.

24. The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis of detention is the satisfaction of the executive about the likelihood of the detenu acting in a manner, similar to his past acts, which is likely to affect adversely the maintenance of public order and, thereby prevent him, by an order of detention, from doing the same. A criminal conviction on the other hand is for an act already done which can only be possible by a trial and legal evidence. There is no parallel between the prosecution in a Court of law and a detention order under the Act 1986. One is a punitive action and the other is a preventive act. In one case a person is punished on proof of his guilt, and the standard is proof beyond the reasonable doubt, whereas in the other a person is detained with a view to prevent him from doing such act(s) as may be specified in the Act authorizing preventive detention.

25. The power of preventive detention is qualitatively different from punitive detention. The power of preventive detention is a precautionary power exercised in reasonable anticipation. It may or may not relate to an offence. It is not a parallel proceeding. It does not overlap with prosecution even if it relies on certain facts for which prosecution may be launched or may have been launched. An order of preventive detention, may be made before or during prosecution. An order of preventive detention may be made with or without prosecution and in anticipation or after discharge or even acquittal. The pendency of prosecution is no bar to an order of preventive detention. An order of preventive detention is also not a bar to prosecution. (See : *Haradhan Saha v. The State of W.B.*, 1974 Cri LJ 1479]

26. In Halsbury's Laws Of England, it is stated thus:—

> *"The writ of habeas corpus ad subjiciendum" unlike other writs, is a prerogative writ, that is to say, it is an extraordinary remedy, which is issued upon cause shown in cases where the ordinary legal remedies are inapplicable or inadequate. This writ is a writ of right and is granted ex debito justitiate. It is not, however, a writ of course.*

Both at common law and by statute, the writ of habeas corpus may be granted only upon reasonable ground for its issue being shown. The writ may not in general be refused merely because an alternative remedy by which the validity of the detention can be questioned. "Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from an illegal imprisonment and any person who is legally entitled to the custody of another may apply for the writ in order to regain custody. In any case, where access is denied to a person alleged to be unjustifiably detained, so that there are no instructions from the prisoner, the application may be made by any relation or friend on an affidavit setting forth the reason for it being made."

27. In Corpus Juris Secundum, the nature of the writ of habeas corpus is summarized thus: —

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf." 'Habeas corpus' literally means "have the body". By this writ, the court can direct to have the body of the person detained to be brought before it in order to ascertain whether the detention is legal or illegal. Such is the predominant position of the writ in the Anglo-Saxon Jurisprudence."

28. In Constitutional and Administrative Law By Hood Phillips & Jackson, it is stated thus:—

"The legality of any form of detention may be challenged at common law by an application for the writ of habeas corpus. Habeas corpus was a prerogative writ, that is, one issued by the King against his officers to compel them to exercise their functions properly. The practical importance of habeas corpus as providing a speedy judicial remedy for the determination of an applicant's claim for freedom has been asserted frequently by judies and writers.

> *Nonetheless, the effectiveness of the remedy depends in many instances on the width of the statutory power under which a public authority may be acting and the willingness of the Courts to examine the legality of decision made in reliance on wide ranging statutory provision. It has been suggested that the need for the "blunt remedy" of habeas corpus has diminished as judicial review has developed into an ever more flexible jurisdiction. Procedural reform of the writ may be appropriate, but it is important not to lose sight of substantive differences between habeas corpus and remedies under judicial review. The latter are discretionary and the court may refuse relief on practical grounds; habeas corpus is a writ of right, granted ex debito justitiae."*

29. The ancient prerogative writ of habeas corpus takes its name from the two mandatory words "habeas" and "corpus". 'Habeas Corpus' literally means 'have his body'. The general purpose of these writs as their name indicates was to obtain the production of the individual before a court or a judge. This is a prerogative process for securing the liberty of the subject by affording an effective relief of immediate release from unlawful or unjustifiable detention, whether in prison or in private custody. This is a writ of such a sovereign and transcendent authority that no privilege of power or place can stand against it. It is a very powerful safeguard of the subject against arbitrary acts not only of private individuals but also of the Executive, the greatest safeguard for personal liberty, according to all constitutional jurists. The writ is a prerogative one obtainable by its own procedure. In England, the jurisdiction to grant a writ existed in Common Law, but has been recognized and extended by statute. It is well established in England that the writ of habeas corpus is as of right and that the court has no discretion to refuse it. "Unlike certiorari or mandamus, a writ of habeas corpus is as of right" to every man who is unlawfully detained. In India, it is this prerogative writ which has been given a constitutional status under Articles 32 and 226 of the Constitution. Therefore, it is an extraordinary remedy available to a citizen of this Country, which he can enforce under Article 226 or under Article 32 of the Constitution of India.

30. It is the duty of the Court to issue this writ to safeguard the freedom of the citizen against arbitrary and illegal detention. Habeas corpus

is a remedy designed to facilitate the release of persons detained unlawfully, not to punish the person detaining and it is not, therefore, issued after the detention complained of has come to an end. It is a remedy against unlawful detention. It is issued in the form of an order calling upon the person who has detained another, whether in prison or in private custody, to 'have the body' of that other before the Court in order to let the Court know on what ground the latter has been confined and thus to give the Court an opportunity of dealing with him as the law may require. By the writ of habeas corpus, the Court can cause any person who is imprisoned to be brought before the Court and obtain knowledge of the reason why he is imprisoned and then either set him free then and there if there is no legal justification for the imprisonment, or see that he is brought speedily to trial. Habeas Corpus is available against any person who is suspected of detaining another unlawfully and not merely against the police or other public officers whose duties normally include arrest and detention. The Court must issue it if it is shown that the person on whose behalf it is asked for is unlawfully deprived of his liberty. The writ may be addressed to any person whatsoever an official or a private individual-who has another in his custody. The claim (for habeas corpus) has been expressed and pressed in terms of concrete legal standards and procedures. Most notably, the right of personal liberty is connected in both the legal and popular sense with procedures upon the writ of habeas corpus. The writ is simply a judicial command directed to a specific jailer directing him or her to produce the named prisoner together with the legal cause of detention in order that this legal warrant of detention might be examined. The said detention may be legal or illegal. The right which is sought to be enforced by such a writ is a fundamental right of a citizen conferred under Article 21 of the Constitution of India, which provides:—

> *"**Article 21. Protection of life and personal liberty.—***
>
> *No person shall be deprived of his life or personal liberty except according to the procedure established by law."*

31. We are of the view that mere registration of the two FIRs for the alleged offences of robbery etc. could not have been made the basis to invoke the provisions of the Act 1986 for the purpose of preventively detaining the appellant herein on the assumption that

he is a "GOONDA" as defined under Section 2(g) of the Act 1986. What has been alleged against the appellant detenu could be said to have raised the problems relating to law and order but we find it difficult to say that they impinged on public order. This Court has time and again, reiterated that in order to bring the activities of a person within the expression of "acting in any manner prejudicial to the maintenance of public order" the activities must be of such a nature that the ordinary laws cannot deal with them or prevent subversive activities affecting society. Inability on the part of the state's police machinery to tackle the law and order situation should not be an excuse to invoke the jurisdiction of preventive detention.

32. The crucial issue is whether the activities of the detenu were prejudicial to public order. While the expression 'law and order' is wider in scope inasmuch as contravention of law always affects order, 'Public order' has a narrower ambit, and could be affected by only such contravention, which affects the community or the public at large. Public order is the even tempo of life of the community taking the country as a whole or even a specified locality. The distinction between the areas of 'law and order' and 'public order' is one of degree and extent of the reach, of the act in question on society. It is the potentiality of the act to disturb the even tempo of life of the community which makes it prejudicial to the maintenance of the public order. If a contravention in its effect is confined only to a few individuals directly involved as distinct from a wide spectrum of public, it could raise problem of law and order only. In other words, the true distinction between the areas of law and order and public order lies not merely in the nature or quality of the act, but in the degree and extent of its reach upon society. Acts similar in nature, but committed in different contexts and circumstances, might cause different reactions. In one case it might affect specific individuals only, and therefore touches the problem of law and order only, while in another it might affect public order. The act by itself, therefore, is not determinant of its own gravity. In its quality it may not differ from other similar acts, but in its potentiality, that is, in its impact on society, it may be very different. [See: *Union of India v. Amrit Lal Manchanda*, (2004) 3 SCC 75.]

33. We have noticed over a period of time that in reports sponsoring preventive detention the officers concerned rely on statements of few

individuals residing in the concerned locality so as to project existence of an atmosphere of panic or fear in the minds of the people residing in that locality. While recording such statements, the individuals concerned are assured that their identity would not be disclosed so that the maker of the statement may not get into any difficulty. Some of the State enactments relating to preventive detention, for instance, Section 9 of the Gujarat Prevention of Anti-Social Activities Act, 1985, empower the Detaining Authority not to disclose facts which it considers to be against the public interest. In the case on hand, there is nothing to indicate that any such statements of people, more particularly the women of the concerned locality, were recorded so as to arrive at the subjective satisfaction that the nefarious activities of the detenu created an atmosphere of panic and fear in the minds of the people of the concerned locality. There is a good reason why we are saying so or rather touching upon this issue. It appears that in none of the FIRs the name of the detenu has been disclosed as one of the accused persons. This is but obvious because the victim from whose neck the chain is alleged to have been snatched would not know the detenu and the other associates of the detenu. In each of the FIRs, it has been stated by the victim that she would be in a position to identify the accused persons if shown to her. We wonder whether any identification parade was carried out by the police in this direction? There is nothing to indicate in this regard from the materials on record. It, *prima facie*, appears that the detenu might have been picked up by the police on suspicion and then all that has been relied upon to point a finger towards the detenu is his confessional statement before the police. We are conscious of the fact that ordinarily the court should not get into or look into the sufficiency of the materials on record on the basis of which the requisite subjective satisfaction is arrived at by the Detaining Authority. However, the facts of the present case are such that we had to go into such issues.

34. The aforesaid gives rise to a neat question of law whether the confessional statement made by a detenu to the police officer is admissible in cases of detention under the Act 1986 or under any other enactment of any State relating to preventive detention. We do not propose to enter into any debate on this question as we have not put the counsel appearing for the parties to notice on this issue. We leave this question open to be looked into by this Court in any other appropriate matter in future.

i. Extraneous Considerations that weighed with the Detaining Authority thereby vitiating the Order of Preventive Detention.

35. We take notice of the fact that in the case on hand, the Detaining Authority has laid much stress on the fact that in the year 2023 in quick succession four FIRs came to be registered against the appellant for the offence of theft, robbery etc. However, the Detaining Authority took into consideration only two FIRs registered for the offences said to have committed within his territorial jurisdiction. The Detaining Authority in its order of detention has clearly stated that he has taken into consideration only the two FIRs registered for the alleged offence committed within his territorial jurisdiction. The Detaining Authority in clear terms has stated that he could not have made the other two FIRs referred to in the order of detention as the basis for arriving at the subjective satisfaction that the activities of the appellant detenu are prejudicial to the maintenance of the public order. However, after saying so, the Detaining Authority has in so many words stated that the other two FIRs have been considered to look into the criminal history of the appellant detenu.

36. We are of the view that in the aforesaid context, the Detaining Authority is not correct and he could be said to have taken into consideration something extraneous.

37. In the case of ***Ameena Begum v. State of Telangana and Others*** reported in (2023) 9 SCC 587, a two-Judge Bench of this Court was confronted with almost an identical situation with which we are dealing with. In ***Ameena Begum*** (supra) this Court while considering whether there was proper application of mind to all the relevant circumstances or whether consideration of extraneous factors had vitiated the order of detention, observed thus:

> *"50. Considering past criminal history, which is proximate, by itself would not render an order illegal. The Commissioner in the detention order made pointed reference to the detenu being a habitual offender by listing 10 (ten) criminal proceedings in which the detenu was involved during the years 2019-2020, consequent to which the detenu was preventively detained under the Act vide order of detention dated 4-3-2021, since quashed by the High Court by its order dated 16-8-2021 [Hakeem Khan v. State of Telangana, 2021 SCC OnLine TS 3663]. It is then stated therein that*

the detenu had committed 9 (nine) offences in the years 2022-2023, and these offences are again listed out in detail. However, the Commissioner states that the present order of detention is based only on 5 (five) out of these 9 (nine) crimes, which are alleged to show that the detenu's activities are "prejudicial to the maintenance of public order, apart from disturbing peace and tranquillity in the area".

51. Interestingly, even in Para 9-E of his counter-affidavit, the Commissioner has extracted a portion of the detention order which we have set out in para 4. The reiteration of considering past criminal history of the detenu is not without its effect, as we shall presently discuss.

52. In Khudiram Das [Khudiram Das v. State of W.B., (1975) 2 SCC 81 : 1975 SCC (Cri) 435] , while examining the "history sheet" of the detenu, this Court had, in express terms, clarified that a generalisation could not be made that the detenu was in the habit of committing those offences. Merely because the detenu was charged for multiple offences, it could not be said that he was in the habit of committing such offences. Further, habituality of committing offences cannot, in isolation, be taken as a basis of any detention order; rather it has to be tested on the metrics of "public order", as discussed above. Therefore, cases where such habituality has created any "public disorder" could qualify as a ground to order detention.

53. Although the Commissioner sought to project that he ordered detention based on the said 5 (five) FIRs, indication of the past offences allegedly committed by the detenu in the detention order having influenced his thought process is clear. With the quashing of the order of detention dated 4-3-2021 by the High Court and such direction having attained finality, it defies logic why the Commissioner embarked on an elaborate narration of past offences, which are not relevant to the grounds of the present order of detention. This is exactly what this Court in Khaja Bilal Ahmed [Khaja Bilal Ahmed v. State of Telangana, (2020) 13 SCC 632 : (2020) 4 SCC (Cri) 629] deprecated. Also, as noted above, this Court in Shibban Lal Saksena [Shibban Lal Saksena

v. State of U.P., (1953) 2 SCC 617 : AIR 1954 SC 179] held that such an order would be a bad order, the reason being that it could not be said in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to his subjective satisfaction forming the basis of the order."

(Emphasis supplied)

38. ***Ameena Begum*** (supra) has referred to and relied upon the decision of this Court in ***Khaja Bilal Ahmed v. State of Telangana and Others*** reported in (2020) 13 SCC 632. ***Khaja Bilal*** (supra) has been authored by one of us (Hon'ble Chief Justice Dr. D.Y. Chandrachud). The Court observed thus:

"23. In the present case, the order of detention states that the fourteen cases were referred to demonstrate the "antecedent criminal history and conduct of the appellant". The order of detention records that a "rowdy sheet" is being maintained at PS Rain Bazar of Hyderabad City and the appellant "could not mend his criminal way of life" and continued to indulge in similar offences after being released on bail. In the counter-affidavit filed before the High Court, the detaining authority recorded that these cases were "referred by way of his criminal background … (and) are not relied upon". The detaining authority stated that the cases which were registered against the appellant between 2009 and 2016 "are not at all considered for passing the detention order" and were "referred by way of his criminal background only". This averment is plainly contradictory. The order of detention does, as a matter of fact, refer to the criminal cases which were instituted between 2007 and 2016. In order to overcome the objection that these cases are stale and do not provide a live link with the order of detention, it was contended that they were not relied on but were referred to only to indicate the antecedent background of the detenu. If the pending cases were not considered for passing the order of detention, it defies logic as to why they were referred to in the first place in the order of detention. The purpose of the Telangana Offenders Act, 1986 is to prevent any person from acting

in a manner prejudicial to the maintenance of public order. For this purpose, Section 3 prescribes that the detaining authority must be satisfied that the person to be detained is likely to indulge in illegal activities in the future and act in a manner prejudicial to the maintenance of public order. The satisfaction to be arrived at by the detaining authority must not be based on irrelevant or invalid grounds. It must be arrived at on the basis of relevant material; material which is not stale and has a live link with the satisfaction of the detaining authority. The order of detention may refer to the previous criminal antecedents only if they have a direct nexus or link with the immediate need to detain an individual. If the previous criminal activities of the appellant could indicate his tendency or inclination to act in a manner prejudicial to the maintenance of public order, then it may have a bearing on the subjective satisfaction of the detaining authority. However, in the absence of a clear indication of a causal connection, a mere reference to the pending criminal cases cannot account for the requirements of Section 3. It is not open to the detaining authority to simply refer to stale incidents and hold them as the basis of an order of detention. Such stale material will have no bearing on the probability of the detenu engaging in prejudicial activities in the future."

(Emphasis supplied)

39. ***Ameena Begum*** (supra) has also referred to in para 53 of its judgment to the decision of this Court in ***Shibban Lal Saksena v. State of Uttar Pradesh and Others*** reported in (1953) 2 SCC 617, wherein Justice B.K. Mukherjea speaking for the Bench observed as under:

"8. The first contention raised by the learned counsel raises, however, a somewhat important point which requires careful consideration. It has been repeatedly held by this Court that the power to issue a detention order under Section 3 of the Preventive Detention Act depends entirely upon the satisfaction of the appropriate authority specified in that section. The sufficiency of the grounds upon which such satisfaction purports to be based, provided they have a rational probative value and are not extraneous to the scope

or purpose of the legislative provision cannot be challenged in a court of law, except on the ground of mala fides [State of Bombay v. Atma Ram Shridhar Vaidya, 1951 SCC 43 : 1951 SCR 167] . A court of law is not even competent to enquire into the truth or otherwise of the facts which are mentioned as grounds of detention in the communication to the detenue under Section 7 of the Act. What has happened, however, in this case is somewhat peculiar. The Government itself in its communication dated 13-3-1953, has plainly admitted that one of the grounds upon which the original order of detention was passed is unsubstantial or non-existent and cannot be made a ground of detention. The question is, whether in such circumstances the original order made under Section 3(1)(a)of the Act can be allowed to stand. The answer, in our opinion, can only be in the negative. The detaining authority gave here two grounds for detaining the petitioner. We can neither decide whether these grounds are good or bad, nor can we attempt to assess in what manner and to what extent each of these grounds operated on the mind of the appropriate authority and contributed to the creation of the satisfaction on the basis of which the detention order was made. To say that the other ground, which still remains, is quite sufficient to sustain the order, would be to substitute an objective judicial test for the subjective decision of the executive authority which is against the legislative policy underlying the statute. In such cases, we think, the position would be the same as if one of these two grounds was irrelevant for the purpose of the Act or was wholly illusory and this would vitiate the detention order as a whole. This principle, which was recognised by the Federal Court in Keshav Talpade v. King Emperor [Keshav Talpade v. King Emperor, (1943) 5 FCR 88 : 1943 SCC OnLine FC 13] seems to us to be quite sound and applicable to the facts of this case."

(Emphasis supplied)

40. Thus, from the aforesaid, two propositions of law are discernible. First, in the case on hand if the Detaining Authority thought fit to eschew from its consideration the two FIRs registered outside his territorial jurisdiction then he could not have made such FIRs as the

basis to arrive at the subjective satisfaction that the appellant detenu is a history sheeter. Secondly, if at all the Detaining Authority wanted to take into consideration the two FIRs registered with the police station not falling within his territorial jurisdiction then he should have recorded the subjective satisfaction that the incidence of the two FIRs created "public disorder". In other words, as observed by this Court in ***Ameena Begum*** (supra) habituality of committing offence cannot, in isolation, be taken as a basis of any detention order; rather it has to be tested on the matrices of "public order". It is only those cases where such habituality has created disturbance of public order that they could qualify as a ground to order detention.

41. The learned counsel appearing for the appellant detenu is also right in his submission that if it is the case of the Detaining Authority that there was no other option but to pass an order of preventive detention as the appellant detenu came to be released by the regular criminal courts on bail then the State should have gone for cancellation of bail. Whenever, any accused is released on bail by any criminal court in connection with any offence, whether specifically said so in the order of bail while imposing conditions or not, it is implied that the bail is granted on the condition that the accused shall not indulge in any such offence or illegal activities in future. In some cases, courts do deem fit to impose one of such conditions for the grant of bail. However, even in those cases, where such a condition is not specifically imposed while granting bail it is implied that if such accused after his release on bail once again commits any offence or indulges in nefarious activities then his bail is liable to be cancelled. In the case on hand, the State instead of proceeding to pass an order of detention could have approached the courts concerned for cancellation of the bail on the ground that the appellant detenu had continued to indulge in nefarious activities and many more FIRs have been registered against him.

42. In the aforesaid context, we may refer to the decision of this Court in the case of ***Shaik Nazeen v. State of Telangana and Others*** reported in (2023) 9 SCC 633, wherein in paras 11 and 19 respectively, this Court observed as under:

> *"11. The detention order was challenged by the wife of the detenu in a habeas corpus petition before the Division Bench of the Telangana High Court. The ground taken by the petitioner before the High Court was that reliance has been*

taken by the Authority of four cases of chain snatching, as already mentioned above. The admitted position is that in all these four cases the detenu has been released on bail by the Magistrate. Moreover, in any case, the nature of crime as alleged against the petitioner can at best be said to be a law and order situation and not the public order situation, which would have justified invoking the powers under the preventive detention law. This, however did not find favour with the Division Bench of the High Court, which dismissed the petition, upholding the validity of the detention order.

xxx xxx xxx

19. In any case, the State is not without a remedy, as in case the detenu is much a menace to the society as is being alleged, then the prosecution should seek for the cancellation of his bail and/or move an appeal to the Higher Court. But definitely seeking shelter under the preventive detention law is not the proper remedy under the facts and circumstances of the case."

(Emphasis supplied)

ii. Summary of the Findings.

43. We summarize our conclusions as under: -

(i) The Detaining Authority should take into consideration only relevant and vital material to arrive at the requisite subjective satisfaction,

(ii) It is an unwritten law, constitutional and administrative, that wherever a decision-making function is entrusted to the subjective satisfaction of the statutory functionary, there is an implicit duty to apply his mind to the pertinent and proximate matters and eschew those which are irrelevant & remote,

(iii) There can be no dispute about the settled proposition that the detention order requires subjective satisfaction of the detaining authority which, ordinarily, cannot be questioned by the court for insufficiency of material. Nonetheless, if the detaining authority does not consider relevant circumstances or considers wholly unnecessary, immaterial and irrelevant circumstances, then such subjective satisfaction would be vitiated,

(iv) In quashing the order of detention, the Court does not sit in judgment over the correctness of the subjective satisfaction. The anxiety of the Court should be to ascertain as to whether the decision-making process for reaching the subjective satisfaction is based on objective facts or influenced by any caprice, malice or irrelevant considerations or non-application of mind,

(v) While making a detention order, the authority should arrive at a proper satisfaction which should be reflected clearly, and in categorical terms, in the order of detention,

(vi) The satisfaction cannot be inferred by mere statement in the order that "it was necessary to prevent the detenu from acting in a manner prejudicial to the maintenance of public order". Rather the detaining authority will have to justify the detention order from the material that existed before him and the process of considering the said material should be reflected in the order of detention while expressing its satisfaction,

(vii) Inability on the part of the state's police machinery to tackle the law and order situation should not be an excuse to invoke the jurisdiction of preventive detention,

(viii) Justification for such an order should exist in the ground(s) furnished to the detenu to reinforce the order of detention. It cannot be explained by reason(s) / grounds(s) not furnished to the detenu. The decision of the authority must be the natural culmination of the application of mind to the relevant and material facts available on the record, and

(ix) To arrive at a proper satisfaction warranting an order of preventive detention, the detaining authority must, *first* examine the material adduced against the prospective detenu to satisfy itself whether his conduct or antecedent(s) reflect that he has been acting in a manner prejudicial to the maintenance of public order and, second, if the aforesaid satisfaction is arrived at, it must further consider whether it is likely that the said person would act in a manner prejudicial to the public order in near future unless he is prevented from doing so by passing an order of detention . For passing a detention order based on subjective satisfaction, the answer of the aforesaid aspects and points must be against the prospective detenu. The absence

of application of mind to the pertinent and proximate material and vital matters would show lack of statutory satisfaction on the part of the detaining authority.

iii. The Saga Continues

44. We are dealing with a litigation arising from an order of preventive detention passed by the State of Telangana under the provisions of the Act 1986.

45. This is one more litigation going against the State of Telangana. We remind the State of Telangana of what has been observed by this Court in ***Mallada K. Sri Ram v. State of Telangana*** reported in (2023) 13 SCC 537 in para 17:

> *"17. It is also relevant to note, that in the last five years, this Court has quashed over five detention orders under the Telangana Act of 1986 for inter alia incorrectly applying the standard for maintenance of public order and relying on stale materials while passing the orders of detention. At least ten detention orders under the Telangana Act of 1986 have been set aside by the High Court of Telangana in the last one year itself. These numbers evince a callous exercise of the exceptional power of preventive detention by the detaining authorities and the respondent-state. We direct the respondents to take stock of challenges to detention orders pending before the Advisory Board, High Court and Supreme Court and evaluate the fairness of the detention order against lawful standards."*

46. Again, in one of the recent pronouncements of this Court in ***Ameena Begum*** (supra), this Court referring to ***Mallada K. Sri Ram*** (supra) observed in para 65 as under:

> *"65. Interference by this Court with orders of detention, routinely issued under the Act, seems to continue unabated. Even after Mallada K. Sri Ram [Mallada K. Sri Ram v. State of Telangana, (2023) 13 SCC 537 : 2022 SCC OnLine SC 424] , in another decision of fairly recent origin in Sk. Nazneen v. State of Telangana [Sk. Nazneen v. State of Telangana, (2023) 9 SCC 633] , this Court set aside the*

impugned order of detention dated 28-10-2021 holding that seeking shelter under preventive detention law was not the proper remedy."

47. We hope that the State of Telangana takes what has fallen from this Court very seriously and sees to it that the orders of preventive detention are not passed in a routine manner without any application of mind.

48. We hope that the State of Telangana does not give any good reason once again to this Court to observe anything further.

iv. Role of the Advisory Board

49. At this stage, it is also apposite to mention that in such scenarios as discussed above, where orders of preventive detention are being passed by the Detaining Authority in a routine and mechanical manner, the role and duty of the Advisory Board(s) becomes all the more imperative to put a check on such capricious exercise of powers and ensure that a bright-line is drawn whereby such illegal detentions are nipped in the bud and the detenu released forthwith.

50. Advisory Board(s) under preventive detention legislations, are not a superficial creation but one of the primary constitutional safeguards available to the detenu against an order of detention. Article 22(4) mandates that, any law pertaining to preventive detention must provide for constitution of an Advisory Board consisting of persons who have been or qualified to be appointed as judges of the High Court. It further vests the Advisory Board with the pivotal role of reviewing an order of detention within three-months by forming an opinion as to whether there is a sufficient cause for such detention or not, after consideration of all the material on record including representation if any, of the detenu.

51. In Telangana also, under the Act, 1986, Section 9 gives expression to this constitutional requirement, and provides for the constitution and composition of an Advisory Board for the purposes of the Act, the relevant provision reads as under: -

"***9. Constitution of Advisory Boards.***

(1) The Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of a Chairman and two other members, who are, or have been Judges or are qualified to be appointed as Judges of a High Court."

52. Section 10 of the Act, 1986 provides for the reference and review of an order of detention passed under the Act by the Advisory Board. It states that any order of detention that has been made under the Act shall be placed before an Advisory Board thereunder within three-weeks from the date of its passing, along with the grounds on which such an order was made, the representation of the detenu if any, and the report of the officer empowered under the Act. The relevant provision reads as under: -

"***10. Reference to Advisory Boards.***

In every case where a detention order has been made under this Act, the Government shall within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by them under section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of section 3."

53. Section 11 of the Act, 1986 delineates the function to be discharged and the procedure to be adopted by the Advisory Board. It *inter-alia* states that the Advisory Board must form an opinion and specify as to whether there is sufficient cause warranting the detention of the detenu. The Advisory Board has to form this opinion by considering all the materials placed before it in terms of Section 10 of the Act, 1986. Section 11 further empowers the Advisory Board to call for any other information or to hear the detenu, wherever necessary so as to ascertain the sufficiency of cause for preventive detention. The relevant provision reads as under: -

"***11. Procedure of Advisory Boards.***

(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such

further information as it may deem necessary from the Government or from any person called for the purpose through the Government or from the person concerned, and if, in any particular case, the Advisory Board considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the Government within seven weeks from the date of detention of the person concerned.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) The proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

(5) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board."

54. Section 12 of the Act, 1986 provides that where the Advisory Board in its report is of the opinion that sufficient cause exists warranting detention, the Government may confirm the detention i.e., it gives the appropriate Government the discretion to either confirm or revoke the order of detention. But where the Advisory Board in its report is of the opinion that no sufficient cause exists for the detention of the detenu, the same is binding on the Government, and the detenu is forthwith required to be released. The relevant observations read as under: -

"***12. Action upon report of Advisory Board.***

(1) In any case where the Advisory Board has reported that there is, in its opinion, sufficient cause for the

detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period, not exceeding the maximum period specified in section 13 as they think fit.

(2) In any case, where the Advisory Board has reported that there is, in its opinion, no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith.

55. What can be discerned from a bare perusal of the abovementioned provisions is that the Advisory Board performs the most vital duty of independently reviewing the detention order, after considering all the materials placed before it, or any other material which it deems necessary. When reviewing the detention order along with the relevant materials, the Advisory Board must form an opinion as to the sufficiency of the cause for warranting detention. An order of detention passed under the Act, 1986 can only be confirmed if the Advisory Board is of the opinion that there exists sufficient cause for the detention of the detenu.

56. The framers of the Constitution being in *seisin* of the draconian nature of an order of preventive detention and its adverse impact on individual liberty, have specifically put in place safeguards within Article 22 through the creation of an Advisory Board, to ensure that any order of preventive detention is only confirmed upon the evaluation and scrutiny of an independent authority which determines and finds that such an order for detention is necessary.

57. The legislature in its wisdom has thought it fit, to entrust the Advisory Board and no one else, not even the Government, with the performance of this crucial and critical function which ultimately culminates into either the confirmation or revocation of a detention order. The Advisory Board setup under any preventive detention law in order to form its opinion is required to; (i) consider the material placed before it; (ii) to call for further information, if deemed necessary; (iii) to hear the detenu, if he desires to be heard and; (iv) to submit a report in writing as to whether there is sufficient cause for "such detention" or whether the detention is justified.

58. An Advisory Board is not a mere rubber-stamping authority for an order of preventive detention. Whenever any order of detention is placed before it for review, it must play an active role in ascertaining whether the detention is justified under the law or not. Where it finds that such order of detention is against the spirit of the Act or in contravention of the law as laid down by the courts, it can definitely opine that the order of detention is not sustainable and should not shy away from expressing the same in its report.

59. As stated by us above, preventive detention being a draconian measure, any order of detention as a result of a capricious or routine exercise of powers must be nipped in the bud. It must be struck down at the first available threshold and as such, it should be the Advisory Board that must take into consideration all aspects not just the subjective satisfaction of the detaining authorities but whether such satisfaction justifies detention of the detenu. The Advisory Board must consider whether the detention is necessary not just in the eyes of the detaining authority but also in the eyes of law.

60. The requirement of having persons who have been or are qualified to be High Court judges in the Advisory Board is not an empty formality, it is there to ensure that, an order of detention is put to robust scrutiny and examined as it would have been by any ordinary court of law. Otherwise, the purpose of independent scrutiny could very well have been served by having any independent persons, and there would have been no need to have High Court judges or their equivalent. Thus, it is imperative that whenever an order of detention is placed before an Advisory Board, it duly considers each and every aspect, not just those confined to the satisfaction of the detaining authority but the overall legality as per the law that has been laid down by this court.

61. An Advisory Board whilst dispensing its function of ascertaining the existence of a "sufficient cause" for detention, cannot keep itself unconcerned or oblivious to the developments that have taken place by a plethora of decisions of this Court delineating the criterion required to be fulfilled for passing an order of detention. The "independent scrutiny" as envisaged by Article 22 includes ascertaining whether the detention order would withstand the scrutiny a court of law.

62. We fail to understand what other purpose the Advisory Board encompassing High Court judges or their equivalent as members would serve, if the extent of their scrutiny of the order of detention is confined just to the subjective satisfaction of the detaining authority. The entire purpose behind creation of an Advisory Board is to ensure that no person is mechanically or illegally sent to preventive detention. In such circumstances, the Advisory Boards are expected to play a proactive role. The Advisory Board is a constitutional safeguard and a statutory authority. It functions as a safety valve between the detaining authority and the State on one hand and the rights of the detenu on the other. The Advisory Board should not just mechanically proceed to approve detention orders but is required to keep in mind the mandate contained in Article 22(4) of the Constitution of India.

63. Thus, an Advisory Board setup under a preventive detention legislation is required to undertake a proper and thorough scrutiny of an order of detention placed before it, by appreciating all aspects and angles before expressing any definite opinion in its report.

F. CONCLUSION

64. In the result, this appeal succeeds and is hereby allowed. The impugned judgment and order passed by the High Court is set aside. Consequently, the order of detention is also quashed and set aside. The appellant detenu be set at liberty forthwith if not required in any other case.

65. The connected Criminal Appeal No. ..... of 2024 @ SLP (Cri) No. 3391 of 2024 of the co-detenu is also allowed for the very same reasons and is disposed of in the aforesaid terms. The order of detention passed against the co-detenu also stands quashed and set aside. He be set at liberty forthwith if not required in any other case.

66. The Registry shall forward one copy each of this judgment to the Chief Secretary and the Principal Home Secretary of the State of Telangana at the earliest.

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

Headnotes prepared by: Nidhi Jain

Result of the case: Appeals allowed.

[2024] 3 S.C.R. 1228 : 2024 INSC 247

Thirumoorthy
v.
State Represented by the Inspector of Police

(Criminal Appeal No. 1773 of 2024)

22 March 2024

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

Issue for Consideration

Appellant-accused, a Child in Conflict with Law on the date of the incident was convicted and sentenced u/ss.363, 342, 302, 201 r/w 302, IPC and s.6, POCSO Act. Trial, conviction and sentence of the appellant, if was vitiated on account of non-adherence to the mandatory requirements of the Juvenile Justice (Care and Protection of Children) Act, 2015.

Headnotes

Juvenile Justice (Care and Protection of Children) Act, 2015 – ss.3, 9, 15, 18, 19 – Despite the appellant-accused having been found to be a juvenile and thus, a Child in Conflict with Law (CICL) on the date of the incident in 2016, charge sheet against the accused was filed directly before the Sessions Court – Appellant was convicted and sentenced u/ss.363, 342, 201 r/w 302, IPC and s.6, POCSO Act – Conviction and sentences affirmed by High Court – Correctness:

Held: Even before the result of investigation was filed, the fact regarding the accused being a CICL was well known to the IO (PW-25), the prosecution and the trial Court as well – Even assuming that the Sessions Court was designated as a Children's Court, there was no option for the said Court but to forward the child to the concerned Juvenile Justice Board for further directions – There was flagrant violation of the mandatory requirements of ss.15 and 19 of the JJ Act – Neither was the charge sheet against the appellant filed before the Board nor was any preliminary assessment conducted u/s.15, so as to find out whether the appellant was required to be tried as an adult – In absence of a preliminary assessment being conducted by the Board u/s.15, and without an order being passed by the Board u/s.15(1) r/w s.18(3), it was impermissible for the trial Court to have accepted the charge sheet and to have proceeded with the trial – Thus, the proceedings undertaken by

* Author

the Sessions Court in conducting trial of the CICL, convicting and sentencing him were in gross violation of the mandate of the Act and hence, vitiated – Further, pursuant to the trial being concluded, the trial Court having realized the gross illegality in the proceedings, dealt with the appellant as per the provisions of the JJ Act on the aspect of sentencing – However, ex facie, the said action does not stand to scrutiny because the very foundation of the prosecution case was illegal to the core – Entire proceedings taken against the appellant right from the stage of investigation and the completion of trial were vitiated being in gross violation of the mandatory requirements of the JJ Act – Impugned judgment quashed and set aside. [Paras 31, 37-41, 44 and 50]

Juvenile Justice (Care and Protection of Children) Act, 2015 – Appellant was convicted and sentenced u/ss.363, 342, 201 r/w 302, IPC and s.6, POCSO Act – Offence was committed by appellant-accused in the year 2016 – Despite him being a juvenile and thus, a Child in Conflict with Law (CICL) on the date of the incident, charge sheet against him was filed directly before the Sessions Court (statedly designated as a Children's Court) and he was never subjected to preliminary assessment by the Board to find out whether he should be tried as an adult – Such exercise if to be done at this stage:

Held: No – Directing such an exercise at this stage would be sheer futility because now the appellant is nearly 23 years of age – At this stage, there remains no realistic possibility of finding out the mental and physical capacity of the appellant to commit the offence or to assess his ability to understand the consequences of the offence and circumstances in which he committed the offence in the year 2016 – Present case not fit to warrant de novo proceedings against the appellant by taking recourse to the provisions of the JJ Act. [Paras 47, 48 and 46]

Juvenile Justice (Care and Protection of Children) Act, 2015 – ss.3, 9, 15, 18, 19 – Prosecution of a Child in Conflict with Law – Provisions to be followed – Discussed.

Case Law Cited

Karan alias Fatiya v. State of Madhya Pradesh [2023] 2 SCR 587 **: (2023) 5 SCC 504;** *Pawan Kumar v. State of Uttar Pradesh & Ors.* [2023] 15 SCR 261 **: 2023 SCC OnLine SC 1492 – distinguished.**

Ajeet Gurjar v. State of Madhya Pradesh **2023 SCC Online SC 1255 – referred to.**

List of Acts

Juvenile Justice (Care and Protection of Children) Act, 2015; Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012.

List of Keywords

Juvenile; Child in Conflict with Law; Children's Court; Juvenile Justice Board; Preliminary assessment; De novo proceedings.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1773 of 2024

From the Judgment and Order dated 15.04.2021 of the High Court of Judicature at Madras in CRLA No. 451 of 2019

Appearances for Parties

Ms. S. Janani, Ms. Sharika Rai, Advs. for the Appellant.

Dr. Joseph Aristotle S., Ms. Bhanu Kapoor, Ashutosh Singh Rana, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. Leave granted.

2. This appeal takes exception to the judgment dated 15th April, 2021, passed by the learned Single Judge of the High Court of Judicature at Madras dismissing the criminal appeal filed by the appellant herein under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter being referred to as 'CrPC') and affirming the conviction of the appellant and sentences awarded to him vide judgment and order dated 18th February, 2019, passed by the Court of Sessions Judge, Mahila Court, Salem (hereinafter being referred to as the 'trial Court') in Special Sessions Case No. 79 of 2016. By the said judgment and order, learned trial Court convicted and sentenced the appellant as below: -

Provision under which convicted	Sentence
Section 363 IPC	Sentenced to undergo 07 years rigorous imprisonment.
Section 342 IPC	Sentenced to undergo 01 years rigorous imprisonment.
Section 6 POCSO Act	Sentenced to undergo 10 years rigorous imprisonment.
Section 302 IPC	Sentenced to undergo 10 years rigorous imprisonment.
Section 201 read with 302 IPC	Sentenced to undergo 07 years rigorous imprisonment.

3. The trial Court in para 96 of its judgment held as under: -

> "96. Accused is now 19 years 2 months old. Therefore, according to Section 20 Juvenile Justice (Care and Protection of Children Act), Juvenile in conflict with law shall be kept in a safe place in Chengalpattu Juvenile Reform School till the age of 21 years. After that, the Probation Officer should evaluate the reformation of the said child and send a periodic report about it to this Court. After the completion of 21 years, the said child shall be produced in this Court and after evaluating whether the child has reformed, became a child who can contribute to the society, the remaining sentence may be reduced and released, or if the child is not reformed, the remaining sentence should be spent in jail after the child reaches the age of 21, considering the report of the Probation Officer and the progress records. The decision will be based on the discipline that the child has achieved and his behaviour."

4. Brief facts relevant and essential for disposal of the instant appeal are noted hereinbelow.

5. The victim Ms. D, being the daughter of the first informant-Mr. G(PW-1) aged 6 years went missing in the evening of 2nd July, 2016. Mr. G (PW-1) lodged a complaint at P.S. Kolathur, District Salem on 3rd July, 2016 at 7 'o clock in the morning alleging, *inter alia* that he had taken his daughter(victim) to a shop on the previous evening at

around 6 o' clock and from there, he asked the child to return home. However, when he reached his house half an hour later and made an inquiry from his wife, he was told that the child had not returned by then. A search was made in the locality but the child could not be traced out. Based on the said complaint, Crime No. 174 of 2016 was registered and investigation was undertaken by S. Viswanathan, Inspector of Police (PW-25).

6. The Investigating Officer (PW-25) recorded the statements of Mylaswamy (PW-10) and Irusappan (PW-11) who stated that they had seen the accused going into the compound of his house with the child victim being the daughter of the first informant-Mr. G (PW-1). On this, the needle of suspicion pointed towards the accused-appellant who was apprehended from his house by the Investigating Officer (PW-25) while he was trying to run away. The accused was interrogated in presence of Mr. Arivazhagan, Village Administrative Officer (PW-15) and his assistant Muthappan.

7. It is alleged that the accused confessed to his guilt and his admission was recorded in memo (Ex. P-20) and acting in furtherance thereof, the dead body of Ms. D was found concealed in a wide-mouthed aluminium vessel lying in the prayer room of the house of the accused. The requisite spot inspection proceedings were undertaken and the dead body of the child victim was sent to the Salem Government Mohan Kumaramangalam Medical College Hospital for conducting post mortem. The post mortem report (Ex. P-7) and final opinion of Doctor (Ex. P-8) were received indicating that the death of the victim was homicidal in nature having being caused by asphyxiation due to compression of neck along with injuries to genitalia. Some incised wounds were also found on the body of the victim. Incriminating articles viz., clothes of the accused, a blade, etc. were recovered from the house of accused.

8. Right at the inception of investigation, the Investigating Officer(PW-25) had gathered information to the effect that the accused was a juvenile since his date of birth recorded in school documents is 30th May, 2000. Thus indisputably, the accused was a Child in Conflict with Law(in short 'CICL') as provided under Section 2(13) of the Juvenile Justice(Care and Protection of Children) Act, 2015 (hereinafter being referred to as the 'JJ Act') and the proceedings were required to be conducted in accordance with the mandatory procedure prescribed

under the JJ Act. Inspite thereof, charge sheet against the accused was filed directly before the Sessions Court (portrayed to be a designated Children's Court, as per the counter affidavit filed by the State in the SLP).

9. Charges were framed against the accused who pleaded not guilty and claimed trial. The prosecution examined 25 witnesses and exhibited 35 documents and 10 material objects to prove its case. The accused was questioned under Section 313(1)(b) of CrPC and was confronted with the circumstances appearing against him in the prosecution case. He denied the allegations levelled against him and claimed to be innocent. However, neither oral nor documentary evidence was led in defence. The trial Court proceeded to convict and sentence the accused as mentioned above, vide judgment and order dated 18th February, 2019.

10. The mother of the accused appellant filed a petition before the Special Court, POCSO Act Cases, Salem praying that the sentence of her son may be reduced and he may be considered for early release in view of his good behaviour.

11. The Special Court, POCSO Act Cases, Salem held an inquiry; conducted psychological evaluation of the accused; procured reports from the Vellore District Social Security Department Probation Officer and Probation Officer of Government Special Home as well as the individual evaluation report of the accused and after analysing the above reports, proceeded to dismiss the application filed by the mother of the accused appellant vide order dated 29th January, 2021.

12. Being aggrieved by his conviction and the sentences awarded by the trial Court, the accused appellant preferred an appeal being CRLA No. 451 of 2019 before the High Court of Judicature at Madras which came to be rejected vide impugned judgment dated 15th April, 2021. Hence this appeal by special leave.

13. Ms. S. Janani, learned counsel representing the accused appellant vehemently urged that admittedly the accused appellant was a CICL on the date of the incident since his date of birth as recorded in the school documents is 30th May, 2000. She contended that the entire series of events commencing from the arrest of the accused appellant; the manner in which the investigation was conducted; the filing of the charge sheet in the Sessions Court; the procedure of trial right up to the conviction and sentencing of the accused appellant

is vitiated as the mandatory procedure provided under the JJ Act was not followed and was rather blatantly flouted. It was submitted that the police official who filed the charge sheet was not having the authority to conduct investigation because investigation into an offence allegedly committed by CICL has to be undertaken by the Special Juvenile Police Unit(SJPU) constituted under Section 107(2) of the JJ Act by the concerned State Government.

14. She urged that Section 3(1) provides for the principle of presumption of innocence, but the said provision was totally ignored in conducting the prosecution of the accused appellant and hence the entire trial is vitiated.

15. It was further submitted that the Sessions Judge who conducted trial was not designated as a Children's Court and thus, the trial of the accused appellant is vitiated. Without prejudice to this submission, learned counsel submitted that even assuming that the Sessions Court had been designated as a Children's Court, the accused appellant could not have been tried by the said Court without preliminary assessment being conducted by the Juvenile Justice Board(hereinafter being referred to as 'Board') as postulated under Section 15 of the JJ Act. The section mandates an enquiry in form of preliminary assessment to be conducted by the Board wherein the CICL has a right to participate. Upon conclusion of enquiry, the Board has to pass an order under Section 18(3) to the effect that there is a need to try the child as an adult and only thereafter, the Board can transfer the case to the Children's Court for trial. The CICL has been given a right to appeal against such order by virtue of Section 101(2) of the JJ Act. Even after the transfer of case under Section 15, the Children's Court is required to apply its own independent mind to find out whether there is a genuine need for trial of the CICL as an adult as provided by Section 19(1)(i) of the JJ Act. However, none of these mandatory requirements were complied with and thus, the trial is vitiated.

16. Referring to the alleged confession of the accused appellant, the learned counsel criticised the manner in which the investigation was conducted and submitted that the confession recorded in presence of the police officer could not have been allowed to be exhibited and admitted in evidence. She submitted that the trial Court, not only allowed the confession to be exhibited but also placed implicit

reliance upon it basing the conviction of the accused appellant on such inadmissible piece of evidence. The recording of confession of a CICL and placing implicit reliance thereupon is contrary to the general principles laid out under Section 3 of the JJ Act which provides the general principles to be followed in the administration of the Act.

17. It was further urged that (PW-10) and (PW-11) whose depositions have been relied upon to constitute the circumstance of last seen are as a matter of fact, totally unreliable witnesses. Had these witnesses seen the child being taken away by the accused, then their natural reaction would have been to promptly inform the child's father, the informant Mr. G. (PW-1) about this important circumstance and the same would definitely have been incorporated in the FIR which was lodged on the next day of the incident.

18. It was also contended that the factum of recovery of the dead body from the aluminium vessel preceded by the disclosure statement of the accused appellant has not been proved by reliable evidence and hence, there does not exist cogent and convincing circumstantial evidence on the record so as to establish the guilt of the accused appellant.

19. On these counts, learned counsel for the appellant implored the Court to accept the appeal and set aside the impugned judgment and sought acquittal for the accused appellant.

20. Learned counsel representing the State, vehemently and fervently opposed the submissions advanced by the appellant's counsel. It was submitted that looking to the gruesome nature of the crime, the entire investigation and trial cannot be held to be vitiated simply on account of irregularity in the procedure of conducting investigation and trial. The Sessions Court which conducted the trial had been designated as a Children's Court. The trial Court as well as the High Court have given due consideration to the fact that the accused appellant was a juvenile on the date of commission of the crime and accordingly, the sentence which has been awarded to the accused appellant is commensurate with the provisions of the JJ Act. Not only this, the trial Court undertook an exhaustive exercise for mental and psychological assessment of the accused appellant after recording his conviction and only after receiving an individual care plan had quantified the sentences to be awarded to the accused which are strictly within the framework of the JJ Act.

21. In support of his contentions, learned counsel for the State placed reliance on judgments rendered by this Court in the cases of ***Karan alias Fatiya v. State of Madhya Pradesh***[1] and ***Pawan Kumar v. State of Uttar Pradesh & Ors***[2]. He contended that the impugned judgment does not warrant any interference by this Court.

22. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the judgments on record.

23. The fact regarding the accused appellant being a CICL on the date of the incident, i.e., 2nd July, 2016 is not in dispute because the date of birth of the accused as entered in the contemporaneous school record is 30th May, 2000.

24. We shall thus first take up the issue whether the trial is vitiated on the account of non-adherence to the mandatory requirements of the JJ Act.

25. At the outset, we may note that the fact regarding the accused appellant being juvenile and thus a CICL on the date of commission of the incident was known to the Investigating Officer(PW-25) right at inception of the proceedings. The Investigating Officer(PW-25) categorically stated in his deposition that after completing the investigation and preparing the final report against the **"juvenile in conflict with law"**, he took opinion from the Salem TTP, prepared a model charge sheet and filed the same in the trial Court.

26. The trial Court was also cognizant of this important aspect as can be clearly discerned from the opening lines of para 2 of the judgment of the trial Court wherein it is mentioned that **"Thirumoorthy', a 17 year old juvenile in conflict with law, lives with his mother in Telanganaur"**. It has also been recorded by the trial Court that on the date of passing of the judgment, i.e., 18th February, 2019, the accused was 19 years and 2 months old and accordingly, he was required to be sent to a place of safety as per Section 20 of the JJ Act. The judgment passed by the Sessions Court also records the fact that during the course of the trial, the accused was kept in a child protection home. Further at para 32 of the judgment, the trial Court also noted that the Public Prosecutor himself argued that Thirumoorthy was a CICL who committed the offence upon the child victim.

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1 [2023] 2 SCR 587 : (2023) 5 SCC 504

2 [2023] 15 SCR 261 : 2023 SCC OnLine SC 1492

27. Thus, there is no escape from the conclusion that even before the result of investigation was filed, the fact regarding the accused being a CICL was well known to the Investigating Officer(PW-25), the prosecution and the trial Court as well.

28. Before dealing with the rival contentions, we would now refer to some of the relevant provisions of the JJ Act which are required to be followed in a case involving prosecution of a CICL:-

> "**3. General principles to be followed in administration of Act. —**The Central Government, the State Governments, the Board, and other agencies, as the case may be, while implementing the provisions of this Act shall be guided by the following fundamental principles, namely: —
>
> (i) *Principle of presumption of innocence*: Any child shall be presumed to be an innocent of any mala fide or criminal intent up to the age of eighteen years.
>
> (ii) *Principle of dignity and worth*: All human beings shall be treated with equal dignity and rights.
>
> (iii) *Principle of participation*: Every child shall have a right to be heard and to participate in all processes and decisions affecting his interest and the child's views shall be taken into consideration with due regard to the age and maturity of the child.
>
> (iv) *Principle of best interest*: All decisions regarding the child shall be based on the primary consideration that they are in the best interest of the child and to help the child to develop full potential.
>
> (v) *Principle of family responsibility*: The primary responsibility of care, nurture and protection of the child shall be that of the biological family or adoptive or foster parents, as the case may be.

(vi) *Principle of safety*: All measures shall be taken to ensure that the child is safe and is not subjected to any harm, abuse or maltreatment while in contact with the care and protection system, and thereafter.

(vii) *Positive measures*: All resources are to be mobilised including those of family and community, for promoting the well-being, facilitating development of identity and providing an inclusive and enabling environment, to reduce vulnerabilities of children and the need for intervention under this Act.

(viii) *Principle of non-stigmatising semantics*: Adversarial or accusatory words are not to be used in the processes pertaining to a child.

(ix) *Principle of non-waiver of rights*: No waiver of any of the right of the child is permissible or valid, whether sought by the child or person acting on behalf of the child, or a Board or a Committee and any non-exercise of a fundamental right shall not amount to waiver.

(x) *Principle of equality and non-discrimination*: There shall be no discrimination against a child on any grounds including sex, caste, ethnicity, place of birth, disability and equality of access, opportunity and treatment shall be provided to every child.

(xi) *Principle of right to privacy and confidentiality*: Every child shall have a right to protection of his privacy and confidentiality, by all means and throughout the judicial process.

(xii) *Principle of institutionalisation as a measure of last resort*: A child shall be placed in institutional care as a step of last resort after making a reasonable inquiry.

(xiii) *Principle of repatriation and restoration*: Every child in the juvenile justice system shall have the right to be re-united with his family at the earliest and to be restored to the same socio-economic and cultural status that he was in, before coming under the purview of this Act, unless such restoration and repatriation is not in his best interest.

(xiv) *Principle of fresh start*: All past records of any child under the Juvenile Justice system should be erased except in special circumstances.

(xv) *Principle of diversion*: Measures for dealing with children in conflict with law without resorting to judicial proceedings shall be promoted unless it is in the best interest of the child or the society as a whole.

(xvi) *Principles of natural justice*: Basic procedural standards of fairness shall be adhered to, including the right to a fair hearing, rule against bias and the right to review, by all persons or bodies, acting in a judicial capacity under this Act.

9. Procedure to be followed by a Magistrate who has not been empowered under this Act. — (1) When a Magistrate, not empowered to exercise the powers of the Board under this Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

(2) In case a person alleged to have committed an offence claims before a court other than a Board, that the person is a child or was a child on the date of commission of the offence, or if the court itself is of the opinion that the person was a child on the date of commission of the offence,

the said court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) to determine the age of such person, and shall record a finding on the matter, stating the age of the person as nearly as may be:

> Provided that such a claim may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such a claim shall be determined in accordance with the provisions contained in this Act and the rules made thereunder even if the person has ceased to be a child on or before the date of commencement of this Act.

(3) If the court finds that a person has committed an offence and was a child on the date of commission of such offence, it shall forward the child to the Board for passing appropriate orders and the sentence, if any, passed by the court shall be deemed to have no effect.

(4) In case a person under this section is required to be kept in protective custody, while the person's claim of being a child is being inquired into, such person may be placed, in the intervening period in a place of safety.

(emphasis supplied)

15. Preliminary assessment into heinous offences by Board. — (1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of subsection (3) of section 18:

> Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation. —For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973:

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101:

Provided further that the assessment under this section shall be completed within the period specified in section 14."

18. **Orders regarding child found to be in conflict with law.** —(1) Where a Board is satisfied on inquiry that a child irrespective of age has committed a petty offence, or a serious offence, or a child below the age of sixteen years has committed a heinous offence, then, notwithstanding anything contrary contained in any other law for the time being in force, and based on the nature of offence, specific need for supervision or intervention, circumstances as brought out in the social investigation report and past conduct of the child, the Board may, if it so thinks fit,—

(a) allow the child to go home after advice or admonition by following appropriate inquiry and counselling to such child and to his parents or the guardian;

(b) direct the child to participate in group counselling and similar activities;

(c) order the child to perform community service under the supervision of an organisation or institution, or a specified person, persons or group of persons identified by the Board;

(d) order the child or parents or the guardian of the child to pay fine:

Provided that, in case the child is working, it may be ensured that the provisions of any labour law for the time being in force are not violated;

(e) direct the child to be released on probation of good conduct and placed under the care of any parent, guardian or fit person, on such parent, guardian or fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and child's well-being for any period not exceeding three years;

(f) direct the child to be released on probation of good conduct and placed under the care and supervision of any fit facility for ensuring the good behaviour and child's well-being for any period not exceeding three years;

(g) direct the child to be sent to a special home, for such period, not exceeding three years, as it thinks fit, for providing reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of stay in the special home:

Provided that if the conduct and behaviour of the child has been such that, it would not be in the child's interest, or in the interest of other children housed in a special home, the Board may send such child to the place of safety.

(2) If an order is passed under clauses (a) to (g) of sub-section (1), the Board may, in addition pass orders to—

(i) attend school; or

(ii) attend a vocational training centre; or

(iii) attend a therapeutic centre; or

(iv) prohibit the child from visiting, frequenting or appearing at a specified place; or

(v) undergo a de-addiction programme.

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

19. Powers of Children's Court.—(1) After the receipt of preliminary assessment from the Board under Section 15, the Children's Court may decide that—

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and pass appropriate orders after trial subject to the provisions of this section and Section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(*ii*) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of Section 18.

(2)-(5)......"

29. The provisions contained in Section 9(1) stipulate that when a Magistrate not empowered to exercise the power of the Board under the Act is of the opinion that the person alleged to have committed the offence and brought before him is a child, he shall, without any delay, record such opinion and forward the child immediately along with the record of such proceedings to the Board having jurisdiction.

30. Sections 9(2) and 9(3) cast a burden that where the Court itself is of the opinion that the person was a child on the date of commission of the offence, it shall conduct an inquiry so as to determine the age of such person and upon finding that the person alleged to have

committed the offence was a child on date of commission of such offence, forward such person to the Board for passing appropriate orders and sentence, if any, passed by the Court shall be deemed to have no effect.

31. In the present case, the situation is very stark inasmuch as, even when the charge sheet was filed, the Investigating Officer had clearly recorded that the date of birth of the accused was 30th May, 2000, and hence, even assuming that Sessions Court at Salem had been designated as a Children's Court, there was no option for the said Court but to forward the child to the concerned Board for further directions.

32. There is no dispute on the aspect that the offences of which the accused appellant was charged with, fall within the category of 'heinous offences' as defined under Section 2(33) of the JJ Act. Section 15(1) provides that in case where a heinous offence/s are alleged to have been committed by a child who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he committed the offence. The Board, after conducting such assessment, may pass an order in accordance with the provisions of sub-section (3) of Section 18 of the JJ Act. Section 15(2) provides that where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial of summons case under CrPC. Under first proviso to this sub-section, the order passed by the Board is appealable under Section 101(2) of the JJ Act.

33. Section 18(3) provides that where the Board after preliminary assessment under Section 15 opines that there is a need for the said child to be tried as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

34. By virtue of Section 19(1), the Children's Court, upon receiving such report of preliminary assessment undertaken by the Board under Section 15 may further decide as to whether there is a need for trial of the child as an adult or not.

35. The procedure provided under Sections 15 and 19 has been held to be mandatory by this Court in the case of ***Ajeet Gurjar v. State of Madhya Pradesh***[3]. In the said case, this Court considered the import of Section 19(1) of the JJ Act and held that the word 'may' used in the said provision be read as 'shall'. It was also held that holding of an inquiry under 19(1)(i) is not an empty formality. Section 19)(1)(ii) provides that after examining the matter, if the Children's Court comes to the conclusion that there is no need for trial of the child as an adult, instead of sending back the matter to the Board, the Court itself is empowered to conduct an inquiry and pass appropriate orders in accordance with provisions of Section 18 of the JJ Act. The trial of a child as an adult and his trial as a juvenile by the Children's Court have different consequences.

36. It was further held that the Children's Court cannot brush aside the requirement of holding an inquiry under Section 19(1)(i) of the JJ Act. Thus, all actions provided under Section 19 are mandatorily required to be undertaken by the Children's Court.

37. As can be seen from the facts of the present case, there has been a flagrant violation of the mandatory requirements of Sections 15 and 19 of the JJ Act. Neither was the charge sheet against the accused appellant filed before the Board nor was any preliminary assessment conducted under Section 15, so as to find out whether the accused appellant was required to be tried as an adult.

38. In absence of a preliminary assessment being conducted by the Board under Section 15, and without an order being passed by the Board under Section 15(1) read with Section 18(3), it was impermissible for the trial Court to have accepted the charge sheet and to have proceeded with the trial of the accused.

39. Thus, it is evident that the procedure adopted by the Sessions Court in conducting the trial of the accused appellant is *de hors* the mandatory requirements of JJ Act.

40. Thus, on the face of the record, the proceedings undertaken by the Sessions Court in conducting trial of the CICL, convicting and sentencing him as above are in gross violation of the mandate of the Act and thus, the entire proceedings stand vitiated.

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41. It seems that pursuant to the trial being concluded, the trial Court realized the gross illegality in the proceedings and thus, in an attempt to give a vestige of validity to the grossly illegal proceedings conducted earlier, an exercise was undertaken to deal with the accused appellant as per the provisions of the JJ Act on the aspect of sentencing. However, *ex facie*, the said action which seems to be taken by way of providing an *ex post facto* imprimatur to the grossly illegal trial does not stand to scrutiny because the very foundation of the prosecution case is illegal to the core.

42. All the proceedings taken against the accused appellant are vitiated as being in total violation of the mandatory procedure prescribed under the JJ Act.

43. In the case of ***Karan Alias Fatiya****(supra)* relied upon by learned counsel for the State, this Court interpreted Section 9(3) and held that this sub-section does not specifically or impliedly provide that the conviction recorded by any Court with respect to a person who has been subsequently, after the disposal of the case found to be juvenile or a child, would lose its effect, rather it is only the sentence if any passed by the Court would be deemed to have no effect. The said judgment is clearly distinguishable because in the present case, the fact that the accused was a child on the date of the incident was clearly known to the Investigating Officer, the prosecution and the trial Court and thus, there is no possibility of saving the illegal proceedings by giving them an *ex post facto* approval.

44. In the case of ***Pawan Kumar****(supra)*, the plea of juvenility raised by the accused did not find favour of the Sessions Court as well as the High Court. However, in the appeal before this Court, a report was submitted by the Additional Sessions Judge, wherein it was opined that the appellant was a juvenile at the time of commission of alleged offences. The incident in the said case occurred on 1st December, 1995 and the age of juvenility was 16 years as provided in the then prevailing Juvenile Justice Act, 1986. In the peculiar facts of the said case, this Court held that by virtue of subsequent amendments, the age of juvenility had been raised to 18 years and thus, the accused was entitled to be treated as a juvenile by virtue of the provisions of the JJ Act prevailing when the appeal was taken up.

Since the accused had already undergone the maximum punishment of detention provided under the said Act, i.e., three years, it was directed that the accused therein be released forthwith.

45. In the above two referred cases, the situation presented was that the factum regarding the accused being a child within the meaning of the JJ Act came to light at a very late stage i.e. after final decision of the cases and hence both these cases are clearly distinguishable from the case at hand.

46. In the case of ***Ajeet Gurjar****(supra)*, this Court remitted back the matter to the Sessions Court for complying with the requirements of Section 19(1) of the JJ Act. However, in the present case, there is yet another hurdle which convinces us that it is not a fit case warranting *de novo* proceedings against the accused appellant by taking recourse to the provisions of the JJ Act. At the cost of repetition, it may be reiterated that the charge sheet was filed against the accused appellant directly before the Sessions Court (statedly designated as a Children's Court) and he was never presented before the Juvenile Justice Board as per the mandate of the JJ Act.

47. The accused appellant being a CICL was never subjected to preliminary assessment by the Board so as to find out whether he should be tried as an adult. Directing such an exercise at this stage would be sheer futility because now the appellant is nearly 23 years of age.

48. At this stage, there remains no realistic possibility of finding out the mental and physical capacity of the accused appellant to commit the offence or to assess his ability to understand the consequences of the offence and circumstances in which he committed the offence in the year 2016.

49. Since we have held that the entire proceedings taken against the appellant right from the stage of investigation and the completion of trial stand vitiated as having been undertaken in gross violation of the mandatory requirements of the JJ Act, we need not dwell into the merits of the matter or to reappreciate the evidence available on record for finding out whether the prosecution has been able to prove the guilt of the appellant by reliable circumstantial evidence.

50. Thus, we are left with no option but to quash and set aside the impugned judgment and direct that the appellant who is presently lodged in jail shall be released forthwith, if not required in any other case.

51. The appeal is allowed accordingly.

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

Headnotes prepared by: Divya Pandey

Result of the case: Appeal allowed.

[2024] 3 S.C.R. 1249 : 2024 INSC 241

Noble M. Paikada
v.
Union of India

(Civil Appeal Nos. 1628-1629 of 2021)

21 March 2024

[Abhay S. Oka* and Sanjay Karol, JJ.]

Issue for Consideration

Item 6 in the impugned notification which granted exemption from requirement of prior Environmental Clearance (EC) for extraction or sourcing or borrowing of ordinary earth for the linear projects such as roads, pipelines, etc., if provided a blanket exemption which was arbitrary and violative of Article 14 of the Constitution of India.

Headnotes

Environment (Protection) Act, 1986 – Environment (Protection) Rules, 1986 – r.5(4) – Constitution of India – Articles 14, 21 – First EC notification provided that certain projects falling under categories set out in the Schedule thereto would require prior EC from the concerned Regulatory Authority – Second EC notification was issued adding Appendix-IX to the first EC notification, providing for exemption to specific categories of projects from the requirement of obtaining EC – Impugned notification substituted Appendix-IX which provided that prior EC will not be required *inter alia* for item 6 i.e. for extraction or sourcing or borrowing of ordinary earth for the linear projects such as roads, pipelines, etc. – Challenge to – NGT held that the exemption u/item 6 should strike a balance and directed Ministry of Environment, Forest and Climate Change to revisit the impugned notification – Review theragainst also dismissed:

Held: Before the issue of the second EC notification by which Appendix-IX was incorporated, the procedure of inviting objections to the draft notification was followed, and the objections were considered – There was no reason to dispense with this important requirement before publishing the impugned notification – Article 21 guarantees right to live in a pollution-free environment – Citizens have a fundamental duty to protect and improve the

* Author

environment – Therefore, the participation of the citizens is very important and is taken care of by allowing them to raise objections to the proposed notification – Citizens being major stakeholders in environmental matters, their participation cannot be prevented by casually exercising the power under sub-rule (4) of r.5 – No document recording the satisfaction of the competent authority about the existence of public interest and the nature of the public interest was produced by the Ministry – The drastic decision to invoke sub-rule (4) of r.5 was made without any application of the mind – Hence, the decision-making process was vitiated – Impugned notification was issued two days after the nationwide lockdown was imposed due to the COVID-19 pandemic – At that time, the work of linear projects, such as roads, pipelines, etc., had come to a grinding halt – So, there was no tearing hurry to modify the EC notifications – Inclusion of item 6 of the substituted Appendix-IX illegal – Further, there was no specification about the quantum of ordinary earth which can be extracted on the basis of the exemption – "Linear projects" were not defined – Without the definition, it is difficult to imagine which projects will be termed linear projects – The term "linear projects" is very vague – The process to be adopted for excavation was also not set out – Thus, item 6 is a case of completely unguided and blanket exemption, which is *per se*, arbitrary and violative of Article 14 – There is no provision for setting up an authority which will decide whether a particular linear project is covered by item 6 – No steps taken to revisit item 6 of the impugned notification, as directed – Notwithstanding the specific directions issued in the impugned judgment, no safeguards were provided, such as laying down processes, the mode and the manner of excavation and quantum – Item 6 of the substituted Appendix-IX forming part of the impugned notification and item 6 of the amended impugned notification (issued during the pendency of the present appeals), struck down and quashed. [Paras 22-25, 28, 31, 32]

Environment (Protection) Act, 1986 – s.3 – Power of Central Government to take measures to protect and improve environment – Environment (Protection) Rules, 1986 – r.5 – Prohibition and Restriction on the location of industries and the carrying on processes and operations in different areas:

Held: s.3 of the EP Act must be read with r.5 of the EP Rules – r.5 has been enacted to give effect to clause (v) of sub-section

(2) of s.3 of the EP Act, which empowers the Central Government to put restrictions on the areas in which industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards – Further, Sub-rule (4) of r.5 empowers the Central Government to dispense with the requirement of publication of notice under sub-rule (3) of r.5 when it appears to the Central Government that it is in the public interest to do so – Thus, sub-rule (4) of r.5 is an exception to sub-rule (3) – The exception can be invoked only on the grounds of public interest. [Paras 15, 19]

Case Law Cited

Deepak Kumar & Ors. v. State of Haryana & Ors. [2012] 4 SCR 819 **: (2012) 4 SCC 629;** *Hanuman Laxman Aroskar v. Union of India* [2019] 5 SCR 916 **: (2019) 15 SCC 401 – referred to.**

List of Acts

Environment (Protection) Act, 1986; Constitution of India; Mines and Minerals (Development and Regulation) Act, 1957.

List of Keywords

Environmental Clearance; Prior Environmental Clearance; Environmental Clearance notification; Blanket exemption; Regulatory Authority; Linear projects.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.1628-1629 of 2021

From the Judgment and Order dated 28.10.2020 of the National Green Tribunal, New Delhi in OA No. 190 of 2020

Appearances for Parties

Ms. Anitha Shenoy, Sr. Adv., Ms. Nishtha Kumar, Vanshdeep Dalmia, Ms. Ayushma Awasthi, Ms. Namrata Sarah Caleb, Ms. Pariksha, Advs. for the Appellant.

Ms. Aishwarya Bhati, A.S.G., Gurmeet Singh Makker, Ms. Swarupama Chaturvedi, Ms. Ruchi Kohli, Ms. Shradha Deshmukh, Madhav Sinhal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

FACTUAL ASPECTS

1. These appeals take exception to the judgment and order dated 28th October 2020 (for short, 'the impugned judgment') passed by the National Green Tribunal, Principal Bench, New Delhi (for short, 'the NGT'). There is also a challenge to the order dated 24th December 2020, by which, the NGT rejected the review petition filed by the appellant for seeking review of the impugned judgment.

2. A notification was issued on 14th September 2006 (for short, 'the first EC notification') by the Ministry of Environment and Forests (for short, 'MoEF') in exercise of powers under sub-section (1) and clause (v) of sub-section (2) of Section 3 of the Environment (Protection) Act, 1986 (for short, 'the EP Act') read with clause (d) of sub-rule (3) of Rule 5 of the Environment (Protection) Rules, 1986 (for short, 'the EP Rules'). Clause 2 of the first EC notification is material, which reads thus:

> "**2. Requirements of prior Environmental Clearance (EC):-** The following projects or activities shall require prior environmental clearance from the concerned regulatory authority, which shall hereinafter referred to be as the Central Government in the Ministry of Environment and Forests for matters falling under Category 'A' in the Schedule and at State level the State Environment Impact Assessment Authority (SEIAA) for matters falling under Category 'B' in the said Schedule, before any construction work, or preparation of land by the project management except for securing the land, is started on the project or activity:
>
> (i) All new projects or activities listed in the Schedule to this notification;
>
> ii) Expansion and modernization of existing projects or activities listed in the Schedule to this notification with addition of capacity beyond the limits specified for the concerned sector, that is, projects or activities which

cross the threshold limits given in the Schedule, after expansion or modernization;

(iii) Any change in product – mix in an existing manufacturing unit included in Schedule beyond the specified range."

3. The notification provided that the projects falling under categories A and B set out in the Schedule to the notification will require prior Environmental Clearance (EC) from the concerned Regulatory Authority. The Regulatory Authorities for different projects have been named in clause (2) of the first EC notification. For the A category, the Central Government in the MoEF was named as the Regulatory Authority. For projects in the B category, the State Environment Impact Assessment Authority (for short, 'SEIAA') was named as the Regulatory Authority. Various procedural aspects regarding applying for a grant of EC, its processing, etc., have been incorporated in the first EC notification. There were subsequent modifications to the first EC notification. Another notification was issued on 15th January 2016 (for short, 'the second EC notification'), by which the first EC notification was partly modified. Clause 7B and Appendix-IX were added to the first EC notification, providing for an exemption to specific categories of projects from the requirement of obtaining EC. Item 6 in the said Appendix-IX reads thus:

"Appendix-IX

Exemption of certain cases from requirement of Environmental Clearance

The following cases shall not require prior environmental clearance, namely:

.. ..

.. ..

6. Dredging and de-silting of dams, reservoirs, weirs, barrages, river, and canals for the purpose of their maintenance, upkeep and disaster management.

.. .."

Though the NGT struck down a part of the second EC notification, Appendix-IX was not touched.

4. In the Original Application subject matter of these appeals, the challenge before the NGT was to the notification dated 28th March 2020 (for short, 'the impugned notification'), which modified earlier EC notifications. Appendix IX to the second EC notification provided for exempting certain cases from the requirement of obtaining EC. By the impugned notification, Appendix-IX was substituted. The substituted Appendix-IX provided that the prior EC will not be required in the thirteen cases set out therein. We are concerned with items 6 and 7 of the substituted Appendix-IX, which read thus:

> **"Appendix-IX**
>
> **Exemption of certain cases from requirement of Environmental Clearance:** The following cases shall not require Prior Environmental Clearance, namely:-
>
> .. ..
>
> .. ..
>
> 6. Extraction or sourcing or borrowing of ordinary earth for the linear projects such as roads, pipelines, etc.
>
> 7. Dredging and de-silting of dams, reservoirs, weirs, barrages, river and canals for the purpose of their maintenance, upkeep and disaster management.
>
> .. .."

Thus, item 6 in Appendix IX of the second EC notification was maintained but was renumbered as item 7. Item 6 was newly added.

5. Before we go into the challenge to the impugned notification, we must note here that items 6 and 7 were substituted by further notification dated 30th August 2023 (for short, 'amended impugned notification') issued during the pendency of these appeals. Substituted items 6 and 7 in the amended impugned notification read thus:

> "6. Extraction or sourcing or borrowing of ordinary earth for the linear projects such as roads, pipelines, etc. shall be subject to the compliance of standard operating procedures and environmental safeguards issued in this regard from time to time.
>
> 7. Dredging and de-silting of dams, reservoirs, weirs, barrages, river and canals for the purpose of their

> maintenance, upkeep and disaster management shall be subject to the compliance of environmental safeguards issued in this regard from time to time."

6. The impugned notification was challenged on several grounds before the NGT by filing the Original Application subject matter of these appeals. Apart from other grounds, it was contended that the impugned notification violated the directions issued by this Court in the case of ***Deepak Kumar & Ors. v. State of Haryana & Ors***[1]. Even the ground that the impugned notification was arbitrary and violative of Article 14 of the Constitution of India was invoked. We must note that in the Original Application, the specific challenge was only to item 6 of the impugned notification.

7. By the impugned judgment, it was held that the exemption under item 6 should strike a balance. The finding recorded on this aspect in paragraph 8 of the impugned judgment reads thus:

> "8. The second issue is exemption from requirement of EC for extraction or sourcing or borrowing of ordinary earth for the linear projects such as roads, pipelines, etc and for dredging and de-silting of dams, reservoirs, weirs, barrages, river and canals for the purpose of their maintenance, upkeep and disaster management. **It is possible to take a view that the EC can be exempted for these situations on account of assessment already made or for extraction of earth for linear project but such blanket exemption must be balanced by sustainable development concept. The exemption should strike balance and instead of being blanket exemption, it needs to be hedged by appropriate safeguards such as the process of excavation and quantum. Similarly, in respect of item 7, safeguards are required to be incorporated in terms of disposal of dredged material. These aspects are not shown to have been considered and the reply does not provide any explanation thereon.** Learned counsel for the MoEFCC is also unable to provide any justification why these aspects be not addressed and incorporated in the

1 [2012] 4 SCR 819 : (2012) 4 SCC 629

> notification for ensuring sustainable development concept which is required to be enforced by this Tribunal under section 20 read with section 15 of the NGT Act, 2010."
>
> (emphasis added)

Accordingly, the Original Application was disposed of by directing the Ministry of Environment, Forest and Climate Change (for short, 'MoEF&CC') to revisit the impugned notification within three months. An application for review was filed, which was dismissed by the second impugned order dated 24th December 2020.

8. Notice was ordered to be issued on 13th December 2021 on the appeals. On 10th August 2023, submissions were heard, and the judgment was reserved. After the judgment was reserved, the respondent-Union of India filed an affidavit of Dr Sujit Kumar Bajpayee, Joint Secretary, MoEF&CC, dated 12th September 2023. Along with the affidavit, two documents were also filed on record. The first document was the Office Memorandum dated 21st August 2023 issued by the MoEF&CC, purportedly laying down the enforcement mechanism for items 6 and 7 in the impugned notification. The second document brought on record was the amended impugned notification. In view of the issuance of the amended impugned notification, even after the verdict was reserved, the parties were permitted to make further submissions on the legality and validity of the amended impugned notification.

SUBMISSIONS

9. The learned senior counsel appearing for the appellant submitted that the object of the EP Act is to provide for the protection and improvement of the environment. She invited our attention to Section 3 of the EP Act, which confers a power on the Central Government to take such measures as it deems necessary or expedient for protecting and improving the quality of the environment and preventing and abating environmental pollution. She pointed out that the first EC notification was issued in the exercise of powers conferred under sub-section (1) and clause (v) of sub-section (2) of Section 3 of the EP Act. Clause (v) empowers the Central Government to take measures for restrictions of the areas, in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. She

also invited our attention to the EP Rules and, in particular, Rule 5 thereof. It lays down that the Central Government may consider the factors set out in sub-rule (1) while prohibiting or restricting the location of industries and carrying out operations and processes in different areas. She pointed out that before issuing the first EC notification, the process laid down in sub-rule (3) of Rule 5 was followed.

10. The learned senior counsel invited our attention to a decision of this Court in the case of ***Hanuman Laxman Aroskar v. Union of India***[2]. She also relied upon a decision of this Court in the case of ***Deepak Kumar***[1]. She pointed out that as a result of item 6, there will not be any regulation of the extraction of ordinary earth for utilisation in linear projects, such as, roads, pipelines, etc. She submitted that such a blanket exemption will defeat the very object of enacting the EP Act and, in particular, Section 3 thereof. She submitted that the decision of this Court in the case of ***Deepak Kumar***[1] and subsequent decisions mandated that there must be a requirement to obtain EC for the minor minerals pertaining to materials used for linear projects. The learned senior counsel submitted that allowing the extraction of the earth in such an indiscriminate manner is wholly arbitrary and violative of Article 14 of the Constitution of India.

11. Inviting our attention to the amended impugned notification, the learned senior counsel pointed out that the substituted item 6 provides that extraction of ordinary earth for linear projects shall be subject to compliance with the Standard Operating Procedure (SOP) and safeguards issued in this regard from time to time. Thus, the exemption remains. However, an SOP will be laid down to avail the exemption. She urged that the substituted item 6 is more arbitrary.

12. The learned senior counsel also pointed out that the whole issue was directed to be reconsidered under the impugned judgment. But nothing has been placed on record to show that the Central Government made reconsideration in true letter and spirit.

13. The learned senior counsel pointed out that the decision of this Court in the case of ***Deepak Kumar***[1] still holds the field, which directs that the leases of minor minerals, including their renewal for an area less than 5 hectares, shall be granted by the States/

2 [2019] 5 SCR 916 : (2019) 15 SCC 401

Union territories only after getting EC. She submitted that the impugned notification and the amended impugned notification, insofar as item 6 is concerned, are completely contrary to the directions issued by this Court in ***Deepak Kumar***[1]. She also urged that before publishing the draft of the impugned notification, objections to the draft notification were not invited. She submits that this action contravenes the provisions of sub-rule (3) of Rule 5 of the EP Rules.

14. The learned Additional Solicitor General appearing on behalf of the respondent – Union of India, submitted that in view of the insertion of Section 8B in the Mines and Minerals (Development and Regulation) Act, 1957 (for short, 'the MMDR Act'), the amendment to the first EC notification was required to be made. Our attention was invited to Section 8B, incorporated on 13th March 2020 and amended Section 8B, effective from 28th March 2021. She submits that the provisions of the first EC notification must conform with the amended provisions of the MMDR Act, and therefore, the amendments were necessitated. She also pointed out that in terms of the impugned order, the matter was placed before the Expert Appraisal Committee (EAC), non-coal mining and EAC, MoEF&CC and others in a meeting. Thereafter, the issue was deliberated in the meeting convened on 30th June 2022 under the chairmanship of the Joint Secretary of the concerned department. She invited our attention to the minutes of the said meeting held on 30th June 2022. She submitted that the ultimate endeavour is to uphold the principles of sustainable development. Relying upon the amended impugned notification, she submitted that now the exemption granted by items 6 and 7 cannot be said to be arbitrary, and it will be subject to compliance with the SOP issued on this behalf from time to time. Therefore, safeguards have been introduced, and the exemption is not blanket. She also pointed out that the Office Memorandum dated 21st August 2023 takes care of the safeguards. It was also submitted that the grant of exemption from the first EC notification is a matter of policy for the Central Government and no interference be called for with policy matters.

CONSIDERATION OF SUBMISSIONS

15. We have carefully considered the submissions. The EP Act was brought into force on 19th November 1986. The statement of objects and reasons of the EP Act specifically refers to the

substantive decline in environmental quality due to increasing pollution, loss of vegetal cover, etc. It also notes the growing risk of environmental accidents and threats to life support systems. It refers to the decisions taken at the United Nations Conference on the Human Environment held in Stockholm in June 1972. In the said Conference, the world communities resolved to protect and enhance the environmental quality. Clause (3) of the statement of objects and reasons reads thus:

> "(3) In view of what has been stated above, **there is urgent need for the enactment of a general legislation on environmental protection which inter alia, should enable co-ordination of activities of the various regulatory agencies, creation of an authority or authorities with advocate powers for environmental protection, regulation of discharge of environmental pollutants and handling of hazardous substances,** speedy response in the event of accidents threatening environment and deterrent punishment to those who endanger human environment, safety and health."
>
> (emphasis added)

Even from the preamble of the EP Act, it is apparent that the object is to provide protection to the environment and to improve the environment. Section 3 of the EP Act confers power on the Central Government to take measures to protect and improve the environment. Sub-sections (1) and (2) of Section 3 read thus:

> **"3. Power of Central Government to take measures to protect and improve environment.-**
>
> **(1) Subject to the provisions of this Act, the Central Government, shall have the power to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing controlling and abating environmental pollution.**
>
> **(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), such measures may include measures with**

respect to all or any of the following matters, namely:--

(i) co-ordination of actions by the State Governments, officers and other authorities--

(a) under this Act, or the rules made thereunder, or

(b) under any other law for the time being in force which is relatable to the objects of this Act;

(ii) planning and execution of a nation-wide programme for the prevention, control and abatement of environmental pollution;

(iii) laying down standards for the quality of environment in its various aspects;

(iv) laying down standards for emission or discharge of environmental pollutants from various sources whatsoever: Provided that different standards for emission or discharge may be laid down under this clause from different sources having regard to the quality or composition of the emission or discharge of environmental pollutants from such sources;

(v) restriction of areas in which any industries, operations or processes or class of industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards;

(vi) laying down procedures and safeguards for the prevention of accidents which may cause environmental pollution and remedial measures for such accidents;

(vii) laying down procedures and safeguards for the handling of hazardous substances;

(viii) examination of such manufacturing processes, materials and substances as are likely to cause environmental pollution;

(ix) carrying out and sponsoring investigations and research relating to problems of environmental pollution;

(x) inspection of any premises, plant, equipment, machinery, manufacturing or other processes, materials or substances and giving, by order, of such directions to such authorities, officers or persons as it may consider necessary to take steps for the prevention, control and abatement of environmental pollution;

(xi) establishment or recognition of environmental laboratories and institutes to carry out the functions entrusted to such environmental laboratories and institutes under this Act;

(xii) collection and dissemination of information in respect of matters relating to environmental pollution;

(xiii) preparation of manuals, codes or guides relating to the prevention, control and abatement of environmental pollution;

(xiv) such other matters as the Central Government deems necessary or expedient for the purpose of securing the effective implementation of the provisions of this Act."

(emphasis added)

Section 3 of the EP Act must be read with Rule 5 of the EP Rules. Rule 5 has been enacted to give effect to clause (v) of sub-section (2) of Section 3 of the EP Act, which empowers the Central Government to put restrictions on the areas in which industries, operations or processes shall not be carried out or shall be carried out subject to certain safeguards. Rule 5 of the EP Rules reads thus:

"5. Prohibition and Restriction on the location of industries and the carrying on processes and operations in different areas.

(1) The Central government may take into consideration the following factors while prohibiting or restricting the

location of industries and carrying on of processes and operations in different areas-

(i) Standards for quality of environment in its various aspects laid down for an area.

(ii) The maximum allowable limits of concentration of various environmental pollutants (including noise) for an area.

(iii) The likely emission or discharge of environmental pollutants from an industry, process or operation proposed to be prohibited or restricted.

(iv) The topographic and climatic features of an area.

(v) The biological diversity of the area which, in the opinion of the Central Government needs to be preserved.

(vi) Environmentally compatible land use.

(vii) Net adverse environmental impact likely to be caused by an industry, process or operation proposed to be prohibited or restricted.

(viii) Proximity to a protected area under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 or a sanctuary, National Park, game reserve or closed area notified as such under the Wild Life (Protection) Act, 1972 or places protected under any treaty, agreement or convention with any other country or countries or in pursuance of any decision made in any international conference, association or other body.

(ix) Proximity to human settlements.

(x) Any other factor as may be considered by the Central Government to be relevant to the protection of the environment in an area.

(2) While prohibiting or restricting the location of industries and carrying on of processes and operations in an area, the Central Government shall follow the procedure hereinafter laid down.

(3) (a) Whenever it appears to the Central Government that it is expedient to impose prohibition or restrictions on the locations of an industry or the carrying on of processes and operations in an area, it may by notification in the Official Gazette and in such other manner as the Central Government may deem necessary from time to time, give notice of its intention to do so.

(b) Every notification under clause (a) shall give a brief description of the area, the industries, operations, processes in that area about which such notification pertains and also specify the reasons for the imposition of prohibition or restrictions on the locations of the industries and carrying on of process or operations in that area.

(c) Any person interested in filing an objection against the imposition of prohibition or restrictions on carrying on of processes or operations as notified under clause (a) may do so in writing to the Central Government within sixty days from the date of publication of the notification in the Official Gazette.

(d) The Central Government shall within a period of one hundred and twenty days from the date of publication of the notification in the Official Gazette consider all the objections received against such notification and may within 1 [three hundred and sixty-five days] from such day of publication] impose prohibition or restrictions on location of such industries and the carrying on of any process or operation in an area.

(4) Notwithstanding anything contained in sub-rule (3), whenever it appears to the Central Government that it is in public interest to do so, it may dispense with the requirement of notice under clause (a) of sub-rule (3).”

(emphasis added)

SCOPE OF ADJUDICATION

16. As far as the scope of adjudication in these appeals is concerned, it is necessary to refer to the Original Application no.190 of 2020 filed by the appellant. There were three prayers made in the said Original Application, which read thus:

> "(a) Pass an Order quashing newly inserted Clause 6 of the Impugned Notification dated 28.03.2020 as being violative of Article 14 and 21 of the Constitution of India, ultra vires the provisions of the EPA Act, 1986, the EIA Notification dated 14.09.2006, and in further violation of the Judgment passed by the Hon'ble Supreme Court in the Deepak Kumar case (supra);
>
> (b) Pass an appropriate Order quashing the Impugned Notification dated 28.03.2020 as being violative of the principles of Polluter Pay, Non-regression, sustainable development and Precautionary Principle;
>
> (c) Pass an appropriate Order directing the Respondent not to allow any mining of ordinary earth without a prior environmental clearance."

From the prayers mentioned above in clauses (a) to (c), it is apparent that the specific challenge was to item 6. Regarding clause (b), perhaps the only ground of challenge taken in the application was that no public interest was involved in exercising the power under sub-rule (4) of Rule 5 of the EP Rules for dispensing with public notice.

17. After perusal of the impugned judgment, we find that the submissions made by the learned counsel appearing for the appellant before the NGT were not recorded therein. The order dated 29th June 2021 passed by this Court in the present appeals is relevant, which reads thus:

> "X(name masked), learned senior counsel appearing for the appellant, submits that the learned counsel appearing for the appellant before the National Green Tribunal argued that exemption could not have been granted by the Notification of the Ministry of Environment, Forest and Climate Change which has not been considered by the Tribunal. Y(name masked), learned counsel who appeared

> before the Tribunal, is directed to file an affidavit that he, in fact, raised this point before the Tribunal during the course of hearing.
>
> List the matter after two weeks."

The advocate filed an affidavit dated 11th December 2021. In paragraph 5(a) of the affidavit, he stated thus:

> "5. .. ..
>
> (a) That the OA No. 190/2020 was listed for hearing before the Hon'ble Tribunal by way of video conferencing on 28.10.2020. On that day the Deponent appeared before the Hon'ble Tribunal and was granted a hearing. **During the course of the hearing the Deponent raised his submissions inter-alia including the fact that the Ministry of Environment and Forests did not have the power to exempt the removal of ordinary earth from the purview of the EIA Notification and that the exemption as granted for the removal of ordinary earth was illegal and ultra vires the Environment Protection Act as well as the judgment of this Hon'ble Court in Deepak Kumar's Judgment.** It is submitted that the aforesaid point was raised, however the Hon'ble Tribunal did not find merit in the said submission as is evident from the judgment dated 28.10.2020."
>
> (emphasis added)

Thus, the Advocate-on-Record stated in the affidavit that what was argued before the NGT was the challenge to the exemption granted for the removal of ordinary earth for linear projects. We may note here that item 7 in the substituted Appendix-IX brought on record by the impugned notification was already there as item 6 in Appendix-IX to the second EC notification dated 15th January 2016. The appellant did not challenge the notification dated 15th January 2016. Even if we set aside or strike down item 7 regarding dredging/desilting in the impugned notification, it will continue to exist as item 6 in the second EC notification. The second EC notification is not under challenge. Therefore, we restrict the challenge to item 6 in the substituted Appendix-IX to the impugned notification.

CHALLENGE TO ITEM 6 IN THE IMPUGNED NOTIFICATION

Failure to follow the procedure prescribed by sub-rule (3) of Rule 5

18. We have already quoted Rule 5 of the EP Rules. There is no dispute that the first EC notification, the second EC notification and the impugned notification were issued in the exercise of powers under sub-rule (1) of Rule 5 of the EP Rules. Sub-rule (2) of Rule 5 provides that while passing an order prohibiting or restricting the location of industries and carrying on processes and operations, the Central Government shall follow the procedure laid down in Rule 5. Sub-rule (3) of Rule 5 requires the Central Government to publish a notice of its intention to do so in the official Gazette and in such other manner as the Central Government deems fit. Any person interested is entitled to file objections against the proposed prohibition or restriction. The Central Government is required to consider the objections before issuing the final notification. The said procedure was followed before publishing the first EC notification.

19. Sub-rule (4) of Rule 5 empowers the Central Government to dispense with the requirement of publication of notice under sub-rule (3) of Rule 5 when it appears to the Central Government that it is in the public interest to do so. Thus, sub-rule (4) of Rule 5 is an exception to sub-rule (3). The exception can be invoked only on the grounds of public interest.

20. Now, we turn to the impugned notification dated 28th March 2020. The recitals of the said notification are important, which read thus:

> "**S.O. 1224(E).—**WHEREAS, vide the Mineral Laws (Amendment) Act, 2020 (2 of 2020), the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957) (hereinafter referred to as MMDR Act) has been amended with effect from the 10th day of January, 2020 and, inter alia, new section 8B relating to the provisions for transfer of statutory clearances has been inserted;
>
> AND WHEREAS, sub-section (2) of section 8B of the MMDR Act provides that notwithstanding anything contained in this Act or any other law for the time being in force, the successful bidder of mining leases expiring under the provisions of sub-sections (5) and (6) of section 8A and selected through auction as per the procedure provided under this Act and the rules made thereunder,

shall be deemed to have acquired all valid rights, approvals, clearances, licences and the like vested with the previous lessee for a period of two years;

AND WHEREAS, sub-section (3) of section 8B of the MMDR Act provides that notwithstanding anything contained in any other law for the time being in force, it shall be lawful for the new lessee to continue mining operations on the land, in which mining operations were being carried out by the previous lessee, for a period of two years from the date of commencement of the new lease;

AND WHEREAS, in pursuance of the aforesaid amendment to the MMDR Act, the Central Government deems it necessary to align the relevant provisions of the notification of the Government of India in the erstwhile Ministry of Environment and Forests number S.O. 1533 (E), dated the 14th September, 2006 (hereinafter referred to as the EIA Notification, 2006);

AND WHEREAS, the Ministry of Environment, Forest and Climate Change is in the receipt of representations for waiver of requirement of prior environmental clearance for borrowing of ordinary earth for roads; and manual extraction of lime shells (dead shell), shrines, etc., within inter tidal zone by the traditional community;

Now, therefore, in exercise of the powers conferred by sub-section (1) and clause (v) of sub-section (2) of section 3 of the Environment (Protection) Act, 1986 (29 of 1986), read with sub-rule (4) of rule 5 of the Environment (Protection) Rules, 1986, the Central Government, after having dispensed with the requirement of notice under clause (a) of sub-rule (3) of the rule 5 of the said rules, in public interest, and in supersession of the notification number S.O. 4307(E), dated the 29th November, 2019, hereby makes the following further amendments in the EIA Notification, 2006, namely:-

.. .."

(emphasis added)

By the impugned notification, after sub-paragraph (2) of paragraph 11 of the first EC notification, sub-paragraph (3) was inserted to give effect to Sections 8A and 8B of the MMDR Act. An entry has been made in the Schedule against Item 1(a) in column (5) for inserting a clause dealing with the evacuation or removal and transportation of already mined out material. Appendix IX, which contains the list of projects exempted from obtaining EC, was substituted by the impugned notification.

21. We have quoted above the recitals of the impugned notification. The first three recitals refer to the necessity of giving effect to Sections 8A and 8B of the MMDR Act. Thereafter, the last recital refers to the Ministry receiving representations for waiver of the requirement of prior EC for borrowing of ordinary earth for roads. After that, without giving any details, it is mentioned that in the public interest, the requirement of publication of notice under sub-rule (3) of Rule 5 was dispensed with. At this stage, we may refer to the relevant ground specifically taken in the Original Application filed by the appellant before the NGT. Ground J was specifically taken on this aspect, which reads thus:

> "J. Because the Respondent has deliberately and ostensibly circumvented the requisite procedures before issuing the Impugned Notification, including evading previous publication, inviting public objections under Rule 5(3) of the EP Rules, 1986, and by wrongly exercising its powers under Rule 5(4) of the EP Rules under the garb of "public interest" during the Covid-19 national lockdown without offering even a shred of reasoning for its actions. It is most respectfully submitted that the amendments brought forth by the Impugned Notification serve and further the interest of private miners and contractors, and the actions of ratifying such illegal and mala fide acts of disregard and disobedience to environmental norms is in fact against public interest at large."

22. We have carefully perused the counter affidavit filed by the MoEF&CC before the NGT. The said affidavit does not deal with Ground J at all. It does not specify or set out reasons for concluding that in the public interest, the requirement of publication of prior notice was needed to be dispensed with. It is pertinent to note that before the issue of the second EC notification by which Appendix-IX was incorporated, the

procedure of inviting objections to the draft notification was followed, and the objections were considered. There is no reason to dispense with this important requirement before publishing the impugned notification. Article 21 guarantees a right to live in a pollution-free environment. The citizens have a fundamental duty to protect and improve the environment. Therefore, the participation of the citizens is very important, and it is taken care of by allowing them to raise objections to the proposed notification. After all, citizens are major stakeholders in environmental matters. Their participation cannot be prevented by casually exercising the power under sub-rule (4) of Rule 5.

23. In the present appeals, the questions of law (e) and (f) have been incorporated regarding the illegal invocation of the power under sub-rule (4) of Rule 5 of the EP Rules. In the grounds of the challenge, ground EE has been taken explicitly on this aspect. We have perused the counter affidavit filed by the MoEF&CC in these appeals. We find from the counter affidavit that the contention raised regarding the illegal invocation of power under sub-rule (4) of Rule 5 has not been dealt with. We are not going into the question of whether it was necessary for the Central Government to specify reasons in the impugned notification itself why it came to the conclusion that in the public interest, the requirement of public notice should be dispensed with. However, the reasons for the said conclusion ought to have been set out in the counter affidavit filed before the NGT or, at least, in the counter affidavit filed before this Court. The document recording the satisfaction of the competent authority about the existence of public interest and the nature of the public interest ought to have been produced by the Ministry. But, no such document was produced. Only one conclusion can be drawn. The drastic decision to invoke sub-rule (4) of Rule 5 was made without any application of the mind. Hence, the decision-making process has been vitiated.

24. The impugned notification was issued two days after the nationwide lockdown was imposed due to the COVID-19 pandemic. At that time, the work of linear projects, such as roads, pipelines, etc., had come to a grinding halt. So, there was no tearing hurry to modify the EC notifications. Apart from the fact that no reasons have been assigned in the counter affidavit filed by the Central Government for coming to the conclusion that in the public interest, the requirement of prior publication of notice was required to be dispensed with, we fail to

understand the undue haste shown by the Central Government in issuing the impugned notification during the nationwide lockdown. Therefore, the inclusion of item 6 of the substituted Appendix-IX will have to be held illegal. We have already given reasons for not dealing with the challenge to item 7 of the impugned notification.

ARBITRARINESS

25. There is one more important ground for striking down item 6. But for item 6 in Appendix-IX to the impugned notification, for extraction, sourcing, or borrowing of ordinary earth for linear projects, prior EC would have been required in terms of the first EC notification. The very object of issuing the first EC notification incorporating the mandatory requirement of obtaining EC for projects was that the damage to the environment must be minimised while implementing projects. When an exception is sought to be carved out by incorporating Appendix-IX to the requirement of obtaining EC in the first EC notification, the exception must be specific. Item 6 grants exemption for "extraction or sourcing or borrowing of ordinary earth for linear projects, such as roads, pipelines, etc." There is no specification about the quantum of ordinary earth, which can be extracted on the basis of the exemption. There is no specification of the area which can be used to extract ordinary earth. It is also not provided that only that quantity of ordinary earth, which is required to implement the linear projects, is exempted. Importantly, "linear projects" have not been defined. Without the definition, it is difficult to imagine which projects will be termed linear projects. The term "linear projects" is very vague. The process to be adopted for excavation has not been set out. Thus, item 6 is a case of completely unguided and blanket exemption, which is, *per se,* arbitrary and violative of Article 14 of the Constitution of India. There is no provision for setting up an authority which will decide whether a particular linear project is covered by item 6.

26. As stated earlier, during the pendency of the appeals, an amendment was made to item 6 by the notification dated 30th August 2023. Even the amended impugned notification does not elaborate on the concept of linear projects. The only addition to item 6 is that the extraction, sourcing or borrowing shall be subject to compliance with SOP and environmental safeguards issued in this regard from time to time. The authority to issue the SOP and environmental safeguards has not been specified. No provision has been made

to enforce the SOP and environmental safeguards. No restriction is imposed on the quantum of ordinary earth, which can be extracted for linear projects. Therefore, even the amended item 6 continues to suffer from the same vice of arbitrariness, which Article 14 of the Constitution of India prohibits.

27. The learned Additional Solicitor General placed reliance on the Office Memorandum dated 21st August 2023. It provides that before carrying on activities mentioned in entry 6, the project proponents must notify the State Pollution Control Board/Pollution Control Committees. The State Pollution Control Boards are required to monitor the compliance status of the SOP/environmental safeguards. As entry 6 is arbitrary, the Office Memorandum is of no consequence. Hence, on account of the violation of Article 14, item 6 in the impugned notification, as well as the amended impugned notification, will have to be struck down. As noted earlier, the object of the EP Act is to protect and improve the environment. Apart from the illegality committed by non-compliance with sub-rule (3) of Rule 5 of the EP Rules, the exemption granted without incorporating any safeguards is completely unguided and arbitrary. Grant of such blanket exemption completely defeats the very object of the EP Act.

NON-COMPLIANCE WITH THE DIRECTIONS OF THE NGT

28. In paragraph 8 of the impugned order, which we have quoted earlier, the NGT observed that the blanket exemption needs to be hedged by appropriate safeguards, such as, the process of excavation and quantum. Therefore, in paragraph 9, a direction was issued to MoEF&CC to revisit the impugned notification in the light of the observations made in paragraph 8. Within the three months provided by the NGT to do so, no steps had been taken to revisit item 6 of the impugned notification.

29. The Ministry has filed an additional affidavit dated 18th July 2023, and reliance has been placed on the guidelines for sand mining. As far as item 6 is concerned, in the counter affidavit, reliance was placed on the Office Memorandum dated 8th August 2022, purportedly issued in terms of the directions issued in paragraph 9 of the impugned judgment. It records that item 6 shall be subject to the SOP attached to the said Office Memorandum. We have perused the said SOP. We find that the SOP creates no regulatory machinery to ensure the implementation of the terms of the SOP. The SOP does

not refer to item 6 at all; it merely refers to the activities relating to the identification to borrow areas to obtain earth or soil materials. It does not refer to extracting ordinary earth for linear projects, such as roads, pipelines, etc. Therefore, the said SOP can hardly be said to be in terms of what the NGT ordered the Central Government to do in terms of paragraphs 8 and 9.

30. We are not entertaining a challenge to item 7 of the impugned notification. As none of the respondents have challenged the impugned notification, they will have to implement the directions issued in terms of paragraph 9 of the impugned judgment regarding item 7.

31. Thus, notwithstanding the specific directions issued in paragraph 8 read with paragraph 9 of the impugned judgment, no safeguards have been provided, such as laying down processes, the mode and the manner of excavation and quantum.

32. Therefore, we have no hesitation in striking down item 6 of the substituted Appendix-IX forming part of the impugned notification dated 28th March 2020 and item 6 of the amended impugned notification dated 30th August 2023. Accordingly, we quash item 6 in the two notifications above.

33. The appeals are, accordingly, partly allowed on above terms. There will be no order as to costs.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeals partly allowed.

[2024] 3 S.C.R. 1273 : 2024 INSC 228

Devu G Nair
v.
The State of Kerala & Ors.

Criminal Appeal No. 1730 of 2024
(Arising out of SLP (Crl.) No. 1891 of 2023)

11 March 2024

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

Issue for Consideration

Whether the High Court, in a habeas corpus petition, was correct in directing the 'corpus' to undergo a counselling session with a psychologist; what guidelines should be followed by courts while dealing with habeas corpus petitions or petitions for police protection.

Headnotes

Constitution of India – Art. 226 – Habeas Corpus petition filed in High Court on the ground that Corpus (also referred to as 'X') was being forcibly kept by her parents in their custody whereas she wished to remain with the Appellant – High Court met X and directed counselling with a psychologist – Appeal against order of High Court – Appeal disposed of as X wants to live with her parents out of her own volition – direction for counselling set aside – note of caution – completely inappropriate to attempt to overcome the identity and sexual orientation of an individual by a process of purported counselling – guidelines issued.

Held: Appellant filed petition seeking writ of habeas corpus in the High Court – Appellant and X are both female and according to the Appellant in an intimate relationship – petition instituted on ground that X was being forcibly kept by her parents in their custody against her wishes – Interim Order of High Court directing Secretary, District Legal Services Authority (DLSA), Kollam to interact with X to ascertain if she was in illegal detention – subsequent interim order of High Court directing production of X before Secretary, DLSA to facilitate interaction with High Court – High Court directing X to undergo a counselling session with a psychologist – order challenged. [Paras 3-5]

* Author

Principal Judge, Family Court, Kollam directed to facilitate an interaction between X and Ms. Saleena VG Nair, member of e-committee of Supreme Court – report submitted by Ms. Nair – X has stated that she is living with her parents out of her own volition – focussed on her career – did not wish to marry any person or live with any person for the time being – no reason to disbelieve report prepared after duly ascertaining wishes of X – not inclined to entertain Petition on ultimate outcome before the High Court – direction for counselling set aside. [Paras 6, 9-11]

Note of caution – completely inappropriate for courts to attempt to overcome the identity and sexual orientation of an individual through purported counselling – Judges must eschew tendency to substitute their own subjective values for the values which are protected by the Constitution – Directions for counseling or parental care have a deterrent effect on members of the LGBTQ+ community – family is not only natal family but encompasses chosen family – chosen families source of immeasurable support, love, mutual aid and social respect – courts to consider importance of chosen family – more so in cases involving habeas corpus petition, petitions for protection of the person, or in missing persons' complaints – guidelines issued for courts in dealing with such cases – guidelines must be followed in letter and spirit as a mandatory minimum measure to secure the fundamental rights and dignity of intimate partners, and members of the LGBTQ+ communities in illegal detention. [Paras 12-17]

List of Acts

Constitution of India – Article 136 and Article 226

List of Keywords

Habeas Corpus; Illegal detention; Personal freedom; Right to choose family; LGBTQ+ persons; Sexual orientation; Judge-in chamber; Counselling; Dignity; Privacy

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.1730 of 2024

From the Judgment and Order dated 13.01.2023 of the High Court of Kerala at Ernakulam in WPCRL No.28 of 2023

Appearances for Parties

Sriram P., Adv. for the Appellant.

Nishe Rajen Shonker, Mrs. Anu K Joy, Alim Anvar, Sayooj Mohandas M, S. Jyotiranjan, Sandeep Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

1. Leave Granted.

2. These proceedings under Article 136 of the Constitution arose from the interim orders of the Kerala High Court dated 13 January 2023 and 02 February 2023 in a petition seeking a writ of habeas corpus.

3. The appellant and the 'corpus' ('X' for convenience of reference) are both female According to the appellant, they were in an intimate relationship. The petition seeking a writ of habeas corpus was instituted on the ground that the 'X' was being forcibly kept by her parents in their custody whereas she wished to remain with the appellant. On 13 January 2023, at the stage of admission, the Kerala High Court ordered the Secretary of the jurisdictional District Legal Services Authority[1] to visit the fourth and fifth respondents who are the parents of 'X', and record her statement to ascertain if she was under illegal detention. The High Court further directed that in the event that 'X' is in illegal detention, the Station Head Officer of the jurisdictional Police Station must ensure that 'X' is produced before the Secretary, DLSA to facilitate an interaction with the High Court through a video conferencing session. The parents of 'X' were allowed to join and remain present during the video conferencing session.

4. On 31 January 2023, the High Court directed the production of 'X' before the Secretary, DLSA on 2 February 2023 to facilitate an interaction with the High Court. After an interaction with 'X', the High Court proceeded to direct 'X' to undergo a counselling session with a psychologist attached to a counselling centre.

1 DLSA

5. Faced with the above grievance, this Court on 6 February 2023 issued notice and issued interim directions. The parents of 'X' were directed to produce her before the Family Court at Kollam by 05:00 pm on 8 February 2023. Further, the Principal Judge of the Family Court was directed to arrange for an interview of 'X' with Ms Saleena V G Nair, a Member of the e-Committee of the Supreme Court who was, at that point in time, on deputation. Ms Nair is in the judicial service of the State of Kerala.

6. The interview was directed to be arranged in consultation with the Principal Judge of the Family Court and Ms Nair was directed to interact with 'X' and submit a report after ascertaining her wishes on whether she is voluntarily residing with her parents or is kept under illegal detention.

7. The Principal Judge of the Family Court has submitted a report on the modalities which were followed.

8. Ms Saleena V G Nair has also submitted a comprehensive report dealing with her interaction with 'X'. The report by Ms Nair indicates that sufficient time was granted to 'X' to express her intent and desire and she was given a break in the course of the recording of her statement so as to reflect on what she had stated.

9. 'X' is a major and has completed her Masters degree in Arts. She has stated that she intends to become a lecturer and is focused on her career. She has stated that she is in possession of a mobile phone and is free to move wherever she desires. Moreover, she has stated that she is living with her parents out of her own volition. While she has stated that the appellant is an "intimate friend", she has stated that she does not wish to marry any person or live with any person for the time being.

10. There is no reason for this Court to disbelieve the report which has been prepared by a senior Judicial Officer after duly ascertaining the wishes of 'X'.

11. Consequently, we are not inclined to entertain the Special Leave Petition on the ultimate outcome before the High Court.

12. However, we would wish to address a note of caution. Learned counsel for the appellant has submitted that in such matters, the High Court has been passing orders directing the counselling of persons similarly situated as 'X' and there is an apprehension that

the counselling should not turn out into a means to overcome the will of the corpus particularly in regard to their sexual orientation.

13. The High Courts must duly bear this facet in mind. Ascertaining the wishes of a person is one thing but it would be completely inappropriate to attempt to overcome the identity and sexual orientation of an individual by a process of purported counselling. Judges must eschew the tendency to substitute their own subjective values for the values which are protected by the Constitution.

14. Directions for counseling or parental care have a deterrent effect on members of the LGBTQ+ community. Courts must bear in mind that the concept of 'family' is not limited to natal family but also encompasses a person's chosen family. This is true for all persons. However, it has gained heightened significance for LGBTQ+ persons on account of the violence and lack of safety that they may experience at the hands of their natal family. When faced with humiliation, indignity, and even violence, people look to their partner and friends who become their chosen family. These chosen families often outlast natal families as a source of immeasurable support, love, mutual aid, and social respect.

15. The importance of a chosen family is sometimes lost to the traditional assumption that the natal family is respectful of a person's choices and freedoms. Courts must not wittingly or unwittingly become allies in this misunderstanding, more so in cases involving habeas corpus petition, petitions for protection of the person, or in missing persons' complaints. Since a direction for counselling has been given by the High Court, which we are inclined to set aside, it is imperative that clear guidelines be formulated for the courts dealing with habeas corpus petitions and in petitions seeking protection from family or police interference.

16. Guidelines for the courts in dealing with habeas corpus petitions or petitions for police protection are formulated below:

    a. Habeas corpus petitions and petitions for protection filed by a partner, friend or a natal family member must be given a priority in listing and hearing before the court. A court must avoid adjourning the matter, or delays in the disposal of the case;

    b. In evaluating the locus standi of a partner or friend, the court must not make a roving enquiry into the precise nature of the relationship between the appellant and the person;

c. The effort must be to create an environment conducive for a free and uncoerced dialogue to ascertain the wishes of the corpus;

d. The court must ensure that the corpus is produced before the court and given the opportunity to interact with the judges in-person in chambers to ensure the privacy and safety of the detained or missing person. The court must conduct in-camera proceedings. The recording of the statement must be transcribed and the recording must be secured to ensure that it is not accessible to any other party;

e. The court must ensure that the wishes of the detained person is not unduly influenced by the Court, or the police, or the natal family during the course of the proceedings. In particular, the court must ensure that the individuals(s) alleged to be detaining the individual against their volition are not present in the same environment as the detained or missing person. Similarly, in petitions seeking police protection from the natal family of the parties, the family must not be placed in the same environment as the petitioners;

f. Upon securing the environment and inviting the detained or missing person in chambers, the court must make active efforts to put the detained or missing person at ease. The preferred name and pronouns of the detained or missing person may be asked. The person must be given a comfortable seating, access to drinking water and washroom. They must be allowed to take periodic breaks to collect themselves. The judge must adopt a friendly and compassionate demeanor and make all efforts to defuse any tension or discomfort. Courts must ensure that the detained or missing person faces no obstacles in being able to express their wishes to the court;

g. A court while dealing with the detained or missing person may ascertain the age of the detained or missing person. However, the minority of the detained or missing person must not be used, at the threshold, to dismiss a habeas corpus petition against illegal detention by a natal family;

h. The judges must showcase sincere empathy and compassion for the case of the detained or missing person. Social morality laden with homophobic or transphobic views or any personal predilection of the judge or sympathy for the natal family must

be eschewed. The court must ensure that the law is followed in ascertaining the free will of the detained or missing person;

i. If a detained or missing person expresses their wish to not go back to the alleged detainer or the natal family, then the person must be released immediately without any further delay;

j. The court must acknowledge that some intimate partners may face social stigma and a neutral stand of the law would be detrimental to the fundamental freedoms of the appellant. Therefore, a court while dealing with a petition for police protection by intimate partners on the grounds that they are a same sex, transgender, inter-faith or inter-caste couple must grant an ad-interim measure, such as immediately granting police protection to the petitioners, before establishing the threshold requirement of being at grave risk of violence and abuse. The protection granted to intimate partners must be with a view to maintain their privacy and dignity;

k. The Court shall not pass any directions for counselling or parental care when the corpus is produced before the Court. The role of the Court is limited to ascertaining the will of the person. The Court must not adopt counselling as a means of changing the mind of the appellant, or the detained/missing person;

l. The Judge during the interaction with the corpus to ascertain their views must not attempt to change or influence the admission of the sexual orientation or gender identity of the appellant or the corpus. The court must act swiftly against any queerphobic, transphobic, or otherwise derogatory conduct or remark by the alleged detainers, court staff, or lawyers; and

m. Sexual orientation and gender identity fall in a core zone of privacy of an individual. These identities are a matter of self-identification and no stigma or moral judgment must be imposed when dealing with cases involving parties from the LGBTQ+ community. Courts must exercise caution in passing any direction or making any comment which may be perceived as pejorative.

17. The above guidelines must be followed in letter and spirit as a mandatory minimum measure to secure the fundamental rights and dignity of intimate partners, and members of the LGBTQ+ communities in illegal detention. The court must advert to these guidelines and

their precise adherence in the judgment dealing with habeas corpus petitions or petition for police protection by intimate partners.

18. Insofar as the present facts are concerned, the Criminal Appeal is disposed of in view of the report of the Judicial Officer.

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

Headnotes prepared by:
Niti Richhariya, Hony. Associate Editor
(*Verified by:* Shibani Ghosh, Adv.)

Result of the case:
Appeal disposed.

[2024] 3 S.C.R. 1281 : 2024 INSC 279

Bina Basak & Ors.
v.
Sri Bipul Kanti Basak & Ors.

(Civil Appeal No. 5525 of 2016)

21 March 2024

[Vikram Nath* and Satish Chandra Sharma, JJ.]

Issue for Consideration

Whether the High Court erred in disallowing the right to title and possession of the family members in the suit property that was allotted by the government as part of rehabilitation programme to the displaced/migrant family as a unit during partition of India?

Headnotes

Welfare Rehabilitation Scheme – Object of, Explained

Held: The rehabilitation programmes are introduced by the Government with the sole aim of re-establishment of the displaced/migrant families and not for the benefit of any individual – As a part of such welfare policies, the property is recorded in the name of one family member for the purpose of convenience even though the ensuing welfare is meant to be enjoyed by all the family members equally. (Para 1)

Welfare Legislation – Abuse of – Suit for Permanent Injunction filed maliciously by the Respondent/Head of the family against the rightful claim of other family members/younger brothers for usurping the entire allotment – Classic example of misuse/abuse of the welfare legislations by the beneficiaries for personal advantage – High Court erred by ignoring the affidavits and communication between the office of the Sub-Divisional Officer, the Deputy Commissioner and the Respondents which is admitted record – The record and admitted facts make it clear that the suit property was allotted under the policy of the Government for the displaced family and not for the individual

Held: The record shows that the elder brother/Head of the family, admittedly, gave statement before the concerned authorities during proceedings relating to allotment, in which he admitted

* Author

that he along with his family members had migrated from East Pakistan to India, and the construction over the plot in question was made out of the joint income of the three brothers, and from the produce of the crops of the land that they held in East Pakistan – It was clearly mentioned that they lived jointly on the suit property and all members contributed proportionately – The Respondents cannot now turn around to claim the entire allotment made treating the family as a unit for rehabilitation to the exclusion of Appellants, by filing the malicious suit. (Paras 3.5, 8 & 9)

Suit – Dismissal of – High Court failed to consider that the suit in question ought to have been dismissed once the suit filed by the Respondents to challenge the cancellation of lease deed in the exclusive name of Smt. Hem Prova Basak was withdrawn – The very basis of filing the suit for permanent injunction was no longer in existence.

Held: The Respondents laid challenge to the cancellation of the 03.11.1975 lease deed by the Sub-Divisional Officer, Siliguri, who allowed the request of Appellants herein for inclusion of their names in the lease deed along with the Respondents – The High Court failed to consider that the suit for permanent injunction was liable to be dismissed given that the suit filed by the Respondent(s) to declare aforesaid cancellation as null, void and illegal was withdrawn during the pendency of the second appeal, as the very basis of filing the suit in question stood eliminated. (Paras 3.7, 3.8, 4, 10)

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Rehabilitation Programmes, Abuse of Welfare Legislation, Malicious Suit, Grab entire allotment, Rehabilitation, Welfare Legislation

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.5525 of 2016

From the Judgment and Order dated 18.12.2013 of the High Court of Calcutta in SA No. 518 of 2008

Appearances for Parties

Pallav Shishodia, Sr. Adv., Danish Zubair Khan, Dr. Lokendra Malik, Advs. for the Appellants.

Uday Gupta, Sr. Adv., Chandra Bhushan Prasad, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Vikram Nath, J.

1. This matter pertains to right to title and possession of a property that was allotted by the Relief and Rehabilitation Department of Government of West Bengal to a family which had come to Siliguri from the then East Pakistan in 1950. Before moving forward with the facts of the case, it is imperative for us to mention that such rehabilitation programmes are introduced by the government with the sole aim of re-establishment of the displaced/ migrant families and not for the benefit of any individual. As a part of such welfare policies, the property is usually recorded in the name of one family member for the purpose of convenience even though the ensuing welfare is meant to be enjoyed by the all the family members equally. However unfortunately, in the instant case greed got better of the de facto head of the family who has been claiming herself as the absolute owner of the property. The matter is a prime example where the plaintiff attempted to defeat the rightful claims of family members with the intention of usurping the entire property. We cannot emphasize enough that this Court highly deprecates such malpractices where the welfare legislations are misused/abused by beneficiaries for personal advantage, thereby defeating the very objective of such policies.

2. This appeal assails the correctness of the judgment and order dated 18.12.2013 passed by the Calcutta High Court dismissing the Second Appeal No.518 of 2008 filed by the appellants herein confirming the judgment and decree of the First Appellate Court dated 11.04.2003 whereby it had reversed the judgment and decree of the Trial Court dated 16.09.1999 dismissing the suit of the present respondents and allowing the counter claim filed by the present appellants in Original Civil Suit No.16 of 1983.

3. Brief facts giving rise to the present appeal are summarized hereunder:

3.1. Late Krishna Behari Basak had three sons namely Benode Behari Basak, Bimal Kanti Basak and Benoy Krishna Basak. Late Krishna Behari Basak was a resident of East Pakistan and his family had migrated to India in 1950 soon after the partition. The eldest son Benode Behari Basak was employed in the Collectorate, Darjeeling since 01.03.1945 and at the relevant time he was working in the office of Deputy Commissioner, Darjeeling. Benode Behari Basak applied (supported by affidavit) for allotment of land in his name for the benefit of the refugee family which comprised of the following seven members namely:

S.No.	Name	Relation	Age
1.	Sri Bimal Kanti Basak	Brother	24 years
2.	Sri Benoy Krishna Basak	Brother	13 years
3.	Srimati Hem Prova Basak	Wife	20 years
4.	Sri Bipul Kanti Basak	Son	6 years
5.	Sjta. Drabanmayee Basak	Grand mother	85 years
6.	Sriman Ajit Kumar Basak	Nephew	9 years
7.	Srimati Kamala Basak	Sister	27 years

3.2. In the said affidavit dated 30.12.1952, it is clearly stated that the deponent was residing at Darjeeling and was in occupation as a government servant; that he had a permanent house in **village Sailabari, Post Office Khosabari, District Pabna** which has since become a part of eastern Pakistan; the family members were compelled to leave the native place in July 1950 due to partition of India; all family members have decided to settle in the Indian Union; he was working in the office of the Deputy Commissioner since 1945 and had opted to serve under the West Bengal Government.

3.3. Another affidavit was filed by Smt. Hem Prova Basak wife of Benode Behari Basak dated 13.11.1953. In the said affidavit it was stated that they had to leave their house and properties in Pakistan worth about Rs.50,000/-, on account of communal disturbance; she along with the whole family consisting of five family members had come to West Bengal in July 1950 with the object of permanently residing in the Union of India;

that she was a bona fide refugee and now a domicile and a national of the Indian Dominion; that she had not taken any loan or advance from the Central or Provincial Governments.

3.4. Based on the said applications supported by affidavits as stated above, the Deputy Commissioner, Darjeeling on 04.12.1953 forwarded the same to the Sub-Divisional Officer, Siliguri enclosing also along with it an order passed by the Deputy Commissioner, Darjeeling on 03.12.1953 for taking appropriate action. The order passed by the Deputy Commissioner on 03.12.1953 recorded that the family had lost their house in Pakistan as such allotment of plot in question be made in favour of Smt. Hem Prova Basak in place of her husband Benode Behari Basak.

3.5. Even before the final allotment could be made and lease could be executed, the family started constructing the house over the plot in question. However, before the construction could be completed on 07.02.1975, the said Benode Behari Basak recorded his statement before the authorities in which he admitted that he along with his family members, had migrated from East Pakistan to India; gave details of the property held in East Pakistan; that how he collected funds for construction of the house. The construction was made out of the joint income of three brothers and also from the produce of the crops of the land that they held. It was also mentioned that they all lived jointly and all members contributed proportionately.

3.6. A letter was issued by the Government of West Bengal on 28.09.1975 calling upon Smt. Hem Prova Basak to appear in the office of the Sub-Divisional Officer on 24.09.1975 in connection with the conferment of right, title and interest of the plot in question and also to produce documents relating to allotment of plot No.41.

3.7. Another letter was issued by the office of Sub-Divisional Officer, Siliguri on 25.09.1975 to Shri Benode Behari Basak stating that his two brothers had also applied for inclusion of their names along with name of his wife in the lease deed so that he could clarify in respect thereof. It appears that the lease deed was executed on 03.11.1975 in the name of Smt. Hem Prova Basak only.

3.8. The two brothers Bimal Kanti Basak and Benoy Kumar Basak represented for inclusion of their names which was appropriately dealt with by the concerned department and in the order sheet it was recorded on 03.08.1979 that the names of Bimal Kanti Basak and Benoy Kumar Basak be also included and there was no legal bar in inclusion of their names. The Sub-Divisional Officer passed an order on 07.11.1979 that the request made for inclusion of their names is allowed and their names will be included at the time of execution of the deed along with Smt. Hem Prova Basak in respect to the plot in question being Plot No.41, Dabgram Colony No.II, College Para, Siliguri.

3.9. Further, another order was passed on 23.08.1983 that in the lease deed of 03.11.1975, the rectification be allowed to the extent of adding the names of Bimal Kanti Basak and Benoy Kumar Basak being family members of Smt. Hem Prova Basak as apparent from the original affidavit filed that they were family members taking into consideration the Government Orders dated 02.07.1981 and 23.04.1981. Accordingly, a fresh lease deed be executed.

3.10. In the meantime, Smt. Hem Prova Basak filed a suit for permanent injunction to restrain the families of Bimal Kanti Basak and Benoy Kumar Basak from changing the character of the suit property and from entering the same. By the time the suit was filed, Bimal Kanti Basak had died as such his legal heirs being his widow, two sons and a daughter were impleaded as defendants 1-A, 1-B, 1-C and 1-D and Benoy Kumar Basak as defendant No.2. In the said suit Smt. Hem Prova claimed that she was the sole lessee of the plot in question and that the said land had been allotted to her exclusively and that she had constructed the house which is recorded in her name as absolute owner. The defendants being brothers of her husband and not having any independent house of their own to live, nor were they employed as such were permitted to live in a portion of the said house. Later on, they have been employed, have their independent separate families and as such they being licensees only, they must vacate the portion of the premises in their possession. The families of the three brothers had grown as such there was shortage of space. Also there were regular disputes between the usage of the property

and common amenities and as such it became necessary to file a suit for their eviction.

3.11. The defendants to the suit filed written statement along with counterclaim praying for a decree that the lease deed dated 03.11.1975 be declared as invalid and inoperative in law and for appropriate injunction against the plaintiff. The written statement and the counterclaim were based on the fact that the three brothers constituted the joint family; the policy of the Government was to provide rehabilitation to the entire family and not to the individual; the request of the defendants to include their names in the lease deed had been positively considered by the Government; the house was constructed from the joint fund from the income of all the three brothers.

3.12. During the pendency of the suit, the Government had come up with policy of freehold and had accordingly issued freehold title deeds separately with respect to the family of the three brothers. It had further canceled the lease deed dated 03.11.1975 and the same was duly communicated to Smt. Hem Prova Basak vide communication dated 25.05.1995. In the said letter, it was clearly stated that as the freehold title deeds are going to be issued to the eligible beneficiaries, the lease deed No.7658 of 03.11.1975 has been cancelled and as such she was required to submit the original lease deed.

3.13. Smt. Hem Prova Basak instituted an Original Civil Suit No.68 of 1995 impleading the State of West Bengal and its officers as defendants challenging the cancellation of the lease deed No.7685. The relief claimed in the said suit was that a declaration be made that the notice dated 25.05.1995 issued by the office of Sub-Divisional Officer, Siliguri, as illegal, invalid and without jurisdiction with the further relief of permanent injunction against the defendants restraining them to act upon the said notice.

3.14. After a detailed inquiry, it was held that fresh freehold title deeds be issued as per calculation in paragraph 'C' of the said report in favour of the family members of all the brothers. The defendants to the suit of 1983 filed an amendment application under Order VI Rule 17, Code of Civil Procedure, 1908, seeking amendment in the written statement in order to incorporate the

subsequent development regarding the cancellation of lease deed as also to issue freehold title deeds. Additionally, the plaintiff also sought amendment in the relief clause to the extent that the declaration be made that the freehold title deeds in favour of the defendants is not valid. They were void and not binding on the plaintiff. Both the amendments were allowed.

4. The Trial Court, after considering the material on record, dismissed the Original Civil Suit No.16 of 1983 and partially allowed the counterclaim declaring that the lease deed dated 03.11.1975 in favour of the plaintiff was illegal, inoperative, and invalid. The plaintiff preferred first appeal registered as Original Civil Appeal No. 19(s) of 1999. The said first appeal came to be allowed vide judgment dated 11.04.2003. Aggrieved by the same, the present appellants preferred a second appeal before the High Court. During the pendency of the second appeal the plaintiff Smt. Hem Prova Basak withdraw the Original Civil Suit No.68 of 1995 on 08.12.2003. These facts and material were placed before the High Court, however, the High Court despite noticing such facts vide impugned order dated 18.12.2013 dismissed the second appeal filed by the present appellants.

5. While issuing notice in the present appeal on 29.10.2014, both parties were directed to maintain status quo with regard to possession prevailing as on date. Later on, by order dated 01.07.2016, leave was granted. The fact remains that the possession of the family members of three brothers in the house has continued.

6. Shri Pallav Sisodia, learned senior counsel appearing for the appellant, apart from drawing our attention to the various affidavits, applications and orders passed on the file of the Sub-Divisional Officer and the Deputy Commissioner to show that the allotment had been made for the benefit of the family and not for one brother or his wife exclusively and that freehold title deeds have been subsequently executed in favour of the family members of all the three brothers, made a legal submission that once the lease itself had been cancelled in 1995 and the suit filed by Smt. Hem Prova Basak to declare the said cancellation as illegal, null and void having been withdrawn, the suit of the plaintiff for eviction and injunction was liable to be dismissed as the very basis for filing the suit stood eliminated.

7. On the other hand, learned senior counsel for the respondent Shri Uday Gupta vehemently urged that the First Appellate Court and the

High Court have examined and considered the material on record while decreeing the suit and dismissing the counterclaim, as such this Court may not interfere with the same under Article 136 of the Constitution of India and accordingly, dismiss this appeal.

8. Having given serious consideration to the material on record and the submissions advanced, we are convinced that the suit was filed maliciously in order to grab the entire allotment and also the house constructed with the joint income of the three brothers. Some noticeable facts in this regard are summarized hereunder-

   i) Binode Behari Basak, the eldest brother was working as Upper Division Assistant in the office of Deputy Commissioner, Siliguri and therefore had all the access in the local administration to favour himself and his wife. Initially, he had applied for allotment to be made in his name but apparently for the reason that he was already a government servant in the state of West Bengal since 1945 prior to the partition and migration no allotment would be made in his favour, he therefore setup his wife to become the applicant for the allotment.

   ii) The affidavits and the communications between the office of the Sub-Divisional Officer, the Deputy Commissioner and Binode Behari Basak and his wife Smt. Hem Prova Basak, are neither disputed nor denied. If that is so then it was more than clear that under the policy of the Government the allotment was being made for the family and not for the individual.

9. Binode Behari Basak and Hem Prova Basak both having admitted the said fact could not turn around to claim that it was their exclusive property. The High Court has gone completely wrong in ignoring these affidavits and communications giving the reason that they were given in a different proceeding and therefore would not be of relevance and any help to the defendants.

10. The lease deed in the exclusive name of Smt. Hem Prova Basak dated 03.11.1975 having been cancelled and the challenge to the said cancellation by way of a Civil Suit No.68 of 1995 having been withdrawn, the suit itself ought to have been dismissed, as the very basis of filing the suit was no longer in existence. The High Court failed to take into consideration this aspect of the matter thereby committing an error.

11. From a perusal of the plaint, it appears that there has been bickering amongst the family members of the brothers and there were cases registered for maintaining tranquillity and peace, appears to be the reason for filing of the suit to deprive the two younger brothers from the benefit of the allotment made treating the family as a unit for rehabilitation.

12. For all the reasons recorded above, the impugned orders passed by the High Court and the First Appellate Court are set aside and that of the Trial Court is restored. The appeal is allowed accordingly.

Headnotes prepared by:
Raghav Bhatia, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeal allowed.

[2024] 3 S.C.R. 1291 : 2024 INSC 267

Samaj Parivartana Samudaya & Ors.
v.
State of Karnataka & Ors.

(Writ Petition (Civil) No. 562 of 2009)

14 March 2024

[Sanjiv Khanna, M.M. Sundresh and Bela M. Trivedi, JJ.]

Issue for Consideration

Various applications were filed before the Hon'ble Court seeking directions pertaining to demarcation of land for mining leases, implementation of R & R [Reclamation and Rehabilitation] Plans, imposition of a Maximum permissible annual production [MPAP] and District-level production ceiling for mining leases, etc.

Headnotes

Environmental Law – Background of illegal mining in Bellary, Chitradurga and Tumkur in Karnataka – Temporary ban on mining in the said Districts – Subsequent imposition of production ceiling on mining leases, enhanced from time-to-time – Categorization of mines into Category 'A', 'B' and 'C' based on severity of encroachment by the mines – Issue of demarcation of seven mining leases.

Held: The Hon'ble Court by an Order dated 28.09.2022 had directed a Joint Team to prepare sketches of the seven mining leases – However, the said Order was deferred till the inter-state boundary was demarcated on the ground – The inter-state boundaries were fixed on the ground – Thereafter, a Joint Team was constituted comprising of Officers from the State of Karnataka and Andhra Pradesh to render support to the CEC in surveying the seven mining leases – Direction issued to the National Institute of Technology, Suratkhal, Karnataka to carry out the survey on the ground level, based on the total station method, and satellite images of the seven mining leases – The survey was directed to be undertaken for one mining lease at a time – The CEC was directed to issue notice to the respective lessees after receipt of the survey/demarcation report, and pass appropriate orders – The exercise was directed to be undertaken, even if the leases had expired – The Monitoring Committee

was also directed to be associated with the aforesaid exercise undertaken by the CEC, after the submission of the survey / demarcation reports. [Paras 5-14]

Environmental law – Maximum permissible annual production [MPAP] and District-level production ceiling for mining leases – CEC fixed implementation of a Reclamation and Rehabilitation (R & R) Plan as a pre-condition for resumption of mining – Object of R & R Plan – CEC proposed implementation of MPAP for each mining lease, accepted by the Court – If total lease-wise annual production from all the leases in the District exceeds the ceiling limit fixed, then the MPAP for each mining lease to be scaled down on a pro-rata basis.

Held: The Hon'ble Court reiterated the object of R & R Plans, and directed implementation of MPAP for mining leases – It was held that the objective of the R & R Plans is to (a) carry out the time-bound reclamation and rehabilitation of the areas found to be under illegal mining; (b) ensure scientific and environmentally sustainable mining; (c) ensure compliance with the various stands stipulated under the environment/mining statutes; and (d) regular and effective motoring, evaluation and corrective measures – The R & R Plans, with specifying actions to be undertaken for reclamation and rehabilitation works provided for an MPAP [i.e. Maximum Permissible Annual Production] restriction for each mining lease – The upper cap fixed at the district level is mandatory and binding – For the purpose of feasible annual production, the following factors would be kept in mind (a) mineral reserves in the lease area; (b) area available for overburden/waste dumps and subgrade dumps; (c) existing transport facilities vis-à-vis the traffic load of the mining lease and adjoining mining leases – The MPAP [Maximum Permissible Annual Production] is the minimum of the quantity that may be feasible based on the above three parameters – If the total of the lease-wise annual production from all the leases in the district exceeds the ceiling limit fixed for a specific District, then the MPAP for each mining lease is to be scaled down on a pro-rata basis, to ensure that the District level production ceiling is not breached – The CEC, with the Monitoring Committee was requested to aid and advice the Oversight Authority to undertake a complete exercise in the three districts, and submit a Report to the Court – The Report shall also examine whether sub-caps in particular areas should be fixed, or caps should be increased or decreased – The CEC, the

Monitoring Committee and the Oversight Authority will examine whether any regulation like e-auctioning is required for the sale of the mined material – They will also consider the date with regard to which royalty and other cess is to be required when e-auctioning was mandatory. [Paras 19-29]

Environmental Law – Special Purpose Vehicle viz. Karnataka Mining Environment Restoration Corporation constituted to facilitate ameliorative and mitigative measures for mining – Plea for discontinuation of transfer of 10% levy imposed on sale of iron ore to the SPV i.e. Karnataka Mining Environment Restoration Corporation for implementing the Comprehensive Environment Plan for Mining Impact Zone [CEPMIZ], rejected by the Court.

Held: Reference made to earlier Judgment in Samaj Parivartana Samudaya v. State of Karnataka [2017] 6 SCR 577 : (2017) 5 SCC 434 : 2017 INSC 241, dated 21.03.2017 wherein the Court rejected a plea for discontinuation of transfer of 10% levy imposed on the sale of iron to the SPV observing that the CEPMIZ is a scheme which can be divided into two broad categories (i) socio-economic development; and (ii) integrated mining and railway infrastructure, industrial infrastructure and medical infrastructure – Reference also made to an earlier Order dated 21.03.2018, whereby the Court rejected a similar prayer – The CEPMIZ Plan stated that a tentative expenditure of nearly Rs.25,000 crores is likely to be incurred in various sectors – Thus, at this stage, it will not be appropriate to withdraw the 10% levy imposed, as the CEPMIZ Plan is still at the initial stage of execution – The Hon'ble Court accordingly dismissed applications seeking discontinuation of transfer of 10% levy imposed on sale of iron ore to the SPV i.e. Karnataka Mining Environment Restoration Corporation for implementing the Comprehensive Environment Plan for Mining Impact Zone [CEPMIZ]. [Paras 86-96]

Case Law Cited

State of Andhra Pradesh v. Obulapuram Mining Company (P) Ltd. **(2011) 12 SCC 491;** *Samaj Parivartana Samudaya v. State of Karnataka* **(2013) 8 SCC 209;** *State of A.P. v. Obulapuram Mining Co. (P) Ltd.* **(2013) 8 SCC 213;** *Samaj Parivartana Samudaya v. State of Karnataka* **[2017] 6 SCR 577 : (2017) 5 SCC 434 : 2017 INSC 241 – referred to.**

List of Keywords

Environmental laws; Illegal Mining; Maximum permissible annual production [MPAP] and District-level production ceiling for mining leases; Reclamation and Rehabilitation Plans.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 562 of 2009

(Under Article 32 of The Constitution of India)

With

W.P.(C) Nos. 505 of 2020 and 768 of 2013

Appearances for Parties

K. M. Nataraj, A.S.G., Nishanth Patil, A.A.G., Shyam Divan, A.D.N. Rao, Kapil Sibal, Vikas Singh, Mukul Rohtagi, Arvind Datar, Dr. S. Muralidhar, Dhruv Mehta, Gopal Sankaranarayanan, V. Giri, R Balasubramanian, Gopal Jain, S. N. Bhat, Sr. Advs., Siddharth Chowdhary, Prashant Bhushan, G.S. Makkar, Shubhranshu Padhi, Kumar Dushyant Singh, Ankur S. Kulkarni, Ms. Surbhi Mehta, Sanjay Kapur, B.V. Balram Das, Rakesh K. Sharma, E.C. Agrawala, O.P. Badani, Sridhar Potaraju, N. Ganapathy, K.V. Sreekumar, Jayant Mohan, D. L. Chidananda, Ishaan George, Gaichangpou Gangmei, M/S. Khaitan & Co., Anantha Narayana M.G., M/S. Aura & Co., Gaurav Sharma, Dhawal Mohan, Ms. Deepika Kalia, Ms. Manisha Singh, Ms. Adya Shree Datta, Anurag Tiwary, Debadutta Kanungo, S. Hari Haran, Rajarajeshwaran S., Amaan Shreyas, Ms. Mannat Tipnis, Vikash Singh, Ms. Aparna Bhat, P. S. Sudheer, Rishi Maheshwari, Ms. Anne Mathew, Bharat Sood, Ms. Miranda Solaman, Mrs. Anjani Aiyagari, Mrs. Anil Katiyar, M/S. Parekh & Co., Adarsh Upadhyay, Mrs. Sudha Gupta, Chanchal Kumar Ganguli, Bhargava V. Desai, Munawwar Naseem, Arvind Kumar Sharma, S. K. Kulkarni, M. Gireesh Kumar, Ms. Uditha Chakravarthy, Ms. Shalaka Srivastava, Nishant Sharma, Anil Kumar Mishra-I, M/S. Ap & J Chambers, Sunil Dogra, Vivek Vishnoi, Abhishek Sharma, K. Raghavacharyulu, Kailash Pandey, Ranjeet Singh, Krishna Yadav, Mrs. Kirti Renu Mishra, T.L.V. Ramachari, Hitesh Kumar Sharma, Sandeep Singh Dingra, Akhileshwar Jha, Amit Kumar Chawla, T.N. Rao, S.S. Reddy, G. N. Reddy, Samir Ali Khan, Vikas Mehta, Ms. Ranjeeta Rohatgi, Balaji Srinivasan, Dr. Sushil

Balwada, Nandlal Kumar Mishra, Srilok Nath Rath, Ms. Reena Rao, M/S. Karanjawala & Co., Rajeev Maheshwaranand Roy, P. V. Dinesh, A. Raghunath, V. N. Raghupathy, Omkar Kambi, Manendra Pal Gupta, Ayush P. Shah, Vignesh Adithiya S, Akhil Anand, Ms. Manjula Gupta, Prashant Kumar, Merusagar Samantaray, Yashraj Singh Deora, Niroop Sukirthy V., Joy Nirupam, Girish Kumar, Pranav Giri, Snehasish Mukherjee, Rohit Sharma, Aditya Narayan, Nikhil Purohit, Jatin Lalwani, Ms. Pratiksha Nagayach, Vishal Sinha, Ishan George, Archit Jain, Mrs. Dr. Rukma George, Prakash Kumar Singh, Ms. Pooja Singh, Ms. Poornima Jauhari, Brij Bhushan Jauhari, Raj Bahadur Yadav, Ms. Indira Bhakar, Shubranshu Padhi, Rajat Nair, Ms. Vimla Sinha, Rajeeva Ranjan Rajesh, B K Satija, Pranay Ranjan, Dinesh Kumar Garg, Neeraj Shekhar, Rajesh Kumar Maurya, Ms. Baby Rajput, Nirnimesh Dube, Susheel Joseph Cyriac, Ms. Priya S. Bhalerao, Varun Kanwal, M/S. Lex Regis Law Offices, Mrs. Vaijayanthi Girish, Rajesh Mahale, Kunal Verma, Mukesh Kumar Maroria, Mrs. Shraddha Deshmukh, Shailesh Madiyal, T. S. Sabarish, Chandra Prakash, Ms. A. Sumathi, Sanjeev Kapoor, Aakash Bajaj, Avirat Kumar, Ms. Aarushi Yadav, Gurmeet Singh Makker, Kanu Agrawal, Ms. Suhasini Sen, S.K. Singhania, Ms. Bina Madhavan, S. Udaya Kumar Sagar, Eeshan D Khaire, M/s. Lawyers Knit & Co, S. S. Shroff, Ms. Hetu Arora Sethi, Pulkit Tare, Rituraj Biswas, Sameer Rohatgi, Ms. Nidhi Jaswal, Ms. Sonali Gaur, Ashwin Garg, Kartikey, Ms. Rohini Musa, Abdul Azeem Kalebudde, Mahesh Thakur, Mrs. Anuparna Bordoloi, Ms. Anusha R, Ms. Mythili Srinivasamurthy, Shivamm Sharrma, Amrish Kumar, Ashwin Kumar D. S., Ishan Roy Chowdhury, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Order

1. The present applications relate to mining activities being undertaken in Districts - Bellary, Chitradurga and Tumkur in Karnataka.

2. In 2009, the petitioner - Samaj Parivartana Samudaya had filed a writ petition praying for this Court's intervention on grounds of the illegality of such mining activities and consequent harm caused to the environment. This Court intervened and has passed several directions and orders.

3. To avoid prolixity, we will not be referring to the catena of orders passed by this Court in depth and detail. However, to appreciate the present applications, we have summarized the relevant developments below:

- The genesis of the Central Empowered Committee[1] goes back to this Court's order dated 09.09.2002 in "*T.N. Godavarman Thirumalpad v. Union of India & Ors.*", where the Court was concerned with the rampant pilferage and illegal extraction of natural resources, particularly iron ore, and the environmental degradation and disaster that may have resulted from unchecked intrusion into the forest areas.
- The CEC was constituted to monitor the situation, implement this Courts' orders, and delineate the steps to be taken.
- On 19.11.2010, the CEC was directed by this Court to submit a report with respect to certain mining leases granted by the State of Karnataka in District – Bellary.
- The initial reports of CEC indicated large-scale illegal mining being undertaken.
- On 06.05.2011, this Court constituted a 'Joint Team' to determine the boundaries of the specific mines since a large number of mining lessees were carrying out operations beyond the lease boundaries, thereby causing environmental degradation.
- On 29.07.2011, this Court imposed a temporary ban on mining operations in District – Bellary.[2]
- On 26.08.2011, this Court extended the temporary ban on mining operations to Districts – Chitradurga and Tumkur.[3]
- On 05.08.2011 and 26.08.2011, this Court directed the Indian Council of Forest Research and Education[4] to conduct a macro-level environmental impact assessment, in collaboration with domain experts to determine the extent of environmental degradation due to illegal mining.

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1 For short, "CEC".

2 See *State of Andhra Pradesh* v. *Obulapuram Mining Company (P) Ltd,* 2011 (12) SCC 491.

3 See *Samaj Parivartana Samudaya v. State of Karnataka*, (2013) 8 SCC 209.

4 For short, "ICFRE".

- On 14.08.2011, ICFRE submitted its report wherein it *inter alia* recommended: (i) imposition of district-level production ceiling; and (ii) preparation of Reclamation and Rehabilitation Plans[5] for each mining lease which apart from prescribing actions for reclamation and rehabilitation works would also prescribe a Maximum Permissible Annual Production[6] restricting the total quantity of iron ore that could be produced at the specific mining lease.
- Based on ICFRE report and CEC's recommendations, this Court imposed differing production ceilings on mining leases in the three districts, which have been enhanced from time to time:
    - *vide* order dated 13.04.2012, production ceiling of 25 Million Metric Tons[7] was fixed on mines in the Bellary District and 5 MMT in Tumkur and Chitradurga Districts;
    - these caps were enhanced to 28 MMT for the Bellary District and 7 MMT for Tumkar and Chitradurga Districts *vide* order dated 14.12.2017; and
    - these caps were further enhanced to 35 MMT for Bellary District and 15 MMT for the Tumkar and Chitradurga Districts *vide* order dated 26.08.2022.
- *Vide* report dated 03.02.2012, the CEC recommended the categorization of the mines into Categories A, B and C based on the severity of encroachment by the mines and overburden dumps, determined in terms of the percentage in relation to the total lease area. In such categorization, Category A mining leases bear no/marginal illegality and Category C mining leases stand in flagrant violation of laws.
- To strike a balance between environmental protection and development, a central public sector undertaking – National Minerals Development Corporation was allowed to operate two mining leases in District – Bellary.

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5 For short, "R&R Plans".

6 For short, "MPAP".

7 For short, "MMT".

- Further, permission to sell old stock of iron ore by e-auction was granted through a Monitoring Committee set up by this Court.
- *Vide* report dated 13.03.2012, the CEC recommended the implementation of R&R Plans, as a precondition to resumption of mining operations.[8] In due course of time, mining was permitted to resume in specific Category A and B mines based on the reports of the CEC and on judgments/orders of this Court.
- Category C mining licenses were cancelled, and the proceeds from sale of iron ore from Category C mines were ordered to be forfeited to the State.
- Some of the Category C mining leases have been auctioned and have subsequently commenced production. The new leaseholders have undertaken to implement R&R Plans as a precondition to commence operations.
- *Vide* order dated 28.09.2012, this Court constituted a Special Purpose Vehicle,[9] namely, Karnataka Mining Environment Restoration Corporation[10] to facilitate ameliorative and mitigative measures around the mining leases in the three districts.
- *Vide* order dated 21.04.2022, this Court constituted the Justice B. Sudarshan Reddy Committee as an Oversight Authority to oversee the work of the SPV.[11]
- *Vide* order dated 28.09.2022, this Court directed the Joint Team to prepare sketches of 7 mining leases placed in Category B-1.

4. The seven B-1 Category mining leases (listed below) lie between the States of Karnataka and Andhra Pradesh. They require demarcation on the ground.

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8 See this Court's judgment/order dated 13.04.2012 where the Court directed the implementation of R&R Plans in all the three categories of mines.

9 For short, "SPV".

10 For short, "KMERC".

11 For short, "Oversight Authority".

S. No.	Lease Names	ML No.	Location	Extent in Ha.	Village	Taluka	Division
1.	T. Narayan Reddy	2527	Sy. No. 01	32.65	Thumati	Sandur	Bellary
2.	N. Rathnaiah	670	Sy. No.01	14.16	Thumati	Sandur	Bellary
3.	Hind Traders	2548	Sy. No. 01	19.63	Vitalapura	Sandur	Bellary
4.	Mehaboob Transport Co.	2568	Sy. No. 106 & 01 Vitalapura	16.19	Thumati and vitalapura	Sandur	Bellary
5.	Vibhuti Gudda Mines Private Ltd.	2542	Sy. No. 283	137.00	Hunahalli	Bellary	Bellary
6.	Suggallamma Gudda Mining & Co.	2541	Sy. No. 90	10.11	Bellagala	Bellary	Bellary
7.	Bellary Mining Corporation	2651	Sy.No. 465	15.80	Halakundi	Bellary	Bellary

5. This Court's order dated 28.09.2022, directing the Joint Team to prepare sketches of these seven mining leases, was deferred till the inter-state boundary was demarcated on the ground.

6 *Vide* letter dated 09.01.2023, the State of Karnataka informed the CEC that inter-state boundaries between the states of Karnataka and Andhra Pradesh had been fixed on the ground.

7. However, it is apparent that further work must be undertaken at the ground level by deploying the total station survey method along with the satellite images of the mining sites.

8. By letter dated 29.02.2024, the government of Andhra Pradesh, had stated it would be represented by the following four officers, as a part of the Joint Team which was directed to render support to the CEC in surveying the seven mining leases:-

S. No.	Name of the Officer	Designation
1.	Sri Vineeth Kumar, I.F.S.	Divisional Forest Officer, Ananthapuramu
2.	Dr. Rani Sushmita	Revenue Divisional Officer, Kalyanadurgam
3.	Sri Eslavath Rupla Naik	Asst. Director Sruvey & Land Records, Ananthapuramu
4.	Sri Y. Nagaiah	District Mines and Geology Officer, (FACT), Ananthapuramu

9. By letter dated 20.01.2023, the State of Karnataka stated that it would be represented by the following three officers in the Joint Team:

S. No.	Name of the Officer	Designation
1.	Sri T. Heeralal	Chief Conservator of Forest, Ballari Circle Ballari (Incharge Working Plan Ballari)
2.	Dr. Bagadi Goutham	IAS, Director, Mines and Geology, Bengaluru
3.	Sri Prashant Kumar Thakur	IPS, Additional Director General of Police, Karnataka Lokayukta, Bengaluru

10. We clarify that if there is a change of the aforesaid named officers of the States of Karnataka and Andhra Pradesh, the replacement/ designated officer would be co-opted in the Joint Team.

11. The CEC has requested the National Institute of Technology, Suratkhal, Karnataka,[12] to carry out the aforesaid survey at the ground level, based on the total station method and satellite images of the seven mining leases. The members of the 'Joint Team' will be associated and shall cooperate with representatives of NIT Karnataka.

12. The survey will be undertaken for one mining lease at a time. The report will be submitted with the joint signatures of the 'Joint Team' to the states of Karnataka and Andhra Pradesh. A copy thereof will be filed before this Court. The said exercise would be completed no later than six months from today.

13. The CEC after receiving the survey/demarcation report will issue notice to the respective lessees and pass appropriate orders. This exercise will be undertaken even if the leases have expired in the due course of time. Orders passed by the CEC will be communicated to the parties, and a report will be filed before this Court within a period of seven months from today.

14. The Monitoring Committee will also be associated with the aforesaid exercise undertaken by the CEC, post the submission of the survey/ demarcation report(s).

12 For short, "NIT Karnataka".

15. The State of Karnataka will be empowered and entitled to participate in the proceedings before the CEC and raise all objections and contentions.

16. Re-list all pending applications in W.P.(C) no. 562/2009 and 768/2013 on 03.04.2024.

I.A. No. 225561 of 2023

MPAP and District-Level Production Ceiling

17. As noticed in the summary of developments above, this Court had fixed a district-level production ceiling for all mining leases in the Districts – Bellary, Tumkur and Chitradurga. These caps were enhanced from time to time. The final enhancement of production ceilings was done *vide* order dated 26.08.2022 whereby a production ceiling of 35 MMT for Bellary District and 15 MMT for the Tumkar and Chitradurga Districts was specified.

18. The district-level production ceilings apply to Category A and Category B mining leases. Category 'C' mining leases were cancelled and were thereafter e-auctioned, and hence are under a different legal regime.

19. Parallelly, in its report dated 13.03.2012, the CEC fixed the guidelines for the preparation and/or implementation of the R&R Plans as a pre-condition to the resumption of mining in the three districts. This was done given the devastation and degradation of the environment on account of unregulated and illegal mining activities. The objective of the R&R Plans is to:-

    (a) carry out the time-bound reclamation and rehabilitation of the areas found to be under illegal mining;

    (b) ensure scientific and environmentally sustainable mining;

    (c) ensure compliance with the various standards stipulated under the environment/mining statutes; and

    (d) regular and effective motoring, evaluation and corrective measures.

20. As noticed above, the R&R Plans, together with specifying actions to be undertaken for reclamation and rehabilitation works, provided for an MPAP restriction for each mining lease. However, the upper cap fixed at the district level is mandatory and binding.

21. This Court, *vide* judgment/order dated 14.12.2017, directed that a production cap of the individual mining leases will be regulated through the MPAP limits prescribed in the R&R Plans, without reference to the upper or general cap fixed at the district level.

22. The CEC states that the lease-wise R&R Plans have been prepared for all mining leases, which have been submitted by the Joint Team. It consists of two broad components: (a) R&R Plans for areas found to be under illegal mining by the Joint Team and (b) Supplementary Environment Management Plan. In addition, Comprehensive Environment Plans for the Mining Impact Zone[13] for the areas surrounding the mining leases, would be prepared.

23. Accordingly, the CEC and CEPMIZ had proposed, and it was accepted by this Court, that MPAP for each of the mining leases should be implemented and executed. This figure may be substantially lower than permissible limits specified under the Environment Clearance, Approved Mining Plan, and/or the Consent to Operate, granted for the respective mining leases. For the purpose of feasible annual production, the following factors would be kept in mind:-

    (a) mineral reserves in the lease area;

    (b) area available for overburden/waste dump(s) and subgrade dump(s); and

    (c) existing transport facilities *vis-a-vis* the traffic load of the mining lease and adjoining mining leases.

24. The MPAP is the minimum of the quantity that may be feasible based on the above three parameters. Further, if the total of the lease-wise annual production from all the leases in the district exceeds the ceiling limit fixed for a specific district, then the MPAP for each mining lease was/is to be scaled down on a *pro-rata* basis, to ensure that the district-level production ceiling is not breached.

25. The aforesaid parameters were accepted by this Court by the order dated 13.04.2012. We respectfully concur and state that these directions shall continue.

13 For short, "CEPMIZ".

26. Our attention has been drawn to the CEC report dated 14.07.2017 and the orders passed by this Court on 14.12.2017 and 26.08.2022.

27. Keeping in view the aforesaid position, we would request the CEC, together with the Monitoring Committee and aid and advice of the Oversight Authority, to undertake a complete exercise in the three districts, and the respective mining leases situated therein, and submit a report before this Court. While undertaking the said exercise, they shall keep in mind the parameters referred to in the report dated 13.03.2012. The CEC will be entitled to take help and assistance of the scientific domain experts who will examine data, including environmental pollution data available/recorded in the districts from time to time.

28. A copy of the said report will be filed before this Court within a period of four months from today. While submitting the report, it shall also be examined whether sub-caps in particular areas should be fixed or caps should be increased or decreased. In other words, the CEC will also examine whether a mining cap must be imposed in an area for better compliance and regulation.

29. Further, the CEC, the Monitoring Committee and the Oversight Authority will examine whether any form of regulation like e-auctioning is required to be put in place for the sale of the mined material. While examining this question, they will take into consideration the data with regard to the royalty and other cess etc., which were recovered when e-auctioning was mandatory and post the order dated 20.05.2022, whereby private sales have been permitted.

30. The question of whether satellite mappings/images should be undertaken with regard to each mine for the purpose of ascertaining the mining activities including the sale and disposal of the waste etc., will be examined by the CEC, the Monitoring Committee and the Oversight Authority.

31. The CEC, the Monitoring Committee and the Oversight Authority will be entitled to examine any other aspect, which they feel is relevant for consideration of the issues and questions referred to them.

32. In view of the directions given today, the application in I.A No. 225561 of 2023 shall await the report of the CEC. Accordingly, the application is not finally decided.

I.A. No.183 of 2013

33. It is stated by the learned counsel for the applicant(s) that in view of the subsequent development, the present application has become infructuous.

34. In view of the statement made, the present application is dismissed as infructuous.

I.A. No. 189 of 2013

35. None is present to press the present application.

36. Accordingly, the present application is dismissed in default.

I.A. No. 191 of 2013

37. It is stated by the learned counsel for the applicant(s) that the present application, which was filed as a contempt petition, has become infructuous, as the petitioner has filed a substantive writ petition and other proceedings.

38. In view of the statement made and without commenting on the merits, the present application is dismissed.

I.A. No. 203 of 2014

39. None is present to press the present application.

40. Accordingly, the present application is dismissed in default.

I.A. No. 204 of 2014

41. None is present to press the present application.

42. Accordingly, the present application is dismissed in default.

I.A. No. 213 of 2014

43. None is present to press the present application.

44. Accordingly, the present application is dismissed in default.

I.A. No. 214 of 2014

45. None is present to press the present application.

46. Accordingly, the present application is dismissed in default.

I.A. No.222 of 2014 in I.A. No. 214 of 2014

47. None is present to press the present application.

48. Accordingly, the present application is dismissed in default.

I.A. No. 226 of 2014

49. None is present to press the present application.

50. Accordingly, the present application is dismissed in default.

I.A. No.228 of 2014

51. None is present to press the present application.

52. Accordingly, the present application is dismissed in default.

I.A. No. 229 of 2014

53. None is present to press the present application.

54. Accordingly, the present application is dismissed in default.

I.A. No.232 of 2014

55. The CEC, in consultation with the Monitoring Committee, will file their report on the assertions and prayer made in the present application, within a period of six weeks from today.

56. Liberty is granted to the State of Karnataka to file their reply/response within six weeks to the present application.

57. Reply/response to the report will be filed within period of six weeks from the date of service of the report.

58. The application is not disposed of today.

I.A. No. 234 of 2014

59. None is present to press the present application.

60. Accordingly, the present application is dismissed in default.

I.A. No.124132 of 2022

61. The CEC, in consultation with the Monitoring Committee, will file a status report to the assertions and prayer made in the present application. The application is not disposed of today.

I.A. No. 21884 of 2020

62. The CEC, in consultation with the Monitoring Committee, will file a status report on the assertions and prayer made in the present application, within a period of six weeks from today.

63. The application is not disposed of today.

I.A. No.149994 of 2018

64. We are not inclined to accept the prayer(s) made in the present application by the applicant – National Mineral Development Corporation Limited[14] in view of specific orders passed by this Court on 23.09.2011, and subsequent order dated 28.09.2012.

65. It is to be noted that the applicant – NMDC, by a subsequent order dated 22.02.2023, was directed a refund of 10% of the sale proceeds, deposited towards SPV w.e.f 01.01.2019 onwards. This order, according to us, balances out the equities and hence, the prayer for reducing the amount to be deposited towards the SPV from 10% for the period prior to 31.12.2018, is rejected. We clarify that the applicant – NMDC will be liable to pay contribution to the SPV at the rate of 10% of the sale proceeds w.e.f 01.01.2019 and thereafter. Any excess amount above 10%, collected/paid by the applicant – NMDC, on and with effect from 01.01.2019 will be refunded to them by the Monitoring Committee within a period of six weeks from today.

66. Accordingly, the present application is disposed of.

I.A. Nos. 43677/2024 and 52570/2024

67. I.A. no. 52570/2024 seeking permission to file application for directions is allowed.

68. I.A. no. 43677/2024 has been filed seeking certain directions.

69. We are not inclined to grant any relief to the applicant(s) and hence, the application is disposed of.

I.A. No. 233 of 2014 and I.A. No. 235 of 2014 in I.A. No. 233 of 2014

70. Learned counsel for the applicant(s) states that the present applications have become infructuous.

71. In view of the statement made, the applications are dismissed as infructuous.

I.A. No. 217 of 2014

72. Learned counsel for the applicant(s) seeks permission to withdraw the present application.

14 For short, "NDMC".

73. In view of the statement made, the application is dismissed as withdrawn.

I.A. No. 190 of 2013

74. Learned counsel for the applicant(s) states that he is satisfied with the orders dated 09.12.2013 and 06.01.2014. He states that in view of the said orders, the application may be disposed of.

75. In view of the statement made, the application will be treated as disposed of.

I.A. No. 212 of 2014

76. We are not inclined to examine the merits of the said application in view of the notification/corrigendum dated 04.08.2014. In case the said notification/corrigendum is set aside or modified, it will be open to the applicant(s) to raise pleas and contentions before this Court or before the High Court.

77. All pending applications in I.A. no. 212/2014 shall stand disposed of.

I.A. No. 208 of 2014

78. We are not inclined to examine the merits of the assertions made in the application, as the issue involved is rather secondary to the issue pending consideration in W.P.(C) no. 562/2009. In case the applicant(s) has any grievance or issue, it will be open to the applicant(s) to file appropriate proceedings before the jurisdictional High Court or any other authority.

79. The stay order passed by this order on 10.02.2014 will continue for a further period of two months in order to enable the applicant(s) to take steps in accordance with law.

80. We clarify that we have not made any comments either way on the merits.

81. The application is disposed of.

I.A. No. 197 of 2013

82. This application has become infructuous and is dismissed as such.

83. It will be open for the applicant(s) to press for hearing of SLP(C) nos. 1684/2017 titled "*Dhruvdesh Metasteel Pvt. Ltd. v. Kiocl Ltd. & Ors.*" and 6854/2017 titled "*M. Babanna v. Kiocl Ltd. & Ors.*", before the appropriate Bench.

I.A. No. 160407 of 2022

84. Arguments have been addressed by the learned counsel for the applicants. The issue is whether a 10% levy imposed on the sale of the iron ore and transferred to the SPV for implementing the CEPMIZ, in terms of the judgment/order of this Court dated 13.04.2012,[15] should be discontinued.

85. It has been pointed out that Rs.24,464 crores are available to the SPV, namely, KMERC, which is to prepare and implement the CEPMIZ to mitigate the environmental damage in the Mining Impact Zone[16] in the three districts.

86. Our attention has been drawn to the judgment of this Court dated 21.03.2017,[17] wherein a similar plea upon being raised, was considered, but rejected by this Court, observing that CEPMIZ is a scheme, which can be divided into two broad categories: (i) socio-economic development; and (ii) integrated mining and railway infrastructure, industrial infrastructure and medical infrastructure. The said order noted that the total cost of implementation of the CEPMIZ over a period of ten years was Rs.15,742.35 crores. The prayer was rejected, observing that at that stage, the CEPMIZ was a vision document with all concrete measures, steps and proposals left to be worked out at a later stage, that is, the stage of the preparation of the Detailed Project Report.[18] We would like to reproduce a portion of the said judgment:

> "15. What had happened in Bellary, Chitradurga and Tumkur, has already been noticed by this Court in para 37 of the judgment dated 18-4-2013 [*Samaj Parivartana Samudaya* v. *State of Karnataka*, (2013) 8 SCC 154] i.e. systematic, extraordinary and unprecedented plunder of the natural wealth and environment. This Court has specifically observed in para 37 that: (*Samaj Parivartana case* [*Samaj Parivartana Samudaya* v. *State of Karnataka*, (2013) 8 SCC 154] , SCC p. 187)

15 (2013) 8 SCC 213.

16 For short, "MIA".

17 (2017) 5 SCC 434.

18 For short, "DPR".

> "*37. … The situation being extraordinary the remedy, indeed, must also be extraordinary*."
>
> (emphasis supplied)
>
> It is to deal with such an extraordinary situation that the necessity of CEPMIZ and implementation thereof by a special purpose vehicle out of funds in credit with the Monitoring Committee was contemplated. The special funds in deposit with the Monitoring Committee being the proceeds of illegal mining were meant to be deployed for re-creation of what had been lost due to such illegal activities. It is for the aforesaid purpose that CEPMIZ was required to be drawn up and thereafter implemented. The state of implementation of the Scheme has not yet commenced. Funds in huge proportions would be necessary. A full and clear picture is yet to emerge. In a situation lessees who may be even remotely connected with the degradation and destruction of nature must continue to pay their share in the process of restitution by contributing to the Monitoring Committee from their present sale proceeds. Even the new lessees who may not have been involved with such degradation are contributing to the process of reclamation and restoration. In such a situation, we do not see how we can vary or modify our earlier orders that require all existing lessees to pay 10% of the sale proceeds and/or to depart from the requirement of payment of what has been already ordered, namely, 10% of the sale proceeds to the Monitoring Committee/SPV."

87. The Court did not make comments on the CEPMIZ, except to state that insofar as socio-economic measures are concerned, different heads under which restoration and implementation work was proposed to be done, details thereof were to be worked out. It is to be noted that at that stage, funds to the extent of Rs.10,336 crores were available.

88. This aspect was again examined in the order dated 21.03.2018 on an application filed by the Federation of Indian Mineral Industries, Southern Region[19] enclosing therewith reports of the CEC dated

19 For short, "FIMI, South".

19.03.2018. In this report, the CEC, with reference to the CEPMIZ, had suggested submission of a project report by KMERC indicating very broadly, different facets of the CEPMIZ, the work to be undertaken and the cost, which is reasonably expected to be incurred. Accordingly, this Court rejected the prayer made in the application, and stated that the same would be considered subsequently. Directions were issued to KMERC to prepare and submit within six months, a revised comprehensive proposal of socio-economic development and eco-restoration including those relating to road infrastructure with short-term and long-term targets and study relating to the railway backbone required to support the mining activity, as suggested by certain authorities/experts.

89. This Court, in the order dated 21.04.2022, granted in-principle approval to the CEPMIZ submitted by the State of Karnataka, as recommended by the CEC in its reports dated 22.10.2018 and 16.04.2019. However, this order also records that the parties are at liberty to place any objections or submissions before the Oversight Authority with regard to the CEPMIZ. The order states that the Oversight Authority shall decide the objections or suggest modifications after hearing the parties and taking assistance of any expert including the CEC, as may be required. Further, if any clarification is required, the parties were granted liberty to approach this Court.

90. The Oversight Authority constituted by this order was to oversee the works and progress being carried out by KMERC.

91. Our attention was also drawn to the report of the CEC, dated 10.04.2022, which states that the SPV amount maintained by the Monitoring Committee exceeds Rs.20,000 crores as of 31.03.2022. This amount including the interest, which will accrue, would be adequate to meet the expenses incurred with the activities proposed to be undertaken under the CEPMIZ. This report recommends that 10% of the sale value (20% of the sale value from NMDC) being contributed towards the SPV, may be discontinued.

92. At this stage, we may record that this Court *vide* order dated 22.02.2023, reduced the contribution of NMDC to the SPV from 20% to 10% w.e.f. 01.01.2019 and accordingly, an amount of Rs.1,326 crores has been refunded to them.

93. As per the figures placed before us, the CEPMIZ Plan, as provisionally approved by this Court, states that a tentative expenditure of nearly

Rs.25,000 crores is likely to be incurred for various sectors, as tabulated below:-

S. No.	Sector/Districts	Bellary(Rs. Cr.)	Chitradurga (Rs. Cr.)	Tumkur (Rs. Cr.)	Total (Rs. Cr.)
1	Eco-Restoration	1584.79	555.64	515.23	2655.75
2	Agriculture & allied	881.93	391.04	330.08	1603.05
3	Drinking Water, Sanitation & Rural Roads	3464.70	978.68	486.52	4929.90
4	Health	1450.17	255.94	209.67	1915.78
5	Education	643.49	330.58	192.28	1166.35
6	Development of vulnerable sections	695.60	188.54	198.42	1082.56
7	Housing	1027	106.88	60	1193.88
8	Skill Development	436.19	70.79	31.27	538.25
9	Tourism	148	34	7	189
10	Irrigation	799	154.70	53	1006.70
11	Physical Infrastructure	734.99	105.29	44.08	884.36
12	Roads & Communication	1512.55	620.22	426.40	2559.17
13	Railway Infrastructure				5271.96
	Grand Total	13378.41	3792.30	2554.05	24996.71

94. The total expenditure to be incurred on the projects, which stand approved, is about Rs.7,000 crores.

95. It is an accepted and admitted position that in respect of 51 Category C mining leases, ICFRE had approved R&R Plans of 28 leases. In respect of the remaining 23 leases, inputs have not been provided to ICFRE to approve the R&R Plans. It is also stated that 23 lessees of Category C have not submitted any data. In three cases, R&R Plans submitted have not been approved by the CEC.

96. We do not think, at this stage, it will be appropriate to withdraw the 10% levy imposed by this Court in terms of the order dated 13.04.2012, as the CEPMIZ Plan is still at the initial stage of execution. The proposed plan was provisionally approved by this Court only *vide* order dated 21.04.2022. Objections and suggestions have been invited and are pending consideration by the Oversight Authority. This apart, we feel certain directions are required to be given for preparation of R&R Plans and execution thereof in respect of Category C leases, which were terminated/cancelled, but thereafter no progress has been made for submission of the plans or execution or implementation of R&R Plans.

97. Accordingly, we deem it appropriate to direct the Principal Chief Conservator of Forests,[20] State of Karnataka to undertake a detailed scrutiny and survey of all Category C mines, where data and R&R Plans have not been submitted and submit R&R Plans after conducting their scrutiny and survey. PCCF, Karnataka will be entitled to procure assistance from domain experts, specialized agencies or institutions. The cost incurred will be paid in the interim from the funds available with the SPV. The R&R Plans will be thereupon implemented and executed either through KMERC or if more appropriate, through any other agency, which may be nominated for this purpose after moving an application before this Court by the CEC, the Monitoring Committee, and the Oversight Authority.

98. The directions given above will equally apply to other cases of Categories A and B mines, where R&R Plans have not been submitted or approved.

99. The amount incurred for R&R Plans must be collected from the erstwhile Category C lease holders or the Category A and B lease holders, as appropriate. The amount will be collected as arrears of land revenue. However, no amount shall be refunded to the new lease holders. The amount collected will be deposited with the SPV.

I.A. No. 41984/2023

100. This application has become infructuous and is disposed of.

20 For short, "PCCF".

101. We clarify that the applicant will be entitled to file a fresh application after this Court has received a report from the CEC in terms of the directions given above.

I.A. Nos.17247/2020 and 17249/2020 and 17250/2020

102. I.A. nos. 17247/2020 seeks permission to file application for impleadment and 17249/2020 seeks impleadment. I.A. no. 17250/2020 has been filed seeking certain directions.

103. We see no reason to grant the prayer in the applications seeking directions to shift the category of the applicant from Category C to B. We have also examined the CEC report no. 23 of 2022.

104. All the applications accordingly stand dismissed.

105. In view of the aforesaid, I.A. Nos. 121324/2022, 121326/2022, and I. A. No. 173897/2022 (Application for Additional Documents) shall also stand disposed of.

I.A. No. 21886 of 2020

106. We are not inclined to accept the prayer made in the present application in view of the facts and hence, the same is dismissed.

I.A. No. 172166/2023

107. We are not inclined to accept the prayer made in the present application in view of the facts and hence, the same is dismissed.

I.A. 49701 in W.P.(C) No. 768/2013

108. The application is not taken up for hearing today.

Writ Petition No. 505 of 2020

109. Learned counsel appearing on behalf of respondent no. 2 – State of Karnataka has drawn our attention to the order dated 28.09.2022 passed in *"M/s Arjun Ladha v. The State of Odisha".*[21] The said order specifically refers to the present Writ Petition(C) No. 505 of 2020.

110. The period of the lease has expired by flux of time. We do not think any relief can be granted to the petitioner(s) in the present writ petition, and the same is dismissed.

21 Writ Petition (C) No. 539 of 2022.

111. It is stated by the learned counsel for the petitioner(s) that the petitioner(s) would like to challenge the fresh auction. It will be open to the petitioner(s) to challenge the fresh auction in accordance with law. However, we make no comments either way in this regard.

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

Headnotes prepared by:
Vidhi Thaker, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Directions issued in IAS Main Writ Petition pending.

[2024] 3 S.C.R. 1315 : 2024 INSC 226

Association of Democratic Reforms & Anr.
v.
Union of India & Ors.

(Miscellaneous Application No. 596 of 2024
In
Miscellaneous Application Diary No. 11805 of 2024
In
Miscellaneous Application No. 486 of 2024
In
Writ Petition (Civil) No. 880 of 2017)

18 March 2024

[Dr Dhananjaya Y Chandrachud, CJI, Sanjiv Khanna, B.R, Gavai, J.B. Pardiwala and Manoj Misra, JJ.]

Issue for Consideration

What is the extent of information required to be furnished by the State Bank of India under sub-paragraphs "b" and "c" of paragraph 219 of *Association for Democratic Reforms & Anr. Vs. Union Of India & Ors.* [2024] 2 SCR 420?

Headnotes

Elections – Electoral Bonds – SBI directed to disclose details of each Electoral Bond encashed by political parties both in terms of the purchase and in terms of the receipt of contributions – Directions issued to State Bank of India and Election Commission of India

Held: A plain reading of paragraph 219 of *Association for Democratic Reforms & Anr. vs. Union of India & Ors.* [2024] 2 SCR 420 indicates that SBI was required to submit *all* details, both in terms of the purchase and in terms of the receipt of contributions – The expression "include" in both subparagraphs "b" and "c" of paragraph 219 demonstrate that the inclusive part is illustrative and not exhaustive of the nature of the disclosure which is to be made by SBI – SBI is required to make a complete disclosure of all details in its possession – This will also comprehend the alphanumeric number and serial number of the Electoral Bonds which were purchased and redeemed – Chairman and Managing Director of SBI directed to submit the details to the Election Commission of India – Election Commission of India directed to

upload the details forthwith on receipt of communication by SBI. [Paras 7, 8, 11, 12]

Elections – Electoral Bonds – Miscellaneous Application filed for pre-dating point of disclosure – Rejected as not maintainable

Held: Vide sub-paragraphs "b" and "c" of paragraph 219 of *Association for Democratic Reforms & Anr. vs. Union of India & Ors.* [2024] 2 SCR 420, the State Bank of India has been directed to furnish the details of Electoral Bonds purchased as well as the Political Parties which have received contributions through Electoral Bonds since the date of the interim order dated 12 April 2019 – Since the Miscellaneous Application filed by the Applicant sought for pre-dating of the point of disclosure, the same rejected as amounting to substantive modification of the judgment. [Paras 3,4]

List of Keywords

Electoral Bonds; Full disclosure; Miscellaneous Application; Maintainability;

Case Arising From

CIVIL ORIGINAL JURISDICTION: Miscellaneous Application No. 596 of 2024

In

Miscellaneous Application Diary No. 11805 of 2024

In

Miscellaneous Application No. 486 of 2024

In

Writ Petition (Civil) No. 880 of 2017

From the Judgment and Order dated 15.03.2024 of the Supreme Court of India in D No.11805 of 2024

Appearances for Parties

Kapil Sibal, Vijay Hansaria, Sr. Advs., Varun thakur, Varinder Kumar Sharma, Ms Sneha Kalita, Ms. Kavya Jhawar, Ms. Nandini Rai, Ms. Doly Deka, Jessy Kurian, K.S. Bhati, Pawan Shree Agarwal, Advs. for the Petitioners.

Tushar Mehta, SG, Harish Salve, Sr. Adv., Sanjay Kapur, Ms. Divya Singh Pundir, Ms. Mahima Kapur, Ms. Mansi Kapur, Mrs. Shubhra Kapur, Devesh Dubey, Surya Prakash, Arjun Bhatia, Ms. Isha Virmani, Kanu Agarwal, Rajat Nair, Raman Yadav, Shyam Gopal, Raj Bahadur Yadav, Prashant Bhushan, Ms. Neha Rathi, Ms. Kajal Giri, Pranav Sachdeva, Ms. Shivani Kapoor, Kamal Kishore, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Miscellaneous Application Diary No 12580 of 2024

1. On being mentioned, the Miscellaneous Application is taken on Board.

2. In sub-paragraphs "b" and "c" of paragraph 221[1] of the judgment of this Court dated 15 February 2024, the direction to the State Bank of India are to submit details of the

   (i) Electoral Bonds purchased; and

   (ii) Political Parties which have received contributions through Electoral Bonds.

3. This information has to be submitted since the date of the interim order dated 12 April 2019. In other words, all details which have been directed to be furnished in the operative directions of this Court are to be submitted with effect from 12 April 2019.

4. The relief which has been sought in the Miscellaneous Application for pre-dating the point of disclosure would amount to a substantive modification of the judgment. Hence, it cannot be dealt with in a Miscellaneous Application.

5. The Miscellaneous Application is, therefore, not maintainable and is accordingly dismissed.

Miscellaneous Application No 596 of 2024

6. By the judgment of this Court dated 15 February 2024, this Court directed "the disclosure of information on contributions received by

1 2024 SCC OnLine SC 150

political parties under the Electoral Bond Scheme to give logical and complete effect" to the ruling.

7. Thereafter, in paragraph 221, this Court issued operative directions. These directions in sub-paragraph "b" and "c" are in two parts. Sub paragraph "b" requires SBI to submit details of the Electoral Bonds purchased since the interim order dated 12 April 2019 "till date to the ECI". Such details, the Court has indicated, "shall include the date of purchase of each Electoral Bond, the name of the purchaser of the bond and the denomination of the Electoral Bonds purchased". Under the second part of the operative directions in sub-paragraph "c", SBI was required to submit "the details of political parties which have received contributions through the Electoral Bonds" since the interim order dated 12 April 2019 till date to ECI. SBI was required to disclose details of **each** Electoral Bond encashed by political parties inclusive of the date of encashment and the denomination of the Electoral Bond.

8. A plain reading of paragraph 221 of the order dated 15 February 2024 indicates that SBI was required to submit **all** details, both in terms of the purchase and in terms of the receipt of contributions. The expression "include" in both sub-paragraphs "b" and "c" demonstrate that the inclusive part is illustrative and not exhaustive of the nature of the disclosure which is to be made by SBI.

9. In other words, SBI is required to make a complete disclosure of all details in its possession. This will also comprehend the alphanumeric number and serial number of the Electoral Bonds which were purchased and redeemed.

10. Mr Harish N Salve, senior counsel appearing on behalf of the SBI, states that there is no reservation on the part of the SBI in disclosing all details which are in its possession and custody.

11. In order to fully effectuate the judgment and to obviate any controversy in the future, we direct that the Chairman and the Managing Director of SBI shall file an affidavit on or before 5.00 pm on 21 March 2024 indicating that SBI has disclosed all details of the Electoral Bonds which are in its possession and custody and that no details have been withheld from disclosure in terms of the directions contained in paragraph 221 of the judgment dated 15 February 2024.

12. The Election Commission of India shall upload the details forthwith on receipt of the communication by SBI.

Headnotes prepared by:
Mukund P Unny, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Miscellaneous Applications disposed of

[2024] 3 S.C.R. 1320 : 2024 INSC 280

M K Ranjitsinh & Ors.
v.
Union of India & Ors.

(Writ Petition (Civil) No. 838 of 2019)

21 March 2024

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

Issue for Consideration

Conservation and protection of the endangered species of the Great Indian Bustard (GIB).

Headnotes

Environment – Rapid and steady decline in the population of the Great Indian Bustard (GIB) – Apart from various other factors, attrition of the existing population of these endangered birds was partly attributed to overhead transmission lines – Vide order dtd. 19.04.2021, a Committee was appointed for assessing the feasibility of laying high voltage underground power lines; direction was also issued imposing blanket prohibition w.r.t the installation of transmission lines for the distribution of solar power in a large territory and it was directed that in cases where overhead power lines existed as on date in the priority and potential GIB areas, steps be taken to install bird diverters pending consideration of the conversion of overhead power lines into underground power lines – Order implemented by the Committee – Modification of the directions sought by Ministry of Environment, Forests, and Climate Change, Ministry of Power and the Ministry of New and Renewable Energy:

Held: The GIB is seriously endangered as a species – However, there is no basis to impose a general prohibition in regard to the installation of transmission lines for the distribution of solar power in an area about 99,000 square kilometres – Reasons due to which it is not feasible to convert all transmission lines into underground power transmission lines, enumerated – While balancing two equally crucial goals, the conservation of the GIB on one hand, with the conservation of the environment as a whole on the other hand, it is necessary to adopt a holistic approach which does not sacrifice

* Author

either of the two goals at the altar of the other – The delicate balance between the two aims must not be disturbed – Rather, care must be taken by all actors including the state and the courts to ensure that both goals are met without compromising on either – Furthermore, the decision on whether to convert the overhead power transmission lines into underground lines is a matter of environmental policy – While adjudicating writ petitions which seek reliefs which are of the nature sought in the present case, this Court must conduct judicial review while relying on domain experts – Order passed by this Court on 19.04.2021 modified – A blanket direction for undergrounding high voltage and low voltage power lines of the nature that was directed by this Court vide said order need recalibration – Expert Committee constituted, remit stated – Directions contained in the aforesaid order substituted – Union of India and the concerned ministries to implement the measures described aimed at conserving the critically endangered GIB – Committee to complete its task and submit report. [Paras 52, 60, 62, 64, 66, 70, 72]

Environment – India's obligations, commitment under international conventions towards preventing climate change and tackling its adverse effects – United Nations Framework Convention on Climate Change; Kyoto Protocol; Paris Agreement – Key features of India's commitment – Discussed.

Environment – Importance of solar power as a source of renewable energy – National Solar Mission; National Mission for Enhanced Energy Efficiency, National Mission for a Green India; National Mission on Strategic Knowledge for Climate Change – Urgent need to shift to solar power – Discussed.

Environment – Right to a healthy environment; Right to be free from the adverse effects of climate change – Constitution of India – Articles 14, 21, 48A, 51A(g):

Held: Despite governmental policy and rules and regulations recognising the adverse effects of climate change and seeking to combat it, there is no single or umbrella legislation in India which relates to climate change and the attendant concerns – However, this does not mean that the people of India do not have a right against the adverse effects of climate change – Importance of the environment, as indicated by Article 48A, Article 51A(g) of the Constitution of India, becomes a right in other parts of the Constitution – Article 21 recognises the right to life and personal liberty while Article 14 indicates that all persons shall have equality before law and the

equal protection of laws – These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change – Despite a plethora of decisions on the right to a clean environment, some decisions which recognise climate change as a serious threat, and national policies which seek to combat climate change, it is yet to be articulated that the people have a right against the adverse effects of climate change – This is perhaps because this right and the right to a clean environment are two sides of the same coin – As the havoc caused by climate change increases year by year, it becomes necessary to articulate this as a distinct right – It is recognised by Articles 14 and 21 – Further, the right to health (a part of the right to life under Article 21) is impacted due to factors such as air pollution, shifts in vector-borne diseases, rising temperatures, droughts, shortages in food supplies due to crop failure, storms, and flooding – If climate change and environmental degradation lead to acute food and water shortages in a particular area, poorer communities will suffer more than richer ones – The right to equality would undoubtedly be impacted in each of these instances – There is a right to be free from the adverse effects of climate change – While giving effect to this right, courts must be alive to other rights of affected communities such as the right against displacement and allied rights – India faces a number of pressing near-term challenges that directly impact the right to a healthy environment, particularly for vulnerable and indigenous communities including forest dwellers – The importance of prioritizing clean energy initiatives to ensure environmental sustainability and uphold human rights obligations cannot be understated – The right to a healthy environment encapsulates the principle that every individual has the entitlement to live in an environment that is clean, safe, and conducive to their well-being – It is imperative for states like India, to uphold their obligations under international law, including their responsibilities to mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment. [Paras 19, 20, 24, 25, 27, 34, 35]

Environment – Climate change litigation in other jurisdictions – United Nations Framework Convention on Climate Change – Global trends in climate change litigation – Role of Courts in such litigation – Highlighted.

Environment – Intersection between climate change and human rights – Discussed.

Case Law Cited

M.C. Mehta v. Kamal Nath [2000] Supp. 1 SCR 389 **: (2000) 6 SCC 213;** *Virender Gaur v. State of Haryana* [1994] Supp. 6 SCR 78 **: (1995) 2 SCC 577;** *Karnataka Industrial Areas Development Board v. C. Kenchappa* [2006] Supp. 2 SCR 362 **: (2006) 6 SCC 371;** *Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group* [2006] 2 SCR 920 **: (2006) 3 SCC 434;** *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.* [2008] 9 SCR 165 **: (2008) 13 SCC 30;** *Apparel Export Promotion Council v. A.K. Chopra* [1999] 1 SCR 117 **: (1999) 1 SCC 759 – referred to.**

The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, HR 20 December 2019 **ECLI:NL:HR:2019:2006;** *Committee on the Rights of the Child, Sacchi et al. v. Argentina et al. (dec.), Committee on the Rights of the Child, 22 September 2021,* **CRC/C/88/D/104/2019;** *Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* **[2015] NZSC 107 – referred to.**

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M. Burger and J. Wentz (eds.), Climate Change and Human Rights, UNEP: December 2015, p.11, 19; J.H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, of 24 January 2018; o D.R. Boyd, Statement on the human rights obligations related to climate change, with a particular focus on the right to life, 25 October 2018, p. 2 -8; J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2023 Snapshot', London School of Economics and Political Science, (2023); D Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 American Journal of International Law, 288; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 2; M. Wewerinke-Singh, State Responsibility, Climate Change and Human Rights

under International Law, Oxford etc.: Hart 2019, pp. 108-109 and 130 **– referred to.**

List of Acts

Constitution of India; Wild Life (Protection)Act 1972, Water (Prevention and Control of Pollution) Act 1974, Air (Prevention and Control of Pollution) Act 1981, Environment (Protection) Act 1986, National Green Tribunal Act 2010; Energy Conservation Act 2001; Electricity Act 2003; Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules 2022.

List of Keywords

The Great Indian Bustard; Endangered species; Overhead transmission lines; Blanket prohibition; Solar power; Conservation of the environment; Environmental policy; Domain experts; Expert Committee; Climate change; Right to be free from the adverse effects of climate change; International conventions; Kyoto Protocol; Paris Agreement; Greenhouse gas emissions; Renewable energy; Fossil fuels; Non-fossil fuels; Right to a healthy environment; Right to equality; Indigenous communities; Forest dwellers; Clean environment; Right to life; Right to health; Human rights and Environment; Climate obligations under international law; Clean energy initiatives; Environmental sustainability; Environmental protection; Sustainable development; Global warming; Carbon footprint.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 838 of 2019

(Under Article 32 of The Constitution of India)

With

Civil Appeal No. 3570 of 2022

Appearances for Parties

Shyam Divan, Prashanto Chandra Sen, Sr. Advs., Ms. Sonia Dube, Ms. Kanchan Yadav, Ms. Anshula L Bakhru, Ms. Surbhi Anand, Arpith Jacob Varaprasad, Ms. Muskan Nagpal, Tanishq Sharma, Ms. Saumya Sharma, M/S. Legal Options, Advs. for the Petitioners.

R. Venkataramani, AG, Ms. Aishwarya Bhati, A.S.G., Shiv Mangal Sharma, Saurabh Mishra, A.A.Gs., M.G. Ramchandran, Dr. Manish

Singhvi, Ranji Thomas, Sr. Advs., Gurmeet Singh Makker, Ms. Ruchi Kohli, Ankur Talwar, Shyam Gopal, Ms. Chinmayee Chandra, Ms. Swarupama Chaturvedi, Chitvan Singhal, Raman Yadav, Kartikay Aggarwal, Abhishek Kumar Pandey, Ms. Ameya Vikrama Thanvi, Mukesh Kumar Singh, Ms. Nidhi Jaiswal, Saurabh Rajpal, Ms. Shalini Singh, Sandeep Kumar Jha, Milind Kumar, Ms. Deepanwita Priyanka, Mahfooz Ahsan Nazki, Rahul Chitnis, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Swati Ghildiyal, Ms. Devyani Bhatt, Sunny Choudhary, Abhimanyu Singh Ga, Shashank Shekhar, Santosh Krishnan, Girish Chowdhary, Ms. Sonam Anand, Shaik Mohammed Haneef, Ms. Deepshikha Sansanwal, Somesh Chandra Jha, Shreay Saini, Tarun Sharma, Ezaj . M Qureshi, Animesh Rajoriya, Ms. Hemantika Wahi, Ms. Jesal Wahi, Ms. Ranjitha Ramchandran, Rohit K. Singh, V. N. Raghupathy, A. Karthik, M/S. Vkc Law Offices, Varun K Chopra, Mehul Sharma, Ms. Arti Singh, Aakashdeep Singh Roda, Ms. Pooja Singh, B P Singh, Devendra Singh, Mrs. Priya Puri, Mrs. Arundhati Katju, Mrs. Smriti Sinha, Sharad Kumar Puri, Vishwa Deepak Singh, Mrs. Pinki Aggarwal, Ms. Parul Shrama, Ankur Sood, Gaurav Singh, Varun Agarwal, Vishrov Mukerjee, Pukhrambam Ramesh Kumar, Girik Bhalla, Damodar Solanki, Karun Sharma, Ms. Rajkumari Divyasana, S. S. Shroff, Mahesh Agarwal, Arshit Anand, Ms. Kamakshi Sehgal, E. C. Agrawala, Advs. for the Respondents.

Petitioner-in-person

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

Table of Contents*

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

1. The jurisdiction of this Court has been invoked for protecting the Great Indian Bustard[1] and the Lesser Florican, both of whom are on the verge of extinction. Given the importance of the issue at hand, a brief background of various aspects which pertain to the matter are discussed below.

A. The Great Indian Bustard

2. The GIB (the scientific name of which is *ardeotis nigriceps*) is native to southern and western India. It typically occupies grasslands or arid regions. The State of Rajasthan is home to a majority of the current population. With time, the country has seen a rapid and steady decline in the population of the GIB. As of 2018, the International Union for Conservation of Nature, or IUCN as it is popularly known, classified the GIB as a 'critically endangered' species. In IUCN's system of classification, only two categories indicate a graver threat to a particular species – 'extinct in the wild' and 'extinct'. The GIB has been classified as a critically endangered species from 2011 until the most recent assessment in 2018. From 1994 to 2008, it was classified as 'endangered' and in 1988, it was labelled 'threatened'. IUCN notes the justification for its classification of the GIB as a critically endangered species in the following terms:[2]

> "This species is listed as Critically Endangered because it has an extremely small population that has undergone an extremely rapid decline owing to a multitude of threats including habitat loss and degradation, hunting and direct disturbance. It now requires an urgent acceleration in

1 "GIB"

2 IUCN Red List, 'Great Indian Bustard' <https://www.iucnredlist.org/species/22691932/134188105#population>

targeted conservation actions in order to prevent it from becoming functionally extinct within a few decades."

3. The Rajasthan government estimated that only about 125 GIBs were present in the year 2013[3] while IUCN placed the number of mature GIBs between 50 and 249.[4] There are significant factors bearing upon the dwindling numbers and low rate of reproduction of the existing population of these species. Pollution, climate change, predators and competition with invasive species are among the many threats that exacerbate the challenges faced by these vulnerable species. The attrition of the existing population of these endangered birds has been partly attributed to overhead transmission lines. GIBs usually lay a single egg which has an incubation period of approximately one month. The GIBs nest on open ground or in cavities in the soil. Consequently, their eggs are also laid and incubated on the ground. The eggs are therefore at risk of being preyed upon by local predators including mongooses, monitor lizards, and other birds. Cows may also trample on or crush the eggs while grazing in the grasslands. The loss of habitat is also a serious concern. As humans have expanded their settlements and economic activities into the grasslands, the natural habitat of the GIB has diminished. The expansion of human population and accompanying activities has also resulted in the fragmentation of the GIB's habitat. The expansion of infrastructure such as roads, mining and farming activities have cumulatively contributed to the dangers faced by the avian species.

4. In the context of the dwindling population of GIBs and the existential threat looming over them, a writ petition invoking the constitutional jurisdiction under Article 32 - Writ Petition (Civil) No 838 of 2019 - was instituted for seeking directions relating to the conservation of the species. The petitioner *inter alia* sought that this Court:

    a. Issue directions to the respondents to urgently frame and implement an emergency response plan for the protection and recovery of the GIB, including directions for the installation of bird diverters, an immediate embargo on the sanction of new projects and the renewal of leases of existing projects,

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3 Government of Rajasthan, Forest Department, 'Project Great Indian Bustard' <https://forest.rajasthan.gov.in/content/raj/forest/en/footernav/department-wings/project-great-indian-bustard.html>

4 IUCN Red List (n 2).

dismantling power lines, wind turbines, and solar panels in and around critical habitats, installation of predator-proof enclosures in breeding habitats, implementation of a population control program for dogs, provision of no-grazing zones and restricted grazing zones in critical and semi-critical habitats, a prohibition on the use of insecticides and pesticides within a radius of 5 km of critical habitats and a prohibition on the encroachment of grasslands in and around critical and semi-critical habitats;

b. Issue directions to the concerned respondents to submit a report on the status of the breeding centres at Jaisalmer, Sorsan, and Velavadar;

c. Issue directions to the concerned respondents to take all measures necessary for the protection of grasslands including by ensuring that no remaining grasslands are classified as 'wastelands' and diverted to other uses, adopting a grasslands conservation policy, and adopting a national grazing policy;

d. Issue directions to the Ministry of Defence (Respondent No. 2) to sensitise the armed forces about the need for conservation of the GIB and to collaborate with scientific bodies in conservation efforts;

e. Appoint an Empowered Committee to oversee the implementation of the directions issued by the Court, to preserve and manage the endangered species and their habitats; and

f. Issue a declaration that the two endangered birds constitute one meta population of the nation and that all state authorities are bound to cooperate and take all steps necessary to ensure their conservation and to implement the decisions of the Empowered Committee.

B. The judgment dated 19 April 2021 and subsequent developments

5. In the order of this Court dated 19 April 2021, restrictions were imposed on the setting up of overhead transmission lines in a large swath of territory of about 99,000 square kilometres. These directions were in IA No 85618 of 2020 in Writ Petition (Civil) No 838 of 2019. In the operative directions, this Court, observed :

> " 14. In the light of the contentions urged on this aspect of the matter, we are conscious that the laying of the underground power line more particularly of high-voltage though not impossible, would require technical evaluation on case-to-case basis and an omnibus conclusion cannot be reached laying down a uniform method and directions cannot be issued unmindful of the fact situation. Though that be the position the consensus shall be that all low voltage powerlines to be laid in the priority and potential habitats of GIB shall in all cases be laid underground in future. In respect of low voltage overhead powerlines existing presently in the priority and potential habitats of GIB, the same shall be converted into underground powerlines. In respect of high-voltage powerlines in the priority and potential habitats of GIB, more particularly the powerlines referred in the prayer column of I.A. No.85618/2020 and indicated in the operative portion of this order shall be converted into underground power line."

6. This Court appointed a committee for assessing the feasibility of laying high voltage underground power lines. In paragraph 18 of its order, this Court directed that in all cases where overhead power lines exist as on date in the priority and potential GIB areas, steps shall be taken to install bird diverters pending consideration of the conversion of overhead power lines into underground power lines. Moreover, the court directed that in all cases, where it is found feasible to convert the overhead lines to underground power lines, this shall be undertaken and completed within a year.

7. The order of this Court has been implemented by the Committee by granting case-specific sanctions to projects where undergrounding was found not to be possible. Respondent Nos 1, 3, and 4 (the Ministry of Environment, Forests, and Climate Change, the Ministry of Power, and the Ministry of New and Renewable Energy respectively) filed IA No 149293 of 2021 on 17 November 2021 for modification of the directions issued by the judgment of this Court dated 19 April 2021. The grounds on which modification was sought are indicated below in brief:

   a. The judgment has vast adverse implications for the power sector in India and energy transition away from fossil fuels;

b. Respondent No. 4 was not heard before passing the judgment;

c. India has made International commitments including under the agreement signed in Paris in 2015 under the United Nations Framework Convention on Climate Change[5] for transition to non-fossil fuels and for the reduction of emissions. The area in respect of which the directions were issued is much larger than the actual area in which the GIBs dwell. Moreover, that area contains a very large proportion of the solar and wind energy potential of the country;

d. Undergrounding high voltage power lines is technically not possible; and

e. The coal fired power which would be used to replace the untapped energy from renewable sources in the concerned area would cause pollution.

8. By an order dated 19 January 2024, this Court directed as follows:

> "1 (The) Attorney General for India states that a comprehensive status report will be filed before this Court indicating the way forward as proposed by the Union Government which would take into account both the need for preservation of the Great Indian Bustard which faces a danger of extinction and need to ensure the development of solar power keeping in mind India's commitments at the international level.
>
> 2 The Union of India shall place its status report on the record...
>
> 3 In the meantime, we direct (i) the Chief Secretaries of the States of Gujarat and Rajasthan; and (ii) the Committee appointed by this Court, to file updated status reports.
>
> …"

9. In pursuance of this order, the Union of India has filed an additional affidavit and an updated, comprehensive status report. In the course of its affidavit, the Union of India has submitted that:

5 "UNFCCC"

a. The reduction in the population of GIBs began in the 1960s, much before the electrification of the area and the construction of transmission lines. Research indicates that the reasons for the dwindling population include a low birth rate, poaching, habitat destruction and predation. The use of insecticides and pesticides has resulted in the reduction of locusts and grasshoppers, which form an essential part of the prey of GIBs. The livestock population has also increased due to which there has been overgrazing in the pastures;

b. The direction by this Court for laying high voltage, or as the case may be, low voltage lines underground is practically impossible to implement;

c. The Union Government has a commitment at the international level to reduce India's carbon footprint and recourse to renewable sources of energy including solar installations provides the key to the implementation of these commitments;

d. The Union of India as well as the concerned state governments are taking comprehensive steps for the conservation and protection of the endangered species of the GIB. They are:

   i. The GIB is listed in Part III of Schedule I of the Wild Life (Protection) Act 1972. The species listed in Schedule I are granted the highest level of protection from hunting, in terms of this statute;

   ii. Under the centrally sponsored scheme titled 'Development of Wildlife Habitats', financial and technical assistance is being provided to the state governments for the conservation of the habitat of the GIB;

   iii. The Forest departments of the states of Rajasthan, Maharashtra, and Gujarat, in collaboration with the Wildlife Institute of India,[6] Dehradun, are carrying out conservation breeding with the aim of building a captive population of the species for release in the wild and promoting in-situ conservation of the species;

6 "WII"

iv. The Government of India has launched a program called the 'Habitat Improvement and Conservation Breeding of Great Indian Bustard' in 2016 for in-situ conservation of the GIB. It is being implemented in collaboration with the Government of Rajasthan;

v. At present, conservation breeding facilities are operational at Sam and Ramdeora in Jaisalmer. A partial founder population of the GIB consisting of twenty-one individuals and seven chicks has been secured. The chicks were artificially hatched from eggs collected from the wild. Captive breeding has been commenced;

vi. The conservation project is being supervised by a team of three scientists, three veterinarians, eighteen project associates, and forty local support staff;

vii. The WII has entered into a Memorandum of Understanding with the International Fund for Houbara Conservation which is dedicated to the conservation of the Houbara Bustard. The MoU outlines various areas of collaboration including training of staff, technical support and advice, and the supply of bird cages and food pellets in the initial stages of the conservation program; and

viii. A study of international efforts to conserve other species of bustards as well as other birds indicates that large swathes of land have not been closed off as a strategy of conservation. Instead, artificial insemination techniques have been used in concert with constructing enclosures in which chicks are nurtured until they are less vulnerable to predators. Such chicks are then released into the wild. This strategy has proved successful and the Government of India is replicating it with respect to the GIB.

e. A blanket direction of the nature that has been imposed by this Court, besides not being feasible to implement, would also not result in achieving its stated purpose, i.e., the conservation of the GIB.

10. Prior to adjudicating the application for modification, it is necessary to briefly advert to India's obligations towards preventing climate change

and tackling its adverse effects. This will assist the Court to take a decision based upon a holistic view of competing considerations.

C. The mission to combat climate change

I. India's commitment under international conventions

11. India has made significant international commitments in its pursuit of global environmental conservation goals. India was a participant in the Kyoto Protocol, which came into force on February 16, 2005. This international agreement, linked to the UNFCCC, obligates its Parties to establish binding emission reduction targets. The Protocol allows countries to meet these targets through national measures and offers additional mechanisms such as International Emissions Trading, Clean Development Mechanism, and Joint Implementation.

12. The UNFCCC is founded on the recognition that climate change is a global issue demanding a collective global response.[7] As greenhouse gas emissions originate from the territories of all nations and also impact all nations, it is imperative that all countries undertake measures to address this challenge. This fundamental premise is articulated in the preamble of the UNFCCC:

> "Acknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions,
>
> …
>
> Recalling also that States have … the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

13. The primary objective of the UNFCCC is to stabilize greenhouse gas concentrations in the atmosphere to prevent dangerous human-induced interference with the climate system, as articulated in Article

7 United Nations Framework Convention on Climate Change: resolution / adopted by the General Assembly (Adopted 20 January 1994).

2.[8] Article 3 elaborates on the principles guiding this objective. Notably, Article 3(1) underscores the responsibility of parties to protect the climate system for the benefit of present and future generations, based on equity and in line with their capabilities.[9] Article 3(3) emphasizes the importance of precautionary measures to anticipate, prevent, or minimize the causes and adverse effects of climate change.[10]

14. At the 18th Conference of the Parties in Doha, Qatar in December 2012[11], States reaffirmed their commitment to addressing climate change and laid the groundwork for greater ambition and action. Among various decisions, they set a timetable to adopt a Universal Climate Agreement by 2015. The objective was to build consensus on a binding and universal agreement which would limit greenhouse gas emissions to levels that would prevent global temperatures from increasing more than 2 degrees Celsius (3.6 degrees F) above the temperature benchmark set before the Industrial revolution. The COP 21 meeting was convened in Paris in December 2015, where 196 countries, including India signed a new Climate Change Agreement on 12 December 2015.[12] This is termed as the Paris Agreement.[13]

15. In the build-up to the Paris meeting, the UN had called upon parties to submit their plans on how they intended to reduce their greenhouse emissions. India submitted its Intended Nationally Determined Contribution (NDC) to the UNFCCC on October 2, 2015. The Paris Agreement mandates that each Party communicate a nationally determined contribution every five years. India communicated an update to its first NDC submitted earlier on 2 October 2015, for the period up to 2030. India's commitment under the Paris Agreement includes the following key features[14]:

    a. To achieve approximately 50 per cent cumulative electric power installed capacity from non-fossil fuel-based energy resources by

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8 *Ibid*, art 2.

9 *Ibid*, art 3(1).

10 *Ibid*, art 3(3).

11 "The Doha Climate Gateway"

12 Conference of the Parties, Adoption of the Paris Agreement (Adopted 12 December 2015). U.N. Doc. FCCC/CP/2015/L.9/Rev/1.

13 "Paris Agreement"

14 See UNFCCC, India's Updated First Nationally Determined Contribution Under Paris Agreement (2021-2030). https://unfccc.int/sites/default/files/NDC/202208/India%20Updated%20First%20Nationally%20Determined%20Contrib.pdf

2030, with support from the transfer of technology and low-cost international finance, including from the Green Climate Fund;

b. To enhance investments in development programs in sectors vulnerable to climate change, particularly agriculture, water resources, the Himalayan region, coastal areas, health, and disaster management, to better adapt to climate change impacts; and

c. To establish domestic frameworks and international architectures for the rapid dissemination of cutting-edge climate technology in India and to engage in joint collaborative research and development for future climate technologies.

As part of its pledge, India has committed to transitioning to non-fossil fuel sources and reducing emissions.

16. One of the key strategies in India's efforts towards sustainability is the ambitious target for renewable energy capacity installation. By 2022, India aimed to achieve an installed renewable energy capacity (excluding large hydro) of 175 GW (Gigawatts), a goal that signifies the country's commitment to clean energy adoption. Looking ahead, India has set an even more ambitious target for 2030, aiming to ramp up its installed renewable energy capacity to 450 GW. This long-term goal underscores India's recognition of the urgent need to accelerate the transition towards renewable energy to mitigate the impacts of climate change and achieve sustainable development.

17. To achieve these targets, India has implemented various policy measures and initiatives to promote renewable energy investment, innovation, and adoption. As highlighted in the Union's additional affidavit, India's commitment to transitioning to non-fossil fuels is not just a strategic energy goal but a fundamental necessity for environmental preservation. Investing in renewable energy not only addresses these urgent environmental concerns but also yields a plethora of socio-economic benefits. By shifting towards renewable energy sources, India enhances its energy security, reducing reliance on volatile fossil fuel markets and mitigating the risks associated with energy scarcity. Additionally, the adoption of renewable energy technologies helps in curbing air pollution, thereby improving public health and reducing healthcare costs.

18. The promotion of renewable energy sources plays a crucial role in promoting social equity by ensuring access to clean and affordable energy for all segments of society, especially in rural and underserved areas. This contributes to poverty alleviation, enhances quality of life, and fosters inclusive growth and development across the nation. Therefore, transitioning to renewable energy is not just an environmental imperative but also a strategic investment in India's future prosperity, resilience, and sustainability.

II. The right to a healthy environment and the right to be free from the adverse effects of climate change

19. India's efforts to combat climate change are manifold. Parliament has enacted the Wild Life (Protection)Act 1972, the Water (Prevention and Control of Pollution) Act 1974, the Air (Prevention and Control of Pollution) Act 1981, the Environment (Protection) Act 1986, the National Green Tribunal Act 2010, amongst others. In 2022, the Energy Conservation Act 2001 was amended to empower the Central Government to provide for a carbon credit trading scheme.[15] The Electricity (Promoting Renewable Energy Through Green Energy Open Access) Rules 2022 were made in exercise of the powers under the Electricity Act 2003 to ensure access to and incentivise green energy. The executive wing of the government has implemented a host of projects over the years including the National Solar Mission (discussed in greater detail in the subsequent segment), the National Mission for Enhanced Energy Efficiency, the National Mission for a Green India, and the National Mission on Strategic Knowledge for Climate Change, amongst others. Despite governmental policy and rules and regulations recognising the adverse effects of climate change and seeking to combat it, there is no single or umbrella legislation in India which relates to climate change and the attendant concerns. However, this does not mean that the people of India do not have a right against the adverse effects of climate change.

20. Article 48A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. Clause (g) of Article 51A stipulates that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wild life,

15 Energy Conservation Act 2001, Section 14(w).

and to have compassion for living creatures. Although these are not justiciable provisions of the Constitution, they are indications that the Constitution recognises the importance of the natural world. The importance of the environment, as indicated by these provisions, becomes a right in other parts of the Constitution. Article 21 recognises the right to life and personal liberty while Article 14 indicates that all persons shall have equality before law and the equal protection of laws. These articles are important sources of the right to a clean environment and the right against the adverse effects of climate change.

21. In **M.C. Mehta v. Kamal Nath**,[16] this Court held that Articles 48A and 51A(g) must be interpreted in light of Article 21:

> "8. …. These two articles have to be considered in the light of Article 21 of the Constitution which provides that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21 of the Constitution."

22. In **Virender Gaur v. State of Haryana**,[17] this Court recognised the right to a clean environment in the following terms:

> "7. … The State, in particular has duty in that behalf and to shed its extravagant unbridled sovereign power and to forge in its policy to maintain ecological balance and hygienic environment. Article 21 protects right to life as a fundamental right. Enjoyment of life and its attainment including their right to life with human dignity encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which life cannot be enjoyed. Any contra acts or actions would cause environmental pollution. Environmental, ecological, air, water, pollution, etc. should be regarded as amounting to violation of Article

16 [2000] Supp. 1 SCR 389 : (2000) 6 SCC 213

17 [1994] Supp. 6 SCR 78 : (1995) 2 SCC 577

> 21. Therefore, hygienic environment is an integral facet of right to healthy life and it would be impossible to live with human dignity without a humane and healthy environment. Environmental protection, therefore, has now become a matter of grave concern for human existence. Promoting environmental protection implies maintenance of the environment as a whole comprising the man-made and the natural environment. Therefore, there is a constitutional imperative on the State Government and the municipalities, not only to ensure and safeguard proper environment but also an imperative duty to take adequate measures to promote, protect and improve both the man-made and the natural environment."

23. In **Karnataka Industrial Areas Development Board v. C. Kenchappa**,[18] this Court took note of the adverse effects of rising sea levels and rising global temperatures. In **Bombay Dyeing & Mfg. Co. Ltd. (3) v. Bombay Environmental Action Group**,[19] this Court recognised that climate change posed a "major threat" to the environment.

24. Despite a plethora of decisions on the right to a clean environment, some decisions which recognise climate change as a serious threat, and national policies which seek to combat climate change, it is yet to be articulated that the people have a right against the adverse effects of climate change. This is perhaps because this right and the right to a clean environment are two sides of the same coin. As the havoc caused by climate change increases year by year, it becomes necessary to articulate this as a distinct right. It is recognised by Articles 14 and 21.

25. Without a clean environment which is stable and unimpacted by the vagaries of climate change, the right to life is not fully realised. The right to health (which is a part of the right to life under Article 21) is impacted due to factors such as air pollution, shifts in vector-borne diseases, rising temperatures, droughts, shortages in food supplies due to crop failure, storms, and flooding. The inability of underserved communities to adapt to climate change or cope with its

18 [2006] Supp. 2 SCR 362 : (2006) 6 SCC 371

19 [2006] 2 SCR 920 : (2006) 3 SCC 434

effects violates the right to life as well as the right to equality. This is better understood with the help of an example. If climate change and environmental degradation lead to acute food and water shortages in a particular area, poorer communities will suffer more than richer ones. The right to equality would undoubtedly be impacted in each of these instances.

26. The right to equality may also be violated in ways that are more difficult to remedy. For example, a person living in say, the Lakshadweep Islands, will be in a disadvantageous position compared to person living in say, Madhya Pradesh when sea levels rise and oceanic problems ensue. Similarly, forest dwellers or tribal and indigenous communities are at a high risk of losing not only their homes but also their culture, which is inextricably intertwined with the places they live in and the resources of that place. In India, the tribal population in the Nicobar islands continues to lead a traditional life which is unconnected to and separate from any other part of the country or world. Indigenous communities often lead traditional lives, whose dependence on the land is of a different character from the dependence which urban populations have on the land. Traditional activities such as fishing and hunting may be impacted by climate change, affecting the source of sustenance for such people. Further, the relationship that indigenous communities have with nature may be tied to their culture or religion. The destruction of their lands and forests or their displacement from their homes may result in a permanent loss of their unique culture. In these ways too, climate change may impact the constitutional guarantee of the right to equality.

27. The right to equality under Article 14 and the right to life under Article 21 must be appreciated in the context of the decisions of this Court, the actions and commitments of the state on the national and international level, and scientific consensus on climate change and its adverse effects. From these, it emerges that there is a right to be free from the adverse effects of climate change. It is important to note that while giving effect to this right, courts must be alive to other rights of affected communities such as the right against displacement and allied rights. Different constitutional rights must be carefully considered before a decision is reached in a particular case.

28. In 2019, the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights,

the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities jointly issued a statement in which they recognised that "…*State parties have obligations, including extra-territorial obligations, to respect, protect and fulfil all human rights of all peoples. Failure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations*."[20]

29. Of late, the intersection between climate change and human rights has been put in sharp focus, underscoring the imperative for states to address climate impacts through the lens of rights. For instance, the contribution of the UN High Commissioner for Human Rights to the 2015 Climate Conference in Paris emphasized that climate change directly and indirectly affects a broad spectrum of internationally guaranteed human rights.[21] States owe a duty of care to citizens to prevent harm and to ensure overall well-being. The right to a healthy and clean environment is undoubtedly a part of this duty of care. States are compelled to take effective measures to mitigate climate change and ensure that all individuals have the necessary capacity to adapt to the climate crisis.

30. This acknowledgement of human rights in the context of climate change is underscored in the preamble of the Paris Agreement, which recognizes the interconnection between climate change and various human rights, including the right to health, indigenous rights, gender equality, and the right to development:

> "Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people

20 UN Office of the High Commissioner, Five UN human rights treaty bodies issue a joint statement on human rights and climate change, 16 September 2019. <https://www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and>.

21 UN Human Rights Office, Understanding Human Rights and Climate Change. Submission of the Office of the High Commissioner for Human Rights to the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015.

in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity."

31. The 2015 United Nations Environment Programme report also outlined five human rights obligations related to climate change, including both mitigation and adaptation efforts.[22] In 2018, the UN Special Rapporteur on Human Rights and the Environment emphasized that human rights necessitate states to establish effective laws and policies to reduce greenhouse gas emissions, aligning with the framework principles on human rights and the environment.[23]

32. The Inter-American Court of Human Rights[24] issued an advisory opinion in 2017 affirming the right to a healthy environment as a fundamental human right. The IACtHR delineated state obligations regarding significant environmental harm, including cross-border impacts, recognizing the inherent relationship between environmental protection and the enjoyment of various human rights. Violations of the right to a healthy environment can reverberate across numerous rights domains, including the right to life, personal integrity, health, water, and housing, as well as procedural rights such as information, expression, association, and participation.

33. In her comprehensive study exploring climate obligations under international law, Wewerinke-Singh underscores the imperative for states to both adapt to and mitigate the impacts of climate change in alignment with human rights principles.[25] This resonates deeply with the burgeoning recognition of the right to a healthy environment as a fundamental human right within the global discourse on environmental protection and sustainability. When discussing the right to a healthy environment, it is crucial to address access to clean and sustainable energy. Clean energy aligns with the human right to a healthy

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22 M. Burger and J. Wentz (eds.), Climate Change and Human Rights, UNEP: December 2015, p.11, 19. <wedocs.unep.org/handle/20.500.11822/9934>

23 J.H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, A/HRC/37/59 of 24 January 2018 (available at <undocs.org/A/HRC/37/59>; See also D.R. Boyd, Statement on the human rights obligations related to climate change, with a particular focus on the right to life, 25 October 2018, p. 2 -8.

24 "IACtHR"

25 M. Wewerinke-Singh, State Responsibility, Climate Change and Human Rights under International Law, Oxford etc.: Hart 2019, pp. 108-109 and 130.

environment, as first recognized by the UN Special Rapporteur on Human Rights and the Environment in 1994.[26]

34. Unequal energy access disproportionately affects women and girls due to their gender roles and responsibilities such as through time spent on domestic chores and unpaid care work. Women in many developing countries spend on average 1.4 hours a day collecting fuelwood and four hours cooking, in addition to other household tasks that could be supported by energy access.[27] The importance of prioritizing clean energy initiatives to ensure environmental sustainability and uphold human rights obligations cannot be understated.

35. India faces a number of pressing near-term challenges that directly impact the right to a healthy environment, particularly for vulnerable and indigenous communities including forest dwellers. The lack of reliable electricity supply for many citizens not only hinders economic development but also disproportionately affects communities, including women and low-income households, further perpetuating inequalities. Therefore, the right to a healthy environment encapsulates the principle that every individual has the entitlement to live in an environment that is clean, safe, and conducive to their well-being. By recognizing the right to a healthy environment and the right to be free from the adverse effects of climate change, states are compelled to prioritize environmental protection and sustainable development, thereby addressing the root causes of climate change and safeguarding the well-being of present and future generations. It is imperative for states like India, to uphold their obligations under international law, including their responsibilities to mitigate greenhouse gas emissions, adapt to climate impacts, and protect the fundamental rights of all individuals to live in a healthy and sustainable environment.

III. Importance of solar power as a source of renewable energy

36. There are many sources of air pollution which harm public health and infringe upon the right to a healthy environment. High levels of

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26 UN Special Rapporteur on Human Rights and the Environment (1994). "Draft Declaration of Principles on Human Rights and the Environment." Report to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN.4/Sub.2/1994/9, Appendix.

27 UN Sustainable Development Goals, Accelerating SDG 7, Achievement Policy Brief- 12 Global Progress of SDG 7—Energy and Gender, UN High-Level Political Forum. 2018. <https://sustainabledevelopment.un.org/content/documents/17489PB12.pdf>

pollution caused by industries and vehicular pollution has left Indian cities amongst those with the poorest air quality in the world, posing significant health risks to citizens. Addressing these challenges requires prioritizing the transition to clean and sustainable energy sources, ensuring a healthier environment for all individuals in India, and safeguarding the well-being of future generations, with particular attention to the rights and needs of vulnerable communities. Therefore, while speaking about climate change, the importance of solar power cannot be overstated. In addition to being sustainable and renewable, solar energy stands out as a pivotal solution in the global transition towards cleaner energy sources. Its significance lies in its capacity to significantly reduce reliance on fossil fuels, thereby curbing greenhouse gas emissions responsible for global warming and climate change.

37. India is endowed with vast solar energy potential and receives about 5,000 trillion kWh per year of solar energy, with most regions receiving 4-7 kWh per sqm per day.[28] Solar photovoltaic power offers immense scalability in India, allowing for effective harnessing of solar energy. Moreover, solar energy facilitates distributed power generation, allowing for rapid capacity addition with short lead times. The impact of solar energy on India's energy landscape has been tangible in recent years. Decentralized and distributed solar applications have brought substantial benefits to millions of people in Indian villages, addressing their cooking, lighting, and other energy needs in an environmentally friendly manner. These initiatives have led to social and economic benefits, including reducing drudgery among rural women and girls, minimizing health risks associated with indoor air pollution, generating employment at the village level, and ultimately improving living standards and fostering economic activities. Additionally, the solar energy sector in India has emerged as a significant contributor to grid-connected power generation capacity. It aligns with India's agenda of sustainable growth and plays a crucial role in meeting the nation's energy needs while enhancing energy security.

38. Solar energy holds a central place in India's National Action Plan on Climate Change, with the National Solar Mission[29] being one of its

28 Ministry of New and Renewable Energy, Solar Overview (2023). See also, Ref. REN21's Global Status Report 2023 & IRENA's Renewable Capacity Statistics 2023.

29 "NSM"

key initiatives. Launched on 11 January 2010, NSM aims to establish India as a global leader in solar energy by creating favourable policy conditions for the diffusion of solar technology across the country. This mission is in line with India's Nationally Determined Contributions target, which aims to achieve about 50 per cent cumulative electric power installed capacity from non-fossil fuel-based energy resources and reduce the emission intensity of its GDP by 45 per cent from 2005 levels by 2030. India's goal to achieve 500 GW of non-fossil-based electricity generation capacity by 2030 aligns with its efforts to be Net Zero by 2070. In 2023-24, out of the total generation capacity of 9,943 MW added, 8,269 is from non-fossil fuel sources. According to the Renewable Energy Statistics 2023 released by the International Renewable Energy Agency (IRENA), India has the 4th largest installed capacity of renewable energy.[30]

39. The International Solar Alliance[31] was formed at the COP21 held in Paris in 2015, as a joint effort by India and France. It is an international platform with 94 member countries.[32] It works with governments to improve energy access and security worldwide and promote solar power as a sustainable way to transition to a carbon-neutral future. ISA's mission is to unlock USD 1 trillion of investments in solar energy by 2030 while reducing the cost of the technology and its financing. It is partnering with multilateral development banks, development financial institutions, private and public sector organisations, civil society, and other international institutions to deploy cost-effective and transformational energy solutions powered by the sun, especially in the least Developed Countries[33] and the Small Island Developing States.[34]

40. The idea for the One Sun One World One Grid [35]initiative was put forth by India at the First Assembly of the ISA in October 2018.[36] The vision behind the OSOWOG initiative is the mantra that "the

30 IRENA, 'Renewable capacity statistics 2023'. International Renewable Energy Agency, Abu Dhabi. < https://www.irena.org/Publications/2023/Mar/Renewable-capacity-statistics-2023>

31 "ISA"

32 See International Solar Alliance, 'Background' <https://isolaralliance.org/about/background>

33 "LDCs"

34 "SIDS"

35 "OSOWOG"

36 International Solar Alliance, 'Annual Report 2020', pp. 4. <https://isolaralliance.org/uploads/docs/20469ea05e2b897ca9ffec8a17273f.pdf >

sun never sets". This initiative aims to connect different regional grids through a common grid that will be used to transfer renewable energy power and, thus, realize the potential of renewable energy sources, especially solar energy.

41. In 2021, the Green Grids Initiative[37] was launched in partnership with OSOWOG during the COP26 World Leaders' Summit. The UK and India jointly adopted the One Sun Declaration which was endorsed by 92 countries.[38] This represented a flagship area for climate collaboration and established the partnership between the two initiatives to tackle arguably the greatest global challenge to a clean powered future: how to build and operate electricity grids capable of absorbing ever greater shares of renewable energy while meeting growing power demands sustainably, securely, reliably, and affordably.

42. It is imperative for India to not only find alternatives to coal-based fuels but also secure its energy demands in a sustainable manner. India urgently needs to shift to solar power due to three impending issues.[39] Firstly, India is likely to account for 25% of global energy demand growth over the next two decades, necessitating a move towards solar for enhanced energy security and self-sufficiency while mitigating environmental impacts. Failure to do so may increase dependence on coal and oil, leading to economic and environmental costs. Secondly, rampant air pollution emphasizes the need for cleaner energy sources like solar to combat pollution caused by fossil fuels. Lastly, declining groundwater levels and decreasing annual rainfall underscore the importance of diversifying energy sources. Solar power, unlike coal, does not strain groundwater supplies. The extensive use of solar power plants is a crucial step towards cleaner, cheaper, and sustainable energy.

43. The geographical landscape of Gujarat and Rajasthan, characterized by vast expanses of arid desert terrain and an abundance of sunlight, positions these regions as prime areas for solar power generation.

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37 "GGI"

38 Ministry of New Renewable Energy, Green Grids Initiative-One Sun One World One Grid Northwest Europe Cooperative Event, (2022) <https://pib.gov.in/PressReleasePage.aspx?PRID=1763712>

39 See Invest India, 'One Sun, One World, One Grid: Empowering Sustainability', 10 January 2024. <https://www.investindia.gov.in/team-india-blogs/one-sun-one-world-one-grid-empowering-sustainability>

The arid climate of these desert regions ensures minimal cloud cover and precipitation, resulting in uninterrupted exposure to sunlight for prolonged durations throughout the year. The consistent and intense sunlight creates ideal conditions for photovoltaic (PV) solar panels to efficiently convert solar radiation into electricity. Additionally, the relatively flat topography of these areas facilitates the installation and operation of large-scale solar energy projects, further enhancing their suitability for solar power generation. By harnessing this natural advantage, India can significantly reduce its reliance on fossil fuels and transition towards cleaner energy sources. Solar power not only meets the country's growing energy demands but also helps mitigate the adverse effects of climate change by reducing greenhouse gas emissions.

IV. Climate change litigation in other jurisdictions

44. Climate change litigation serves as a pivotal tool in advancing rights-based energy transitions and promoting energy justice, intertwined with human rights principles.[40] Article 3(1) of the UNFCCC underscores the imperative for parties to safeguard the climate system for the well-being of present and future generations, grounded in equity and is reflective of their differentiated responsibilities and capabilities. This obligation places a particular onus on developed countries to take the lead in addressing climate change and its adverse impacts. Moreover, the mechanisms established under international climate change law contribute to a more comprehensive and cohesive approach to monitoring and implementing Sustainable Development Goal 7 (SDG7) (i.e., ensuring access to affordable, reliable, sustainable and modern energy for all) and related international obligations.[41]

45. Internationally, courts have been confronted with the challenging task of adjudicating cases where significant issues related to climate change are at stake. The topics of environmental degradation, pollution, industries, and infrastructure projects have long formed the corpus of cases before courts across countries. Of late, however, an increasing number of cases are to do with climate change, in

40 J Setzer and R Byrnes, 'Global Trends in Climate Change Litigation: 2023 Snapshot', London School of Economics and Political Science, (2023). < https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2023/06/Global_trends_in_climate_change_litigation_2023_snapshot.pdf>

41 D Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110 American Journal of International Law, 288.

one way or another. It is necessary to advert to the judgments from other jurisdictions, not because they have precedential value in the adjudication of this case but to highlight global trends in climate change litigation and to assess the manner in which courts have understood their own role in such litigation.

46. In **State of the Netherlands** v. **Urgenda Foundation,**[42] the respondent sought directions to the State of the Netherlands directing it to reduce the emission of greenhouse gases. The District Court and the Court of Appeal ruled in favour of the respondent. On appeal, the Dutch Supreme Court affirmed the decisions of the lower courts. It acknowledged the obligations under Articles 2 (right to life)[43] and 8 (right to private and family life)[44] of the European Convention on Human Rights,[45] compelling the State to adopt more ambitious climate policies. The case addressed whether the Dutch government was obligated to reduce greenhouse gas emissions originating from its territory by at least 25% compared to 1990 levels by the end of 2020, and whether a judicial intervention was warranted.

47. The Supreme Court of the Netherlands recognized the direct correlation between anthropogenic greenhouse gas emissions and global warming, emphasizing the potentially severe consequences of exceeding a 2°C temperature rise, which could threaten the right to life and disrupt family life.[46] Additionally, it observed that the right to private and family life applies to environmental matters where pollution directly impacts these rights, requiring States to implement "reasonable and appropriate measures" to safeguard individuals from significant environmental harm.[47]

48. In **Sacchi, et al.** v. **Argentina, et al**[48] sixteen children from different countries sent a communication to the Committee on the Rights of

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42 The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation, HR 20 December 2019, ECLI:NL:HR:2019:2006, para 2.1

43 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended), art 2.

44 *Ibid*, art 8.

45 "ECHR"

46 *Ibid.*

47 *Ibid.* Para 5.2.3.

48 Committee on the Rights of the Child, Sacchi et al. v. Argentina (dec.), 22 September 2021, CRC/C/88/D/104/2019.

the Child[49] alleging violations of their rights under the UN Convention on the Rights of the Child[50] by Argentina, Brazil, France, Germany, and Turkey. The communication asserted that these nations had not reduced their greenhouse gas emissions to an adequate level and that they had failed to curb carbon pollution. Although the CRC found that the communication was inadmissible for failure to exhaust domestic remedies, it affirmed that States exercise effective control over carbon emissions and bear responsibility for transboundary harm arising from such emissions. Notably, it observed that while climate change necessitates a global response, individual states retain accountability for their actions or inactions concerning climate change and their contribution to its effects.

49. In **Ioane Teitiota** v. **The Chief Executive of the Ministry of Business, Innovation and Employment**,[51] the appellant travelled to New Zealand from Kiribati, a small island country in the Pacific Ocean, and remained there after his permit expired. He later applied for refugee status and / or protected person status on the ground that sea levels in Kiribati were rising due to climate change. He anticipated being forced to leave Kiribati in the future due to this. The relevant authorities rejected his application and the concerned tribunal dismissed the appeal. The appellant sought leave to appeal the decision of the tribunal, which was rejected by two appellate courts. Finally, the Supreme Court of New Zealand dismissed his application for leave to appeal. It held that the appellant would not face serious harm if he returned to Kiribati and that there was "*no evidence that the Government of Kiribati [was] failing to take steps to protect its citizens from the effects of environmental degradation*." Significantly, it also held that its decision in this case would not rule out the possibility of a similar application succeeding in an appropriate case in the future.

50. These cases, all instituted and decided in the past decade, indicate the type of concerns which will travel to the courts in the next few years.

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49 "CRC"

50 "UNCRC"

51 [2015] NZSC 107.

D. The reasons for the modification of the judgement dated 19 April 2021

51. During the course of the hearing, reference has been made to several reports which were prepared by the Wild Life Institute of India, identifying 13,663 square kilometres as the "priority area"; 80,680 square kilometres as "potential areas"; and 6,654 square kilometres as "additional important areas" for the GIB. These areas are distributed between the States of Rajasthan and Gujarat. The tabulation is reproduced below:

AREAS	State of Rajasthan	State of Gujarat	Total
Priority Areas	13,163 sq. kms.	500 sq. kms.	13,663 sq. kms
Potential Areas	78,580 sq. kms	2,100 sq. kms.	80,680 sq. kms
Additionally Important Areas	5977 sq. kms.	677 sq. kms.	6654 sq. kms.

52. During the course of the hearing and by its previous orders, this Court has underscored the importance of taking proactive measures to protect the GIB. The GIB is seriously endangered as a species. At the same time, it has emerged in the course of the hearing that there is no basis to impose a general prohibition in regard to the installation of transmission lines for the distribution of solar power in an area about 99,000 square kilometres. There are several reasons due to which it is not feasible to convert all transmission lines into underground power transmission lines:

a. In view of the diverse factors responsible for the reduction in the population of the GIB as discussed in the preceding paragraphs, the conversion of overhead into underground transmission lines is not likely to lead to the conservation of the species. Other factors such as low fecundity, fragmentation, habitat loss, predators, and loss of prey must be addressed;

b. Underground power transmission cables are available only in 400 kV. The drum size for such cables is 250 m. These cables have a greater number of joints. The current is more likely to leak from joints. For a 1 km stretch, about 4 to 5 joints will be present. When laid for longer distances spanning thousands of kilometres, the number of joints will increase proportionately. As the number of joints increases, there is a corresponding rise in the

risk to safety, especially to farmers under whose land the cables are laid. The downtime of electricity plants will also increase. Further, 400 kV lines can be laid for a maximum of 5 to 8 km;

c. 220 kV lines have been laid underground in some areas. In those places where they have been laid underground, flag marks were placed to trace the route of the cable and to avoid accidents while digging around the cable. However, such marks do not serve their intended purpose in desert regions because of strong winds which blow and carry sand. The effect is that the landscape and sand dunes change. This may cover or otherwise impact the flag markings. In the absence of functional markings, it is unsafe and impractical to underground high voltage cables in deserts;

d. Underground cables do not efficiently transmit AC power. The transmission loss in such cables is higher by about five times;

e. It is difficult and time-consuming to detect faults with underground cables. If there is a delay in attending to and repairing problems with such cables, the rise in the temperature of the cable may result in it bursting. This would endanger the safety of GIBs;

f. The Electricity Act does not contemplate the acquisition of land. However land may be required to be acquired if cables are to be undergrounded. In contrast, overhead transmission lines require only the right of way;

g. Underground cables may give rise to environmental issues for many vulnerable species. They may also result in forest fires or other fires;

h. The cost of laying underground cables is prohibitive. It is about four to five times higher than laying overhead transmission lines. The cost is estimated to run into thousands of crores. If the cables are undergrounded in their entirety, the cost of harnessing renewable energy would be prohibitive;

i. Cables are not generally used for the evacuation of power from a generating station;

j. The report prepared by the technical expert committee constituted by the Ministry of Power indicates that the undergrounding of transmission lines of 60kV and above is not technically feasible

because any outage would result in large generation losses;

k. It is essential to harness power from sources of renewable energy in Rajasthan and Gujarat to meet the rising power demand in the country in an expeditious and sustainable manner. This is also necessitated by India's international commitments with respect to climate change;

l. The area in which undergrounding has been directed to be implemented is about 80,688 sq km, which is larger than many states in India. Even globally, undergrounding of cables in such a large area has not been attempted; and

m. The same area in which undergrounding has been directed to be implemented contains the lion's share of the potential areas from which wind and solar energy may be harnessed. Until now, only 3% of this potential has been tapped. If the remaining potential remains untapped, an additional 93,000 MW of coal would be required in the future. An estimated 623 billion kg of carbon dioxide would be released from coal fired power generation. This would significantly damage the environment and hinder global efforts to combat climate change. Thermal power plants would also adversely impact the health of the local populace.

53. In addition to the reasons listed above, it is imperative to recognize the intricate interface between the conservation of an endangered species, such as the Great Indian Bustard, and the imperative of protecting against climate change. Unlike the conventional notion of sustainable development, which often pits economic growth against environmental conservation, the dilemma here involves a nuanced interplay between safeguarding biodiversity and mitigating the impact of climate change. It is not a binary choice between conservation and development but rather a dynamic interplay between protecting a critically endangered species and addressing the pressing global challenge of climate change.

54. India's commitment to promoting renewable energy sources, particularly in regions like Gujarat and Rajasthan, aligns with its broader sustainable development objectives. By transitioning towards solar power and other renewable energy sources, India aims to not only reduce carbon emissions but also improve energy access, foster economic growth, and create employment opportunities.

55. India's commitment to sustainable development is also underpinned by its international obligations and commitments. As a signatory to various international conventions and agreements, including the UNFCCC and the Convention on Biological Diversity, India has pledged to uphold principles of environmental stewardship, biodiversity conservation, and climate action on the global stage. Through partnerships, knowledge sharing, and collaborative action, India seeks to amplify the impact of its sustainable development efforts, contributing to collective efforts aimed at addressing global challenges.

56. Needless to say, it is the duty of the Court to give effect to international agreements and treaties to which India is a party. In **Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.**,[52] this Court observed that it has relied on international law extensively including for the purpose of fulfilling the spirit of international obligations which India has entered into, when they are not in conflict with the existing domestic law.[53] It also rightly observed:

> "80. Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the international conventions."

57. In **Apparel Export Promotion Council v. A.K. Chopra**,[54] this Court cited numerous cases which constituted precedent for the proposition that this Court must give effect to international instruments which India is party to:

> "This Court has in numerous cases emphasised that while discussing constitutional requirements, court and counsel must never forget the core principle embodied in the international conventions and instruments and as far as possible, give effect to the principles contained in those international instruments. The courts are under an obligation to give due regard to international conventions

52 [2008] 9 SCR 165 : (2008) 13 SCC 30

53 This position has been reiterated by various other decisions of this Court. See, for instance, National Legal Services Authority v. Union of India, (2014) 5 SCC 438

54 [1999] 1 SCR 117 : (1999) 1 SCC 759

> and norms for construing domestic laws, more so, when there is no inconsistency between them and there is a void in domestic law. (See with advantage — Prem Shankar Shukla v. Delhi Admn. [(1980) 3 SCC 526 : 1980 SCC (Cri) 815 : AIR 1980 SC 1535] ; Mackinnon Mackenzie and Co. Ltd. v. Audrey D' Costa [(1987) 2 SCC 469 : 1987 SCC (L&S) 100 : JT (1987) 2 SC 34] ; Sheela Barse v. Secy., Children's Aid Society [(1987) 3 SCC 50, 54 : 1987 SCC (Cri) 458] SCC at p. 54; Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932 : JT (1997) 7 SC 384] ; People's Union for Civil Liberties v. Union of India [(1997) 3 SCC 433 : 1997 SCC (Cri) 434 : JT (1997) 2 SC 311] and D.K. Basu v. State of W.B. [(1997) 1 SCC 416, 438 : 1997 SCC (Cri) 92] SCC at p. 438.)"

58. India's international obligations and commitments in the present case (detailed in the preceding segments of this judgment) have not been enacted in domestic law. Regardless, the Court must be alive to these obligations while adjudicating writ petitions which seek reliefs that may hinder these obligations from being fulfilled or otherwise interfere with India's international commitments as well as the right to be free from the adverse effects of climate change.

59. Beyond mere adherence to international agreements, India's pursuit of sustainable development reflects the complex interplay between environmental conservation, social equity, economic prosperity and climate change. Its national goals in this regard require a holistic understanding of sustainable development that balances immediate needs with long-term sustainability, ensuring that present actions do not compromise the well-being of future generations. It acknowledges that solutions to today's challenges must not only address pressing issues but also lay the groundwork for a resilient and equitable future.

60. While balancing two equally crucial goals - the conservation of the GIB on one hand, with the conservation of the environment as a whole on the other hand - it is necessary to adopt a holistic approach which does not sacrifice either of the two goals at the altar of the other. The delicate balance between the two aims must not be disturbed. Rather, care must be taken by all actors including the state and the courts to ensure that both goals are met without compromising on either. Unlike other competing considerations, these do not exist in

disjunctive silos. Therefore, a dilemma such as the present one does not permit the foregrounding of one of these as a priority, at the cost of the other. If this Court were to direct that the power transmission lines be undergrounded in the entire area delineated above, many other parts of the environment would be adversely impacted. Other endangered species may suffer due to the emission of harmful gases from fossil fuels. Rising temperatures and the attendant evils of climate change may not be halted in a timely fashion, leading to disastrous consequences for humankind and civilisation as a whole. The existential threat may not be averted.

61. Moreover, the decision on whether to convert the overhead power transmission lines into underground lines is a matter of environmental policy. While adjudicating writ petitions which seek reliefs which are of the nature sought in the present case, this Court must conduct judicial review while relying on domain experts. Those who are equipped and trained to assess the various facets of a problem which is litigated before the Court must be consulted before a decision is taken. If this is not done, the Court may be in danger of passing directions without a full understanding of the issue in question. Consequently, in the absence of evidence which forms a certain basis for the directions sought, this Court must be circumspect in issuing sweeping directions. In view of the implications of the direction issuing a blanket prohibition on overhead transmission lines, we are of the view that the direction needs to be recalled and it will be appropriate if an expert committee is appointed. The committee may balance the need for the preservation of the GIB which is non-negotiable, on one hand, with the need for sustainable development, especially in the context of meeting the international commitments of the country towards promoting renewable sources of energy, on the other hand. By leveraging scientific expertise and engaging stakeholders in meaningful consultations, this approach ensures that conservation efforts are grounded in evidence and inclusive of diverse perspectives.

62. We are accordingly of the view that the order passed by this Court on 19 April 2021 needs to be suitably modified. A blanket direction for undergrounding high voltage and low voltage power lines of the nature that was directed by this Court would need recalibration for the reasons discussed above. This task is best left to domain

experts instead of an a priori adjudication by the Court. Experts can assess the feasibility of undergrounding power lines in specific areas, considering factors such as terrain, population density, and infrastructure requirements. This approach allows for more nuanced decision-making tailored to the unique circumstances of each location, ensuring that conservation objectives are met in a sustainable manner.

63. During the course of the hearing, we had requested Mr Shyam Divan, senior counsel appearing on behalf of the petitioners, Mr R Venkataramani, Attorney General for India, Mr. Tushar Mehta, Solicitor General of India, and Ms Aishwarya Bhati, Additional Solicitor General to propose names of experts for the constitution of a Committee to perform the task which the Court will assign to it.

64. Having received their suggestions and upon evaluating them, we constitute an Expert Committee, the composition of which will be as follows:

    (i) Director, Wildlife Institute of India, Dehradun;

    (ii) Dr Hari Shankar Singh, Member, National Board for Wildlife;

    (iii) Dr Niranjan Kumar Vasu, Former Principal Chief Conservator of Forest;

    (iv) Mr B Majumdar, former Chief Wildlife Warden and Principal Chief Conservator of Forest, Maharashtra;

    (v) Dr Devesh Gadhavi, Deputy Director, The Corbett Foundation.

    (vi) Shri Lalit Bohra, Joint Secretary (Green Energy Corridor), Ministry of New and Renewable Energy; and

    (vii) Joint Secretary, Ministry of Environment, Forests and Climate Change.

65. Since the work of the Committee, as assigned below, would also traverse the area of the setting up of transmission lines to facilitate solar power generation, we direct that the Committee shall consist of the following two special invitees:

    (i) Shri Ashok Kumar Rajpur, Member Power Systems, Central Electricity Authority; and

    (ii) Mr. PC Garg, Chief Operating Officer, Central Transmission

Utility of India Ltd.

66. The remit of the Committee which has been appointed by the Court shall encompass the following:

a. Determining the scope, feasibility and extent of overhead and underground electric lines in the area identified as priority areas in the reports of the Wild Life Institute of India in the States of Rajasthan and Gujarat;

b. The need for adopting conservation and protection measures for the GIB as well as other fauna specific to the topography;

c. Identification of the measures to be adopted in the priority areas to ensure the long-term survival of the GIB and facilitating an increase in its population. Such measures may include habitat restoration, anti-poaching initiatives, and community engagement programs;

d. Evaluating the potential consequences of climate change on GIB habitats, considering factors such as shifting precipitation patterns, temperature extremes, habitat degradation and developing adaptive management strategies to enhance their resilience;

e. Identification of suitable options in the context of sustainable development in the matter of laying power lines in the future. The alternatives identified should balance the conservation and protection of the GIB with the arrangement of power lines in a manner that would facilitate the fulfilment of the international commitments made by India for developing renewable sources of energy.

f. Engaging with relevant stakeholders, including government agencies, environmental organizations, wildlife biologists, local communities, and energy industry representatives, to solicit inputs, build consensus, and promote collaborative efforts towards achieving conservation and sustainable development goals;

g. Conducting a thorough review of conservation efforts and innovative approaches in similar contexts globally, such

as the Houbara Bustard in the Middle East or the Black Stilt in New Zealand, to inform best practices;

h. Implementing a robust monitoring and research program to track GIB populations, habitat dynamics, and the effectiveness of conservation measures over time. This may include employing techniques such as satellite tracking, camera trapping, and ecological surveys to gather essential data for informed decision-making; and

i. Adopting any additional measures both in regard to the priority and potential areas, as the Committee considers appropriate including considering the efficacy and suitability of installing bird diverters on existing and future power lines on the basis of a scientific study. The installation of sub-standard bird diverters which are of a poor quality would give the impression that conservation efforts are underway even as such efforts are destined for failure. Hence, it is of utmost importance to ensure that any direction by the Committee to install bird diverters by any party whose activities concern the GIB (including private operators) is implemented by installing bird diverters of a requisite standard and quality. Accordingly, if the Committee is of the view that the installation of bird diverters would subserve the conservation of the GIB species, it shall identify the indicators of high-quality bird diverters and specify the parameters that they must meet before they are installed. The Central Electricity Authority, Ministry of Power has released a document titled 'Technical Specification for Bird Flight Diverter'. These specifications concern the GIB in particular. By its undated letter to various power transmission companies and other concerned parties, the Central Electricity Authority noted that it had received complaints stating that the quality of the bird diverters being installed was unsatisfactory. It also requested the addressees to install diverters which are of a high quality. The relevant portion of the letter is extracted below:

> "We are in receipt of complaint/representation that poor quality bird flight diverters are being installed on the lines and sometimes disc of bird

> diverter is found strewn in the farm and land below transmission lines that may be due to poor quality of the product, inadequate designe by manufacturer, not installed properly due to lack of experienced manpower etc.
>
> CEA's "Technical Specifications for Bird Flight Diverter" were prepared after consultation with utilities and manufacturers. The document specifies that the minimum expected service life of the bird flight diverter should be at least 15 years and to ensure that the supplied bird diverter is of good quality, various tests have also been specified. To safeguard the Great Indian Bustard which is on the verge of extinction and other birds, you are requested to take necessary action so that good quality bird flight diverters are installed which shall be durable and effective for whole life and to be installed by experienced professionals so that these diverters can serve their designated purpose."

67. The Committee shall be at liberty to assess the efficacy of bird diverters and subject to its own findings on efficacy, to lay down specifications for bird diverters with due regard to the parameters specified by the Central Electricity Authority. It shall also identify the number of bird diverters required for the successful implementation of conservation efforts. In this regard, the Committee may also consider the recommendations of the technical expert committee constituted by the Ministry of Power by OM No 25–7/42/2019 – PG dated 27 May 2022.

68. The injunction which has been imposed in the order dated 19 April 2021 in respect of the area described as the priority and potential areas shall accordingly stand recalled subject to the condition that the Expert Committee appointed by this Court may lay down suitable parameters covering both the priority and potential areas.

69. In the event that the Committee considers it appropriate and necessary to do so, it would be at liberty to recommend to this Court any further measures that are required to enhance the protection of the GIB.

This may include identifying and adding suitable areas beyond the designated priority zones outlined above, if deemed crucial for the conservation of the species. Such additional areas could serve as vital habitats, corridors, or breeding grounds for the GIB, contributing significantly to its long-term survival.

70. We request the Committee to complete its task and submit a report to this Court through the Union Government on or before 31 July 2024.

71. In its affidavit, the Union of India has detailed the steps it has taken thus far and has also undertaken to implement a host of measures in the future, which are aimed at conserving the critically endangered GIB. They include:

    a. The Ministry of Environment, Forest and Climate Change has implemented the national GIB Project which undertakes ex-situ conservation measures to provide and conserve habitats into which captive bred birds may be released. Insulation breeding centres will be established in range states other than Rajasthan where they do not currently exist. In-situ operations will be implemented in the desert National Park Sanctuary, Rajasthan, Kachch Bustard Sanctuary, Gujarat, Great Indian Bustard Sanctuary, Maharashtra, Rollapadu Sanctuary, Andhra Pradesh, Ranebennur Sanctuary, Karnataka and Ghatigao Sanctuary, Madhya Pradesh;

    b. Predator-proof enclosures will be developed to prevent the entry of predators including foxes, mongooses, hedgehogs, and monitor lizards. Anthropogenic activities will not take place in these enclosures;

    c. Local grass seed dissemination will be used to restore degraded grasslands. Water will be supplied to these grasslands;

    d. Undesirable and invasive species will be eliminated to make the grasslands more friendly to GIBs released from captivity;

    e. GIB movement shall be monitored using satellite telemetry;

    f. Ongoing administration and maintenance will include the repair and restoration of water points and historic watch towers as well as the maintenance of existing fences and fire lines;

    g. ‘National Bustard Day’ will be celebrated to highlight the need for conservation;

h. Capacity building programmes will be conducted and collaboration with scientific organisations will be fostered. Further, local stakeholders will be involved in initiatives aimed at conserving the GIB and awareness programs will be implemented in the relevant areas;

i. As the majority of villages and settlements in the concerned region depend on grasslands for the supply of fodder, the pastures in these lands are in need of revival. These lands will be revived and innovative strategies of fodder management will be implemented; and

j. The conservation activities detailed above will be upscaled from the financial year commencing on 1 April 2024 and will continue for at least ten years.

72. The Union of India and the concerned ministries are directed to implement the measures described in the preceding paragraph, which it has undertaken to implement. Further, they are directed to continue implementing the measures detailed in paragraph 8(d) of this judgment. The directions contained in the order dated 19 April 2021 shall accordingly stand substituted by those contained in the present judgment. The project clearances which have been granted pursuant to the recommendations of the earlier committee appointed in terms of the order dated 19 April 2021 shall not be affected by the present judgment.

73. This Court records its appreciation to the work which was done by the Committee which was appointed in terms of the order dated 19 April 2021.

74. List in the second week of August 2024 for consideration of the report of the expert committee appointed in terms of the present judgment.

Headnotes prepared by: Divya Pandey

Result of the case:
Directions issued.