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[2024] 5 S.C.R. 1 : 2024 INSC 319

Insolvency and Bankruptcy Board of India
v.
Satyanarayan Bankatlal Malu & Ors.

(Criminal Appeal No. 3851 of 2023)

19 April 2024

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

Issue for Consideration

Special Court under the Insolvency and Bankruptcy Code, 2016 would be as provided u/s. 435 of the Companies Act as it existed at the time when the Code came into effect, or it would be as provided u/s.435 after the 2018 Amendment; and the reference to 'Special Court established under Chapter XXVIII of the Companies Act, 2013' in s. 236(1) is 'legislation by incorporation' or 'legislation by reference'.

Headnotes

Insolvency and Bankruptcy Code, 2016 – ss.236, 73(a) and 235A – Trial of offences by Special Court – Petition by the Corporate Debtor for initiation of the Corporate Insolvency Resolution Process – Petition admitted and interim Resolution Professional appointed – Meanwhile, the respondent/Ex-Director of the Corporate Debtor filed an application for the withdrawal in light of One Time Settlement and the same was allowed by the NCLT – On account of non-compliance of the terms of the OTS by the respondents, the NCLT found it to be a fit case to prosecute the respondents – Appellant-Board then filed a complaint against the respondents before the Sessions Judge u/ss. 73(a) and 235A – Sessions Judge directed issuance of process against the respondents – Respondents filed writ petition before the High Court for the quashing the order passed by the Sessions Judge for the want of jurisdiction – High Court allowed the petition – Correctness:

Held: Special Court presided by a Sessions Judge or an Additional Sessions Judge would have jurisdiction to try the complaint under the Code – Under s. 236(1) the reference is only to the fact that the offences under the Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 – Reference is not general but specific – Instant case is a case of 'legislation by incorporation' and not a case of 'legislation by

* Author

reference' – Provision with regard to Special Court has been bodily lifted from s. 435 of the Companies Act, 2013 and incorporated in s. 236(1) – Provision of s. 435 of the Companies Act, 2013 with regard to Special Court would become a part of s. 236(1) as on the date of its enactment – Any amendment to s. 435 of the Companies Act, 2013, after the date on which the Code came into effect would not have any effect on the provisions of s. 236(1) – Special Court at that point of time only consists of a person who was qualified to be a Sessions Judge or an Additional Sessions Judge – Thus, the reasoning of the High Court that in view of the 2018 Amendment only the offences under the Companies Act would be tried by a Special Court of Sessions Judge or Additional Sessions Judge and all other offences including under the Code shall be tried by a Metropolitan Magistrate or Judicial Magistrate of the First Class, is untenable – High Court erred in quashing the complaint only on the ground that it was filed before a Special Court presided by a Sessions Judges – High Court could have directed the complaint to be withdrawn and presented before the appropriate court having jurisdiction – Impugned judgment passed by the High Court is quashed and set aside. [Paras 41-46,48]

Legislation – 'Legislation by incorporation' or a 'legislation by reference' – Distinction between:

Held: Effect of incorporation means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched – However, in the case of a reference or a citation of the provisions of one enactment into another without incorporation, the amendment or repeal of the provisions of the said Act referred to in a subsequent Act will also bear the effect of the amendment or repeal of the said provisions. [Para 27]

Case Law Cited

Bolani Ores Ltd. v. State of Orissa [1975] 2 SCR 138 : **(1974) 2 SCC 777;** *Mahindra and Mahindra Ltd. v. Union of India and another* [1979] 2 SCR 1038 : **(1979) 2 SCC 529;** *Ebix Singapore Private Limited v. Committee of Creditors of Educomp Solutions Limited and another* [2021] 14 SCR 321 : **(2022) 2 SCC 401;** *Embassy Property Developments Private Limited v. State of Karnataka and others* [2019] 17 SCR 559 : **(2020) 13 SCC 308;** *Bharti Airtel Ltd. and another v. Vijaykumar V. Iyer*

and others [2024] 1 SCR 140 **: (2024) SCC OnLine SC 4;** *Girnar Traders (3) v. State of Maharashtra and others* [2007] 9 SCR 383 **: (2011) 3 SCC 1;** *Collector of Customs, Madras v. Nathella Sampathu Chetty and Anr.* [1962] 3 SCR 786 **: AIR 1962 SC 316;** *New Central Jute Mills Co. Ltd. v. Assistant Collector of Central Excise, Allahabad & Ors.* [1971] 2 SCR 92 **: (1970) 2 SCC 820;** *Ujagar Prints and others v. Union of India and others* [1989] 1 SCR 344 **: (1989) 3 SCC 488;** *Innoventive Industries Limited v. ICICI Bank and another* [2017] 8 SCR 33 **: (2018) 1 SCC 407;** *Principal Commissioner of Income Tax v. Monnet Ispat and Energy Limited* **(2018) 18 SCC 786;** *E.S. Krishnamurthy and others v. Bharath Hi-Tech Builders Private Limited* [2021] 12 SCR 28 **: (2022) 3 SCC 161;** *Pratap Technocrats Private Limited and others v. Monitoring Committee of Reliance Infratel Limited and another* [2021] 8 SCR 938 **: (2021) 10 SCC 623;** *V. Nagarajan v. SKS Ispat and Power Limited and others* [2021] 14 SCR 736 **: (2022) 2 SCC 244 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016; Companies Act, 2013.

List of Keywords

Special Court; Legislation by incorporation; Legislation by reference; Want of jurisdiction.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3851 of 2023

From the Judgment and Order dated 14.02.2022 of the High Court of Judicature at Bombay in WP No. 2592 of 2021

Appearances for Parties

S.V. Raju, A.S.G., Ms. Rashi Rampal, Apoorv Khatore, Vikas Mehta, Advs. for the Appellant.

Amir Arsiwala, Dhaval Deshpande, Anand Dilip Landge, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Advs. for the Respondents.

Judgment / Order of the Supreme Court

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Judgment

B.R. Gavai, J.

I. FACTUAL BACKGROUND

1. This appeal challenges the judgement and order dated 14th February 2022, passed by the learned Single Judge of the High Court of Judicature at Bombay in Writ Petition No.2592 of 2021, thereby allowing the petition filed by Satyanarayan Bankatlal Malu and Ramesh Satyanarayan Malu, the Ex-Directors of M/s. SBM Paper Mills Pvt. Ltd. (hereinafter referred to as 'the Respondents') challenging the order dated 17th March 2021 passed by the learned Additional Sessions Judge, 58th Court in Special Case No.853 of 2020 ('learned Sessions Judge' for short). The learned Sessions Judge had directed issuance of process against the Respondents on account of a Complaint filed by the Insolvency and Bankruptcy Board of India (hereinafter referred to as 'the Appellant-Board') under Section 236 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as "the Code") read with Sections 190, 193 and 200 of the Code of Criminal Procedure, 1973 ("Cr.P.C.) for the offences punishable under Section 73(a) and Section 235A of the Code.

2. The facts in brief, giving rise to the present appeal are as under:

2.1 M/s. SBM Paper Mills Private Limited (hereinafter referred to as "the Corporate Debtor") filed a petition on 4th September 2017 under Section 10 of the Code for initiation of the Corporate Insolvency Resolution Process (hereinafter referred to as "CIRP") of itself vide CP/1362/I&BC/NCLT/MB/MAH/2017. The National Company Law Tribunal, Mumbai Bench (hereinafter

referred to as "the NCLT") vide order dated 17th October 2017, admitted the Petition and directed the moratorium to commence as prescribed under Section 14 of the Code and directed certain statutory steps to be taken as a consequence thereof. Vide the said order, the NCLT also appointed Mr. Amit Poddar as the Interim Resolution Professional (hereinafter referred to as "RP") to carry out the functions as prescribed under the provisions of the Code.

2.2 In the meanwhile, Mr. Satyanarayan Malu, i.e., the Respondent/ Ex-Director of the Corporate Debtor filed an application being M.A. No. 1396/2018 before the NCLT under Section 12A of the Code for the withdrawal of the aforesaid petition under Section 10 in light of a One Time Settlement ("OTS" for short) entered into with the sole Financial Creditor, i.e., Allahabad Bank. On the other hand, the RP had also filed an application being M.A. No. 827/2018 for the approval of the Resolution Plan. The NCLT vide order dated 20th December 2018 allowed the M.A. No. 1396/2018 filed by the Respondent while observing the consent for withdrawal of the petition by the sole Financial Creditor vide letter dated 27th November 2018.

2.3 However, on account of non-compliance of the terms of the OTS by the Respondents, the NCLT issued a Show-Cause Notice against them vide order dated 11th March 2019. The NCLT further found it to be a fit case to propose the prosecution of the Respondents vide order dated 20th August 2019 while hearing an application filed by the sole Financial Creditor being M.A. 494 and 495 of 2019 thereby seeking prosecution of the Respondents.

2.4 Thereafter, on 22nd September 2020, the Appellant-Board filed a Complaint against the Respondents before the Sessions Judge in Special Case No. 853/2020 under the aforementioned provisions and for offences punishable under Section 73(a) and 235A of the Code for the non-compliance of the terms of the OTS and for not having filed the M.A. 1396/2018 under Section 12A of the Code through the RP. The Sessions Judge vide Order dated 17th March 2021 directed issuance of process against the Respondents and further directed them to be summoned on the next date of hearing.

2.5 Being aggrieved thereby, the Respondents filed a Writ Petition No. 2592 of 2021 before the High Court of Judicature at Bombay, praying for the quashing and setting aside of the order dated 17th March 2021 passed by the Sessions Judge for the want of jurisdiction. The High Court vide impugned judgement and order dated 14th February 2022 allowed the Writ Petition No. 2592 of 2021 filed by the Respondents.

2.6 Hence, this Appeal.

II. SUBMISSIONS

3. We have heard Shri S.V. Raju, learned Additional Solicitor General of India ("ASG" for short) appearing for the Appellant-Board and Shri Amir Arsiwala, Advocate on Record, appearing for the Respondents/ Ex-Directors of the Corporate Debtor.

4. Shri S.V. Raju, learned ASG submitted that the learned Single Judge of the High Court has grossly erred in quashing the proceedings. Shri Raju submitted that the learned Single Judge of the High Court has grossly erred in holding that, in view of the Companies (Amendment) Act, 2017 (which came into effect from 7th May 2018), only the offences committed under the Companies Act can be tried by Special Court consisting of Sessions Judge or Additional Sessions Judge. He submitted that the reasoning given by the learned Single Judge that the offences other than the Companies Act cannot be tried by the Special Court consisting of Sessions Judge or Additional Sessions Judge is totally in ignorance of the provisions of sub-section (1) of Section 236 of the Code.

5. Learned ASG submitted that sub-section (1) of Section 236 of the Code provides that the offences under the Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013. He submits that the legislative intent is clear. There is no general reference to the provisions of the Companies Act. He submits that what has been done by sub-section (1) of Section 236 of the Code is that the offences punishable under the Code are required to be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013

6. Shri Raju further submitted that the legislative intent is clear. A specific provision of the Companies Act, 2013 has been incorporated in sub-section (1) of Section 236 of the Code. It is submitted that, if the

legislative intent was that of legislation by reference, then a general reference could have been made in sub-section (1) of Section 236 of the Code to Chapter XXVIII of the Companies Act. Learned ASG therefore submitted that, if the reference made to the Special Court established under Chapter XXVIII of the Companies Act, 2013 is held to be legislation by incorporation, then the subsequent amendments to the Companies Act, 2013 would not be applicable to the Code. He submitted that since the Code has come into effect on 28th May, 2016, the provisions of Section 435, as it existed in Chapter XXVIII of the Companies Act, 2013 then, would only be applicable. Learned ASG in this respect refers to the judgments of this Court in the cases of ***Bolani Ores Ltd. vs State of Orissa***[1] ***and*** ***Mahindra and Mahindra Ltd. vs Union of India and another***[2].

7. Learned ASG further submits that the Code has been held to be a complete Code in itself in a catena of judgments of this Court. In this respect, he relied on the judgments of this Court in the cases of ***Ebix Singapore Private Limited vs Committee of Creditors of Educomp Solutions Limited and another***[3], ***Embassy Property Developments Private Limited vs State of Karnataka and others***[4], and ***Bharti Airtel Ltd. and another vs Vijaykumar V. Iyer and others***[5].

8. Learned ASG submits that, if a statute is a complete Code in itself, then normally a reference to the provisions of the prior statute referred to in a subsequent statute would only have a restrictive operation. In such a case, it would be a 'legislation by incorporation' and not a 'legislation by reference'. In this respect, he relied on the judgments of this Court in the case of ***Girnar Traders (3) vs. State of Maharashtra and others***[6].

9. Learned ASG further submits that the Statement of Objects and Reasons (SOR) to the Companies (Amendment) Act, 2017, amending the Companies Act, 2013 clearly shows that the amendment is for the purposes of restricting only to the Companies

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1 [1975] 2 SCR 138 : (1974) 2 SCC 777

2 [1979] 2 SCR 1038 : (1979) 2 SCC 529

3 [2021] 14 SCR 321: (2022) 2 SCC 401

4 [2019] 17 SCR 559 : (2020) 13 SCC 308

5 [2024] 1 SCR 140 : 2024 SCC OnLine SC 4

6 [2007] 9 SCR 383 : (2011) 3 SCC 1

Act and not for any other purpose. He therefore submits that the finding of the learned Single Judge of the High Court that in view of the Companies (Amendment) Act, 2017, the Special Court consisting of Sessions Judge or Additional Sessions Judge will not have the jurisdiction to entertain the complaint in question is totally erroneous.

10. Learned ASG submits that, in any event, the learned Single Judge of the High Court has erred in quashing the complaint. It is submitted that, in the event the learned Single Judge found that the Special Court consisting of Sessions Judge or Additional Sessions Judge did not have jurisdiction and it is the Special Court of Metropolitan Magistrate or Judicial Magistrate First Class which has jurisdiction, then it should have returned the complaint for presentation of the same before the competent court having jurisdiction.

11. Shri Amir Arsiwala, learned Advocate on Record appearing for the Respondents raises a preliminary objection. He submits that the point with regard to 'legislation by incorporation' was not argued before the learned Single Judge of the High Court and therefore the said contention cannot be permitted to be raised for the first time in this Court.

12. Shri Arsiwala submits that the judgment of this Court in the case of ***Bolani Ores Ltd.*** (supra) would not be applicable in the facts of the present case inasmuch as, in the said case what was incorporated in the subsequent statute was a definition of 'motor vehicles' as found in the earlier statute i.e. Motor Vehicles Act, 1939. It is therefore submitted that, the definition cannot be in a state of flux subject to the mercy of amendments to the Central Act.

13. Similarly, he submits that the judgment of this Court in the case of ***Mahindra and Mahindra Ltd.*** (supra) would not be applicable to the facts of the present case inasmuch as, in the said case what was referred in Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 was a right to file an appeal on any of the grounds mentioned in Section 100 of the Code of Civil procedure, 1908 ("CPC" for short). He submitted that in the said case, this Court was considering a provision which provided a substantive right to file an appeal. As such, a reference to Section 100 of the CPC was held amounting to be an 'incorporation' as the substantive right of appeal could not be left at the mercy of subsequent amendments to the CPC.

14. Insofar as the judgment of this Court in the case of ***Girnar Traders*** (supra) is concerned, learned counsel submits that rather than the said judgment supporting the case of the Appellant-Board, if the test laid down in the said case is applied to the facts of the present case, it will lead to a conclusion that the present case is that of 'legislation by reference'.

15. Relying on the judgments of this Court in the cases of ***Collector of Customs, Madras vs Nathella Sampathu Chetty and Anr.***[7], ***New Central Jute Mills Co. Ltd. vs. Assistant Collector of Central Excise, Allahabad & Ors.***[8], ***and Ujagar Prints and others vs Union of India and others***[9], he submits that what has to be taken into consideration is the plain language used by the legislation in the statute to which a reference is made by the subsequent statute. Learned counsel submits that in the present case, a general reference is made to Chapter XXVIII of the Companies Act. It is therefore submitted that, since a general reference is made, the present case would not be a case of 'legislation by incorporation' but would be a case of 'legislation by reference'.

16. Learned counsel submits that in any case, the Respondents Nos.1 and 2 have a good case on merits. He submits that the learned Single Judge of the High Court has not considered the merits of the matter and in the event this Court holds that the learned Single Judge was not justified in quashing the proceedings, the matter be remitted to the learned Single Judge of the High Court for deciding it afresh on merits.

17. Shri Vikas Mehta, learned Advocate on Record for the Appellant-Board, in rejoinder, reiterated the submissions made by Shri S.V. Raju, learned ASG. He submits that the legislative intent is clear. If the legislature wanted to take out the offences punishable under the Code from the ambit of Chapter XXVIII of the Companies Act, 2013, nothing prevented it from making an amendment to the Code itself.

III. CONSIDERATION OF STATUTORY PROVISIONS

18. For considering the rival submissions, it will be necessary to refer to Section 236(1) of the Code, which reads thus:

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7 [1962] 3 SCR 786

8 [1971] 2 SCR 92 : (1970) 2 SCC 820

9 [1989] 1 SCR 344 : (1989) 3 SCC 488

> **236. Trial of offences by Special Court.**—(1) Notwithstanding anything in the Code of Criminal Procedure, 1973 (2 of 1974), offences under of this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013 (18 of 2013).

19. It can thus be seen that Section 236(1) of the Code begins with a non-obstante clause. It provides that the offences under the Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013. Chapter XXVIII of the Companies Act, 2013 deals with 'Special Courts'.

20. For appreciating the rival submissions, it will also be necessary to refer to Section 435 of the Companies Act, 2013, as it was originally enacted; Section 435 after the amendment in 2015 by the Companies (Amendment) Act, 2015, which came into effect from 29th May 2015 (hereinafter referred to as "the 2015 Amendment"); and Section 435 as it existed after the amendment by the Companies (Amendment) Act, 2017 with effect from 7th May 2018 (hereinafter referred to as "the 2018 Amendment"), which reads thus:

Section 435 (originally enacted)

> "435. *Establishment of Special Courts.*—(1) The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act, by notification, establish or designate as many Special Courts as may be necessary.
>
> (2) A Special Court shall consist of a Single Judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.
>
> (3) A person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge."

Section 435 (after the 2015 Amendment)

> "435. *Establishment of Special Courts.*—(1) The Central Government may, for the purpose of providing speedy trial of offences punishable under this Act with imprisonment of

two years or more, by notification, establish or designate as many Special Courts as may be necessary.

Provided that all other offences shall be tried, as the case may be, by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under this Act or under any previous company law.

(2) A Special Court shall consist of a Single Judge who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working.

(3) A person shall not be qualified for appointment as a Judge of a Special Court unless he is, immediately before such appointment, holding office of a Sessions Judge or an Additional Sessions Judge."

Section 435 (after the 2018 Amendment)

"**435. Establishment of Special Courts**.—(1) The Central Government may, for the purpose of providing speedy trial of offences under this Act, except under section 452, by notification, establish or designate as many Special Courts as may be necessary.

(2) A Special Court shall consist of—

(a) a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable under this Act with imprisonment of two years or more; and

(b) a Metropolitan Magistrate or a Judicial Magistrate of the First Class, in the case of other offences, who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court within whose jurisdiction the judge to be appointed is working."

21. It could thus be seen that as per Section 435(3) of the Companies Act, 2013, as it existed on the date on which the Code came into effect (i.e. after the 2015 Amendment), a person to be qualified for appointment as a Judge of a Special Court was required to hold office

of a Sessions Judge or an Additional Sessions Judge immediately before his appointment as a Judge of a Special Court.

22. After Section 435 of the Companies Act, 2013 suffered an amendment in the year 2015 by the 2015 Amendment (Act No. 21 of 2015), with effect from 29th May, 2015, sub-section (1) thereof provided that the Central Government may, for the purpose of providing speedy trial of offences punishable under the said Act with imprisonment of two years or more, by notification, establish or designate as many Special Courts as may be necessary. It further provided that all other offences shall be tried either by a Metropolitan Magistrate or a Judicial Magistrate of the First Class having jurisdiction to try any offence under the said Act or under any previous company law; meaning thereby, the offences under the Companies Act punishable with imprisonment of two years or more were to be tried by Special Courts comprising of Sessions Judge or Additional Sessions Judge, whereas all other offences punishable with imprisonment of less than two years, were to be tried by the Courts of Metropolitan Magistrate or Judicial Magistrate First Class having jurisdiction to try such offences. Insofar as sub-sections (2) and (3) are concerned, there was no change and as such, for being a person to be eligible for appointment as a Judge of a Special Court it was necessary that he occupied the office of a Sessions Judge or an Additional Sessions Judge prior to his appointment.

23. Another amendment to Section 435 of the Companies Act, 2013 was effected by the Companies (Amendment) Act, 2017 (i.e. Act No. 1 of 2018), with effect from 7th May, 2018. Vide the said amendment, two classes of Special Courts were constituted. Firstly, a Special Court presided by a single judge holding office as Session Judge or Additional Session Judge, in case of offences punishable with imprisonment of two years or more under the Companies Act, 2013; and the second being presided by a Metropolitan Magistrate or a Judicial Magistrate of the First Class in the case of other offences, i.e., offences punishable with imprisonment of less than two years.

24. It is thus clear that Section 435 of the Companies Act, 2013 as it originally existed, provided for only one class of Special Courts i.e. a person holding office of a Sessions Judge or an Additional Sessions Judge and all offences under the Companies Act, 2013 were required to be tried by such Special Courts. The 2015 Amendment to Section 435 also provided for only one class of Special Courts i.e. a person

holding the rank of a Sessions Judge or an Additional Sessions Judge. The change that was brought out was that, only offences punishable under the Companies Act, 2013 with imprisonment of two years or more were to be tried by the Special Courts, whereas all other offences i.e. offences punishable with imprisonment of less than two years were to be tried by the jurisdictional Metropolitan Magistrate or the Judicial Magistrate of the First Class. By the 2018 Amendment, two classes of Special Courts were established. The first class of Special Courts comprised of an officer holding the office as Sessions Judge or Additional Sessions Judge, whereas the second class of Special Courts comprised of Metropolitan Magistrate or a Judicial Magistrate of the First Class. The offences punishable under the Companies Act with imprisonment of two years or more were required to be tried by a Special Court comprising of Sessions Judge or Additional Sessions Judge, whereas all other offences i.e. the offences punishable with imprisonment of less than two years were to be tried by a Special Court comprising of Metropolitan Magistrate or the Judicial Magistrate of the First Class.

25. The question that requires to be considered is, as to whether the Special Court under the Code would be as provided under Section 435 of the Companies Act as it existed at the time when the Code came into effect, or it would be as provided under Section 435 of the Companies Act after the 2018 Amendment. The answer to that question would depend upon as to whether the reference to 'Special Court established under Chapter XXVIII of the Companies Act, 2013' in Section 236(1) of the Code is a 'legislation by incorporation' or a 'legislation by reference'. If it is held that it is a 'legislation by incorporation', then the subsequent amendments would not have any effect on the Code and the Special Court would continue to be as provided under Section 435 of the Companies Act, as it existed when the Code came into effect. Per contra, if it is held that it is a 'legislation by reference' then the subsequent amendments would also be applicable to the Code and the Special Courts would be as provided under Section 435 of the Companies Act after its amendment by the 2018 Amendment.

IV. CONSIDERATION OF PRECEDENTS

26. A Constitution Bench of this Court in the case of ***Collector of Customs, Madras vs Nathella Sampathu Chetty and Anr.*** (supra)

has considered the distinction between 'legislation by reference' and 'legislation by incorporation'. It will be apposite to refer to the following observations of this Court in the said case:

> "……To consider that the decision of the Privy Council has any relevance to the construction of the legal effect of the terms of Section 23-A of the Foreign Exchange Regulation Act is to ignore the distinction between a mere reference to or a citation of one statute in another and an incorporation which in effect means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched. In the case, however, of a reference or a citation of one enactment by another without incorporation, the effect of a repeal of the one "referred to" is that set out in Section 8(1) of the General clauses Act:
>
> > "8. (1) Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears: be construed as references to the provision so re-enacted."
>
> On the other hand, the effect of incorporation is as stated by Brett, L.J. in *Clarke* v. *Bradlaugh* [1881 8 QBD 63] :
>
> > "Where a statute is incorporated, by reference, into a second statute the repeal of the first statute by a third does not affect the second."
>
> This is analogous to, though not identical with the principle embodied in Section 6-A of the General Clauses Act enacted to define the effect of repeals effected by repealing and amending Acts which runs in these terms:
>
> > "6-A. Where any Central Act or Regulation made after the commencement of this Act repeals any enactment by which the text of any Central Act or Regulation was amended by the express omission,

> insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal."
>
> We say "not identical" because in the class of cases contemplated by Section 6-A of the General clauses Act, the function of the incorporating legislation is almost wholly to effect the incorporation and when that is accomplished, they die as it were a natural death which is formally effected by their repeal. In cases, however, dealt with by Brett, L.J. the legislation from which provisions are absorbed continue to retain their efficacy and usefulness and their independent operation even after the incorporation is effected."

27. It could thus be seen that the effect of incorporation means the bodily lifting of the provisions of one enactment and making it part of another so much so that the repeal of the former leaves the latter wholly untouched. However, in the case of a reference or a citation of the provisions of one enactment into another without incorporation, the amendment or repeal of the provisions of the said Act referred to in a subsequent Act will also bear the effect of the amendment or repeal of the said provisions.

28. In the case of ***Bolani Ores Ltd.*** (supra), this Court was considering the question as to what would be the effect of amendment of the definition of 'motor vehicles' for the purposes of Bihar and Orissa Motor Vehicles Taxation Act, 1930 (for short "the Orissa Taxation Act"). The Orissa Taxation Act had adopted the definition of 'motor vehicles' as provided in the Motor Vehicles Act, 1939 for the purposes of taxation. The definition at the time of adoption brought the motor vehicle under the ambit of the said definition. It excluded the 'motor vehicles' used solely upon the premises of the owner. However, the said enactment suffered an amendment in the year 1956 and specifically excluded vehicles of special type adapted for use only in a factory or in any other enclosed premises. It was sought to be urged on behalf of the State of Orissa that the definition of 'motor vehicles' as adopted in Section 2(c) of the Orissa Taxation Act was not the definition by 'incorporation' but a definition by 'reference' and therefore amendment to the said definition would also be applicable

for the purposes of taxation under the Orissa Taxation Act.

29. Rejecting the said contention and referring to various earlier judgments, this Court observed thus:

> "**29.** The question then remains as to whether these vehicles though registrable under the Act are motor vehicles for the purpose of the Taxation Act. ***It has already been pointed out that before the amendment vehicles used solely upon the premises of the owner, though they may be mechanically propelled vehicles adapted for use upon roads were excluded from the definition of 'motor vehicle'. If this definition which excludes them is the one which is incorporated by reference under Section 2(c) of the Taxation Act, then no tax is leviable on these vehicles under the Taxation Act***. Shri Tarkunde for the State of Orissa contends that the definition of 'motor vehicle' in Section 2(*c*) of the Taxation Act is not a definition by incorporation but only a definition by reference, and as such the meaning of 'motor vehicle' for the purpose of Section 2(*c*) of the Taxation Act would be the same as defined from time to time under Section 2(18) of the Act. In ascertaining the intention of the legislature in adopting the method of merely referring to the definition of 'motor vehicle' under the Act for the purpose of the Taxation Act, we have to keep in mind its purpose and intendment as also that of the Motor Vehicles Act. We have already stated what these purposes are and having regard to them the registration of a motor vehicle does not automatically make it liable for taxation under the Taxation Act. The Taxation Act is a regulatory measure imposing compensatory taxes for the purpose of raising revenue to meet the expenditure for making roads, maintaining them and for facilitating the movement and regulation of traffic. The validity of the taxing power under Entry 57 List II of the Seventh Schedule read with Article 301 of the Constitution depends upon the regulatory and compensatory nature of the taxes. It is not the purpose of the Taxation Act to levy taxes on vehicles which do not use the roads or in any way form

part of flow of traffic on the roads which is required to be regulated. The regulations under the Motor Vehicles Act for registration and prohibition of certain categories of vehicles being driven by persons who have no driving licence, even though those vehicles are not plying on the roads, are designed to ensure the safety of passengers and goods etc. etc. and for that purpose it is enacted to keep control and check on the vehicles. Legislative power under Entry 35 of List III (Concurrent List) does not bar such a provision. But Entry 57 of List II is subject to the limitations referred to above, namely, that the power of taxation thereunder cannot exceed the compensatory nature which must have some nexus with the vehicles using the roads viz. public roads. If the vehicles do not use the roads, notwithstanding that they are registered under the Act, they cannot be taxed. This very concept is embodied in the provisions of Section 7 of the Taxation Act as also the relevant sections in the Taxation Acts of other States, namely, that where a motor vehicle is not using the roads and it is declared that it will not use the roads for any quarter or quarters of a year or for any particular year or years, no tax is leviable thereon and if any tax has been paid for any quarter during which it is not proposed to use the motor vehicle on the road, the tax for that quarter is refundable. If this be the purpose and object of the Taxation Act, when the motor vehicle is defined under Section 2(*c*) of the Taxation Act as having the same meaning as in the Motor Vehicles Act, 1939, then the intention of the Legislature could not have been anything but to incorporate only the definition in the Motor Vehicles Act as then existing, namely, in 1943, as if that definition was bodily written into Section 2(*c*) of the Taxation Act. ***If the subsequent Orissa Motor Vehicles Taxation (Amendment) Act, 1943, incorporating the definition of 'motor vehicle' referred to the definition of 'motor vehicle' under the Act as then existing, the effect of this legislative method would, in our view, amount to an incorporation by reference of the provisions of Section 2(18) of the Act in Section 2(c) of the Taxation***

Act. Any subsequent amendment in the Act or a total repeal of the Act under a fresh legislation on that topic would not affect the definition of 'motor vehicle' in Section 2(c) of the Taxation Act. This is a well-accepted interpretation both in this country as well as in England which has to a large extent influenced our law. This view is further reinforced by the use of the word 'has' in the expression "has the same meaning as in the Motor Vehicles Act, 1939" in Section 2(*c*) of the Taxation Act, which would perhaps further justify the assumption that the Legislature had intended to incorporate the definition under the Act as it then existed and not as it may exist from time to time. This method of drafting which adopts incorporation by reference to another Act whatever may have been its historical justification in England in this country does not exhibit an activists draftsmanship which would have adopted the method of providing its own definition. Where two Acts are complimentary or interconnected, legislation by reference may be an easier method because a definition given in the one Act may be made to do as the definition in the other Act both of which being enacted by the same Legislature. At any rate, Lord Esher, M.R. dealing with legislation by incorporation, in *In re. Wood's Estate* [(1886) 31 Ch D 607] said at p. 615:

> "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have these clauses in the later Act, you have no occasion to refer to the former Act at all."

The observations in *Clarke* v. *Bradlaugh* [(1881) 8 QBD 63 607] are also to the same effect. Brett, L.J. in that case had said at p. 69:

> "… there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second."

30. In *Secretary of State for India in Council* v. *Hindusthan Cooperative Insurance Society Ltd.* [AIR 1931 PC 149 : 132 IC 748 : LR 58 IA 259] the Privy Council was considering a case where the incorporation effected in the statute viz. the Calcutta Improvement Trust Act, 1911 — referred to by their Lordships as the "Local Act" — was in express terms and in the form illustrated by 54 and 55 Vict., Ch. 19. The "Local Act" in dealing with the acquisition of land for the purposes designated by it, made provision for the acquisition under the Land Acquisition Act, and the provisions of the Land Acquisition Act were subjected to numerous modifications which were set out in the Schedule, so that in effect the "Local Act" was held to be the enactment of a Special Law for the acquisition of land for the special purpose. It was in the context of these and several other provisions which pointed to the absorption of certain of the provisions of the Land Acquisition Act into the "Local Act" with vital modifications that Privy Council observed at p. 266:

> "But Their Lordships think that there are other and perhaps more cogent objections to this contention of the Secretary of State, and their Lordships are not prepared to hold that the sub-section in question, which was not enacted till 1921, can be regarded as incorporated in the Local Act of 1911. It was not part of the Land Acquisition Act when the Local Act was passed, nor in adopting the provisions of the Land Acquisition Act is there anything to suggest that the Bengal Legislature intended to bind themselves to any future additions which might be made to that Act. It is at least conceivable that new provisions might have been added to the Land Acquisition Act which would be wholly unsuitable to the local code. Nor again, does Act 19 of 1921 contain any provision that the amendments enacted by it are to be treated as in any way retrospective, or are to be regarded as affecting any other enactment than the Land Acquisition Act itself. Their Lordships regard the Local Act as doing nothing more than incorporating certain provisions

> from an existing Act, and for convenience of drafting doing so by reference to that Act, instead of setting out for itself at length the provisions which it was desired to adopt."

It was further observed at p. 267:

> "In this country it is accepted that where a statute is incorporated by reference into a second statute, the repeal of the first statute does not affect the second: see the cases collected in *Craies on Statute Law*, 3rd Edn. pp. 349-50. This doctrine finds expression in a common-form section which regularly appears in the amending and repealing Acts which are passed from time to time in India …. The independent existence of the two Acts is therefore recognized; despite the death of the parent Act, its off-spring survives in the incorporating Act. Though no such saving clause appears in the General Clauses Act, their Lordships think that the principle involved is as applicable in India as it is in this country.
>
> It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition."

This Court in the *Collector of Customs, Madras v. Nathella SampathuChetty* [AIR 1962 SC 316 : (1962) 3 SCR 786, 830-833 : (1962) 1 Cr LJ 364] considered the Privy Council decision in the *Hindustan Cooperative Insurance Society Ltd*. and distinguished that case and held the principle inapplicable to the facts of that case.

31. In *State of Bihar* v. *S.K. Roy* [AIR 1966 SC 1995 : 1966 Supp SCR 259 : (1966) 2 LLJ 759] this Court was considering the definition of "employer" in Section 2(*e*) of the Coal Mines Provident Fund and Bonus Schemes Act, 1948, where that expression was defined to mean "the owner of a coal mine as defined in clause (*g*) of Section

3 of the Indian Mines Act, 1923". The Indian Mines Act, 1923, had been repealed and substituted by the Mines Act, 1952 (Act 35 of 1952). In the latter Act the word "owner" had been defined in clause (1) of Section 2. The question was whether by virtue of Section 8 of the General Clauses Act, the definition of the word "employer" in clause (*e*) of Section 2 of the Coal Mines Provident Fund and Bonus Schemes Act should be construed with reference to the definition of the word, "owner" in clause (1) of Section 2 of Act 35 of 1952, which repealed the earlier Act and re-enacted it. It may be mentioned that according to Section 2(1) of Act 35 of 1952 the word "owner", when used in relation to a mine, means "any person who is the immediate proprietor or lessee or occupier of the mine or of any part thereof and in the case of a mine the business whereof is being carried on by a liquidator or receiver, such liquidator or receiver…." The expression "coal mine" is separately defined in clause (*b*) of Section 2 of the Coal Mines Provident Fund and Bonus Schemes Act, 1948. Ramaswami, J. speaking for the Court observed at p. 261:

> "As a matter of construction it must be held that all works, machinery, tramways and sidings, whether above or below ground, in or adjacent to a coal mine will come within the scope and ambit of the definition only when they belong to the coal mine. In other words, the word or occurring before the expression 'belonging to a coal mine' in the main definition has to be read to mean 'and'."

This case, as well as the decision in *New Central Jute Mills Co. Ltd. v. Assistant Collector of Central Excise, Allahabad* [(1970) 2 SCC 820 : (1971) 2 SCR 92] are distinguishable on the facts and legislation which this Court was considering. In the *New Central Jute Mills Co. Ltd. case*, the Privy Council decision in the *Hindusthan Cooperative Insurance Society Ltd. case* was referred to and distinguished. It is, however, contended by the learned Solicitor General that both in *Nathella Sampathu Chetty case* as well as the *New Central Jute Mills Co. Ltd. case* this Court was considering the effects of the two Acts which

were made by Parliament by Central legislation and it is, therefore, not strictly a case of incorporation because the Central Legislature is deemed to have, while making the latter enactment, kept in view the provisions of the former Act. In our view this may not be conclusive.

32. In *Ram Sarup* v. *Munshi* [AIR 1963 SC 553 : (1963) 3 SCR 858] a judgment of the Bench of five Judges of this Court held that the repeal of the Punjab Alienation of Land Act, 1900, had no effect on the continued operation of the Punjab Pre-emption Act, 1913, and that the expression "agricultural land" in the later Act had to be read as if the definition of the Alienation of Land Act had been bodily transposed into it. After referring to the observations of Brett, L.J. in *Clarke case*, Rajagopala Ayyangar, J. speaking for the Court observed at pp. 868-69:

> "Where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated.
>
> * * *
>
> In the circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre-emption Act and the expression 'agricultural land' in the later Act has to be read as if the definition in the Alienation of Land Act had been bodily transposed into it."

The above decision of this Court is more in point and supports our conclusion. In our view, the intention of Parliament for modifying the Motor Vehicles Act has no relevance in determining the intention of the Orissa Legislature in enacting the Taxation Act."

[Emphasis supplied]

30. It is thus clear that this Court found that, if the vehicles do not use the roads, notwithstanding that they are registered under the Motor Vehicles Act, they cannot be taxed under the Orissa Taxation Act. This Court held that the intention of the Legislature could not have

been anything but to incorporate only the definition in the Motor Vehicles Act, as it existed in 1943, as if that definition was bodily written into Section 2(*c*) of the Orissa Taxation Act. It further held that, if the subsequent Orissa Motor Vehicles Taxation (Amendment) Act, 1943, incorporating the definition of 'motor vehicle' referred to the definition of 'motor vehicle' under the Motor Vehicles Act, as it existed at the time of enactment of the subsequent Act; the effect of this legislative method would amount to an incorporation by reference to the provisions of Section 2(18) of the Motor Vehicles Act in Section 2(*c*) of the Orissa Taxation Act. It was further held that, any subsequent amendment in the Motor Vehicles Act or a total repeal of the Motor Vehicles Act under a fresh legislation on that topic would also not affect the definition of 'motor vehicle' in Section 2(*c*) of the Orissa Taxation Act.

31. This Court unequivocally held that the intention of Parliament for modifying the Motor Vehicles Act had no relevance in determining the intention of the Orissa Legislature in enacting the Orissa Taxation Act. This Court held that the dumpers and rockers, which were used by the miners in their premises though registrable under the Motor Vehicles Act were not taxable under the Orissa Taxation Act as long as they were working solely within the premises of the respective owners.

32. In the case of ***Mahindra and Mahindra Ltd.*** (supra), Section 55 of the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act, 1969" for short) provided that any person aggrieved by an order made by the Commission under Section 13 may prefer an appeal to the Supreme Court on 'one or more of the grounds specified in Section 100 of the CPC'. Section 100 of the CPC at the time of the incorporation of the MRTP Act specified three grounds on which a second appeal could be brought to the High Court and one of the grounds was that the decision appealed against was contrary to law. However, by the Code of Civil Procedure (Amendment) Act, 1976 with effect from February 1, 1977, it was provided that a second appeal shall lie to the High Court only if the High Court is satisfied that the case involves a substantial question of law. It was sought to be argued that substitution of the new Section 100 amounted to repeal and re-enactment of the former Section 100 and therefore the reference in Section 55 of the MRTP Act, 1969 to Section 100 of CPC must be construed as reference to the new Section 100 and

the appeal would be tenable only on ground specified in the new Section 100 of CPC i.e., on a substantial question of law.

33. Rejecting the said contention, this Court observed thus:

> "**8.** The first question that arises for consideration on the preliminary objection of the respondents is as to what is the true scope and ambit of an appeal under Section 55. That section provides inter alia that any person aggrieved by an order made by the Commission under Section 13 may prefer an appeal to this Court on "one or more of the grounds specified in Section 100 of the Code of Civil Procedure, 1908". Now at the date when Section 55 was enacted, namely, December 27, 1969, being the date of coming into force of the Act, Section 100 of the Code of Civil Procedure specified three grounds on which a second appeal could be brought to the High Court and one of these grounds was that the decision appealed against was contrary to law. It was sufficient under Section 100 as it stood then that there should be a question of law in order to attract the jurisdiction of the High Court in second appeal and, therefore, if the reference in Section 55 were to the grounds set out in the then existing Section 100, there can be no doubt that an appeal would lie to this Court under Section 55 on a question of law. But subsequent to the enactment of Section 55, Section 100 of the Code of Civil Procedure was substituted by a new section by Section 37 of the Code of Civil Procedure (Amendment) Act, 1976 with effect from February 1, 1977 and the new Section 100 provided that a second appeal shall lie to the High Court only if the High Court is satisfied that the case involves a substantial question of law. The three grounds on which a second appeal could lie under the former Section 100 were abrogated and in their place only one ground was substituted which was a highly stringent ground, namely, that there should be a substantial question of law. This was the new Section 100 which was in force on the date when

> the present appeal was preferred by the appellant and the argument of the respondents was that the maintainability of the appeal was, therefore, required to be judged by reference to the ground specified in the new Section 100 and the appeal could be entertained only if there was a substantial question of law. The respondents leaned heavily on Section 8(1) of the General Clauses Act, 1897 which provides:
>
> "Where this Act or any Central Act or Regulation made after the commencement of this Act, repeals and re-enacts, with or without modification, any provision of a former enactment, then references in any other enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted."

and contended that the substitution of the new Section 100 amounted to repeal and re-enactment of the former Section 100 and, therefore, on an application of the rule of interpretation enacted in Section 8(1), the reference in Section 55 to Section 100 must be construed as reference to the new Section 100 and the appeal could be maintained only on ground specified in the new Section 100, that is, on a substantial question of law. We do not think this contention is well founded. ***It ignores the distinction between a mere reference to or citation of one statute in another and an incorporation which in effect means bodily lifting a provision of one enactment and making it a part of another. Where there is mere reference to or citation of one enactment in another without incorporation. Section 8(1) applies and the repeal and re-enactment of the provision referred to or cited has the effect set out in that section and the reference to the provision repealed is required to be construed as reference to the provision as re-enacted.*** Such was the case in *Collector of Customs v. Nathella Sampathu Chetty* [AIR 1962 SC 316 : (1962) 3 SCR 786] and *New Central Jute Mills Co. Ltd. v. Assistant Collector of Central Excise* [(1970)

2 SCC 820 : AIR 1971 SC 454 : (1971) 2 SCR 92]. ***But where a provision of one statute is incorporated in another, the repeal or amendment of the former does not affect the latter. The effect of incorporation is as if the provision incorporated were written out in the incorporating statute and were a part of it.*** Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statute by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. ***Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporation statute.*** Lord Esher, M.R., while dealing with legislation in incorporation in *In re Wood's Estate* [(1886) 31 Ch D 607] pointed out at p. 615:

> "If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all."

Lord Justice Brett, also observed to the same effect in *Clarke* v. *Bradlough* [(1881) 8 QBD 63, 69] :

> "…. there is a rule of construction that, where a statute is incorporated by reference into a second statute, the repeal of the first statute by a third statute does not affect the second."

This was the rule applied by the Judicial Committee of the Privy Council in *Secretary of State for India in Council* v. *Hindustan Cooperative Insurance Society Ltd*. [58 IA 259] The Judicial Committee pointed out in this case that the provisions of the Land Acquisition Act, 1894 having been incorporated in the Calcutta Improvement Act, 1911 and

become an integral part of it, the subsequent amendment of the Land Acquisition Act, 1894 by the addition of sub-section (2) in Section 26 had no effect on the Calcutta Improvement Act, 1911 and could not be read into it. Sir George Lowndes delivering the opinion of the Judicial Committee observed at p. 267:

> "In this country it is accepted that where a statute is incorporated by reference into a second statute, the repeal of the first statute does not affect the second: see the cases collected in Craies on *Statute Law*, 3rd Edn. pp. 349, 350 ... The independent existence of the two Acts is, therefore, recognised; despite the death of the parent Act, its offspring survives in the incorporating Act.
>
> It seems to be no less logical to hold that where certain provisions from an existing Act have been incorporated into a subsequent Act, no addition to the former Act, which is not expressly made applicable to the subsequent Act, can be deemed to be incorporated in it, at all events if it is possible for the subsequent Act to function effectually without the addition."

So also in Ram Sarup v. Munshi [AIR 1963 SC 553 : (1963) 3 SCR 858] it was held by this Court that since the definition of "agricultural land" in the Punjab Alienation of Land Act, 1900 was bodily incorporated in the Punjab Pre-emption Act, 1913, the repeal of the former Act had no effect on the continued operation of the latter. Rajagopala Ayyangar, J., speaking for the Court observed at p. 868-69 of the Report:

> "Where the provisions of an Act are incorporated by reference in a later Act the repeal of the earlier Act has, in general, no effect upon the construction or effect of the Act in which its provisions have been incorporated.
>
> In the circumstances, therefore, the repeal of the Punjab Alienation of Land Act of 1900 has no effect on the continued operation of the Pre-emption Act

> and the expression 'agricultural land' in the later Act has to be read as if the definition in the Alienation of Land Act, 1900, had been bodily transposed into it."

The decision of this Court in *Bolani Ores Ltd. v. State of Orissa* [(1974) 2 SCC 777 : AIR 1975 SC 17 : (1975) 2 SCR 138] also proceeded on the same principle. There the question arose in regard to the interpretation of Section 2(*c*) of the Bihar and Orissa Motor Vehicles Taxation Act, 1930 (hereinafter referred to as "the Taxation Act"). This section when enacted adopted the definition of "motor vehicle" contained in Section 2(18) of the Motor Vehicles Act, 1939. Subsequently, Section 2(18) was amended by Act 100 of 1956 but no corresponding amendment was made in the definition contained in Section 2(*c*) of the Taxation Act. The argument advanced before the Court was that the definition in Section 2(*c*) of the Taxation Act was not a definition by incorporation but only a definition by reference and the meaning of "motor vehicle" in Section 2(*c*) must, therefore, be taken to be the same as defined from time to time in Section 2(18) of the Motor Vehicles Act, 1939. This argument was negatived by the Court and it was held that this was a case of incorporation and not reference and the definition in Section 2(18) of the Motor Vehicles Act, 1939 as then existing was incorporated in Section 2(*c*) of the Taxation Act and neither repeal of the Motor Vehicles Act, 1939 nor any amendment in it would affect the definition of "motor vehicle" in Section 2(*c*) of the Taxation Act. ***It is, therefore, clear that if there is mere reference to a provision of one statute in another without incorporation, then, unless a different intention clearly appears, Section 8(1) would apply and the reference would be construed as a reference to the provision as may be in force from time to time in the former statute. But if a provision of one statute is incorporated in another, any subsequent amendment in the former statute or even its total repeal would not affect the provision as incorporated in the latter statute. The question is to which category the present case belongs.***"

[Emphasis supplied]

34. This Court therefore held that if there was mere reference to a provision of one statute in another without incorporation, then, unless a different intention clearly appears, Section 8(1) of the General Clauses Act would apply and the reference would be construed as a reference to the provision in the former statute, as may be in force from time to time. However, if a provision of one statute was incorporated in another statute, then any subsequent amendment in the former statute or even its total repeal would not affect the provision as incorporated in the latter statute.

35. In the case of ***Girnar Traders (3)*** (supra), this Court was considering the question, as to whether the provisions of the Land Acquisition Act, 1894, with particular reference to Section 11-A, can be read into and treated as part of the Maharashtra Regional and Town Planning Act, 1966 ("MRTP Act, 1966" for short) on the principle of either 'legislation by reference' or 'legislation by incorporation'?

36. It will be relevant to refer to the following observations of this Court in the said case:

> "**86.** At the very outset, we may notice that in the preceding paragraphs of the judgment, we have specifically held that the MRTP Act is a self-contained code. Once such finding is recorded, application of either of the doctrines i.e. "legislation by reference" or "legislation by incorporation", would lose their significance particularly when the two Acts can coexist and operate without conflict.
>
> **87.** However, since this aspect was argued by the learned counsel appearing for the parties at great length, we will proceed to discuss the merit or otherwise of this contention without prejudice to the above findings and as an alternative plea. These principles have been applied by the courts for a considerable period now. ***When there is general reference in the Act in question to some earlier Act but there is no specific mention of the provisions of the former Act, then it is clearly considered as legislation by reference. In the case of legislation by reference, the amending laws of the former Act would normally become applicable to the later Act; but, when the provisions of an Act are specifically referred and incorporated in the later statute, then those provisions***

alone are applicable and the amending provisions of the former Act would not become part of the later Act. This principle is generally called legislation by incorporation. General reference, ordinarily, will imply exclusion of specific reference and this is precisely the fine line of distinction between these two doctrines. Both are referential legislations, one merely by way of reference and the other by incorporation. It, normally, will depend on the language used in the later law and other relevant considerations. While the principle of legislation by incorporation has well-defined exceptions, the law enunciated as of now provides for no exceptions to the principle of legislation by reference. Furthermore, despite strict application of doctrine of incorporation, it may still not operate in certain legislations and such legislation may fall within one of the stated exceptions.

xxx xxx xxx

121. These are the few examples and principles stated by this Court dealing with both the doctrines of legislation by incorporation as well as by reference. Normally, when it is by reference or citation, the amendment to the earlier law is accepted to be applicable to the later law while in the case of incorporation, the subsequent amendments to the earlier law are irrelevant for application to the subsequent law unless it falls in the exceptions stated by this Court in *M.V. Narasimhan case* [*State of M.P.* v. *M.V. Narasimhan*, (1975) 2 SCC 377 : 1975 SCC (Cri) 589] . It could well be said that even where there is legislation by reference, the Court needs to apply its mind as to what effect the subsequent amendments to the earlier law would have on the application of the later law. The objective of all these principles of interpretation and their application is to ensure that both the Acts operate in harmony and the object of the principal statute is not defeated by such incorporation. Courts have made attempts to clarify this distinction by reference to various established canons. But still there are certain grey areas which may require the court to consider other angles of interpretation.

122. In *Maharashtra SRTC* [(2003) 4 SCC 200] the Court was considering the provisions of the MRTP Act as well as the provisions of the Land Acquisition Act. The Court finally took the view by adopting the principle stated in *U.P. Avas Evam Vikas Parishad* [(1998) 2 SCC 467] and held that there is nothing in the MRTP Act which precludes the adoption of the construction that the provisions of the Land Acquisition Act as amended by Central Act 68 of 1984, relating to award of compensation would apply with full vigour to the acquisition of land under the MRTP Act, as otherwise it would be hit by invidious discrimination and palpable arbitrariness and consequently invite the wrath of Article 14 of the Constitution. While referring to the principle stated in *Hindusthan Coop. Insurance Society Ltd.* [(1930-31) 58 IA 259 : AIR 1931 PC 149] and clarifying the distinction between the two doctrines, the Court declined to apply any specific doctrine and primarily based its view on the plea of discrimination but still observed: (*Maharashtra SRTC case* [(2003) 4 SCC 200] , SCC p. 208, para 11)

"*11*. … The fact that no clear-cut guidelines or distinguishing features have been spelt out to ascertain whether it belongs to one or the other category makes the task of identification difficult. The semantics associated with interpretation play their role to a limited extent. Ultimately, it is a matter of probe into legislative intention and/or taking an insight into the working of the enactment if one or the other view is adopted. The doctrinaire approach to ascertain whether the legislation is by incorporation or reference is, on ultimate analysis, directed towards that end. The distinction often pales into insignificance with the exceptions enveloping the main rule."

123. ***In the case in hand, it is clear that both these Acts are self-contained codes within themselves. The State Legislature while enacting the MRTP Act has referred to the specific sections of the Land Acquisition Act in the provisions of the State Act. None of the sections require application of the provisions of the Land Acquisition Act generally or mutatis mutandis. On***

> ***the contrary, there is a specific reference to certain sections and/or content/language of the section of the Land Acquisition Act in the provisions of the MRTP Act.***"
>
> [Emphasis supplied]

37. This Court has held that once a finding is recorded that an Act is a self-contained code, then the application of either of the doctrines i.e. "legislation by reference" or "legislation by incorporation" would lose their significance particularly when the two Acts can coexist and operate without conflict.

38. This Court further held that, in case of general reference in the Act in question to an earlier Act but there being no specific mention of the provisions of the former Act, then it would clearly be considered as 'legislation by reference'. In such a case, the amending laws of the former Act would become applicable to the later Act. However, when the provisions of an Act are specifically referred and incorporated in the later statute, then those provisions alone are applicable and the amending provisions of the former Act would not become part of the later Act.

39. This Court in the case of ***Girnar Traders*** (supra) held that, if the legislature intended to apply the provisions of the Land Acquisition Act generally and wanted to make a general reference, it could have said that the provisions of the Land Acquisition Act would be applicable to the MRTP Act, 1966. This Court observed that such expression was conspicuous by its very absence. This Court held that both these Acts i.e. Land Acquisition Act and the MRTP Act, 1966 are self-contained codes within themselves. This Court observed that the State Legislature while enacting the MRTP Act, 1966 has referred to the specific sections of the Land Acquisition Act in the provisions of the State Act. This Court further observed that none of the sections require application of the provisions of the Land Acquisition Act generally or *mutatis mutandis*. On the contrary, there was a specific reference to certain sections and/or content/ language of the section of the Land Acquisition Act in the provisions of the MRTP Act, 1966.

40. It will also be relevant to note that this Court in a catena of cases has held that the Code is a self-contained Code. Reference in this respect could be made to the following judgments of this Cout:

(i) ***Innoventive Industries Limited vs ICICI Bank and another***[10];

(ii) ***Principal Commissioner of Income Tax vs Monnet Ispat and Energy Limited***[11];

(iii) ***E.S. Krishnamurthy and others vs Bharath Hi-Tech Builders Private Limited***[12];

(iv) ***Pratap Technocrats Private Limited and others vs Monitoring Committee of Reliance Infratel Limited and another***[13];

(v) ***V. Nagarajan vs. SKS Ispat and Power Limited and others***[14];

(vi) ***Embassy Property Developments Private Limited vs State of Karnataka and others*** (supra); and

(vii) ***Bharti Airtel Ltd. and another vs Vijaykumar V. Iyer and others*** (supra).

V. CONCLUSION

41. Applying these legal principles, we will have to analyze the provisions of Section 236(1) of the Code. Under Section 236(1) of the Code, reference is "offences under this Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act, 2013".

42. It can thus be seen that the reference is not general but specific. The reference is only to the fact that the offences under the Code shall be tried by the Special Court established under Chapter XXVIII of the Companies Act.

43. Applying the principle as laid down by this Court in various judgments, since the reference is specific and not general, it will have to be held that the present case is a case of 'legislation by incorporation' and not a case of 'legislation by reference'. The effect would be that the provision with regard to Special Court has been bodily lifted from Section 435 of the Companies Act, 2013 and incorporated in Section 236(1) of the Code. In other words, the provision of Section 435 of

10 [2017] 8 SCR 33 : (2018) 1 SCC 407

11 (2018) 18 SCC 786

12 [2021] 12 SCR 28 : (2022) 3 SCC 161

13 [2021] 8 SCR 938 : (2021) 10 SCC 623

14 [2021] 14 SCR 736 : (2022) 2 SCC 244

the Companies Act, 2013 with regard to Special Court would become a part of Section 236(1) of the Code as on the date of its enactment. If that be so, any amendment to Section 435 of the Companies Act, 2013, after the date on which the Code came into effect would not have any effect on the provisions of Section 236(1) of the Code. The Special Court at that point of time only consists of a person who was qualified to be a Sessions Judge or an Additional Sessions Judge.

44. It is further to be noted that the Code has also suffered two subsequent amendments i.e. the 2015 Amendment and the 2018 Amendment. If the legislative intent was to give effect to the subsequent amendments in the Companies Act to Section 236(1) of the Code, nothing prevented the legislature from amending Section 236(1) of the Code. The legislature having not done that, the provision with regard to the reference in Section 236(1) of the Code pertaining to Special Court as mentioned in Section 435 of the Companies Act, 2013 stood frozen as on the date of enactment of the Code. As such, the learned Judge of the High Court has erred in holding that in view of the subsequent amendment, the offences under the Code shall be tried only by a Metropolitan Magistrate or a Judicial Magistrate of the First Class.

45. We further find that the reasoning of the learned single judge of the High Court that in view of the 2018 Amendment only the offences under the Companies Act would be tried by a Special Court of Sessions Judge or Additional Sessions Judge and all other offences including under the Code shall be tried by a Metropolitan Magistrate or a Judicial Magistrate of the First Class is untenable. For a moment, even if it is held that the reference in Section 236(1) of the Code is a 'legislation by reference' and not 'legislation by incorporation', still the offences punishable under the Code having imprisonment of two years or more will have to be tried by a Special Court presided by a Sessions Judge or an Additional Sessions Judge. Whereas the offences having punishment of less than two years will have to be tried by a Special Court presided by a Metropolitan Magistrate or a Judicial Magistrate of the First Class.

46. In any case, the learned single Judge of the High Court has grossly erred in quashing the complaint only on the ground that it was filed before a Special Court presided by a Sessions Judges. At the most, the learned single judge of the High Court could have directed the

complaint to be withdrawn and presented before the appropriate court having jurisdiction.

47. Shri Amir Arsiwala, learned Advocate-on-record for the respondent Nos.1 and 2, had submitted that in the event this Court holds that the Special Courts presided by a Sessions Judge or an Additional Sessions Judge will have jurisdiction to try the complaint under the Code, this Court should remand the matter to the High Court for deciding the matter afresh on merits. It is submitted that the respondents have a good case on merits and there has been no adjudication on merits of the matter.

48. In the result, we allow the appeal. The impugned judgment and order dated 14th February 2022, passed by the learned Single Judge of the High Court of Judicature at Bombay in Writ Petition No.2592 of 2021 is quashed and set aside. It is held that the Special Court presided by a Sessions Judge or an Additional Sessions Judge will have jurisdiction to try the complaint under the Code. However, since the learned single judge of the High Court has not considered the merits of the matter, the matter is remitted to the learned single judge of the High Court for considering the petition of the respondents afresh on merits.

49. We place on record our deep appreciation for the valuable assistance rendered by Shri S.V. Raju, learned ASG as well as Shri Amir Arsiwala and Shri Vikas Mehta, learned counsel for the appearing parties.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal allowed.

[2024] 5 S.C.R. 36 : 2024 INSC 343

Shivani Tyagi
v.
State of U.P. & Anr.

(Criminal Appeal Nos.1957-1961 of 2024)

05 April 2024

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

Issue for Consideration

Matter pertains to suspension of sentence of life imprisonment of the convicted persons, and their consequential enlargement on bail, in an acid attack case.

Headnotes

Code of Criminal Procedure, 1973 – s. 389 – Suspension of sentence pending appeal, and releasing on bail – Acid attack on victim at the hands of the accused persons – Victim suffered 30-40 percent burn injuries resulting in total disfigurement of her face – Conviction of the accused persons u/ss. 307/149 and 326A/149 IPC and sentenced to life imprisonment – High Court suspended the sentence and enlarged them on bail – Interference:

Held: (per C. T. Ravikumar, J) Mere factum of sufferance of incarceration for a particular period and likelihood of delay in disposal of cases, in a case where life imprisonment is imposed, cannot be a reason for invocation of power u/s. 389 without referring to the relevant factors – Each case has to be examined on its own merits and based on the given parameters – Acid attack may completely strip off the victim of her basic human right to live a decent human life owing to permanent disfiguration – Impugned judgment reflects only non-application of mind and non-consideration of the relevant factors required for invocation of power u/s. 389 despite the fact that the case involved an acid attack on a young woman resulting into permanent disfiguration – High Court took into account the offer made on behalf of the convicts that they would give a payment of Rs. 25 lakhs, and that the evidence that the victim had incurred an amount of Rs. 21

* Authors

lakhs for her treatment besides the period of incarceration and also the delay likely to occur in the consideration of appeal – Serious nature of the offence involved was not taken into account besides the other relevant parameters for the exercise of power u/s. 389 – Thus, the impugned judgment cannot be sustained and is set aside, and the bail granted to the accused is cancelled [Paras 9-12] – **Held: (per Rajesh Bindal,J) (Supplementing)** One of the principles of sentencing, being proportionality, if the appropriate punishment is not awarded or if, after conviction for a heinous crime, the court directs the suspension of the sentence without valid reasons, the very purpose for which the criminal justice system exists would fail – High Court directed the suspension of the sentence of the accused on payment of ₹ 25 lakhs to the victim – Amount was not accepted by the victim and the convicts could not be released from the jail – Also despite spending ₹ 21 lakhs on the treatment, victim still has not been cured – Infirmity of the court is evident from the fact that the High Court went on to modify the earlier order and noted that a Demand Draft having been handed over to the Chief Judicial Magistrate, the accused be released on bail subject to Surety Bonds – Order passed in the Correction Application does not suggest that there was any consideration of the parameters laid down for grant of bail or suspension of sentence, instead, the High Court noticed and directed that the convicts have offered to pay compensation to the victim for grant of suspension of sentence, which when she refused to accept, was directed to be deposited in the court – It was in a way kind of "Blood Money" offered by the convicts to the victim for which there is no acceptability in the criminal justice system [Paras 6, 7, 13]

Case Law Cited

In the judgment of C.T. Ravikumar, J.

Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat **[1999] 3 SCR 545 : (1999) 4 SCC 421;** *Kishori Lal v. Rupa & Ors.* **[2004] Supp. 4 SCR 628 : (2004) 7 SCC 638;** *Anwari Begum v. Sher Mohammad & Anr.* **[2005] Supp. 3 SCR 287 : (2005) 7 SCC 326;** *Khilari v. State of Uttar Pradesh & Ors.* **[2009]**

1 SCR 543 : (2009) 4 SCC 23; *State of Haryana v. Hasmat* **[2004] Supp. 3 SCR 132 : (2004) 6 SCC 175 – referred to.**

In the judgment of Rajesh Bindal, J.

Parivartan Kendra v. Union of India and Others **[2015] 12 SCR 607 : (2016) 3 SCC 571 : 2015 INSC 893;** *Suresh Chandra Jana v. State of West Bengal and Others* **[2017] 13 SCR 1 : (2017) 16 SCC 466 : 2017 INSC 1296;** *State of Himachal Pradesh and Another v. Vijay Kumar alias Pappu and Another* **(2019) 5 SCC 373 : 2019 INSC 377;** *Deepak Yadav v. State of Uttar Pradesh and Another* **[2022] 4 SCR 1 : (2022) 8 SCC 559 : 2022 INSC 610;** *Gian Singh v. State of Punjab and Another* **[2012] 8 SCR 753 : (2012) 10 SCC 303 : 2012 INSC 419;** *The State of Jharkhand v. Md. Sufiyan* **SLP (Crl) No. 1960 of 2022 decided on 16.01.2024;** *Sahab Alam alias Guddu v. State of Jharkhand and another* **(2022) SCC Online SC 1874 – referred to.**

List of Acts

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

List of Keywords

Acid attack case; Suspension of sentence; Life imprisonment; Enlargement on bail; Disfigurement of face; Sufferance of incarceration; Delay; Public interest and social security; Permanent disfiguration of young woman; Principles of sentencing; Criminal law; Proportionality; Criminal justice system; Compensation; Blood Money.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1957-1961 of 2024

From the Judgment and Order dated 12.12.2023 of the High Court of Judicature at Allahabad in CRLA Nos.2467, 996, 801, 1155 and 467 of 2021

Appearances for Parties

Niranjan Sahu, Adv. for the Appellant.

Vinay Navare, Sr. Adv., Rajat Singh, Divyanshu Sahay, Sarthak Chandra, Akhand Pratap Singh Chauhan, Anil Verma, Tungesh, Nagendra Kasana, Rajesh Rathod, Ms. Palak Munjal, Aditya Sharma, Arun Kumar Arunachal, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

C. T. Ravikumar, J.

Leave granted.

1. In these quintuplet appeals the victim of an acid attack assails the suspension of sentence of life imprisonment of the convicted persons, the private respondents and their consequential enlargement on bail.

2. Heard learned counsel appearing for the self-same appellant-victim in the captioned appeal, learned counsel appearing for the common first respondent-State of Uttar Pradesh and learned counsel appearing for the private respondents.

3. Section 389 of the Code of Criminal Procedure (for short the "Cr. PC") deals with the suspension of execution of sentence pending the appeal against conviction and release of appellant(s) on bail. The said provision mandates for recording of reasons in writing leading to the conclusion that the convicts are entitled to get suspension of sentence and consequential release on bail. The said requirement thus indicates the legislative intention that the appellate Court invoking the power under Section 389, Cr. PC, should assess the matter objectively and that such assessment should reflect in the order.

4. We will briefly refer to some of the relevant decisions dealing with Section 389, Cr. PC. In the case of short-term imprisonment for conviction of an offence, suspension of sentence is the normal rule and its rejection is the exception. (See the decision in ***Bhagwan Rama Shinde Gosai & Ors. v. State of Gujarat***[1]***)***. However, we

1 [1999] 3 SCR 545 : (1999) 4 SCC 421

are of the considered view that the position should be vice-versa in the case of conviction for serious offences when invocation of power under Section 389 is invited. This Court, in the decision in ***Kishori Lal v. Rupa & Ors.***[2], held in paragraphs 4 and 5 thus:-

> *"4. Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed against. If he is in confinement, the said Court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.*
>
> *5. The appellate Court is duty-bound to objectively assess the matter and to record reasons for the conclusion that the case warrants suspension of execution of sentence and grant of bail. In the instant case, the only factor which seems to have weighed with the High Court for directing suspension of sentence and grant of bail is the absence of allegation of misuse of liberty during the earlier period when the accused-respondents were on bail."*

5. In the decision in ***Anwari Begum v. Sher Mohammad & Anr.***[3] this Court in paragraphs 7 and 8 held thus:-

> *"7. Even on a cursory perusal the High Court's order shows complete non-application of mind. Though a detailed examination of the evidence and elaborate documentation of the merits of the case is to be avoided by the Court while passing orders on bail applications, yet a Court*

2 [2004] Supp. 4 SCR 628 : (2004) 7 SCC 638

3 [2005] Supp. 3 SCR 287 : (2005) 7 SCC 326

dealing with the bail application should be satisfied as to whether there is a prima facie case, but exhaustive exploration of the merits of the case is not necessary. The Court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course.

8. There is a need to indicate in the order reasons for prima facie concluding why bail was being granted, particularly where an accused was charged of having committed a serious offence. It is necessary for the Courts dealing with application for bail to consider among other circumstances, the following factors also before granting bail, they are:

1. *The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;*
2. *Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant;*
3. *Prima facie satisfaction of the Court in support of the charge.*

Any order dehors of such reasons suffers from non-application of mind as was noted by this Court in Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598, Puran v. Rambilas (2001) 6 SCC 338 and in Kalyan Chandra Sarkar v. Rajesh Ranjan (2004) 7 SCC 528."

6. After referring to the aforesaid paragraphs in the decisions in ***Kishori Las's*** case (supra) and ***Anwari Begum's*** case (supra), this Court in the decision in ***Khilari v. State of Uttar Pradesh & Ors.***[4] interfered with an order suspending the sentence and granting bail for non-application of mind and non-consideration of the relevant aspects.

7. Applying the principles and parameters for invocation of the power under Section 389. Cr. PC, revealed from the decisions,

4 [2009] 1 SCR 543 : (2009) 4 SCC 23

as above, we will have to consider the sustainability of the challenge against the impugned orders by the appellant victim. In that regard a succinct narration of the facts involved in the case, strictly confining to the requirement for consideration of these appeals, is required. The private respondents in the appeals, five in numbers, were convicted finding guilty of offences, including under Sections 307/149 and 326A/149, IPC. The appellant-victim was then aged about 31 years and, in the incident, she suffered attack with sulfuric acid and her body was burnt 30 to 40 percent. PW-6, Dr. Uttam Jain with Ext.A5, would reveal that she suffered deep burn on the face, chest and both hands and injuries on her were grievous in nature.

8. We may hasten to add that regarding the merits of the appeals by the party respondents against their conviction, we shall not be understood to have held or made any observation as it is a matter to be considered on its own merits in the pending appeals.

9. We have already referred to the mandate under Section 389 Cr.PC that the order passed invoking the said provision should reflect the reason for coming to the conclusion that the convicts are entitled to get suspended their sentence and consequential release on bail. In the decision in ***State of Haryana v. Hasmat***[5], this Court held that in an appeal against conviction involving serious offence like murder punishable under Section 302, IPC the prayer for suspension of sentence and grant of bail should be considered with reference to the relevant factors mentioned thereunder, though not exhaustively. On its perusal, we are of the opinion that factors like nature of the offence held to have committed, the manner of their commission, the gravity of the offence, and also the desirability of releasing the convict on bail are to be considered objectively and such consideration should reflect in the consequential order passed under Section 389, Cr.PC. It is also relevant to state that the mere factum of sufferance of incarceration for a particular period, in a case where life imprisonment is imposed, cannot be a reason for invocation of power under Section 389 Cr.PC without referring to the relevant factors. We say so because there cannot be any

5 [2004] Supp. 3 SCR 132 : (2004) 6 SCC 175

doubt with respect to the position that disposal of appeals against conviction, (especially in cases where life imprisonment is imposed for serious offences), within a short span of time may not be possible in view of the number of pending cases. In such circumstances if it is said that disregarding the other relevant factors and parameters for the exercise of power under Section 389, Cr. PC, likelihood of delay and incarceration for a particular period can be taken as a ground for suspension of sentence and to enlarge a convict on bail, then, in almost every such case, favourable invocation of said power would become inevitable. That certainly cannot be the legislative intention as can be seen from the phraseology in Section 389 Cr.PC. Such an interpretation would also go against public interest and social security. In such cases giving preference over appeals where sentence is suspended, in the matter of hearing or adopting such other methods making an early hearing possible could be resorted. We shall not be understood to have held that irrespective of inordinate delay in consideration of appeal and long incarceration undergone the power under the said provision cannot be invoked. In short, we are of the view that each case has to be examined on its own merits and based on the parameters, to find out whether the sentence imposed on the appellant(s) concerned should be suspended during the pendency of the appeal and the appellant(s) should be released on bail.

10. Having observed and held as above, we are deeply peeved on perusing the impugned judgment, for the same reflects only non-application of mind and non-consideration of the relevant factors despite the fact that the case involved an acid attack on a young woman resulting into permanent disfiguration. In the case on hand, a scanning of the impugned order would reveal that what mainly weighed with the Court is the offer made on behalf of the convicts that they would give a payment of Rs. 25 lakhs through demand drafts, taking into account the evidence that the victim had incurred an amount of Rs. 21 lakhs for her treatment. Paragraph 10 of the impugned order would reveal that taking note of the said offer besides the period of incarceration and also the delay likely to occur in the consideration of appeal, sentence imposed was suspended and the private respondents were enlarged on bail. Paragraph 10 of the order would reveal this position and it reads thus:-

> *"10. After hearing counsel for the parties and considering the voluntarily offer made by the appellants, which is without prejudice to the right of defence as well as right of the prosecution to be decided at the time of final adjudication and having no bearing on the merit of the case, over and above, the amount of compensation being paid by the District Legal Services Authority, Meerut, the appellants have offered to pay an amount of Rs. 25 lacs to the victim for her medical treatment and also in view of the long custody as well as the antecedents of the appellants and also considering the fact that the appeals pertain to the year 2021 and are not likely to be listed for final argument in near future, we deem it appropriate to grant suspension of sentence of the appellants."*

11. We have no hesitation to hold that the impugned order is infected with non-application of mind and non-consideration of the relevant factors required for invocation of power under Section 389 in the light of the settled position of law. An acid attack may completely strip off the victim of her basic human right to live a decent human life owing to permanent disfiguration. We have no hesitation to hold that in appeals involving such serious offence(s), serious consideration of all parameters should be made. Even a cursory glance of the impugned order would reveal the consideration thereunder was made ineptly. The serious nature of the offence involved was not taken into account besides the other relevant parameters for the exercise of power under Section 389, Cr. PC.

12. In such circumstances, the impugned judgment cannot be sustained. The upshot of the discussion is that the order suspending the sentence of the private respondents and enlarging them on bail, invite interference. Consequently, the impugned order is set aside and consequently the bail granted to the private respondent in all these appeals stands cancelled. Consequently, the appellants shall surrender before the trial Court for the purpose of their committal to judicial custody. This shall be done within a period of four days. In case of their failure to surrender as ordered, the private respondents who are convicts shall be re-arrested and committed to custody.

13. The Appeals are allowed as above.

Order

Rajesh Bindal, J.

1. I have gone through the detailed reasons recorded by brother C.T. Ravikumar, J. Elaborate discussion has been made on the aspect of suspension of sentence in heinous crimes as it is a case where the High Court had directed suspension of sentence of the respondents in an acid attack case, which will haunt the victim throughout her life. The disfigurement of the face of the victim, as is evident from the photographs placed on record, could not even be seen.

2. It is a case in which after hearing the arguments raised by the appellant and going through the paper book our conscience was shocked. By a short order we granted the leave in the matters and allowed the appeals, for the reasons to follow. The respondents were directed to surrender before the Trial Court on or before 09.04.2024. The same is extracted below:

> "Leave granted.
>
> Appeals are allowed. Reasons to follow.
>
> The respondents-life convicts shall surrender on or before 9.4.2024 before the concerned Trial Court. In case of their failure to surrender, they shall be taken into custody and produced before the Trial Court."

2.1 I fully subscribe to the views expressed, but wish to add some more reasons.

3. The main ground on which the High Court ordered suspension of sentence of the respondents, who have been awarded life imprisonment is that the counsel for the accused submitted that in the evidence it had come on record that about ₹ 21 lakhs (Rupees Twenty-One Lakhs only) have been spent on her treatment as she suffered disfigurement of her face. It was further argued that the Trial Court in its judgment of conviction had directed that the victim be granted adequate compensation for her treatment under the Victim Compensation Scheme. Then, it was collectively argued by the learned counsel for the accused that without prejudice to their right of defence the accused collectively and voluntarily offered to pay a sum of ₹ 25 lakhs (Rupees Twenty Five Lakhs only) which may be given to the victim for her medical treatment. It was objected to by

the learned counsel for the State. Taking note of the offer made by the counsel for the private respondents, who are the convicts, the High Court accepted the offer made by them and directed that, over and above, the amount of compensation paid by the District Legal Services Authority to the victim, the private respondents have offered to pay a sum of ₹ 25 lakhs (Rupees Twenty-Five Lakhs only) for her treatment. The sentence awarded to them was suspended. It was further noticed that the hearing of appeal is likely to take some time. Relevant paragraph 10 of the impugned order is extracted below:

> "10. After hearing counsel for the parties and considering the voluntarily offer made by the appellants, which is without prejudice to the right of defence as well as right of the prosecution to be decided at the time of final adjudication and having no bearing on the merit of the case, over and above, the amount of compensation being paid by the District Legal Services Authority, Meerut, the appellants have offered to pay an amount of ₹ 25 lakhs to the victim for her medical treatment and also in view of the long custody as well as the antecedents of the appellants and also considering the fact that the appeals pertain to the year 2021 and are not likely to be listed for final argument in near future, we deem it appropriate to grant suspension of sentence of the appellants."

4. As the victim may also be in shock and not interested in receiving the amount as offered by the private respondents, the respondents moved a Correction Application[1] before the High Court. On the aforesaid application, the High Court, while noticing that offer made by the private respondents was not acceptable to the victim, directed the respondents to deposit the amount with the Chief Judicial Magistrate, Meerut. The relevant part of the order dated 21.02.2024 is reproduced hereinunder:

> "Correction in the order dated 12.12.2023, is sought to the extent that the applicants have already handed over the demand drafts in the Court of Chief Judicial Magistrate, Meerut, as the victim has not come forward to accept the drafts, the appellants, who are granted bail, are still languishing in judicial custody.

1 Criminal Misc. Correction Application No. 12 of 2024

It is further submitted that appellants have performed their part of liability by depositing the demand draft before the CJM, Meerut, thus they may be released on bail.

In paragraph No. 11 of the order dated 12.12.2023, we modify to the extent that the appellants may be released on bail, even prior to handing over the demand drafts to the victims as ordered earlier.

Notice of the application has been sent by registered post to Sri P.K. Rai, learned counsel for the respondent No. 2 by Sri P.K. Mishra, learned counsel for the appellants on 04.01.2024, but none appeared on behalf of respondent No. 2. Learned AGA has no objection to the prayer made by counsel for the appellants.

The bail order dated 12.12.2023 was passed in other connected Criminal Appeal No. 996 of 2021, Criminal Appeal No. 801 of 201, Criminal Appeal No. 1155 of 2021 and Criminal Appeal No. 467 of 2021.

Considering the facts and circumstances of the case, it is undisputed that the demand drafts have been handed over to the CJM, Meerut, the appellants be released on bail subject to furnishing of surety bond.

The appellants will tender an undertaking before the Court that in case the victim appears subsequently and applies for release of money and in the meantime if the validity of the drafts have lapsed, they will revalidate the draft and hand over the same to the Court of CJM, Meerut.

With the aforesaid observations, the order dated 12.12.2023 is modified accordingly."

5. Detailed discussions have been made in the opinion expressed by my brother C.T. Ravikumar, J. with reference to the suspension of sentence in case of heinous offences. I would like to touch upon the issue of offer of money to the victim for suspension of sentence in a heinous crime of acid attack, where the victim suffered burn injuries to the extent of 30 to 40% resulting in total disfigurement of her face. As is evident from the record, despite spending ₹ 21 lakhs (Rupees Twenty-One Lakhs only) on the treatment, she still has not been cured.

6. One of the principles of sentencing in criminal law is proportionality. If the appropriate punishment is not awarded or if, after conviction for a heinous crime, the court directs the suspension of the sentence without valid reasons, the very purpose for which the criminal justice system exists will fail.

7. After passing of the order dated 12.12.2023 *vide* which the High Court directed the suspension of the sentence of the private respondents on payment of ₹ 25 lakhs (Rupees Twenty-Five Lakhs only) to the victim, the amount was not accepted by the victim and the convicts could not be released from the jail. An application for correction[2] of the impugned order was filed by the private respondents. The infirmity of the court is evident from the fact that despite this development, the High Court went on to modify the earlier order dated 12.12.2023 and noted that a Demand Draft having been handed over to the Chief Judicial Magistrate, Meerut the private respondents be released on bail subject to Surety Bonds. It was recorded that, in case subsequently the victim appears in court for release of amount and the validity of the Demand Draft lapses, the private respondents shall get the same revalidated.

8. From the facts it can safely be noticed that there is no question of acceptance of money by the victim as she has challenged the order of suspension of sentence of the private respondents.

9. This court had been taking the offence of acid attacks, which are on increase, seriously. It is even to the extent of regulating the sale of the acid with stringent action so that the same is not easily available to the people with perverse mind. Observations made by this court in paragraph 13 of **Parivartan Kendra vs Union of India and Others**[3] being appropriate is extracted below:

> **"13.** We have come across many instances of acid attacks across the country. These attacks have been rampant for the simple reason that there has been no proper implementation of the regulations or control for the supply and distribution of acid. There have been many cases where the victims of acid attack are made to sit at home

2 Criminal Misc. Correction Application No. 12 of 2024

3 [2015] 12 SCR 607 : (2016) 3 SCC 571: 2015 INSC 893

> owing to their difficulty to work. These instances unveil that the State has failed to check the distribution of acid falling into the wrong hands even after giving many directions by this Court in this regard. Henceforth, stringent action be taken against those erring persons supplying acid without proper authorisation and also the authorities concerned be made responsible for failure to keep a check on the distribution of the acid."

10. In **Suresh Chandra Jana vs State of West Bengal and Others**[4], while rejecting the acquittal of an accused as ordered by the High Court in an acid attack case, this Court observed that the acid attack has transformed itself to a gender-based violence, which causes immense psychological trauma resulting in hurdle in overall development of the victim. Paragraph 30 thereof is extracted below:

> **"30.** At the outset, certain aspects on the acid attack need to be observed. Usually vitriolage or acid attack has transformed itself as a gender based violence. Acid attacks not only cause damage to the physical appearance of its victims but also cause immense psychological trauma thereby becoming a hurdle in their overall development. Although we have acknowledged the seriousness of the acid attack when we amended our laws in 2013 [The Criminal Law (Amendment) Act, 2013 (13 of 2013).] , yet the number of acid attacks are on the rise. Moreover, this Court has been passing various orders to restrict the availability of corrosive substance in the market which is an effort to nip this social evil in the bud. [Parivartan Kendra v. Union of India, (2016) 3 SCC 571 : (2016) 2 SCC (Cri) 143] It must be recognised that having stringent laws and enforcement agencies may not be sufficient unless deep-rooted gender bias is removed from the society."

11. In another case reported as **State of Himachal Pradesh and Another vs Vijay Kumar alias Pappu and Another**[5] regarding acid attack on a young girl of 19 years, in which this Court observed in paragraph 13 thereof, that the victim had suffered 16% burn injuries and that

4 [2017] 13 SCR 1 : (2017) 16 SCC 466 : 2017 INSC 1296

5 (2019) 5 SCC 373 : 2019 INSC 377

such a victim cannot be compensated by grant of any compensation. Paragraph 13 is thereof extracted below:

> **"13.** Indeed, it cannot be ruled out that in the present case the victim had suffered an uncivilised and heartless crime committed by the respondents and there is no room for leniency which can be conceived. A crime of this nature does not deserve any kind of clemency. This Court cannot be oblivious of the situation that the victim must have suffered an emotional distress which cannot be compensated either by sentencing the accused or by grant of any compensation."

12. The circumstances under which a bail granted by the court below can be cancelled, having been summarised by this Court in **Deepak Yadav vs State of Uttar Pradesh and Another**[6]. Relevant paragraphs 31 to 35 are extracted below:

> "**C. Cancellation of bail**
>
> **31.** This Court has reiterated in several instances that bail once granted, should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during trial. Having said that, in case of cancellation of bail, very cogent and overwhelming circumstances are necessary for an order directing cancellation of bail (which was already granted).
>
> **32.** A two-Judge Bench of this Court in Dolat Ram v. State of Haryana [Dolat Ram v. State of Haryana, (1995) 1 SCC 349 : 1995 SCC (Cri) 237] laid down the grounds for cancellation of bail which are:
>
> (i) interference or attempt to interfere with the due course of administration of justice;
>
> (ii) evasion or attempt to evade the due course of justice;

6 [2022] 4 SCR 1 : (2022) 8 SCC 559 : 2022 INSC 610

(iii) abuse of the concession granted to the accused in any manner;

(iv) possibility of the accused absconding;

(v) likelihood of/actual misuse of bail;

(vi) likelihood of the accused tampering with the evidence or threatening witnesses.

33. It is no doubt true that cancellation of bail cannot be limited to the occurrence of supervening circumstances. This Court certainly has the inherent powers and discretion to cancel the bail of an accused even in the absence of supervening circumstances. Following are the illustrative circumstances where the bail can be cancelled:

33.1. Where the court granting bail takes into account irrelevant material of substantial nature and not trivial nature while ignoring relevant material on record.

33.2. Where the court granting bail overlooks the influential position of the accused in comparison to the victim of abuse or the witnesses especially when there is prima facie misuse of position and power over the victim.

33.3. Where the past criminal record and conduct of the accused is completely ignored while granting bail.

33.4. Where bail has been granted on untenable grounds.

33.5. Where serious discrepancies are found in the order granting bail thereby causing prejudice to justice.

33.6. Where the grant of bail was not appropriate in the first place given the very serious nature of the charges against the accused which disentitles him for bail and thus cannot be justified.

33.7. When the order granting bail is apparently whimsical, capricious and perverse in the facts of the given case.

34. In Neeru Yadav v. State of U.P. [Neeru Yadav v. State of U.P., (2014) 16 SCC 508 : (2015) 3 SCC (Cri) 527] , the accused was granted bail by the High Court. In an appeal against the order [Mitthan Yadav v. State of U.P.,

2014 SCC OnLine All 16031] of the High Court, a two-Judge Bench of this Court examined the precedents on the principles that guide grant of bail and observed as under : (SCC p. 513, para 12)

> "12. … It is well settled in law that cancellation of bail after it is granted because the accused has misconducted himself or of some supervening circumstances warranting such cancellation have occurred is in a different compartment altogether than an order granting bail which is unjustified, illegal and perverse. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of or it is founded on irrelevant considerations, indisputably the superior court can set aside the order of such a grant of bail. Such a case belongs to a different category and is in a separate realm. While dealing with a case of second nature, the court does not dwell upon the violation of conditions by the accused or the supervening circumstances that have happened subsequently. It, on the contrary, delves into the justifiability and the soundness of the order passed by the court."

35. This Court in Mahipal [Mahipal v. Rajesh Kumar, (2020) 2 SCC 118 : (2020) 1 SCC (Cri) 558] held that : (SCC p. 126, para 17)

> "17. Where a court considering an application for bail fails to consider relevant factors, an appellate court may justifiably set aside the order granting bail. An appellate court is thus required to consider whether the order granting bail suffers from a non-application of mind or is not borne out from a prima facie view of the evidence on record. It is thus necessary for this Court to assess whether, on the basis of the evidentiary record, there existed a prima facie or reasonable ground to believe that the accused had committed the crime, also taking into account the seriousness of the crime and the severity of the punishment."

13. The impugned order passed by the High Court is perused. Specifically the order dated 21.02.2024 passed in the Correction Application. The order does not suggest that there was any consideration of the parameters laid down by this court for grant of bail or suspension of sentence. Instead, the High Court had noticed and directed that the convicts have offered to pay compensation to the victim for grant of suspension of sentence, which when she refused to accept, was directed to be deposited in the court. It was in a way kind of "Blood Money" offered by the convicts to the victim for which there is no acceptability in our criminal justice system.

14. This Court in **Gian Singh vs State of Punjab and Another**[7] while dealing with an issue regarding quashing of criminal proceedings on the ground of settlement between the offender and victim, observed that even if settlement or payment of compensation is pleaded in a heinous crime, still the same should not be quashed as the crimes are acts which have harmful effect on the public and in general the well-being of the society. It is not safe to leave the crime-doer on the plea of settlement with victim. Relevant paragraph 58 thereof is extracted below:

> **"58.** Where the High Court quashes a criminal proceeding having regard to the fact that the dispute between the offender and the victim has been settled although the offences are not compoundable, it does so as in its opinion, continuation of criminal proceedings will be an exercise in futility and justice in the case demands that the dispute between the parties is put to an end and peace is restored; securing the ends of justice being the ultimate guiding factor. No doubt, crimes are acts which have harmful effect on the public and consist in wrongdoing that seriously endangers and threatens the well-being of the society and it is not safe to leave the crime-doer only because he and the victim have settled the dispute amicably or that the victim has been paid compensation, yet certain crimes have been made compoundable in law, with or without the permission of the court. In respect of serious offences like murder, rape, dacoity, etc., or other offences of mental

7 [2012] 8 SCR 753 : (2012) 10 SCC 303 : 2012 INSC 419

> depravity under IPC or offences of moral turpitude under special statutes, like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity, the settlement between the offender and the victim can have no legal sanction at all. However, certain offences which overwhelmingly and predominantly bear civil flavour having arisen out of civil, mercantile, commercial, financial, partnership or such like transactions or the offences arising out of matrimony, particularly relating to dowry, etc. or the family dispute, where the wrong is basically to the victim and the offender and the victim have settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may within the framework of its inherent power, quash the criminal proceeding or criminal complaint or FIR if it is satisfied that on the face of such settlement, there is hardly any likelihood of the offender being convicted and by not quashing the criminal proceedings, justice shall be casualty and ends of justice shall be defeated. The above list is illustrative and not exhaustive. Each case will depend on its own facts and no hard-and-fast category can be prescribed."

15. In **the State of Jharkhand vs. Md. Sufiyan**[8], the Jharkhand High Court directed the accused to deposit certain amount in court, as *ad interim* compensation to be paid to the victim as a condition for grant of anticipatory bail. It was a case for various crimes committed under IPC, POCSO Act and I.T. Act. The aforesaid direction of the High Court was deprecated by this Court. It was opined that the willingness of the accused to pay compensation to the victim cannot be a reason for grant of anticipatory bail. Para 6, thereof is extracted below:

> "6. The factors on which anticipatory bail could be granted are very well crystallized in a catena of judgments of this Court. Leave aside the discussion of such factors, not even a whisper as to on what grounds anticipatory bail was being allowed were considered by the High Court.

8 SLP (Crl) No. 1960 of 2022 decided on 16.01.2024

> Merely because the accused is willing to pay some amount as an interim compensation cannot be a ground for grant of anticipatory bail."

16. Similar view was expressed by this Court in **Sahab Alam alias Guddu vs. State of Jharkhand and another**[9]. Paras 2 and 8 thereof are extracted below:

> "2. We have a batch of petitions before us, arising from different nature of offences from dowry to Section 420 IPC to Section 376, IPC and POCSO Act. The common aspect in all these cases is that one particular learned Judge of the High Court has granted bail on condition on deposit of substantive sums of money without consideration of the requirements of bail dependent on the nature of offences. It is trite to say that bail cannot per se be granted if a person can afford to deposit the money or his capacity to pay. That is what seems to have happened. Since there is no proper consideration, it is also difficult for us to analyse what weighed with the learned Judge while granting bail and it is certainly not the jurisdiction of this Court to be first or a second court of bail.
>
> 8. We also clarify that in view of our judgment in Dharmesh v. State of Gujarat (2021) 7 SCC 198 there is no question of victim compensation, as there cannot be such a criteria at the stage of grant of bail."

Headnotes prepared by: Nidhi Jain

Result of the case: Appeals allowed.

9 2022 SCC Online SC 1874

[2024] 5 S.C.R. 56 : 2024 INSC 346

The State of Odisha
v.
Nirjharini Patnaik @ Mohanty & Anr.

(Criminal Appeal No. 2270 of 2024)

26 April 2024

[Vikram Nath* and Prashant Kumar Mishra, JJ.]

Issue for Consideration

Chargesheet was filed against the Respondents in an FIR filed alleging a widespread conspiracy involving forgery of documents to facilitate the illegal transfer of valuable government land to private entities. SDJM, Bhubaneshwar passed an order of cognizance of offence u/s 420,467,468,471,477(A),120B and 34 IPC and issue of process against the Respondents. Whether the High Court was justified in quashing the order taking cognizance against the Respondents.

Headnotes

Quashing- Decision of High Court to quash the proceedings at preliminary stage, when the case is linked to a larger conspiracy involving government lands:

Held: The investigation into Respondent No. 1 (accused no. 7) and Respondent No. 2 (accused no. 10) reveals their critical roles in the misuse of GPA and subsequent property transactions, presenting a strong prima facie case for further examination – Lands in the heart of Bhubaneswar city were acquired for as little as Rs. 9,000/- per acre, whereas the prevailing market rates exceeded Rs. 50 lakhs per acre – Such drastic undervaluation raises substantial questions regarding the intent behind these transactions, indicative of a deliberate scheme to evade appropriate stamp duties and registration fees, causing considerable loss to the state – Respondent No. 1, who is the wife of Respondent No. 2, the Managing Director of M/s Z Engineer's Construction Pvt. Ltd., was central to the planning and execution of these transactions – Both respondents, along with their connections in the Real Estates Developers Association and their familiarity with key figures in the real estate sector, played pivotal roles in

* Author

this conspiracy – Dismissing the case at the preliminary stage, especially when linked to a broader pattern of similar frauds involving government lands as part of a larger conspiracy, risks undermining the integrity of multiple ongoing investigations and judicial processes – Such a decision would be detrimental to the investigation of similar fraudulent schemes against public assets – The High Court's decision to quash the proceedings was based on an incomplete assessment of the facts, which could only be fully unraveled through a detailed trial process – The nature and extent of the alleged conspiracy, the involvement of the respondents, and the actual harm caused to the public exchequer need to be judiciously examined in a trial setting – The High Court has hastily concluded that there is no evidence to show meeting of minds between the other accused persons and the Respondents which in our considered opinion, can only be decided after a thorough examination of evidence and witnesses by the Trial Court. [Paras 5,6,7,8 and 9]

List of Acts

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

List of Keywords

Quashing; Conspiracy; Forgery; Illegal transfer; Government land, Public asset; Loss to public exchequer; Dismissing the case at the preliminary stage; Larger conspiracy; Fraudulent schemes; Incomplete assessment of facts.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2270 of 2024

From the Judgment and Order dated 17.01.2018 of the High Court of Orissa at Cuttack in CRLMC No. 454 of 2017

Appearances for Parties

Ravi Prakash Mehrotra, Sr. Adv., Ms. Sharmila Upadhyay, Sarvjit Pratap Singh, Apoorva Srivastava, Advs. for the Appellant.

Siddhartha Luthra, Sr. Adv., Shubhranshu Padhi, Niroop Sukrithy, Jay Nirupam, D. Girish Kumar, Pranav Giri, Anmol Kheta, Pradyuman Kasistha, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

Leave granted.

2. This appeal, by the State of Orissa, arises out of the impugned judgment dated 17.01.2018 passed by the High Court of Orissa, which quashed the order dated 26.09.2015 passed by the SDJM, Cuttack in G.R. Case No.1771 of 2005 for taking cognizance of offences under sections 420, 467, 468, 471, 477(A), 120(B) and 34 Indian Penal Code, 1860[1] and directing issuance of process against the Respondents.

3. The facts leading up to the present case are as follows:

   3.1 On 20.05.2005, an FIR registered as Capital P.S. Case No. 178 of 2005 was lodged by the then Special Secretary to the Government in the General Administration (G.A.) Department, alleging a widespread conspiracy involving the forgery of documents to facilitate the illegal transfer of valuable government land to private entities. Following the FIR, the Police initiated investigations that culminated in a chargesheet filed against ten individuals, including the present respondents, accusing them of engaging in a criminal conspiracy under sections 420, 467, 468, 471, 477A, 120B and 34 IPC.

   3.2 The chargesheet dated 28.08.2015 detailed that the respondents, along with other co-conspirators, allegedly utilized forged documents such as Hata Patas, Ekpadia, and rent receipts to manipulate judicial processes and revenue records to illegally acquire government lands. These documents were purportedly produced in various revenue and civil courts to secure favorable orders, which were then used to substantiate false claims of ownership over the disputed properties.

   3.3 Central to the allegations is a transaction involving the sale of land situated in the heart of Bhubaneshwar, initially leased to one Kamala Devi under dubious circumstances before the

1 In short, 'IPC'

independence of India. After her demise, her legal heir, Kishore Chandra Patnaik, continued to assert rights over the property based on this lease, which had been previously declared non-genuine by the competent authorities. Despite adverse findings, the OEA Collector and subsequent judicial rulings set aside earlier decisions and reinstated the lease, albeit amidst allegations of document manipulation and improper legal proceedings.

3.4 In the year 2000, Kishore Chandra Patnaik, through a General Power of Attorney[2], granted Anup Kumar Dhirsamant (accused no. 5), a real estate developer, the authority to manage and dispose of the property. It is alleged that this GPA was later found to be interpolated towards transactions favourable to the Respondents and the other accused persons. Following the interpolation, Dhirsamant executed sales of substantial portions of the land to the respondents at rates grossly undervalued, as per the market rates at the time and transactions that were finalized without proper scrutiny of the title's legitimacy or the GPA's authenticity.

3.5 On 26.09.2015, the SDJM, Bhubaneshwar passed an order of cognizance for offence u/s 420, 467, 468, 471, 477(A), 120(B) and 34 IPC and issue of process against the Respondents and the other accused persons which was challenged by the Respondents before the High Court.

3.6 The High Court in its impugned judgment, quashed the order taking cognizance against the respondents. It reasoned that there was insufficient evidence of a conspiracy directly implicating the respondents and criticized the preliminary stage of judicial scrutiny as overly thorough, contrary to the standards required for prima facie evaluation at the stage of taking cognizance.

4. The appellant-State contends that the High Court overlooked circumstantial evidence suggestive of a broader conspiracy involving the respondents, particularly highlighting their professional acumen in real estate, which should have informed them of the dubious

2 In short, "GPA"

nature of the transactions. Furthermore, the State argued that the High Court failed to appreciate the severity of the offences involved and the potential implications for governance and public trust in the administration of land records.

5. Having heard the arguments on both sides, this Court is of the belief that the impugned order of the High Court merits reconsideration. The investigation into Respondent No. 1 (accused no. 7) and Respondent No. 2 (accused no. 10) reveals their critical roles in the misuse of GPA and subsequent property transactions, presenting a strong prima facie case for further examination. Initially, Kishore Chandra Patnaik granted a GPA to M/s Millan Developer and Builders Pvt. Ltd., represented by Anup Kumar Dhirsamanta. This GPA was registered outside the proper jurisdiction by including a small, unrelated parcel of land to falsely extend the Sub-Registrar of Khandagiri's authority. This setup was key to the subsequent illegal activities.

6. The manipulation of the GPA where specific terms were altered to misrepresent the authority granted, was carried out with the help of one Ajya Kumar Samal, a junior clerk (accused no.3). This act of forgery was a deliberate attempt to circumvent the legal procedure for transferring property. Following this forgery, extensive lands were sold at significantly lowered values. Specifically, lands in the heart of Bhubaneswar city were acquired for as little as Rs. 9,000/- per acre, whereas the prevailing market rates exceeded Rs. 50 lakhs per acre. Such drastic undervaluation raises substantial questions regarding the intent behind these transactions, indicative of a deliberate scheme to evade appropriate stamp duties and registration fees, causing considerable loss to the state. Crucially, part of this land was bought under suspicious conditions by Respondent No. 1 and Puspa Choudhury (accused no.8), in transactions managed by Prahallad Nanda (accused no. 2), who was temporarily in charge of the Sub-Registrar's office. The intentional undervaluation of this land and the strategic involvement of Respondent No. 1, in conjunction with the revocation of the GPA due to its fraudulent tampering, highlight a clear scheme to misappropriate government property and incur losses upon the public exchequer.

7. Furthermore, Respondent No. 1, who is the wife of Respondent No. 2, the Managing Director of M/s Z Engineer's Construction Pvt. Ltd., was central to the planning and execution of these transactions.

Both respondents, along with their connections in the Real Estates Developers Association and their familiarity with key figures in the real estate sector, played pivotal roles in this conspiracy. Their professional positions and industry influence were misused to facilitate and conceal these transactions.

8. This Court believes that dismissing the case at the preliminary stage, especially when linked to a broader pattern of similar frauds involving government lands as part of a larger conspiracy, risks undermining the integrity of multiple ongoing investigations and judicial processes. Such a decision would be detrimental to the investigation of similar fraudulent schemes against public assets.

9. Therefore, this Court finds that the High Court's decision to quash the proceedings was based on an incomplete assessment of the facts, which could only be fully unraveled through a detailed trial process. The nature and extent of the alleged conspiracy, the involvement of the respondents, and the actual harm caused to the public exchequer need to be judiciously examined in a trial setting. The High Court has hastily concluded that there is no evidence to show meeting of minds between the other accused persons and the Respondents which in our considered opinion, can only be decided after a thorough examination of evidence and witnesses by the Trial Court.

10. In view of the above, the appeal is allowed. The impugned order of the High Court is set aside. The trial to proceed in accordance with law against the respondents also. As the FIR is of the year 2005, the Trial Court is directed to decide the trial expeditiously.

Headnotes prepared by:
Adeeba Mujahid, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeal allowed.

[2024] 5 S.C.R. 62 : 2024 INSC 339

Shri Mallikarjun Devasthan, Shelgi
v.
Subhash Mallikarjun Birajdar and Others

(Civil Appeal Nos. 5323 - 5324 of 2024)

25 April 2024

[A.S. Bopanna and Sanjay Kumar,* JJ.]

Issue for Consideration

Whether delay in submitting Change Report to record name in register maintained u/s 7 Maharashtra Public Trusts Act, 1950 (1950 Act) in relation to the Vahiwatdar (Administrator) of a Public Trust, can be condoned. Further, consequence of Change Report being submitted beyond stipulated time of 90 days u/s 22(1) 1950 Act.

Headnotes

Appellant was registered as a Public Trust u/s. 18 of the 1950 Act – Mode of succession of managership was that Mallikarjun Mahalingappa Patil was to be the Vahiwatdar of the Trust and the eldest male member of his family was to succeed him – Vahiwatdar also empowered to co-opt others – First Change Report submitted by Jagdishchandra to record his name in register maintained u/s. 17 of the 1950 Act belatedly – First Change Report accepted and held to be legal and valid by Deputy Charity Commissioner – Jagdishchandra appointed four other persons as Trustees, by co-opting them – Second Change Report filed to record names of said four persons in register maintained u/s. 17 of the 1950 Act – Second Change Report held to be legal by Assistant Charity Commissioner – Appeals/Revision applications challenging orders accepting both Change Reports dismissed – Writ Petitions filed against orders accepting and confirming both Change Reports – Same allowed by High Court as no separate order passed by the Deputy Charity Commissioner, condoning delay of over 17 years in filing of first Change Report as being contrary to s. 22 1950 Act – Consequently, second Change Report could not be sustained.

Held: S. 22 of the 1950 Act was amended in 2017 whereby proviso was added in s. 22(1) of the 1950 Act providing for condonation of

* Author

delay in filing of a Change Report, if sufficient cause is shown – Not mandatory that written application be filed seeking condonation of delay and relief can be granted in that regard upon oral request, provided sufficient cause is shown for such delay – Even otherwise, 2017 proviso merely clarificatory in nature – Wording of s. 22(1) of the 1950 Act, as it stood earlier, did not negate applicability of s. 29(2) of the Limitation Act, 1963, and in consequence, s. 5 of Limitation Act, 1963, could be invoked for condonation of delay in submission of Change Report – If Change Report not submitted within stipulated period, 1950 Act does not contemplate automatic invalidation of assumption of office as the Vahiwatdar of the Trust – Failure to file Change Reports would invite penal consequences that would flow only from orders passed by authorities concerned under the relevant provisions – When failure to file a Change Report would not be fatal in itself, delay in filing a Change Report cannot automatically impact the assumption of office by a Vahiwatdar of a Trust – Proviso added in s. 22(1) 1950 Act further indicates the same – There should be liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with application for condonation of delay – Courts usually condone delay in filing as purpose is to advance justice. [Paras 19-22, 25]

Case Law Cited

Bhagmal & Ors. v. Kunwar Lal & Ors. [2010] 8 SCR 1104 **: [2010] 12 SCC 159;** *Sesh Nath Singh & Anr. v. Baidyabati Sheoraphuli Co-operative Bank Ltd. & Anr* [2021] 3 SCR 806 **: [2021] 7 SCC 313;** *Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors.* [2013] 9 SCR 782 **: [2013] 12 SCC 649 - relied on**

List of Acts

Bombay Public Trusts Act, 1950 (Maharashtra Public Trusts Act, 1950); Limitation Act, 1963.

List of Keywords

Maharashtra Public Trusts Act, 1950 – s. 17 and s. 22; Condonation of delay; s. 5 Limitation Act, 1963 applicable to delay in submission of Change Report; Delay in filing Change Report curable defect; Assumption of office not automatically invalidated by delay.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5323-5324 of 2024

From the Judgment and Order dated 27.08.2019 of the High Court of Judicature at Bombay in WP Nos. 8570 and 8571 of 2019

Appearances for Parties

Shyam Divan, Sr. Adv., Abhay Anil Anturkar, Dhruv Tank, Nitin Habib, Aniruddha Awalgaonkar, Bhagwant Deshpande, M/S. Dr. R.R. Deshpande and Associates, Advs. for the Appellant.

Sudhanshu S. Choudhari, Sr. Adv., A. Selvin Raja, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Sanjay Kumar, J

1. Leave granted.

2. Acceptance of Change Reports in relation to the Vahiwatdar (Administrator) and Trustees of Shri Mallikarjun Devasthan, Shelgi, a Public Trust, is in issue. A learned Judge of the High Court of Judicature at Bombay invalidated such acceptance and remanded the matters to the Deputy Charity Commissioner, Solapur Region, Solapur, for consideration afresh. Hence, these appeals.

3. Though, no interim orders were passed by this Court, we are informed that the orders of remand have not been acted upon owing to the pendency of these cases. Further, in terms of the High Court's directions, the Vahiwatdar and the Trustees, whose names were already entered in the records, are continuing to administer the Trust as on date.

4. Facts, to the extent relevant, played out thus: By application dated 26.05.1952, Mallikarjun Mahalingappa Patil applied for registration of Shri Mallikarjun Devasthan, Shelgi, as a Public Trust, under Section 18 of the Bombay Public Trusts Act, 1950, now known as Maharashtra Public Trusts Act, 1950 (for brevity, 'the Act of 1950'). The object of this Trust was the upkeep and maintenance of Shri Mallikarjun Temple

at Shelgi, North Solapur Taluka. Shri Mallikarjun Devasthan, Shelgi, was accordingly registered as a Public Trust. The mode of succession of managership and trusteeship, as provided in the application, was that Mallikarjun Mahalingappa Patil was to be the Vahiwatdar of the Trust and the eldest male member of his family was to succeed him. Further, the Vahiwatdar was also empowered to co-opt others, if and when necessary. Mallikarjun Mahalingappa Patil passed away in the year 1992 and his eldest son, Ashok Mallikarjun Patil, became the Vahiwatdar of the Trust. Thereafter, Ashok Mallikarjun Patil died on 16.02.1997 and his brother, Jagdishchandra Mallikarjun Patil, took over. Jagdishchandra was the third son of Mallikarjun Mahalingappa Pati, but his elder brother, Satish Patil, the second son of Mallikarjun Mahalingappa Pati, had no interest in taking over as the Vahiwatdar of the Trust. Thus, Jagdishchandra assumed the role of Vahiwatdar though he was not the eldest male member in the family.

5. It would be apposite at this stage to note the statutory scheme obtaining under the Act of 1950. Section 17 thereof mandates that, in every Public Trusts Registration Office or Joint Public Trusts Registration Office, the Deputy or Assistant Charity Commissioner concerned should keep and maintain such books, indices and other registers, as may be prescribed, which shall contain such particulars as may also be prescribed. Section 18 of the Act of 1950 provides for registration of Public Trusts upon application and prescribes the procedure therefor. Section 19 empowers the Deputy or Assistant Charity Commissioner concerned to make an inquiry upon receipt of an application for registration of a Public Trust under Section 18. Section 20 of the Act of 1950 states that, upon completion of such inquiry, the Deputy or Assistant Charity Commissioner shall record his finding with reasons therefor and make an order for the payment of the registration fee, if he is satisfied. Section 21(1) requires the Deputy or Assistant Charity Commissioner to then make necessary entries in the register maintained under Section 17. Section 21(2) provides that the entries so made shall, subject to the provisions of the Act of 1950 and subject to any change recorded as per the provisions thereof, be final and conclusive.

6. Section 22(1) of the Act of 1950, as it stood prior to 2017, stated that where any change occurs in any of the entries recorded in the register maintained under Section 17, the Trustee shall, within

90 days from the date of occurrence of such change, report the same to the Deputy or Assistant Charity Commissioner in charge of the Registration Office where the register is kept. Section 22(2) empowers the Deputy or Assistant Charity Commissioner to hold an inquiry for the purpose of verifying the correctness of the entries or for ascertaining whether any change has occurred in any of the particulars, recorded in the register kept under Section 17. The first *proviso* to Section 22(2) states that, in case of change in the names and addresses of the Trustees and Managers etc., the Deputy or Assistant Charity Commissioner may provisionally accept the change and issue a notice inviting objections to such change within thirty days from the date of publication of such notice. The second *proviso* states that if no objections are received within that time, the order provisionally accepting the change shall become final and entry thereof shall be taken in the register kept under Section 17. The third *proviso* states that if objections are received within thirty days, the Deputy or Assistant Charity Commissioner may hold an inquiry in the prescribed manner and record a finding within three months from the date of filing objections.

7. Section 22(3) of the Act of 1950 speaks of how the Deputy or Assistant Charity Commissioner is to record a finding after completing the aforestated inquiry, which may include a decision to remove the name of the Trust from the register by reason of the change. Further, it provides that the finding recorded shall be appealable to the Charity Commissioner. It then states that the Deputy or Assistant Charity Commissioner shall amend or delete the entries in the register in accordance with his finding, and if appeals or applications were made against such finding, in accordance with the final decision of the competent authority, and the amendment in the entries so made, subject to any further amendment on occurrence of a change or any cancellation of entries, shall be final and conclusive. Section 41D provides for the suspension, removal or dismissal of Trustees by the Charity Commissioner, if any of the grounds mentioned therein is satisfied. Such power can be exercised either on application of a Trustee or any person interested in the Trust and one of the grounds for such action being taken against the Trustee is continuous neglect of his duty or a breach of trust in respect of the Trust.

8. Section 70 provides for appeals to the Charity Commissioner against the findings or orders of the Deputy or Assistant Charity Commissioner

in the cases enumerated under Section 70(1)(a) to 70(1)(e). Section 70(1)(b) relates to findings under Section 22. Further, Section 70A(1) of the Act of 1950 empowers the Charity Commissioner to call for and examine, either *suo motu* or on an application, the record and proceedings of any of the cases before any Deputy or Assistant Charity Commissioner, mentioned in Section 70 thereof, for the purpose of satisfying himself as to the correctness of any finding or order recorded or passed by the Deputy or Assistant Charity Commissioner. Notably, the Act of 1950 was amended in the year 2017, whereby a *proviso* was added in Section 22(1). This *proviso* states that the Deputy or Assistant Charity Commissioner may extend the period of 90 days for reporting the change, on being satisfied that there was a sufficient cause for not reporting the change within the stipulated period, subject to payment of costs by the reporting Trustee to the Public Trust Administration Fund.

9. Given the above statutory milieu, it was incumbent upon Jagdishchandra to submit a Change Report within the stipulated 90 days but he did so, long thereafter, on 21.10.2015. He also filed a delay condonation application therewith, stating that he did not file the Change Report earlier by mistake as he was not aware about it. His report was taken on file as Change Report No. 899 of 2015. Judgment dated 15.03.2016 was passed therein by the Deputy Charity Commissioner, Solapur. Thereby, the Change Report was held to be legal and valid, taking note of the fact that no one had taken an objection thereto. In consequence, Schedule 1, pertaining to the Trust, was directed to be amended after expiry of the appeal period. However, no appeal was filed against this judgment within such period.

10. Thereafter, Jagdishchandra appointed four other persons, *viz.,* Kedar Patil, Shailesh Patil, Vishwajit Virajkumar Nandimath and Balasaheb Yelshetty as Trustees, by co-opting them on 28.03.2017. He filed Change Report No. 1177 of 2017 to record their names in the register maintained under Section 17 of the Act of 1950.

11. While so, five persons, *viz.,* Subhash Mallikarjun Birajdar, Abhijeet Prakash Birajdar, Kalyani Mallappa Birajdar, Sachin Shivanand Birajdar and Kedar Shivanna Birajdar, claiming to be the devotees of Shri Mallikarjun Temple at Shelgi filed an application under Section 70A of the Act of 1950 before the Joint Charity Commissioner, Pune, against the judgment dated 15.03.2016 passed by the Deputy

Charity Commissioner, Solapur, accepting Change Report No. 899 of 2015. The same was taken on file as Revision Application No. 61 of 2017. Therein, these five devotees questioned the eligibility of Jagdishchandra to be the Vahiwatdar of the subject Trust, alleging that he had 'unlawfully, without having any kind of relation, by cheating and misleading villagers, society as well as the Hon'ble Court, filed the Change Report No. 899 of 2015 and obtained approval'. They further alleged that the Deputy Charity Commissioner had not made a proper inquiry on the Change Report. According to them, after the death of Ashok Mallikarjun Patil, the functioning of the Trust was being handled by the villagers and they had been looking after the worship and other programs and Jagdishchandra was just overseeing the Temple. They, however, did not make the delay on his part a ground of challenge.

12. However, Jagdishchandra filed an application in the revision pointing out that he had filed a delay condonation application in relation to the filing of Change Report No. 899 of 2015 and that pendency of the same may adversely affect his legal rights. He prayed that a finding be called for from the Deputy Charity Commissioner, Solapur, about the said application pending the revision. By order dated 29.01.2019, the Joint Charity Commissioner, Pune, held that the Change Report had been accepted, which meant that the delay stood condoned, and it was not necessary to call for a finding on the delay condonation application.

13. Thereafter, the Joint Charity Commissioner, Pune, dismissed Revision Application No. 61 of 2017 filed by the five devotees, *vide* judgment dated 09.07.2019. Therein, the Joint Charity Commissioner observed that Jagdishchandra was the son of Mallikarjun Mahalingappa Patil, at whose behest the Public Trust had been registered. He noted that Jagdishchandra was the third son and that the other four sons, including Satish, who was older than Jagdishchandra, had filed affidavits stating that they consented to his appointment as Trustee. The Joint Charity Commissioner also noted that the revision applicants were not members of the family of Mallikarjun Mahalingappa Patil and that their other revision, being Revision Application No. 60 of 2017, challenging the order dated 17.06.1954 passed in Inquiry Application No. 25 of 1952, pertaining to the registration of the subject Trust, had already been dismissed on 10.10.2017.

14. In the meanwhile, as regards Change Report No. 1177 of 2017 pertaining to the co-option of four Trustees by Jagdishchandra, the Assistant Charity Commissioner, Solapur, delivered judgment dated 18.04.2018. Therein, while noting that some of the devotees of the Temple had filed objections to the said report, he ultimately held that the Change Report was legal and acceptable. The opponents to the Change Report had contended that Jagdishchandra was not the eldest son of Mallikarjun Mahalingappa Patil, but the Assistant Charity Commissioner noted that Ashok Mallikarjun Patil, the eldest son, had died issueless and the second son, Satish, claimed no interest in the Trust. Further, the Assistant Charity Commissioner took note of the fact that the revision filed against the registration of the subject Trust had been dismissed by the Joint Charity Commissioner, Pune. The Assistant Charity Commissioner, accordingly, concluded that the Change Report was acceptable, subject to the decision in the revision filed against the judgment in relation to Change Report No. 899 of 2015 pending before the Joint Charity Commissioner, Pune.

15. Aggrieved by this judgment, two of the devotees, Shivshankar Revansidha Birajdar and Prakash Sangappa Birajdar, filed Appeal No. 79 of 2018 before the Joint Charity Commissioner, Pune, under Section 70 of the Act of 1950. The said appeal was dismissed by the Joint Charity Commissioner, Pune, *vide* judgment dated 09.07.2019. Therein, the Joint Charity Commissioner held that as Revision Application No. 61 of 2017 pertaining to Change Report No. 899 of 2015 was dismissed by a separate judgment on that day, Jagdishchandra stood confirmed as the Vahiwatdar of the subject Trust and, therefore, he had a right to co-opt Trustees.

16. Assailing the dismissal of their Revision Application No. 61 of 2017, *vide* judgment dated 09.07.2019, confirming the judgment dated 15.03.2016 passed by the learned Deputy Charity Commissioner, Solapur, in respect of Change Report No. 899 of 2015, the five devotees filed W.P. No. 8570 of 2019 before the High Court of Judicature at Bombay. Therein, for the very first time, they raised the ground of delay of more than 17 years on the part of Jagdishchandra in filing a Change Report after the death of Ashok Mallikarjun Patil on 16.02.1997.

17. Challenging the dismissal of their Appeal No. 79 of 2018, *vide* judgment dated 09.07.2019 passed by the Joint Charity Commissioner, Pune,

confirming the judgment dated 18.04.2018 passed by the Assistant Charity Commissioner, Solapur, in respect of Change Report No. 1177 of 2017, the two devotees filed W.P. No. 8571 of 2019 before the High Court of Judicature at Bombay.

18. By common judgment dated 27.08.2019, a learned Judge of the High Court of Judicature at Bombay allowed both the writ petitions. The point that weighed with the learned Judge was that there was no separate order passed by the Deputy Charity Commissioner, Solapur, condoning the delay of over 17 years in the filing of the first Change Report. This, according to the learned Judge, was contrary to Section 22 of the Act of 1950. He accordingly held that acceptance of Jagdishchandra as the Vahiwatdar under Change Report No. 899 of 2015 could not be sustained and, in consequence, his Change Report No. 1177 of 2017 could also not be sustained. It is on this sole ground that the learned Judge restored the proceedings in relation to both the Change Reports to the file and directed the Deputy Charity Commissioner, Solapur, to decide them afresh. The learned Judge further directed that the position existing as on that date should be maintained, i.e., Jagdischandra and his nominated Trustees, who were administering the Trust, were permitted to continue to administer the Trust in accordance with law.

19. Before we proceed to consider the matter on merits, we may again note the fact that the Act of 1950 was amended in 2017, whereby a *proviso* was added in Section 22(1), providing for condonation of delay in the filing of a Change Report, if sufficient cause is shown therefor. It may be noted that no such *proviso* was in existence at the time Change Report No. 899 of 2015 was submitted by Jagdishchandra. Despite the same, he had filed a delay condonation application therewith praying for condonation of the delay on his part in filing the report. It is well settled that it is not mandatory that a written application be filed seeking condonation of delay and relief can be granted in that regard even upon an oral request, provided sufficient cause is shown for such delay [See ***Bhagmal and others vs. Kunwar Lal and others***[1] and ***Sesh Nath Singh and another vs. Baidyabati Sheoraphuli Co-operative Bank Ltd. and another***[2]].

1 [2010] 8 SCR 1104 : (2010) 12 SCC 159

2 [2021] 3 S.C.R. 806 : (2021) 7 SCC 313

20. The *proviso* added in Section 22(1) in the year 2017 is merely clarificatory in nature as is evident from the fact that it was 'added' in Section 22(1) and it did not bring about any substantive change. Even in the absence thereof, the wording of Section 22(1) of the Act of 1950, as it stood earlier, did not negate the applicability of Section 29(2) of the Limitation Act, 1963, and in consequence, Section 5 of the Limitation Act, 1963, could be invoked for condonation of the delay in the submission of a Change Report. Significantly, the High Court did not call for the original file to verify whether the Deputy Charity Commissioner, Solapur, had passed a separate order on the delay condonation application, condoning the delay in exercise of such power. In any event, the Joint Charity Commissioner, Pune, proceeded on the understanding that the delay had already been condoned. He passed an order to that effect on 29.01.2019 and that order was never challenged by the applicants in Revision Application No.61 of 2017, *viz.,* the Birajdar family. Once that order attained finality, it is not open to them to ignore the same and reopen the issue of delay before the High Court. All the more so, when the issue of delay was never raised by them in Revision Application No. 61 of 2017 and was raised for the very first time only in the writ petition filed against the judgment passed therein.

21. Further, what is of greater import is as to what would be the consequence of a Change Report being submitted belatedly. In the event a new Vahiwatdar takes over a Trust and, be it for whatever reason, he fails to submit a Change Report within the stipulated period of 90 days, what would be the fallout thereof? The provisions of the Act of 1950 do not contemplate automatic invalidation of his assumption of office as the Vahiwatdar of the Trust in such a situation. Once a Trust is registered as a Public Trust under Section 18 of the Act of 1950, it becomes the statutory duty of the authorities concerned to maintain proper records in relation to such Trust, including the particulars of its Administrators and Trustees. The Change Report in that regard has to be filed before the authorities concerned to facilitate timely updating of records after hearing all the parties concerned, as the statute provides for objections being raised against a Change Report. Delay or failure in doing so would mean that the records would not stand updated promptly. Objectors to the changes in the Trust, if any, can always take recourse to the remedies provided under the Act of 1950, complaining of the failure or

delay in the filing of a Change Report and the adverse consequences of such changes, if any.

22. Notably, as per the statutory scheme, failure to file Change Reports would invite penal consequences under Section 66 of the Act of 1950, which provides that whoever contravenes Section 22 and fails to report a change would be liable to pay a fine of ₹10,000/-. Continued failure to do so may invite more adverse consequences, as provided in the Act of 1950, but such consequences would flow from the orders passed by the authorities concerned under the relevant provisions and would not stem from such failure automatically. Therefore, when failure to file a Change Report would not be fatal in itself, the delay in filing a Change Report cannot automatically impact the assumption of office by a Vahiwatdar of a Trust. The very fact that a *proviso* was added in Section 22(1) of the Act of 1950, enabling the authority concerned to condone the delay in the filing of the Change Report, if sufficient cause is made out, clearly indicates that such delay is curable and the delay in filing a Change Report would not, by itself, entail non-acceptance or nullification of the changes in the Trust which are sought to be informed to the authorities with delay. In ***Esha Bhattacharjee vs. Managing Committee of Raghunathpur Nafar Academy and others***[3], this Court observed that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay as Courts are not supposed to legalize injustice but are obliged to remove injustice.

23. That apart, it appears that the devotees, all bearing the same family name 'Birajdar', who are raising objections seem to have a grievance with the very registration of the subject Trust, but their revision in that regard stood dismissed and appears to have attained finality. After such dismissal, in the capacity of being devotees of the Temple, they can have no legitimate grievance with regard to the succession to the post of Vahiwatdar of the subject Trust. More so, when the eldest male member in the founder's family has no issue with it.

24. Though it has been contended before us on behalf of the devotees that the Trust is not taking proper care of the Temple, we are of the opinion that such an issue cannot be a ground for them to challenge the Change Reports relating to the Vahiwatdar and the Trustees

3 [2013] 9 S.C.R. 782 : (2013) 12 SCC 649

of the subject Trust. Separate machinery is provided in the Act of 1950 to address such issues and it is for them to take recourse to such statutory remedies, if so advised. Their repeated attempts to attack the Change Reports relating to assumption of office by the new administration of the Trust only indicates their inimical attitude thereto and to the family of the founder, Mallikarjun Mahalingappa Patil. All in all, much ado about nothing!

25. Viewed thus, we are of the opinion that the learned Judge of the High Court of Judicature at Bombay adopted a rather hypertechnical approach by attaching so much importance to the delay in the submission of the first Change Report. Much did not turn upon the same as it was a curable defect. In any event, it had no impact on the change that had been brought about in the subject Trust but which was informed to the authorities belatedly.

26. The common judgment dated 27.08.2019 passed by the High Court of Judicature at Bombay in Writ Petition Nos. 8570 and 8571 of 2019, therefore, cannot be sustained and is accordingly set aside.

In consequence, acceptance of Change Report Nos. 899 of 2015 and 1177 of 2017 is confirmed.

Both the civil appeals are allowed.

Pending applications, if any, shall stand closed.

Parties shall bear their own costs.

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

Result of the case:
Appeals allowed.

[2024] 5 S.C.R. 74 : 2024 INSC 324

Parteek Bansal
v.
State of Rajasthan & Ors.

(Criminal Appeal No. 2167 of 2024)

19 April 2024

[Vikram Nath* and Prashant Kumar Mishra, JJ.]

Issue for Consideration

Whether the High Court erred in not quashing FIR under Section 482 of Code of Criminal Procedure, 1973 in a complaint alleging offences under Sections 498A, 406, 384, 420, and 120(B), Indian Penal Code, 1860, on the ground that the second FIR was on the same set of allegations.

Headnotes

Code of Criminal Procedure, 1973 – s. 482 – Abuse of process of law – Subsequent FIR in Udaipur, Rajasthan on the same set of allegations by the complainant after two weeks of lodging the first FIR under Section 498A read with Section 34 IPC in Hisar, Haryana was an abuse of process of law.

Held: The inaction of the complainant in withdrawing the first complaint or allowing the investigating agency in Hisar to continue its investigation without taking steps to transfer the first complaint to Udaipur on the ground of commission of offence in Udaipur i.e., where the second FIR was filed constitutes an abuse of process of law. [Paras 7, 11]

Code of Criminal Procedure, 1973 – s. 482 – Non-application of mind by High Court – Findings of the High Court contradictory to the record and admitted facts.

Held: The record clearly shows that the subsequent complaint lodged at Udaipur contained the same allegations as in the first FIR at Hisar and additionally it was stated therein about the earlier complaint lodged at Hisar – Thus, the High Court erred in dismissing the quashing petition of the Appellant on the ground that the complaint in Udaipur was prior in point of time than the complaint in Hisar and the Rajasthan Police was unaware of the earlier proceedings. [Paras 7-12]

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* Author

Parteek Bansal v. State of Rajasthan & Ors.

Abuse of Process of Law – Misuse of State machinery for ulterior motives – The complainants' conduct of neither appearing before the trial court at Hisar nor withdrawing their complaint shows their intention to harass the appellant.

Held: The Court noticed that the Respondent No. 3 wife as a gazetted police officer at the relevant time and being well aware of the laws, in particular, CrPC, misused her position for filing one complaint after the other through her father (complainant) – Further, the conduct of the Complainant and Respondent wife of neither appearing before the Trial Court at Hisar nor withdrawing the complaint shows their intention to harass the Appellant by first making him face a trial in Hisar, which ultimately acquitted the Appellant, and then again at Udaipur – Accordingly, impugned FIR quashed with costs. [Paras 4, 11]

Case Law Cited

Prem Chand Singh v. State of UP **(2020) 3 SCC 54;** *T.T. Antony v. State of Kerala & Ors.* **[2001] 3 SCR 942;** *Y. Abraham Ajith & Ors. v. Inspector of Police, Chennai & Anr.* **[2004] Supp. 3 SCR 604 – relied on.**

List of Acts

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

List of Keywords

Another complaint; Same allegations; Abuse of process; Intention to harass; Quashing; Criminal proceedings; Conduct; Failure to withdraw; Section 482 Cr.P.C.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.2167 of 2024

From the Judgment and Order dated 06.03.2017 of the High Court of Judicature for Rajasthan at Jodhpur in SBCRM No. 3259 of 2015

Appearances for Parties

Rishi Malhotra, Jaydip Pati, Utkarsh Singh, Advs. for the Appellant.

Dr. Manish Singhvi, Uday Gupta, Sr. Advs., Ms. Shubhangi Agarwal, Apurv Singhvi, Anuj Gupta, Shailesh Joshi, D. K. Devesh, Ms. Shivani

Lal, Gaurav Dave, M. K. Tripathi, Ms. Sanam Singh, Harish Dasan, Rajiv Ranjan, Rajeev Kumar Gupta, Ms. Yogamaya M. G., Hiren Dasan, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath, J.

Leave granted.

2. This appeal assails the correctness of the judgement and order dated 06.03.2017 passed by the Rajasthan High Court in S.B. Criminal Misc. (Pet.) No. 3259 of 2015 dismissing the said petition filed under Section 482 of the Code of Criminal Procedure, 1973[1] for quashing the FIR No. 156 of 2015, Women Police Station, Udaipur under Sections 498A, 406, 384, 420 and 120(B) of Indian Penal Code, 1860[2].

3. At the outset, it would be relevant to mention that the sole ground on which the quashing was sought was that this was a second FIR on the same set of allegations made by the complainant after two weeks of lodging the first FIR being FIR No. 19 of 2015 under Section 498A read with Section 34 IPC, Police Station, Hisar, Haryana.

4. The relevant facts are briefly stated hereunder:

   (i). The appellant and respondent No.3 came in contact with each other in June, 2014 through internet.

   (ii). The complainant (respondent No.2) who is the father of respondent No.3 had visited the appellant in Udaipur, who is a Chartered Accountant based in Hisar, for proposal of marriage of his daughter (respondent No.3) who was at that time posted as Deputy Superintendent of Police at Udaipur, Rajasthan.

   (iii). On 18.02.2015 engagement took place and thereafter on 21.03.2015, the marriage was solemnised at Udaipur. On 10.10.2015, the respondent No.2 filed a complaint at Police Station, Hisar, Haryana under Section 498A IPC etc. The said complaint was registered at Police Station Hisar on 17.10.2015 as FIR No. 19 of 2015 under Section 498A read with Section 34 IPC.

1 In short, "Cr.P.C."

2 In short, "IPC"

(iv). In the meantime, respondent No.2 submitted another complaint on 15.10.2015 i.e. five days after the first complaint at the Police Station, Udaipur in the State of Rajasthan on the same set of allegations as in the previous complaint. This complaint came to be registered on 01.11.2015 as FIR No. 156 under Section 498A/506 IPC etc.

(v). In the first FIR No. 19 of 2015 along with the appellant other family members were also roped in. However, after further investigation, a Police Report under Section 173(2) Cr.P.C. was submitted in December, 2015 only against the appellant under Section 498A IPC. Based on the said Police Report, the Magistrate took cognizance and the trial proceeded and a case was registered as Crl. Case No. 232-I of 2015, in the Court of Judicial Magistrate, Ist Class, Hisar.

(vi). In the meantime, the appellant filed a petition under Section 482 Cr.P.C. before the Rajasthan High Court for quashing of the second FIR No. 156 of 2015 registered at Udaipur. By the impugned order, the High Court has dismissed the said petition on 06.03.2017 primarily on two grounds. Firstly, that the complaint at Udaipur was prior in point of time than the complaint in Hisar. The second ground was that the Rajasthan Police was not aware of the earlier proceedings/complaint before the Hisar Police and as such the Udaipur Police should be at liberty to investigate the said complaint made at Udaipur.

(vii). Aggrieved by the impugned order, the present petition was preferred before this Court on which notice was issued on 03.04.2017, and this Court also stayed further investigation in the FIR No. 156 dated 01.11.2015 P.S. Women Police Station, Udaipur, until further orders. As such the said FIR has not been investigated so far.

(viii). After the impugned order was passed, the trial at Hisar was concluded, and the Trial Court vide judgement dated 02.08.2017 acquitted the appellant. Copy of the said judgment has been placed along with additional documents (I.A. No. 118201 of 2021).

(ix). A perusal of the judgment and order of acquittal reflects that the prosecution examined ASI Sheela Devi Investigating Officer as PW-1 who proved the Police Papers, Head Constable Raja

Ram as PW-2, who proved the documents relating to marriage etc., Jaipal Singh, DSP as PW-3, who also proved some of the police papers, and Sub Inspector Mane Devi as PW-4, who had prepared the Challan upon completion of the investigation.

(x). The Trial Court further records that prosecution tried its best to secure the presence of the complainant and the victim but they did not turn up to depose before the Court. Left with no alternative, the Trial Court proceeded to close the evidence of the prosecution and after recording the statement of the appellant under Section 313 Cr.P.C., proceeded to hear the counsel for the parties and record the finding of acquittal.

5. Learned Counsel for the appellant has drawn our attention to both the complaints, the judgement of acquittal as also the errors apparent on the face of record in the impugned order regarding both the grounds, that the complaint at Udaipur was prior in point of time than that at Hisar, and secondly that the Rajasthan Police had no knowledge of the proceedings at Hisar.

6. Learned counsel for the respondents, both the State of Rajasthan as also the complainant, have vehemently argued that the Court at Hisar had no territorial jurisdiction as the offence had been committed at Udaipur, and therefore, the judgment of acquittal delivered by the Hisar Court was void. The complaint ought to have been examined and investigated by Rajasthan Police, but owing to the interim order passed by this Court the investigation has not proceeded as such the petition deserves to be dismissed. We have also been taken through the relevant statutory provisions under the Cr.P.C. in particular Sections 300, 177, 461 and Article 22 of the Constitution of India by the counsel for the parties and further reliance has also been placed on the following judgements:

(i). **Prem Chand Singh** vs. **State of UP**[3]

(ii). **T.T. Antony vs. State of Kerala & Ors.**[4]

(iii). **Y. Abraham Ajith & Ors. vs. Inspector of Police, Chennai & Anr.**[5]

3 (2020) 3 SCC 54

4 [2001] 3 SCR 942 : (2001) 6 SCC 181

5 [2004] Supp. 3 SCR 604 : (2004) 8 SCC 100

The first two have been relied upon by the counsel for the appellant and the third by the counsel for the respondents.

7. Without going into these statutory provisions and the case laws relied upon by the parties, we are convinced that the impugned proceedings are nothing but an abuse of the process of law. It is not denied by the respondent Nos. 2 and 3 that they did not lodge complaint at Hisar. They also did not file an application withdrawing their complaint on the ground that it was wrongly filed here or that the said complaint may be transferred to Udaipur for investigation as the offence was committed at Udaipur. They allowed the investigating agency to continue to investigate in which their statements were also recorded. The respondent No.3 was a gazetted Police Officer at the relevant time and was also well aware of the laws, in particular the Cr.P.C. and the provisions thereto. Neither the complainant nor the victim entered the witness box before the Hisar Court allowing total wastage of the valuable time of the Court and the investigating agency. Merely because she was a Police Officer, she first managed to get an FIR lodged at Hisar through her father, and thereafter she moved to her hometown at Udaipur and got another complaint lodged by her father within a week.

8. The following admitted dates would be relevant to upset the finding of the High Court that the complaint at Udaipur was prior in point of time:

   (i). Complaint at Hisar is dated 10.10.2015.

   (ii). Complaint at Udaipur is dated 15.10.2015.

   (iii). FIR registered at Hisar is dated 17.10.2015

   (iv). FIR registered at Udaipur is dated 01.11.2015.

   On what basis the High Court recorded the finding that the complaint at Udaipur was prior in point of time is not discernible from the above dates and is contrary to the records and the admitted facts.

9. It is also not in dispute that in the complaint lodged at Udaipur, the allegations were the same as in the complaint at Hisar and additionally it was stated in the complaint at Udaipur that the complainant had earlier lodged a complaint at Hisar. Thus, the investigating agency at Udaipur was well aware of the complaint on similar allegations being lodged at Hisar. The High Court again fell in error in observing that

the Rajasthan Police was not aware about the earlier proceedings initiated at Hisar. The High Court and the Rajasthan Police were expected to at least read the complaint carefully.

10. Thus, on both the counts, we find that the High Court fell in error in dismissing the petition of the appellant.

11. In the facts and circumstances as recorded above, we are of the view that respondent Nos. 2 and 3 had been misusing their official position by lodging complaints one after the other. Further, their conduct of neither appearing before the Trial Court at Hisar nor withdrawing their complaint at Hisar, would show that their only intention was to harass the appellant by first making him face a trial at Hisar and then again at Udaipur. It would also be relevant to note that the appellant had been arrested and thereafter granted bail. And now before this Court, the respondent Nos. 2 and 3 have been vehemently opposing the quashing of the FIR at Udaipur. We may also note that in the complaint made at Hisar, there are allegations to the effect that when respondent No.2 visited the appellant at Hisar, he had made a demand of Rs. 50,00,000/- and also an Innova Car. Thus, the argument that no offence was committed in Hisar but only at Udaipur was also not correct. We thus deprecate this practice of state machinery being misused for ulterior motives and for causing harassment to the other side, we are thus inclined to impose cost on the respondent No.2 in order to compensate the appellant.

12. In view of the above, the appeal is allowed. The impugned proceeding passed by the High Court is quashed, and the impugned proceedings registered as FIR No. 156 of 2015 dated 01.11.2015, Women Police Station, Udaipur are quashed with costs of Rs. 5,00,000/- (Rs. Five Lacs Only) which shall be deposited with the Registrar of this Court within four weeks and upon deposit of the same, 50% may be transmitted in the account of Supreme Court Legal Services Committee and the remaining 50% to the appellant.

Headnotes prepared by:
Ankitesh Ojha, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeal allowed.

[2024] 5 S.C.R. 81 : 2024 INSC 310

The State of Telangana & Ors.
v.
Mohd. Abdul Qasim (Died) Per LRs.

(Civil Appeal No. 5001 of 2024)

18 April 2024

[M. M. Sundresh* and S. V. N. Bhatti, JJ.]

Issue for Consideration

High Court whether justified in passing the impugned order in review petition in favour of the plaintiff-respondent despite him not proving his title over the suit property (forest land), setting aside the concurrent judgments rendered by courts below which *inter alia* found that the suit land was a part of the reserved forest and the plaintiff had failed to show his title to the suit property.

Headnotes

Andhra Pradesh Forest Act, 1967 – s.15 – Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F. – s.87 – Code of Civil Procedure 1908 – s.114; Or. XLVII, r.1 – Proceedings of the revenue department dtd. 17.11.1960 whereunder a revision of survey and settlement took place – Respondent No.1 herein-Plaintiff filed application u/s.87, A.P. Land Revenue Act, 1317 F. seeking rectification of survey error stating that he owned the suit land, allowed – Land being forest land was declared as reserved forest by way of notification published u/s.15 of the A.P. Forest Act on 11.11.1971 – Trial court while granting title to the plaintiff declined the relief of injunction – High Court in appeal dismissed the suit – Review filed by the plaintiff – Contrary stands as regards the suit land being forest land were taken by State whereby Defendant No.1-District Collector (representing the Revenue Department), who had filed a common written statement along with the Defendant No.2-Forest Officer taking a stand that the suit property was a forest land which became part of a reserved forest area, constituted a committee and it was held that the suit property was to be excluded in favour of the plaintiff – Said decision was taken by the District Collector after the judgment of the First Appellate Court – High Court passed the impugned order in review petition in favour of

* Author

the plaintiff despite him not proving his title over the suit property – Sustainability:

Held: Officials of the State expected to protect and preserve the forests in discharge of their public duties clearly abdicated their role – High Court placed reliance upon evidence produced after the decree, at the instance of a party which succeeded along with the contesting defendant, particularly in the light of the finding that the land was forest land which had become part of reserved forest – Evidence relied upon was inadmissible on the face of it and, therefore, void from its inception, rendered by an authority which had absolutely no jurisdiction at all – There was a distinct lack of jurisdiction – Land belonged to the Forest Department and therefore, Defendant No.1 District Collector (representing the Revenue Department) had absolutely no role in dealing with it in any manner – A subsequent event per se cannot form the basis of a review – Sub-clause (c) of Or.XLVII r.1 specifies that the important matter or evidence produced must have been available at the time when the decree was passed – This is a matter of rule – Further, proceeding under the A.P. Land Revenue Act, 1317 F had no relevancy or connection with a proceeding under the A.P. Forest Act concluded on 11.11.1971 – Thereafter, without any jurisdiction, an order was passed u/s.87, A.P. Land Revenue Act, 1317 F – High Court had earlier given a clear finding that even at the time of declaration under the A.P. Land Revenue Act, 1317 F, these lands were not shown as private lands by the defendant – High Court which is expected to act within the statutory limitation went beyond and graciously gifted the forest land to a private person who could not prove his title – While disposing of the first appeal, the High Court exercised its power u/Or.XLI, r.22, CPC for partly reversing the trial court decree – Even otherwise, there were concurrent findings in so far as dismissal of the suit for injunction was concerned – High Court showed utmost interest and benevolence in allowing the review by setting aside the well merited judgment in the appeal – Impugned judgment set aside, judgment rendered in appeal restored. [Paras 51, 54-56, 59]

Andhra Pradesh Forest Act, 1967 – ss.15, 16 – Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F. – s.87 – Notification was published u/s.15 declaring the land being forest land, as reserved forest – Suit filed for declaration of title and permanent injunction – Maintainability:

Held: Completion of the process as prescribed u/s.15 results in changing the character of land, including a forest land into a reserved forest – Thereafter, there shall be no question of raising any dispute on its character – Suit filed was not maintainable as the plaintiff had not challenged the proceedings u/s.15 which had become final and conclusive in view of the express declaration provided in s.16 – Rather, the plaintiff filed application for denotification before the Government which was rejected – Neither the State Government, which rejected the said application, nor the Forest Settlement Officer were made as party defendants in the suit, with the State arrayed as respondent represented by the Principal Secretary, Forest Department, at a later stage in the appeal – Though, the Forest Officer of the Forest Department may be an interested party, the authority who otherwise could answer was the Forest Settlement Officer – He was the one who concluded the proceedings – In any case, the said exercise was irrelevant as the Plaintiff could not prove his title nor does there lie any relevance to the action taken under the A.P. Land Revenue Act, 1317 F – Furthermore, there was no specific challenge to the concluded proceedings under the A. P. Forest Act – Plaintiff merely asked for declaration of title and permanent injunction restraining the Defendants from interfering with possession. [Paras 13, 57]

Andhra Pradesh Forest Act, 1967 – Object – Discussed.

Code of Civil Procedure 1908 – s.114; Order XLVII Rule 1 – "after the exercise of due diligence"; "on account of some mistake or error apparent on the face of the record" – Review – Scope – Code of Civil Procedure, 1859 – ss.376, 378 – Code of Civil Procedure, 1877 – s.623:

Held: The words "due diligence", though one of fact, places onus heavily on the one who seeks a review – It has to be seen from the point of view of a reasonable and prudent man – Though an element of flexibility is given to any evidence or matter on its discovery, it has to be one which was not available to the court earlier – It could not have been produced despite due diligence, meaning thereby that it should have been available and, therefore, in existence at least at the time of passing the decree – Mistake or error apparent on the face of record would debar the court from acting as an appellate court in disguise, by indulging in a re-hearing – A decision, however erroneous, can never be a factor for review, but can only be corrected in appeal – Such a

mistake or error should be self-evident on the face of record – The material produced, at this stage, should be of such pristine quality which, if taken into consideration, would have the logical effect of reversing the judgment – A subsequent event per se cannot form the basis of a review – Sub-clause (c) of Order XLVII Rule 1 of the CPC 1908, clearly specifies that the important matter or evidence produced must have been available at the time when the decree was passed – This is a matter of rule – On a very rare occasion, an exception can be carved out – While exercising the said power, the court has to first check the evidentiary value of such discovery, including the circumstances under which it emanated, particularly when it inherently lacks jurisdiction or the evidence cannot be made admissible in law and therefore, is not relevant – In such a circumstance, there is no question of proceeding further in deciding the review application. [Paras 19-23]

Constitution of India – Articles 14, 19, 21, 48A and 51A – Forest – Constitutional Perspective:

Held: Article 48A imposes a clear mandate upon the State as a Directive Principle of State Policy, while Article 51A(g) correspondingly casts a duty upon a citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for fellow living creatures – These two provisions qua a forest ought to be understood in light of Articles 14, 19 and 21 of the Constitution of India, as they represent the collective conscience of the Constitution – If the continued existence and protection of forests is in the interest of humanity, various species and nature, then there can be no other interpretation than to read the constitutional ethos into these provisions. [Para 25]

Environment (Protection) Act, 1986 – Environment – Need for forests – Change in approach from Anthropocentric to Ecocentric – Natural rights theory – Economic Considerations – "Green Accounting" – Discussed.

Judicial Deprecation – Costs – Collusive affidavits filed – Despite a categorical finding of the suit property being a forest land, contrary stands taken by instrumentality of the State, but finally rectified by way of an affidavit before Supreme Court – However, in view of such different stands, the impugned order was passed in favour of the respondents despite him not proving his title over the suit property (forest land):

Held: Officials of the State expected to protect and preserve the forests in discharge of their public duties clearly abdicated their role – Cost of Rs. 5,00,000/- imposed – Appellant-State free to enquire into the lapses committed by the officers in filing collusive affidavits before the competent court, and recover the same from the officers responsible for facilitating and filing incorrect affidavits. [Paras 54, 59]

Environment – Protection and preservation – Approach to be adopted by the courts – Constitution of India – Articles 48A, 51A, 21, 14 and 19:

Held: This Court has repeatedly reiterated the approach required to be adopted by the courts where the onus is on the violator to prove that there is no environmental degradation – There is a constitutional duty enjoined upon every court to protect and preserve the environment – Courts will have to apply the principle of *parens patriae* in light of the constitutional mandate enshrined in Articles 48A, 51A, 21, 14 and 19 of the Constitution of India – Therefore, the burden of proof lies on a developer or industrialist and also on the State in a given case to prove that there is no such degradation. [Para 38]

Case Law Cited

Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi [1980] 2 SCR 650 **: (1980) 2 SCC 167;** *Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and others* **(1979) 4 SCC 389;** *Parsion Devi v. Sumitri Devi* [1997] Supp. 4 SCR 470 **: (1997) 8 SCC 715;** *Chhajju Ram v. Neki* **(1922) SCC OnLine PC 11;** *State of W.B. v. Kamal Sengupta* [2008] 10 SCR 4 **: (2008) 8 SCC 612;** *Shri Ram Sahu v. Vinod Kumar Rawat* [2020] 11 SCR 865 **: (2021) 13 SCC 1;** *Kerala SEB v. Hitech Electrothermics & Hydropower Ltd.* [2005] Supp. 2 SCR 517 **: (2005) 6 SCC 651;** *Sachidanand Pandey v. State of W.B.* [1987] 2 SCR 223 **: (1987) 2 SCC 295;** *M.C. Mehta v. Kamal Nath* [2000] Supp. 1 SCR 389 **: (2000) 6 SCC 213;** *Pradeep Krishen v. Union of India* [1996] Supp. 2 SCR 697 **: (1996) 8 SCC 599;** *Municipal Corpn. of Greater Mumbai v. Ankita Sinha* [2021] 10 SCR 1 **: (2022) 13 SCC 401;** *T.N. Godavarman Thirumulpad v. Union of India* [2012] 3 SCR 460 **: (2012) 3 SCC 277;**

T.N. Godavarman Thirumulpad (87) v. Union of India [2006] 3 SCR 1046 **: (2006) 1 SCC 1;** *A.P. Pollution Control Board v. Prof. M.V. Nayudu* [1999] 1 SCR 235 **: (1999) 2 SCC 718;** *Intellectuals Forum v. State of A.P.* [2006] 2 SCR 419 **: (2006) 3 SCC 549;** *Narinder Singh and Ors. v. Divesh Bhutani and Ors.* [2022] 15 SCR 1066 **: 2022 SCC OnLine SC 899;** *Amarnath Shrine, In re* [2012] 13 SCR 1093 **: (2013) 3 SCC 247;** *H.P. Bus-Stand Management & Development Authority v. Central Empowered Committee* [2021] 1 SCR 344 **: (2021) 4 SCC 309 – referred to.**

Books and Periodicals Cited

Paper titled "New Transitions from Human Rights to the Environment to the Rights of Nature" by Dr. Susana Borras published in Transnational Environmental Law, Volume 5, Issue 1, April 2016; Christopher D. Stone: Should Trees Have Standing? – Toward Legal Rights For Natural Objects, Southern California Law Review, 45 (1972) (pp. 464, 473, 474, 476); Professor Wahlen in her paper titled "Opportunities for making the invisible visible: Towards an improved understanding of the economic contributions of NTFPs", published in the Journal of Forest Policy and Economics, Volume 84, November 2017; report of the Ministry of Environment and Forests, Government of India titled "India's Forest and Tree Cover: Contribution as a Carbon Sink" (August 2009); Report on Currency and Finance; Towards a Greener Cleaner India", published by the Reserve Bank of India, (2022-2023), (pp. 45, 47); "Top Soil and Civilization" by Tom Dale and Vernon Gill Carter, published by the University of Oklahoma Press, (1955) – referred to.

List of Acts

Andhra Pradesh Forest Act, 1967; Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F.; Code of Civil Procedure, 1908; Environment (Protection) Act, 1986; Constitution of India.

List of Keywords

Forest land; Reserved forest; Forest Officer; Forest Department; Forests; Review petition; Subsequent event; Due diligence; Mistake or error apparent on the face of the record; Costs; Collusive affidavits.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5001 of 2024

From the Judgment and Order dated 19.03.2021 of the High Court for the state of Telangana at Hyderabad in IA No. 3 of 2019

Appearances for Parties

Ms. Aishwarya Bhati, Neeraj Kishan Kaul, L. Narasimha Reddy, Sr. Advs., Sravan Kumar Karanam, Ms. Manisha Chava, Annirudh Singh, Ms. Pranali Tayade, Ms. Shireesh Tyagi, Mrs. Medha Singh, P. Santhosh Kumar, Dharmesh Dk Jaiswal, Ms. Ira Mahajan, Manoj C. Mishra, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

M. M. Sundresh, J.

1. Leave granted.

2. The statement made by the Tribal Chief Seattle, way back in the year 1854, in his letter to the offer of George Washington, the former First President of the United States of America, to buy their land, is a pearl of wisdom not understood by the ignorant, educated modern mind.

> "Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every meadow, every humming insect. All are holy in the memory and experience of my people.
>
> xxx xxx xxx
>
> This we know: the earth does not belong to man; man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life; he is merely a strand in it. Whatever he does to the web, he does to himself."

3. A well merited judgment, passed in A.S. No. 145 of 1994 by the High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh, decided on a conscious consideration of the issues raised before it, confirming the one rendered by the Trial Court, was reviewed like an Appellate Court, based upon the materials that emanated after its filing, at the instance of a party defendant in

whose favour a decree was granted and that too by acting without the requisite jurisdiction, is under challenge in this appeal.

4. We are dealing with a case where an instrumentality of the State, despite a categorical finding of the suit property being a forest land, took different stands, but finally rectified by way of an affidavit before this Court. This act of taking different stands resulted in facilitating the impugned order being passed in favour of the respondents, setting aside the concurrent judgments rendered by two courts below, on appreciation of fact and law.

5. Heard Learned Additional Solicitor General Ms. Aishwarya Bhati for Appellants and Learned Senior Counsel Mr. Neeraj Kishan Kaul, Mr. L Narsimha Reddy for Respondents, perused the entire record, including the affidavits filed.

THE ANDHRA PRADESH FOREST ACT, 1967

6. The Andhra Pradesh Forest Act, 1967 (hereinafter referred to as "**the A.P. Forest Act**") has been enacted with a laudable objective of conserving, protecting and extending the forest cover, with a sound mechanism to deal with all the disputes arising thereunder while declaring land as reserved forest.

> "As this Act is only a Consolidating Act, it is necessary that the objects and reasons of the Madras Act are incorporated so that the objects and reasons for this Act can as well be known. The Objects and Reasons of the Madras Act were published in Fort St. George Gazette Extraordinary, dated 06th July 1882 at page 17 as follows:
>
> *Statement of Objects and Reasons:* This Act is designed to supply the want which had long been felt of legislative enactment to enable Government to carry out effectually the conservancy of forests of the Presidency, and to systematic and regulate the action of the Forest Department.
>
> **The first necessity is to provide for the constitution of the more important forests as State Reserves, and either to clear them under arrangement for due compensation of private rights which mitigate against forest conservancy, or to ascertain and define such rights so that future extension of them and fresh encroachments shall be impossible. To this end, the**

Act enables Government to empower officers to be called Forest Settlement officers to enquire into and to commit on record all private rights in areas to be elected for constitution as reserved forests. From the decisions of the officers appeal will lie, in the case of claims involving proprietary rights, to the District Courts, in the case of rights of way, and of rights to pasture to forest produce, or to the use of water to the Collector or other Revenue Officer of not less than such standing. When the enquiry is completed and all claims disposed of and settled, the forest will be declared by the Government to be reserved, and thereafter no fresh rights can accrue therein. The Bill also contains such provisions as are necessary for the protection of forests declared reserved…"

(emphasis supplied)

Section 2 of the A.P. Forest Act

"2. Definitions:- In this Act, unless the context otherwise requires-

xxx xxx xxx

(f) *'forest officer'* means any person appointed by the Government or by any officer empowered by the government in this behalf,-

[(i) to be the Principal Chief Conservator of Forests, Special Principal Chief Conservator of Forests, Additional Principal Chief Conservator of Forests, Chief Conservator of Forests, Conservator, Deputy Conservator, Assistant Conservator, Divisional Forest Officer, Sub-Divisional Forest Officer, Ranger, Deputy Ranger, Forester or Forest Section Officer, Forest Guard or Forest Beat Officer, Assistant Beat Officer, Thanadar, Checking Officer or Plantation Watcher or any other person or authority as may be notified;]

(ii) to perform any function of a forest officer under this Act or any rule or order made thereunder;

but does not include a Forest Settlement Officer appointed under Clause (c) of sub-section (1) of Section 4;"

Section 4 of the A.P. Forest Act

"4. Notification by Government:- (1) Whenever it is proposed to constitute any land as a reserved forest, the Government shall publish a notification in the Andhra Pradesh Gazette and in the District Gazette concerned in any;

(a) specifying, as nearly as possible, the situation and limits of such land;

(b) declaring that it is proposed to constitute such land as reserved forest;

(c) appointing a Forest Settlement Officer to consider the objections, if any, against the declaration under Clause (b) and to enquire into and determine the existence, nature and extent of any rights claimed by, or alleged to exist in favour of, any person in or over any land comprised within such limits, or to any forest produce of such land, and to deal with the same as provided in this Chapter.

Explanation:- (1) For the purpose of Clause (a), it shall be sufficient to describe the limits of the land by any well-known or readily intelligible boundaries, such as roads, rivers, bridges and the like.

(2) A person appointed to be a Forest Settlement Officer under Clause (c) of sub-section (1) shall be an officer of the Revenue Department not below the rank of a Revenue Divisional Officer.

(3) Any forest officer may represent the Forest Department at the inquiry conducted under this Chapter."

Section 7 of the A.P. Forest Act

"7. Bar of accrual of fresh rights and prohibition of clearings:- (1) During the interval between the publication of a notification in the Andhra Pradesh Gazette under Section 4 and the date fixed by the notification under Section 15-

(a) no right shall be acquired by any person in or over the land included in the notification under

Sec. 4 except by succession or under a grant or contract in writing made or entered into by or on behalf of the Government or any person in whom such right was vested before the publication of the notification under Section 4;

(b) no new house shall be built or plantation formed, no fresh clearing for cultivation or for any other purpose shall be made, on such land and no tress shall be cut from such land for the purpose of trade or manufacture;

Provided that nothing shall prohibit the doing of any act specified in this clause with the permission in writing of the Forest Settlement Officer; and

(c) no person shall set fire or kindle or leave burning any fire in such manner as to endanger or damage such land or forest produce.

(2) No patta in such land shall be granted by or on behalf of the Government."

Section 8 of the A.P. Forest Act

"**8. Inquiry by Forest Settlement Officer:-** (1) The Forest Settlement Officer shall consider every objection and inquire into every claim made under Section 6, after recording in writing the statements made or evidence given in pursuance of the proclamation published or notice served under that section. He shall record any representation which the forest officer, if any, representing the Forest Department under sub-section (3) of Section 4, may make in respect of any such objection or claim.

(2) The evidence under sub-section (1) shall be recorded in the manner provided by the Code of Civil Procedure, 1908 in appealable cases."

Section 9 of the A.P. Forest Act

"**9. Powers of Forest Settlement Officer:-** For the purpose of an inquiry under Section 8, the Forest Settlement Officer may exercise the following powers, namely:

(a) power to enter by himself or to authorise any officer to enter upon any land and to survey, demarcate and make a map of the land; and

(b) the powers conferred on a Civil Court by the Code of Civil Procedure, 1908, for summoning and enforcing the attendance of any person and examining him on oath and requiring the production of any document or other article."

Section 10 of the A.P. Forest Act

"10. Claims to certain rights:- (1) Where the claims relate to a right in or over any land other than the following rights:-

(a) a right of way;

(b) a right to water-course, or to use of water;

(c) a right of pasture; or

(d) a right to forest produce;

the Forest Settlement Officer shall, after considering the particulars of such claim, and the objections of the forest officer, if any, pass, an order, admitting or rejecting the same wholly or in part after recording the reasons therefor.

(2)(a) If any claim is admitted wholly or in part under sub-section (1), the Forest Settlement Officer may:-

(i) accept the voluntary surrender of the right by the claimant or determine the amount of compensation payable for the surrender of the right of the claimant, as the case may be; or

(ii) direct the exclusion of the land from the limits of the proposed forest: or

(iii) acquire such land in the manner provided by the Land Acquisition Act, 1894 (hereinafter in this sub-section referred to as the said Act).

(b) For the purpose of acquiring such land:-

(i) the acquisition shall be deemed to be for a public purpose; and the notification under Section 4 shall be deemed to be a notification under sub-section (1) of Section 4 of the said Act;

(ii) the Forest Settlement Officer shall be deemed to be a Collector under the said Act, and the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under Section 9 of the said Act;

(iii) the provisions of Sections 5-A, 6,7 and 8 of the said Act shall not be applicable; and

(iv) the Forest Settlement Officer with the consent of the claimant, or the Court as defined in the said Act-with the consent of the claimant and of the Government may, instead of money compensation, award compensation by the grant of any other land in exchange, by the grant of any right in or over land or partly by the grant of any land of any right therein and partly by the payment of money."

Section 13 of the A.P. Forest Act

"13. Appeals from the orders of Forest Settlement Officer:- (1) Where a claim is rejected wholly or in part, the claimant may, within ninety days from the date of the order under sub-section (1) of Section 10 and within sixty days from the date of the order under sub-section (1) of Section 11, prefer an appeal to the District Court having jurisdiction in respect of such rejection only.

(2) Where a claim is admitted under Section 10 or Section 11 in the first instance wholly or in part and where such claim does not relate to the acquisition of any land under the Land Acquisition Act, 1894, a like appeal, subject to the same period of limitation and subject to the same conditions, may be preferred to the District Court having

jurisdiction on behalf of the Government by the forest officer or other person, generally or specially empowered by the Government in this behalf.

(3) Every order passed on appeal under this section shall be final.

(4) Where the District Court, on appeal, decides that the claim or such part thereof as has been rejected should be admitted, the Forest Settlement Officer shall proceed to deal with it in like manner as if it has been in the first instance admitted by himself."

Section 15 of the A.P. Forest Act

"15. Notification declaring Forest reserved:- (1) Upon the occurrence of the following events namely:-

(a) the period fixed under Section 6 for preferring of an objection or a claim had elapsed, and every objection or claim made under that section was disposed of by the Forest Settlement Officer; and

(b) in any such claim was made, the period limited by Section 13 for preferring an appeal from the order passed on such claim had elapsed, and every appeal presented within such period was disposed of by the appellate authority; and

(c) all proceedings mentioned in Section 10 were taken and all lands, if any, to be included in the proposed forest, which the Forest Settlement Officer had, under Section 10, elected to acquire under the Land Acquisition Act, 1894, had become vested in the Government under Section 16 of that Act;

the Government may publish a notification specifying definitely according to the boundary marks erected or otherwise, the limits of the forest which it is intended to reserve and declaring the same to be reserved from a

date to be fixed by such notification and from the date so fixed, such forest shall be deemed to be a reserved forest.

(2) Copies of the notification shall also be published in the District Gazette, if any, and in the manner provided for the proclamation under Section 6."

Section 16 of the A.P. Forest Act

"16. Extinction of rights not claimed:- Rights in respect of which no claim was preferred under Section 6 within the period fixed under that section shall stand extinguished on the publication of the notification under Section 15 unless, before the publication of such notification the person claiming them has convinced the Forest Settlement Officer that he had sufficient cause for not preferring such claim within that period in which case the Forest Settlement Officer shall proceed to dispose of the claim in the manner herein before provided."

7. Section 2 of the A.P. Forest Act, defines a "Forest Officer", to mean a vast category of officers. Such a forest officer is appointed to perform any function of a forest officer under the A.P. Forest Act, or any rule or order made thereunder. Clause (f) of Section 2 clarifies that such Forest Officer does not include a Forest Settlement Officer appointed under Clause (c) of sub-section (1) of Section 4, thus, making a distinction between a Forest Officer and a Forest Settlement Officer.

8. Under Section 4(2) of the A.P. Forest Act, a Forest Settlement Officer shall be an officer of the Revenue Department not below the rank of a Revenue Divisional Officer. Wide powers have been conferred upon the State Government to declare any land as a reserved forest, subject to due compliance of the other provisions. This has to be done by a notification published in Andhra Pradesh Gazette and District Gazette under Section 4(1), by declaring its intention through a proposal.

9. The legislature consciously did not confer any role on an officer working under the forest department, by specifically naming an officer of the revenue department with his designation for determining qualification, as Forest Settlement Officer. Such an officer has to exercise quasi-judicial power.

10. After the commencement of proceedings under Section 4 of the A.P. Forest Act, even the Government is restrained from issuing any

patta to any individual, for the reason that all disputes would have to be adjudicated under the Act, be it one of title under Section 10 or any other limited right as prescribed under Section 11 of the A.P. Forest Act. Under Sections 8 and 9 of the A.P. Forest Act, the Forest Settlement Officer has been conferred with powers of the civil court, as available under the Code of Civil Procedure, 1908 (hereinafter referred to as **"the CPC 1908"**), for the aforesaid purpose. While exercising power, the Forest Settlement Officer may even admit the claim wholly or in part under Section 10(2) by excluding any extent of land which is in dispute.

11. As per Section 13 of the A.P. Forest Act, an appeal lies before the District Court having territorial jurisdiction, which is to be filed within a period of 90 days from the date of the order passed under Section 10 by the Forest Settlement Officer. Thus, anyone who claims a right of ownership under Section 10 or any other limited right as illustrated under Section 11, has to seek an adjudication of his claim before the Forest Settlement Officer. If aggrieved, the remedy lies before the jurisdictional District Court, subject to the limitation as prescribed under Section 13.

12. After completion of the said exercise, the State Government would declare the proposed land as a reserved forest by issuing a notification under Section 15 of the A.P. Forest Act. Thereafter, the vesting of the land takes place by way of a deeming fiction i.e., giving the land the status of a reserved forest. Any right not claimed with respect to the land, shall stand extinguished after the publication under Section 15 as declared expressly under Section 16, by way of a reinforcement.

13. From the abovementioned provisions and their interpretation, it is very clear that the completion of the process as prescribed under Section 15 of the A.P. Forest Act would result in changing the character of land, including a forest land into a reserved forest. Thereafter, there shall be no question of raising any dispute on its character. The period of limitation mentioned under Section 13 of the A.P. Forest Act cannot be breached, though one might raise an objection with respect to its commencement.

SCOPE OF REVIEW

14. We shall start our discussion with the statement of law rendered by Justice V.R. Krishna Iyer.

Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167,

> "14. A plea for review, unless the first judicial view is manifestly distorted, is like asking for the moon. A forensic defeat cannot be avenged by an invitation to have a second look, hopeful of discovery of flaws and reversal of result…"

15. The legislature, in its wisdom, has chosen to restrict the scope of review from time to time. To indicate this legislative shift, Section 376 and 378 of the Code of Civil Procedure 1859 (hereinafter referred to as **"the CPC 1859"**), Section 623 of the Code of Civil Procedure 1877 (hereinafter referred to as **"the CPC 1877"**), Section 114 and Order XLVII Rule 1 of the CPC 1908 are reproduced herein below,

Section 376 of the CPC 1859

> **"376 - Review of Judgement on discovery of new evidence:** Any person considering himself aggrieved by a decree of a Court of original jurisdiction, from which no appeal shall have been preferred to a Superior Court - or by a decree of a District Court in appeal from which no special appeal shall have been admitted by the Sudder Court - or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred no proceedings in the suit have been transmitted to Her Majesty in Council - **and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed**, or **from any other good and sufficient reason**, may be desirous of obtaining a review of the judgement passed against him – may apply for a review of judgement by the Court which passed the decree."
>
> (emphasis supplied)

Section 378 of the CPC 1859

> **"378 - The order of the Court for granting or refusing the review is final:** If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, **but if it shall be of opinion that the review desired is necessary to correct an evident**

error or omission or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final. Provided that no review of judgement shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree of which a review is solicited."

(emphasis supplied)

16. Section 376 of the CPC 1859 provided a larger playing field to the court while dealing with an application to review. However, under Section 378 of the CPC 1859, a finality was sought to be given to the order of the court.

Section 623 of the CPC 1877

"623. Application for review of judgement: Any person considering himself aggrieved

(a) by a decree or order from which an appeal is hereby allowed, but from which no appeal has been preferred;

(b) by a decree or order from which no appeal is hereby allowed; or

(c) by a judgement on a reference from a Court of Small Causes,

And **who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made**, or **on account of some mistake or error apparent on the face of the record**, or **for any other sufficient reason**, desires to obtain a review of the decree passed or order made against him,

may apply for a review of judgement to the Court which passed the decree or made the order, or to the Court, if any, to which the business of the former Court has been transferred.

A party who is not appealing from a decree may apply for a review of judgement notwithstanding the pendency of

> an appeal by some other party, except when the ground of such appeal is common to the applicant and the appellant, or when, being a respondent, he can present to the appellate Court the case on which he applies for the review."
>
> (emphasis supplied)

17. Thus, taking note of the existence of a larger power to review, the legislature brought forth a change by adding the words "*after the exercise of due diligence*". Additionally, the words "*on account of some mistake or error apparent on the face of the record*" were also added. This conscious inclusion clearly restricts the power of review.

Section 114 of the CPC 1908

> **"114. Review**.—Subject as aforesaid, any person considering himself aggrieved,—
>
> *(a)* by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
>
> *(b)* by a decree or order from which no appeal is allowed by this Code, or
>
> *(c)* by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

Order XLVII Rule 1 of the CPC 1908

> **"1. Application for review of judgment**.—(1) Any person considering himself aggrieved—
>
> *(a)* by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> *(b)* by a decree or order from which no appeal is allowed, or
>
> *(c)* by a decision on a reference from a Court of Small Causes,

> **and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made**, or **on account of some mistake or error apparent on the face of the record,** or **for any other sufficient reason**, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment of the Court which passed the decree or made the order.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.
>
> [*Explanation.*—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a Superior Court in any other case, shall not be a ground for the review of such judgment.]"
>
> (emphasis supplied)

18. Section 114 read with Order XLVII Rule 1 of the CPC 1908 is verbatim similar to Section 623 of the CPC 1877, except for the Explanation to Order XLVII Rule 1 which was added by way of an Amendment in the year 1976. Section 114 of the CPC 1908 speaks of the circumstances, instances and situations under which a review can be filed. The words "*as it thinks fit*" cannot be interpreted to mean anything beyond what is conferred under Order XLVII Rule 1. In other words, Section 114 has to be read along with Order XLVII Rule 1. While they are to be read together, Section 114 is more procedural, whereas Order XLVII Rule 1 is substantially substantive.

19. The words "*due diligence*", though one of fact, places onus heavily on the one who seeks a review. It has to be seen from the point of view of a reasonable and prudent man. Though an element of flexibility is given to any evidence or matter on its discovery, it has to be one which was not available to the court earlier. It could not

have been produced despite due diligence, meaning thereby that it should have been available and, therefore, in existence at least at the time of passing the decree.

20. Mistake or error apparent on the face of record would debar the court from acting as an appellate court in disguise, by indulging in a re-hearing. A decision, however erroneous, can never be a factor for review, but can only be corrected in appeal. Such a mistake or error should be self-evident on the face of record. The error should be grave enough to be identified on a mere cursory look, and an omission so glaring that it requires interference in the form of a review. Being a creature of the statute, there is absolutely no room for a fresh hearing. The court has got no role to involve itself in the process of adjudication for a second time. Instead, it has to merely examine the existence of an apparent mistake or error. Even when two views are possible, the court shall not indulge itself by going into the merits.

21. The material produced, at this stage, should be of such pristine quality which, if taken into consideration, would have the logical effect of reversing the judgment. Order XLVII Rule 1 of the CPC, 1908 indicates that power of review can be exercised by courts, in three different situations, but these occasions ought to be read in an analogous manner. In other words, they should be read in a manner to mean that a restrictive power has been conferred upon the court. As stated, the words "*for any other sufficient reason*" ought to be read in conjunction with the earlier two categories reiterating the scope. Being a judicial discretion, it has to be exercised with circumspection and on rare occasions. It is a power to be exercised by way of an exception, subject to the rigours of the provision.

22. A subsequent event *per se* cannot form the basis of a review. Sub-clause (c) of Order XLVII Rule 1 of the CPC 1908, clearly specifies that the important matter or evidence produced must have been available at the time when the decree was passed. This is a matter of rule. On a very rare occasion, an exception can be carved out. Such an exception can only be exercised when the said matter or evidence is of unimpeachable quality. It is not only a new matter or evidence that should be taken into consideration, but it should also be an important one.

23. While exercising the said power, the court has to first check the evidentiary value of such discovery, including the circumstances under

which it emanated, particularly when it inherently lacks jurisdiction or the evidence cannot be made admissible in law and therefore, is not relevant. In such a circumstance, there is no question of proceeding further in deciding the review application.

PRECEDENTS

24. Now, we shall place on record decisions rendered by this Court on the above principle of law discussed by us,

Power of Review is not to be confused with Powers of Appellate Court in Appeal Jurisdiction.

- **Aribam Tuleshwar Sharma v. Aribam Pishak Sharma and others, (1979) 4 SCC 389**

  "3. The Judicial Commissioner gave two reasons for reviewing his predecessor's order. The first was that his predecessor had overlooked two important documents Exs. A/1 and A/3 which showed that the respondents were in possession of the sites even in the year 1948-49 and that the grants must have been made even by then. The second was that there was a patent illegality in permitting the appellant to question, in a single writ petition, settlement made in favour of different respondents. We are afraid that neither of the reasons mentioned by the learned Judicial Commissioner constitutes a ground for review. It is true as observed by this Court in *Shivdeo Singh* v. *State of Punjab* [AIR 1963 SC 1909] there is nothing in Article 226 of the Constitution to preclude a High Court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it. **But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the**

decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate Court to correct all manner of errors committed by the subordinate Court."

(emphasis supplied)

Error Apparent on the Face of Record

- **Northern India Caterers (India) Ltd. v. Lt. Governor of Delhi, (1980) 2 SCC 167**

"8. It is well-settled that a party is not entitled to seek a review of a judgment delivered by this Court merely for the purpose of a rehearing and a fresh decision of the case. The normal principle is that a judgment pronounced by the Court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so: *Sajjan Singh v. State of Rajasthan* [AIR 1965 SC 845 : (1965) 1 SCR 933, 948 : (1965) 1 SCJ 377] . For instance, if the attention of the Court is not drawn to a material statutory provision during the original hearing, the Court will review its judgment: *G.L. Gupta v. D.N. Mehta* [(1971) 3 SCC 189 : 1971 SCC (Cri) 279 : (1971) 3 SCR 748, 750] . The Court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice: *O.N. Mohindroo v. Distt. Judge, Delhi* [(1971) 3 SCC 5 : (1971) 2 SCR 11, 27] . Power to review its judgments has been conferred on the Supreme Court by Article 137 of the Constitution, and that power is subject to the provisions of any law made by Parliament or the rules made under Article 145. In a civil proceeding, an application for review is entertained only on a ground mentioned in Order 47 Rule 1 of the Code of Civil Procedure, and in a criminal proceeding on the ground of an error apparent on the face of the record (Order XL Rule 1, Supreme Court Rules, 1966). **But whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment**

delivered by the Court will not be reconsidered except "where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility": *Sow Chandra Kante v. Sheikh Habib* [(1975) 1 SCC 674 : 1975 SCC (Tax) 200 : (1975) 3 SCR 933] .

9. Now, besides the fact that most of the legal material so assiduously collected and placed before us by the learned Additional Solicitor - General, who has now been entrusted to appear for the respondent, was never brought to our attention when the appeals were heard, we may also examine whether the judgment suffers from an error apparent on the face of the record. **Such an error exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record."**

(emphasis supplied)

- **Parsion Devi v. Sumitri Devi, (1997) 8 SCC 715**

"9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule 1 CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

10. Considered in the light of this settled position we find that Sharma, J. clearly overstepped the jurisdiction vested in the Court under Order 47 Rule 1 CPC. The observations of Sharma, J. that "accordingly, the order in question is reviewed and it is held that the decree in question was of

composite nature wherein both mandatory and prohibitory injunctions were provided" and as such the case was covered by Article 182 and not Article 181 cannot be said to fall within the scope of Order 47 Rule 1 CPC. **There is a clear distinction between an *erroneous decision* and *an error apparent on the face of the record*. While the first can be corrected by the higher forum, the latter only can be corrected by exercise of the review jurisdiction.** While passing the impugned order, Sharma, J. found the order in Civil Revision dated 25-4-1989 as an *erroneous* decision, though without saying so in so many words. Indeed, while passing the impugned order Sharma, J. did record that there was a mistake or an error apparent on the face of the record which was not of such a nature, "which had to be detected by a long-drawn process of reasons" and proceeded to set at naught the order of Gupta, J. However, mechanical use of statutorily sanctified phrases cannot detract from the real import of the order passed in exercise of the review jurisdiction. Recourse to review petition in the facts and circumstances of the case was not permissible. The aggrieved judgment-debtors could have approached the higher forum through appropriate proceedings to assail the order of Gupta, J. and get it set aside but it was not open to them to seek a "review" of the order of Gupta, J. on the grounds detailed in the review petition. In this view of the matter, we are of the opinion that the impugned order of Sharma, J. cannot be sustained and we accordingly accept this appeal and set aside the impugned order dated 6-3-1997."

(emphasis supplied)

Meaning of the Words '*for any other sufficient reason*' in Order XLVII Rule 1 of the CPC 1908

- **Chhajju Ram v. Neki, 1922 SCC OnLine PC 11**

  "…It will be observed that the question with which their Lordships have to deal is one concerned not with appeal to a Court of Appeal, but with review by the Court which had already disposed of the case. In England it is only under strictly limited circumstances

that an application for such a review can be entertained. In India, however, provision has for long past been made by legislation for review in addition to appeal. But as the right is the creation of Indian statue law, it is necessary to see what such statutory law really allows. The law applicable to the present case is laid down by O. 47, R. 1, of the Code of Civil Procedure, 1908. This Rule is enacted in the following terms:—

"Any person considering himself aggrieved, (*a*) by a decree or order from which an appeal is allowed, but from which no appeal has, been preferred (*b*) by a decree or order from which no appeal is hereby allowed, or (*c*) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or **for any other sufficient reason**, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order."

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If their Lordships felt themselves at liberty to construe the language of O. 47 of the Code of Civil Procedure, 1908 without reference to its history and to the decisions upon it, their task would not appear to be a difficult one. For it is obvious that the Code contemplates procedure by way of review by the Court which has already given judgment as being different from that by way of appeal to a Court of Appeal. The three cases in which alone mere review is permitted are those of new material overlooked by excusable misfortune, mistake or error apparent on the face of the record, or "any other sufficient reason." The first two alternatives do not apply in the present case, and the expression "sufficient," if this were all, would naturally be read as meaning sufficiency of a kind analogous to the two already specified, that is to say, to excusable failure

to bring to the notice of the Court new and important matters, or error on the face of the record. But before adopting this restricted construction of the expression "sufficient," it is necessary to have in mind, in the first place, that the provision as to review was not introduced into the Code for the first time in 1908, but appears there as a modification of previous provision made in earlier legislation : and, in the second place, that the extent of the power of a Court in India to review its own decree under successive forms of legislative provision has been the subject of a good deal of judicial interpretation, not, however, in all cases harmonious. That the power given by the Indian Code is different from the very restricted power which exists in England appears plain from the decision in *Charles Bright and Co.* v. *Seller* [[1904] 1 K.B. 6.] , where the Court of Appeal discussed the history of the procedure in England and explained its limits.

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Their Lordships have examined numerous authorities, and they have found much conflict of judicial opinion on the point referred to. There is plainly no such preponderance of view in either direction as to render it clear that there is any settled course of decision which they are under obligation to follow. Some of the decisions in the earlier cases may have been influenced by the wider form of expression then in force, and these decisions may have had weight with the learned Judges who, in cases turning on the subsequent Code, had regarded the intention of the legislature as remaining unaltered. But their Lordships are unable to assume that the language used in the Codes of 1877 and 1908 is intended to leave open the questions which were raised on the language used in the earlier legislation. They think that R. 1 of O. 47 must be read as in itself definitive of the limits within which review is to-day permitted, and that reference to practice under former and different statutes is misleading. So construing it they interpret the words "any other sufficient reason" as meaning a reason sufficient on grounds at least

analogous to those specified immediately previously. Such an interpretation excludes from the power of review conferred the course taken by the second and third Division Bench, composed of Wilberforce, J., and Scott Smith, J., and by Wilberforce, J., and LeRossignol, J., respectively. The result is that the judgments given by these two Division Benches ought to be set aside, and that of the Bench of the Chief Court composed of Scott Smith, J., and Leslie Jones, J., restored, so that the suit will stand dismissed. The respondent-plaintiffs must pay the costs here and in the Courts below."

(emphasis supplied)

Discovery of New Matter or Evidence

- **State of W.B. v. Kamal Sengupta, (2008) 8 SCC 612**

"21. At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review *ex debito justitiae*. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier.

22. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(*f*) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the

power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

An Order can be reviewed only on the prescribed grounds mentioned in Order XLVII Rule 1 of the CPC 1908

- **Shri Ram Sahu v. Vinod Kumar Rawat, (2021) 13 SCC 1**

  "10. To appreciate the scope of review, it would be proper for this Court to discuss the object and ambit of Section 114CPC as the same is a substantive provision for review when a person considering himself aggrieved either by a decree or by an order of court from which appeal is allowed but no appeal is preferred or where there is no provision for appeal against an order and decree, may apply for review of the decree or order as the case may be in the court, which may order or pass the decree. **From the bare reading of Section 114CPC, it appears that the said substantive power of review under Section 114CPC has not laid down any condition as the condition precedent in exercise of power of review nor the said section imposed any prohibition on the court for exercising its power to review its decision. However, an order can be reviewed by a court only on the prescribed grounds mentioned in Order 47 Rule 1CPC, which has been elaborately discussed hereinabove. An application for review is more restricted than that of an appeal and the court of review has limited jurisdiction as to the definite limit mentioned in Order 47 Rule 1CPC itself. The powers of review cannot be exercised as an inherent power nor can an appellate power be exercised in the guise of power of review."**

  (emphasis supplied)

Evidence cannot be Reappreciated in Review

- **Kerala SEB v. Hitech Electrothermics & Hydropower Ltd., (2005) 6 SCC 651**

  "10. This Court has referred to several documents on record and also considered the documentary evidence brought on record. This Court on a consideration of the evidence on record concluded that the respondent had

been denied power supply by the Board in appropriate time which prevented the respondent from starting the commercial production by 31-12-1996. This is a finding of fact recorded by this Court on the basis of the appreciation of evidence produced before the Court. **In a review petition it is not open to this Court to reappreciate the evidence and reach a different conclusion, even if that is possible.** Learned counsel for the Board at best sought to impress us that the correspondence exchanged between the parties did not support the conclusion reached by this Court. **We are afraid such a submission cannot be permitted to be advanced in a review petition. The appreciation of evidence on record is fully within the domain of the appellate court. If on appreciation of the evidence produced, the court records a finding of fact and reaches a conclusion, that conclusion cannot be assailed in a review petition unless it is shown that there is an error apparent on the face of the record or for some reason akin thereto.** It has not been contended before us that there is any error apparent on the face of the record. **To permit the review petitioner to argue on a question of appreciation of evidence would amount to converting a review petition into an appeal in disguise."**

(emphasis supplied)

UNDERSTANDING OF THE FOREST: A CONSTITUTIONAL PERSPECTIVE

25. Article 48A of the Constitution of India, 1950 imposes a clear mandate upon the State as a Directive Principle of State Policy, while Article 51A(g) correspondingly casts a duty upon a citizen to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for fellow living creatures. These two provisions *qua* a forest ought to be understood in light of Articles 14, 19 and 21 of the Constitution of India, 1950. We say so, as they represent the collective conscience of the Constitution. If the continued existence and protection of forests is in the interest of humanity, various species and nature, then there can be no other interpretation than to read the constitutional ethos into these provisions.

26. Part III and Part IV of the Constitution are like two wheels of a chariot, complementing each other in their commitment to a social change and development. They form the core of nation building and a progressive society.

PRECEDENTS

Relevance of Directive Principles of State Policy

- **Sachidanand Pandey v. State of W.B., (1987) 2 SCC 295**

  "4. In India, as elsewhere in the world, uncontrolled growth and the consequent environmental deterioration are fast assuming menacing proportions and all Indian cities are afflicted with this problem. The once Imperial City of Calcutta is no exception. The question raised in the present case is whether the Government of West Bengal has shown such lack of awareness of the problem of environment in making an allotment of land for the construction of a Five Star Hotel at the expense of the zoological garden that it warrants interference by this Court? Obviously, if the government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the court may interfere in order to prevent a likelihood of prejudice to the public. **Whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48-A of the Constitution, the Directive Principle which enjoins that "the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country", and Article 51-A(*g*) which proclaims it to be the fundamental duty of every citizen of India "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures". When the court is called upon to give effect to the Directive Principle and the fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority.**

The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case. The court may always give necessary directions. However the court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authority. We may now proceed to examine the facts of the present case."

(emphasis supplied)

Article 48A and 51A To Be Considered in Light of Article 21 of the Constitution of India, 1950

- **M.C. Mehta v. Kamal Nath, (2000) 6 SCC 213**

"8. Apart from the above statutes and the rules made thereunder, Article 48-A of the Constitution provides that the State shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country. One of the fundamental duties of every citizen as set out in Article 51-A(*g*) is to protect and improve the natural environment, including forests, lakes, rivers and wildlife and to have compassion for living creatures. **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.**

9. In the matter of enforcement of rights under Article 21 of the Constitution, this Court, besides enforcing the provisions of the Acts referred to above, has also given effect to fundamental rights under Articles 14 and 21 of the Constitution and has held that if those rights are violated by disturbing the environment, it

can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21 of the Constitution. The judgment for removal of hazardous and obnoxious industries from the residential areas, the directions for closure of certain hazardous industries, the directions for closure of slaughterhouse and its relocation, the various directions issued for the protection of the Ridge area in Delhi, the directions for setting up effluent treatment plants to the industries located in Delhi, the directions to tanneries etc., are all judgments which seek to protect the environment."

(emphasis supplied)

Article 48A And 51A Must guide the Interpretation of Laws

- **Pradeep Krishen v. Union of India, (1996) 8 SCC 599**

"15. Now as pointed out earlier, since Parliament had no power to make laws for the States except as provided by Articles 249 and 250 of the Constitution, the States were required to pass resolutions under Article 252(1) to enable Parliament to enact the law. After as many as 11 States passed resolutions to that effect, the Act came to be enacted to provide for the protection of wild animals and birds and for matters connected therewith or ancillary or incidental thereto. **Even Articles 48-A and 51-A(*g*) inserted in the Constitution by the 42nd Amendment oblige the State and the citizen, respectively, to protect and improve the natural environment and to safeguard the forest and wildlife of the country. The statutory as well as the constitutional message is therefore loud and clear and it is this message which we must constantly keep in focus while dealing with issues and matters concerning the environment and the forest area as well as wildlife within those forests. This objective must guide us in**

interpreting the laws dealing with these matters and our interpretation must, unless the expression or the context conveys otherwise, subserve and advance the aforementioned constitutional objectives. With this approach in mind we may now proceed to deal with the contentions urged by parties."

(emphasis supplied)

ENVIRONMENT

Section 2 of the Environment (Protection) Act, 1986

"**2. Definitions.—**In this Act, unless the context otherwise requires,—

(a) 'environment' includes water, air and land and the inter-relationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organism and property;"

27. The word "*environment*" shall not be understood from a narrow perspective. Albert Einstein once observed "*environment is everything that is not me*". In our considered view, the environment would include both animate and inanimate. One cannot segregate these two segments, which are broadly differentiated only for the ease of human understanding.

WHY WE NEED FORESTS ?

"***Man is the most insane species. He worships an invisible God and destroys a visible Nature, unaware that this Nature he's destroying is this God he's worshiping***."

Hubert Reeves.

Canadian astrophysicist

28. Human beings indulge themselves in selective amnesia when it comes to fathom the significance of forests. It is the forests which give life to the Earth by replacing carbon dioxide with oxygen, thereby providing a hospitable environment for the steady growth of diverse life forms. It's the spirit of the forest that moves the Earth. History shall not be understood from the jaundiced eyes of humans but through the prism of the environment, the forest in particular.

29. Forests not only provide for and facilitate the sustenance of life, but they also continue to protect and foster it. They continue to tackle the ever-increasing carbon dioxide emissions produced by humans in the name of development, while striving to sustain all species. Despite the unblemished, selfless and motherly service rendered by forests, man in his folly continues with their destruction, unmindful of the fact that he is inadvertently destroying himself.

30. Consequent to the advent of agriculture, man has destroyed a significant portion of forests at his own peril. Forests serve the Earth in a myriad of ways ranging from regulating carbon emissions, aiding in soil conservation and regulating the water cycle. Water being a life source, its availability for all life forms is heavily dependent upon the aquifers created by forests. Forests also play a pivotal role in controlling pollution, which significantly affects the underprivileged, violating their right to equality under Article 14 of the Constitution of India, 1950. It is the vulnerable sections of the society who would be most affected by the depletion of forests, considering the fact that the more affluent sections of society have better access to resources as compared to them. Therefore, the protection of forests is in the interest of mankind, even assuming that the other factors can be ignored.

Municipal Corpn. of Greater Mumbai v. Ankita Sinha, (2022) 13 SCC 401

> **"XI. *Environmental Justice and Environmental Equity***
>
> **75.** The conceptual frameworks of environmental justice and equity should merit consideration vis-à-vis NGT's domain and how its functioning and decisions can have wide implications in socio-economic dimensions of people at large. **The concept of environmental justice is a trifecta of distributive justice, procedural justice and justice as recognition. [Schlosberg D., *Defining Environmental Justice : Theories, Movements, and Nature* (Oxford University Press 2009).] Environmental equity as a developing concept has focused on the disproportionate implications of environmental harms on the economically or socially marginalised groups. The concerns of human rights and environmental degradation overlap under this umbrella term, to highlight the human element, apart from economic**

and environmental ramifications. Environmental equity thus stands to ensure a balanced distribution of environmental risks as well as protections, including application of sustainable development principles.

76. Voicing concerns about the disproportionate harm for the poor segments, Lois J. Schiffer [then Assistant Attorney General, Environment and Natural Resources Division ("ENRD"), US Department of Justice] and Timothy J. Dowling (then Attorney at ENRD) in their *Reflections on the Role of the Courts in Environmental Law*, wrote the following evocative passage on the concept of environmental justice:

> "Environmental justice, which focuses on whether minorities and low-income people bear a disproportionate burden of exposure to environmental harms and any resulting health effects. In the past ten to fifteen years, this issue has crystallized a grass-roots movement that combines civil rights issues with environmental issues, with a goal of achieving "environmental justice" or "environmental equity", which is understood to mean the fair distribution of environmental risks and protection from environmental harms." [Schiffer, L.J. & Dowling, T.J. (1997), "Reflections on the Role of the Courts in Environmental Law", 27(2) Environmental Law 327-342.]

77. There is also a need to focus on the interconnection between principles of procedural justice and distributive justice. The concern is to create a system which is affirmative enough to balance the disproportionate wielding of power between polluters and affected people:

"Environmental justice starts with distributive justice, or more accurately, distributive injustice. The rich and powerful derive the most benefit while suffering the least harm from environmentally harmful activities; conversely, the poor and minorities derive the least benefit but suffer the most harm. Further, those who benefit cause harm to the places where people "live, work, play, and go to school", whereas the people who reside there do little or nothing to harm their community." [Jeff Todd, "A 'Sense of Equity'

in Environmental Justice Litigation", 44 Harv Envtl L Rev 169, 193 (2020).]

78. When substantive justice is elusive for a large segment, disengaging with substantive rights at the very altar, for a perceived procedural lacuna, would surely bring in a process, which furthers inequality, both economic and social. An "*equal footing*" conception may not therefore be feasible to adequately address the asymmetrical relationship between the polluters and those affected by their actions. Instead, a recognition of the historical experience of marginalised classes of persons while accessing and effectively using the legal system, will allow for necessary appreciation of social realities and balancing the arm of justice.

xxx xxx xxx

80. In the backdrop of the above weighty concerns, this Court should advert to what Schiffer and Dowling have stated on the "*Blindfold of Lady Justice*", which symbolises "*the ideal of administering equal justice to everyone who comes to our courts, regardless of race, creed, or economic class*". [Schiffer, L.J. & Dowling, T.J. (1997), "Reflections on the Role of the Courts in Environmental Law", 27(2) Environmental Law 327-342.] The relevance of this concept is particularly apposite when we consider the inability of most marginalised communities, to access the legal machinery."

(emphasis supplied)

NEED FOR A CHANGE: FROM ANTHROPOCENTRIC TO ECOCENTRIC

31. There is a crying need for a change in our approach. Man being an enlightened species, is expected to act as a trustee of the Earth. It is his duty to ensure the preservation of the ecosystem and to continuously endeavour towards the protection of air, water and land. It is not his right to destroy the habitat of other species but his duty to protect them from further peril. A right to enjoy cannot be restricted to any specific group, and so also to human beings. The time has come for mankind to live sustainably and respect the rights of rivers, lakes, beaches, estuaries, ridges, trees, mountains, seas and air. It is imperative to

do so as there is always a constant threat to forests due to the ever-increasing population. Man is bound by nature's law. Therefore, the need of the hour is to transform from an anthropocentric approach to ecocentric approach which will encompass a wider perspective in the interest of the environment. Dr. Susana Borras in her paper titled "*New Transitions from Human Rights to the Environment to the Rights of Nature*" published in Transnational Environmental Law, Volume 5, Issue 1, April 2016 has reflected on the rights of nature (p. 114),

> "A new approach is emerging, however: the recognition of the rights of nature, which implies a holistic approach to all life and all ecosystems. **In recent years, a series of normative precedents have surfaced, which recognize that nature has certain rights as a legal subject and holder of rights. These precedents potentially contribute not merely a greater sensitivity to the environment, but a thorough reorientation about how to protect the Earth as the centre of life.**
>
> **From this perspective, known as 'biocentrism', nature is not an object of protection but a subject with fundamental rights, such as the rights to exist, to survive, and to persist and regenerate vital cycles**. The implication of this recognition is that human beings have the legal authority and responsibility to enforce these rights on behalf of nature in that rights of nature become an essential element for the sustainability and the survivability of human societies. This concept is based on the recognition that humans, as but one part of life on earth, must live within their ecological limits rather than see themselves as the purpose of environmental protection, as the 'anthropocentric' approach proposes. **Humans are trustees of the Earth rather than being mere stewards. The idea is based on the proposition that ecosystems of air, water, land, and atmosphere are a public trust and should be preserved and protected as habitat for all natural beings and natural communities**."
>
> (emphasis supplied)

- **T.N. Godavarman Thirumulpad v. Union of India, (2012) 3 SCC 277**

> "17. Environmental justice could be achieved only if we drift away from the principle of anthropocentric to ecocentric. Many of our principles like sustainable development, polluter-pays principle, intergenerational equity have their roots in anthropocentric principles. Anthropocentrism is always human interest focussed and that non-human has only instrumental value to humans. In other words, humans take precedence and human responsibilities to non-human based benefits to humans. Ecocentrism is nature-centred where humans are part of nature and non-humans have intrinsic value. In other words, human interest does not take automatic precedence and humans have obligations to non-humans independently of human interest. Ecocentrism is therefore life-centred, nature-centred where nature includes both humans and non-humans. The National Wildlife Action Plan 2002-2012 and the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 are centred on the principle of ecocentrism."

The concept of *natural rights theory* is being evolved, which encapsulates recognizing and acknowledging the rights of nature. As stated, such a right is meant for the benefit of nature, inclusive of all species, both present and future. The concept of trusteeship and inter-generational equity ought to be understood from this perspective, as any deviation would cause not only degradation of the environment but also serious inequality between different species as well as amongst them. The idea is to recognize the importance of forests *qua* the society as their significance has to be seen in the light of their effect on the Earth.

Christopher D. Stone: Should Trees Have Standing? – Toward Legal Rights For Natural Objects, Southern California Law Review, 45 (1972) (pp. 464, 473, 474, 476),

> "It is not inevitable, nor is it wise, that natural objects should have no rights to seek redress on their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities…
>
> …If the environment is not to get lost in the shuffle, we would do well, I think, to adopt the guardianship approach

as an additional safeguard, conceptualizing major natural objects as holders of their own rights, raisable by the court-appointed guardian.

…There is also a good case to be made for taking into account harm to the environment-in its own right. As indicated above, the traditional way of deciding whether to issue injunctions in lawsuits affecting the environment, at least where communal property is involved, has been to strike some sort of balance regarding the economic hardships *on human beings*….

…Why should the environment be of importance only indirectly, as lost profits to someone else? Why not throw into the balance the cost to the environment?

…the lost environmental "values" of which we are now speaking are by definition over and above those that the market is prepared to bid for: they are priceless.

One possible measure of damages, suggested earlier, would be the cost of making the environment whole, just as, when a man is injured in an automobile accident, we impose upon the responsible party the injured man's medical expenses…"

32. Similarly, the concept of sustainable development is to be understood from an ecocentric approach. First and foremost, it is the environment that needs to be sustained, while the anthropogenic development must follow later. **T.N. Godavarman Thirumulpad (87) v. Union of India, (2006) 1 SCC 1**

> **"38. Forest sustainability is an integral part of forest management and policy that also has a unique dominating feature and calls for forest owners and society to make a long-term (50 years or longer) commitment to manage forests for future generations. One of the viewpoints for sustaining forest is a naturally functioning forest ecosystem. This viewpoint takes the man and nature relationship to the point of endorsing, to the extent possible, the notion of letting the forest develop and process without significant human intervention. A strong adoption of the naturalistic**

> **value system that whatever nature does is better than what humans do, this is almost the "nature dominates man" perspective.** Parks and natural reserve creations; non-intervention in insect, disease and fire process; and reduction of human activities are typical policy situations. This viewpoint has been endorsed by the 1988 Forest Policy of the Government of India."
>
> (emphasis supplied)

ECONOMIC CONSIDERATIONS

33. Wealth of a country has to be seen not only from the perspective of mere revenue, augmented through its industries and business activities. Rather, it has to be seen by giving due importance to its natural wealth which actually contributes much more than the other factors. As discussed, forests play a pivotal role in reducing carbon emissions in the atmosphere created by human activities. A substantial value needs to be attached to the contribution of forests.

34. Professor Wahlen in her paper titled "*Opportunities for making the invisible visible: Towards an improved understanding of the economic contributions of NTFPs*", published in the Journal of Forest Policy and Economics, Volume 84, November 2017, has considered the implications on forest governance management and policy arguing that Sustainable Development Goals (SDGs) offer an opportunity to increase attention on the non-cash contributions of forests and turn this invisible contribution into a visible one. These "*invisible services*" rendered by forests ought to be given due credit. Depletion and disappearance of forests would ultimately lead to a massive extinction of organisms. Appreciation of this fact shall come from the point of view of a species rather than through the prism of a State or a nation. Regulation of temperature and prevention of water depletion is the primary role of forests. Destroying forests would lead to the depletion and destruction of our life source. It would lead to extreme droughts, rainfall would become scarce and even if it pours, there would not be any means for its natural storage. The concept of forests acting as a major sink of carbon dioxide has to be appreciated and encouraged. Destruction of forests also affects pollination and would ultimately impact the food chain.

35. A difference of one and half degree Celsius in temperature saves the global economy tens of trillions of dollars. We must realise

that carbon emissions not only come from industrial activities but also agriculture. Such functions are to be valued for assessing forest wealth. The concept of carbon credit in carbon market is indeed a reality. With the need for imposing restrictions towards carbon emissions, the concept of carbon markets has come into being. Emissions of carbon dioxide worldwide, need to be seen holistically, as emissions from each nation ultimately disperses into the atmosphere. Thus, a country with excess forest cover would be in a position to sell its excess carbon credit to the one in deficit. This in turn underlines the significance of forests in contributing to the financial wealth of a country. From the economic perspective we wish to quote the report of the Ministry of Environment and Forests, Government of India titled "*India's Forest and Tree Cover: Contribution as a Carbon Sink*" (August 2009), as an aid to assess the valuation of forests in the Indian context,

> "Over the last two decades, progressive national forestry legislations and policies in India aimed at conservation and sustainable management of forests have reversed deforestation and have transformed India's forests into a significant net sink of CO_2 . **From 1995 to 2005, the carbon stocks stored in our forests and trees have increased from 6,245 million tonnes (mt) to 6,662 mt, registering an annual increment of 38 mt of carbon or 138 mt of CO_2 equivalent.**
>
> **Mitigation Service by India's Forest and Tree Cover**
>
> **India's forests serve as a major sink of CO_2** . Our estimates show that the annual CO_2 removals by India's forest and tree cover is enough to neutralize 11.25 % of India's total GHG emissions (CO_2 equivalent) at 1994 levels, the most recent year for which comparable data is available for developing countries based on their respective National Communications (NATCOMs) to the United Nations Framework Convention on Climate Change (UNFCCC) . This is equivalent to offsetting 100% emissions from all energy in residential and transport sectors; or 40% of total emissions from the agriculture sector. **Clearly, India's forest and tree cover is serving as a major mode of carbon mitigation for India and the world.**

Value of Mitigation

Putting a conservative value of US$ 5 per tonne of CO_2 locked in our forests, this huge sink of about 24,000 mt of CO_2 is worth US$ 120b, or Rs 6,00,000 crores. Incremental carbon under scenario three will add a value of around US$ 1.2b, or Rs 6,000 crores every year to India's treasury of forest sink, assuming a value of US$ 7 per tonne."

(emphasis supplied)

A recent report of the Reserve Bank of India presents a very disturbing scenario. The report clearly suggests the enormous potential impact of climate change on the society, leading to serious job losses in every sector. Therefore, the adverse effect will be on the future of the nation as a whole, as against an identifiable group.

"*Report on Currency and Finance; Towards a Greener Cleaner India*", published by the Reserve Bank of India, (2022-2023), (pp. 45, 47),

"**4. Macroeconomic Impact of Climate Change in India**

xxx xxx xxx

II.32 India, along with countries such as Brazil and Mexico, face high risk of reduction in economic growth, if global warming raises temperature by 2 degree Celsius as against 1.5 degree Celsius (IPCC, 2018). **Climate change manifested through rising temperature and changing patterns of monsoon rainfall in India could cost the economy 2.8 per cent of its GDP and depress the living standards of nearly half of its population by 2050 (Mani *et al.*, 2018). India could lose anywhere around 3 per cent to 10 per cent of its GDP annually by 2100 due to climate change (Kompas *et al.*, 2018; Picciariello *et al.*, 2021) in the absence of adequate mitigation policies. Furthermore, Indian agriculture (along with construction activity) as well as industry are particularly vulnerable to labour productivity losses caused by heat related stress (Somnathan *et al.*, 2021). India could account for 34 million of the projected 80 million global job losses from heat stress associated productivity decline by 2030 (World Bank, 2022). Further, up to 4.5 per cent of India's**

> **GDP could be at risk by 2030 owing to lost labour hours from extreme heat and humidity conditions.** Moreover, heatwaves could also last 25 times longer, *i.e.,* rise in severity, by 2036-2065 if current rate of carbon emissions is not contained (CMCC, 2021). These estimates, thus, underscore the importance of timely adoption and faster implementation of climate mitigation policies to reduce the adverse impact on the Indian economy."
>
> (emphasis supplied)

One way of dealing with this situation is preserving the existing forests, while making an endeavour to enhance its cover. An understanding from the economic and social perspective would be the best approach.

36. The concept of "Green Accounting" in evaluating a nation's wealth, including its natural assets, would extend enormous benefits which are both tangible and intangible. There are numerous resources that are being tapped from the forests. Therefore, what is required is a comprehensive approach.

37. We shall conclude our discussion with a quote from the book "*Top Soil and Civilization*" by Tom Dale and Vernon Gill Carter, published by the University of Oklahoma Press, (1955)

> "Man, whether civilised or savage, is a child of nature — he is not the master of nature. He must conform his actions to certain natural laws if he is to maintain his dominance over his environment. When he tries to circumvent the laws of nature, he usually destroys the natural environment that sustains him. And when his environment deteriorates rapidly, his civilisation declines..."

APPROACH OF THE COURT

38. This Court has repeatedly reiterated the approach required to be adopted by the courts where the onus is on the violator to prove that there is no environmental degradation. There is a constitutional duty enjoined upon every court to protect and preserve the environment. Courts will have to apply the principle of *parens patriae* in light of the constitutional mandate enshrined in Articles 48A, 51A, 21, 14 and 19 of the Constitution of India, 1950. Therefore, the burden of proof lies on a developer or industrialist and also on the State in a given case to prove that there is no such degradation.

39. Not being an adversarial litigation, the court shall utilise all possible resources, including scientific inventions, in its endeavour to preserve the environment. While adopting an ecocentric approach, the concept of inter-related existence has to be kept in mind. A narrow or pedantic approach should be avoided. While considering the economic benefits, the invisible value and benefits provided by the forests shall also be factored into. There has to be an inclusive approach, which should be society centric, meaning thereby that all species should co-exist with minimum collateral damage. The effort is to minimise the damage to the environment, even in a case where the need for human development is indispensable. While having a pragmatic and practical approach, courts will have to weigh in the relevant factors and thus, perform a balancing act.

PRECEDENTS

Uncertainty of Science and Burden of Proof

- **A.P. Pollution Control Board v. Prof. M.V. Nayudu, (1999) 2 SCC 718**

  "36. We shall next elaborate the new concept of burden of proof referred to in the *Vellore case* [(1996) 5 SCC 647] at p. 658. In that case, Kuldip Singh, J. stated as follows: (SCC p. 658, para 11)

  "(*iii*) The 'onus of proof' is on the actor or the developer/ industrialist to show that his action is environmentally benign."

  37. It is to be noticed that while the inadequacies of science have led to the "precautionary principle", the said "precautionary principle" in its turn, has led to the special principle of *burden of proof* in environmental cases where burden as to the absence of injurious effect of the actions proposed, — is placed on those who want to change the status quo [Wynne, *Uncertainty and Environmental Learning*, 2 Global Envtl. Change 111 (1992) at p. 123]. This is often termed as a reversal of the burden of proof, because otherwise in environmental cases, those opposing the change would be compelled to shoulder the evidentiary burden, a procedure which is not fair. Therefore, it is necessary that the party

attempting to preserve the status quo by maintaining a less polluted state should not carry the burden of proof and the party who wants to alter it, must bear this burden. [See James M. Olson: "*Shifting the Burden of Proof*', 20 Envtl. Law, p. 891 at p. 898 (1990).] [Quoted in Vol. 22 (1998), Harv. Env. Law Review, p. 509 at pp. 519, 550.]

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39. It is also explained that if the environmental risks being run by regulatory inaction are in some way "*uncertain* but *non-negligible*", then regulatory action is justified. This will lead to the question as to what is the "non-negligible risk". **In such a situation, the burden of proof is to be placed on those attempting to alter the status quo. They are to discharge this burden by showing the absence of a "reasonable ecological or medical concern". That is the required standard of proof. The result would be that if insufficient evidence is presented by them to alleviate concern about the level of uncertainty, then the presumption should operate in favour of environmental protection. Such a presumption has been applied in *Ashburton Acclimatisation Society* v. *Federated Farmers of New Zealand* [(1988) 1 NZLR 78] . The required standard now is that the risk of harm to the environment or to human health is to be decided in public interest, according to a "reasonable persons" test. [See Charmian Barton: *Precautionary Principle in Australia* (Vol. 22) (1998) Harv. Env. L. Rev., p. 509 at p. 549.]"**

(emphasis supplied)

Approach of the Court: High Degree of Judicial Scrutiny on Any Action of Government

- **Intellectuals Forum v. State of A.P., (2006) 3 SCC 549**

"Public trust doctrine

76. The Supreme Court of California, in *National Audubon Society* v. *Superior Court of Alpine Country* [33 Cali 419] also known as *Mono Lake case* [33 Cali 419] summed up the substance of the doctrine. The Court said:

> "Thus the public trust is more than an affirmation of State power to use public property for public purposes. It is an affirmation of the duty of the State to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust."

This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly *prohibit* the alienation of the property held as a public trust. **However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources [Joseph L. Sax "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", *Michigan Law Review*, Vol. 68, No. 3 (Jan. 1970) pp. 471-566].** According to Prof. Sax, whose article on this subject is considered to be an authority, three types of restrictions on governmental authority are often thought to be imposed by the public trust doctrine [ibid]:

1. the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public;

2. the property may not be sold, even for fair cash equivalent;

3. the property must be maintained for particular types of use (*i*) either traditional uses, or (*ii*) some uses particular to that form of resources."

(emphasis supplied)

- Narinder Singh and Ors. v. Divesh Bhutani and Ors., **2022 SCC OnLine SC 899**

"THE APPROACH OF THE COURT IN INTERPRETING THE LAWS RELATING TO FORESTS AND THE ENVIRONMENT

25. While interpreting the laws relating to forests, the Courts will be guided by the following considerations:

i. **Under Clause (a) Article 48A forming a part of Chapter IV containing the Directive Principles of State Policy, it is the obligation of the State to protect and improve the environment and to safeguard the forests;**

ii. **Under Clause (g) of Article 51A of the Constitution, it is a fundamental duty of every citizen to protect and preserve the natural environment, including forests, rivers, lakes and wildlife etc.;**

iii. **Article 21 of the Constitution confers a fundamental right on the individuals to live in a pollution-free environment. Forests are, in a sense, lungs which generate oxygen for the survival of human beings. The forests play a very important role in our ecosystem to prevent pollution. The presence of forests is necessary for enabling the citizens to enjoy their right to live in a pollution-free environment;**

iv. **It is well settled that the Public Trust Doctrine is a part of our jurisprudence. Under the said doctrine, the State is a trustee of natural resources, such as sea shores, running waters, forests etc. The public at large is the beneficiary of these natural resources. The State being a trustee of natural resources is under a legal duty to protect the natural resources. The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gains;**

v. **Precautionary principle has been accepted as a part of the law of the land. A conjoint reading of Articles 21, 48A and 51-A(g) of the Constitution of India will**

show that the State is under a mandate to protect and improve the environment and safeguard the forests. The precautionary principle requires the Government to anticipate, prevent and remedy or eradicate the causes of environmental degradation including to act sternly against the violators;

vi. **While interpreting and applying the laws relating to the environment, the principle of sustainable development must be borne in mind.** In the case of Rajeev Suri v. Delhi Development Authority and Ors. [(2022) 11 SCC 1], a Bench of this Court to which one of us is a party (A.M. Khanwilkar, J.) has very succinctly dealt with the concept of sustainable development. Paragraphs 507 and 508 of the said decision reads thus:

> "507. The principle of sustainable development and precautionary principle need to be understood in a proper context. The expression "sustainable development" incorporates a wide meaning within its fold. It contemplates that development ought to be sustainable with the idea of preservation of natural environment for present and future generations. It would not be without significance to note that sustainable development is indeed a principle of development - it posits controlled development. The primary requirement underlying this principle is to ensure that every development work is sustainable; and this requirement of sustainability demands that the first attempt of every agency enforcing environmental Rule of law in the country ought to be to alleviate environmental concerns by proper mitigating measures. The future generations have an equal stake in the environment and development. They are as much entitled to a developed society as they are

to an environmentally secure society. By Declaration on the Right to Development, 1986, the United Nations has given express recognition to a right to development. Article 1 of the Declaration defines this right as:

> "1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

508. The right to development, thus, is intrinsically connected to the preservance of a dignified life. It is not limited to the idea of infrastructural development, rather, it entails human development as the basis of all development. The jurisprudence in environmental matters must acknowledge that there is immense interdependence between right to development and right to natural environment. In International Law and Sustainable Development, Arjun Sengupta in the chapter "Implementing the Right to Development" notes thus:

> "… Two rights are interdependent if the level of enjoyment of one is dependent on the level of enjoyment of the other…"

vii. **Even 'environmental rule of law' has a role to play. This Court in the case of Citizens for Green Doon v. Union of India and Ors. 2021 SCC OnLine SC 1243 has dealt with another important issue of lack of consistent and uniform standards for analysing the impact of development projects. This Court**

observed that the principle of sustainable development may create differing and arbitrary metrics depending on the nature of individual projects. Therefore, this Court advocated and accepted the need to apply and adopt the standard of 'environmental Rule of law'. Paragraph 40 of the said decision reads thus:

> "40. A cogent remedy to this problem is to adopt the standard of the 'environmental Rule of law' to test governance decisions under which developmental projects are approved. In its 2015 Issue Brief titled "Environmental Rule of Law : Critical to Sustainable Development", the United Nations Environment Programme has recommended the adoption of such an approach in the following terms:
>
> > "Environmental rule of law integrates the critical environmental needs with the essential elements of the rule of law, and provides the basis for reforming environmental governance. It prioritizes environmental sustainability by connecting it with fundamental rights and obligations. It implicitly reflects universal moral values and ethical norms of behaviour, and it provides a foundation for environmental rights and obligations. Without environmental rule of law and the enforcement of legal rights and obligations, environmental governance may be arbitrary, that is, discretionary, subjective, and unpredictable."
>
> (emphasis supplied)

Forest Constitute A National Asset

- **Amarnath Shrine, In re, (2013) 3 SCC 247**

  "19. Where it is the bounden duty of the State to protect the above rights of the citizen in discharge of its constitutional obligation in the larger public interest, there the law also casts a duty upon the State to ensure due protection to the forests and environment of the country. **Forests in India are an important part of the environment. They constitute a national asset. We may, at this stage, refer to the concept of inter-generational equity, which has been treated to be an integral part of Article 21 of the Constitution of India. The courts have applied this doctrine of sustainable development and precautionary principle to the cases where development is necessary, but certainly not at the cost of environment. The courts are expected to drive a balance between the two. In other words, the onerous duty lies upon the State to ensure protection of environment and forests on the one hand as well as to undertake necessary development with due regard to the fundamental rights and values."**

  (emphasis supplied)

Environmental Rule of Law

- **H.P. Bus-Stand Management & Development Authority v. Central Empowered Committee, (2021) 4 SCC 309**

  "I.1. ***Environmental rule of law***

  xxx xxx xxx

  "49. The environmental rule of law, at a certain level, is a facet of the concept of the rule of law. But it includes specific features that are unique to environmental governance, features which are sui generis. The environmental rule of law seeks to create essential tools — conceptual, procedural and institutional to bring structure to the discourse on environmental protection. It does so to enhance our understanding of environmental challenges — of how they have been shaped by humanity's interface

with nature in the past, how they continue to be affected by its engagement with nature in the present and the prospects for the future, if we were not to radically alter the course of destruction which humanity's actions have charted. The environmental rule of law seeks to facilitate a multi-disciplinary analysis of the nature and consequences of carbon footprints and in doing so it brings a shared understanding between science, regulatory decisions and policy perspectives in the field of environmental protection. It recognises that the "law" element in the environmental rule of law does not make the concept peculiarly the preserve of lawyers and Judges. On the contrary, it seeks to draw within the fold all stakeholders in formulating strategies to deal with current challenges posed by environmental degradation, climate change and the destruction of habitats. The environmental rule of law seeks a unified understanding of these concepts. There are significant linkages between concepts such as sustainable development, the polluter pays principle and the trust doctrine. The universe of nature is indivisible and integrated. The state of the environment in one part of the earth affects and is fundamentally affected by what occurs in another part. Every element of the environment shares a symbiotic relationship with the others. It is this inseparable bond and connect which the environmental rule of law seeks to explore and understand in order to find solutions to the pressing problems which threaten the existence of humanity. The environmental rule of law is founded on the need to understand the consequences of our actions going beyond local, State and national boundaries. The rise in the oceans threatens not just maritime communities. The rise in temperatures, dilution of glaciers and growing desertification have consequences which go beyond the communities and creatures whose habitats are threatened. They affect the future survival of the entire eco-system. The environmental rule of law attempts to weave an understanding of the connections in the natural environment which make the issue of survival a unified challenge which confronts human societies everywhere. It seeks to build on experiential

learnings of the past to formulate principles which must become the building pillars of environmental regulation in the present and future. The environmental rule of law recognises the overlap between and seeks to amalgamate scientific learning, legal principle and policy intervention. Significantly, it brings attention to the rules, processes and norms followed by institutions which provide regulatory governance on the environment. In doing so, it fosters a regime of open, accountable and transparent decision making on concerns of the environment. It fosters the importance of participatory governance — of the value in giving a voice to those who are most affected by environmental policies and public projects. The structural design of the environmental rule of law composes of substantive, procedural and institutional elements. The tools of analysis go beyond legal concepts. The result of the framework is more than just the sum total of its parts. Together, the elements which it embodies aspire to safeguard the bounties of nature against existential threats. For it is founded on the universal recognition that the future of human existence depends on how we conserve, protect and regenerate the environment today.

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54. In an article in Georgetown Environmental Law Review (2020), Arnold Kreilhuber and Angela Kariuki explain the manner in which the environmental rule of law seeks to resolve this imbroglio [Arnold Kreilhuber and Angela Kariuki, "Environmental Rule of Law in the Context of Sustainable Development", 32 Georgetown Environmental Law Review 591 (2020).] :

> "One of the main distinctions between environmental rule of law and other areas of law is the need to make decisions to protect human health and the environment in the face of uncertainty and data gaps. Instead of being paralyzed into inaction, careful documentation of the state of knowledge and uncertainties allows the regulated community, stakeholders, and other institutions to more fully understand why certain decisions were made."

The point, therefore, is simply this — the environmental rule of law calls on us, as Judges, to marshal the knowledge emerging from the record, limited though it may sometimes be, to respond in a stern and decisive fashion to violations of environmental law. We cannot be stupefied into inaction by not having access to complete details about the manner in which an environmental law violation has occurred or its full implications. Instead, the framework, acknowledging the imperfect world that we inhabit, provides a roadmap to deal with environmental law violations, an absence of clear evidence of consequences notwithstanding."

(emphasis supplied)

Role of Courts

- **H.P. Bus-Stand Management & Development Authority (Supra)**

"I.2. *Role of courts in ensuring environmental protection*

56. In **a recent decision of this Court in *BDA* v. *Sudhakar Hegde*** [(2020) 15 SCC 63] , this Court, speaking through one of us (D.Y. Chandrachud, J.) held : (SCC pp. 112-13, paras 94-95)

"*94.* The adversarial system is, by its nature, rights based. In the quest for justice, it is not uncommon to postulate a winning side and a losing side. In matters of the environment and development however, there is no trade-off between the two. The protection of the environment is an inherent component of development and growth. …

Professor Corker draws attention to the idea that the environmental protection goes beyond lawsuits. Where the State and statutory bodies fail in their duty to comply with the regulatory framework for the protection of the environment, the courts, acting on actions brought by public-spirited individuals are called to invalidate such actions. …

***95*. The protection of the environment is premised not only on the active role of courts, but also on robust institutional frameworks within which every stakeholder complies with its duty to ensure sustainable development. A framework of environmental governance committed to the rule of law requires a regime which has effective, accountable and transparent institutions. Equally important is responsive, inclusive, participatory and representative decision-making. Environmental governance is founded on the rule of law and emerges from the values of our Constitution. Where the health of the environment is key to preserving the right to life as a constitutionally recognised value under Article 21 of the Constitution, proper structures for environmental decision-making find expression in the guarantee against arbitrary action and the affirmative duty of fair treatment under Article 14 of the Constitution. Sustainable development is premised not merely on the redressal of the failure of democratic institutions in the protection of the environment, but ensuring that such failures do not take place."**

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58. The UNEP Report (supra) also goes on to note [UNEP, "Environmental Rule of Law First Global Report" (January 2019), p. 213.] :

> "Courts and tribunals must be able to grant meaningful legal remedies in order to resolve disputes and enforce environmental laws. As shown in Figure 5.12, legal remedies are the actions, such as fines, jail time, and injunctions, that courts and tribunals are empowered to order. For environmental laws to have their desired effect and for there to be adequate incentives for compliance with environmental laws, the remedies must both redress the past environmental harm and deter future harm."

> **59.** In its *Global Judicial Handbook on Environmental Constitutionalism*, the UNEP has further noted [UNEP, *Global Judicial Handbook on Environmental Constitutionalism* (3rd Edn., 2019), p. 7.] :
>
> > "Courts matter. They are essential to the rule of law. Without courts, laws can be disregarded, executive officials left unchecked, and people left without recourse. And the environment and the human connection to it can suffer. Judges stand in the breach."
>
> **60.** The above discussion puts into perspective our decision in the present appeals, through which we shall confirm the directions given by NGT in its impugned judgment [*T.N. Godavarman Thirumulpad* v. *Union of India*, 2016 SCC OnLine NGT 1196] . **The role of courts and tribunals cannot be overstated in ensuring that the "shield" of the "rule of law" can be used as a facilitative instrument in ensuring compliance with environmental regulations."**
>
> (emphasis supplied)

FACTUAL BACKGROUND

40. Between the years 1950-1959, a revision of survey and settlement of village Kompally took place. It was concluded on 17.11.1960. An application was stated to have been filed by Respondent No. 1 (Original Plaintiff), invoking Section 87 of the Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 F. (hereinafter referred to as "**A.P. Land Revenue Act, 1317 F.**"), seeking rectification of survey error. It was so filed on the premise that the Plaintiff actually owned the suit land. The suit land consists of 106.34 Acres and the Schedule reads thus – Village Kompally, District Warangal, Survey Number 171/3 to 171/7 admeasuring 106.34 Acres. This application did not surface for nearly a decade and a half, for the reasons known to the Plaintiff.

41. A notification being Gazette No. 85-B was published in the Andhra Pradesh Gazette on 11.11.1971 by the State Government, under Section 15 of the A.P. Forest Act, declaring the land, which was part of the earlier proceedings of the revenue department dated 17.11.1960, as reserved forest. It was done on the premise that the lands were forest lands and, therefore, they were accordingly declared as reserved forest.

42. Rather strangely, the application so filed by the Plaintiff was rejected by the Revenue Authority only on 10.01.1975. The revision filed by him was allowed by remitting the matter to the Joint Collector. Suffice it is to state that despite the findings rendered, neither the Forest Department nor the Forest Settlement Officer was arrayed as a party to these proceedings before the revenue department. It is also seen that the order of the Revenue Authority and the Revisional Authority were passed much after the declaration under Section 15 of the A.P. Forest Act, vesting the lands in the State by giving them the status of a reserved forest.

43. On 07.07.1981, the Joint Collector, Warangal allowed the application of the Plaintiff. Realising that the said order will not give the Plaintiff benefit of any sort, he filed an application before the Government seeking denotification of the land declared as reserved forest', which was rightly dismissed on 01.09.1984.

44. A suit was filed by the Plaintiff on 23.04.1985 in OS No. 56 of 1985 on the file of I Additional Sub-Judge, Warangal seeking a declaration of title and permanent injunction. In the said suit the Defendant no. 1 was the District Collector representing the Revenue Department with the Defendant no. 2, Forest Officer representing the Forest Department. Quite surprisingly, neither the Forest Settlement Officer nor the State of Andhra Pradesh, Forest Department was made a party defendant. The trial court while granting title to the plaintiff declined the incidental relief of injunction.

45. On appeal, the High Court, by giving adequate reasons reversed the said finding of the trial court *qua* the declaration, and confirmed the findings on injunction by dismissing the suit *in toto*. Ultimately, it was held that the suit property is forest land. The proceedings concluded under the A.P. Forest Act, though not specifically challenged, and that too without the proper and necessary parties, were found to be just and proper.

46. The trial court and the High Court in first appeal have given factual findings against the plaintiff. Only two witnesses were examined, one on each side. The trial court took note of the fact that there is material evidence to show that the suit land is a part of the reserved forest. The plaintiff was not at all in possession of the suit land. The suit was also held as barred under Section 5 of the A.P. Forest Act.

47. The High Court, being the final court of fact and law, went ahead and held that the plaintiff had miserably failed to show his title to the suit property. The Plaintiff did not have any personal knowledge about the manner of his succession to the suit property. Even as per his own evidence, he is not the absolute owner of the suit property, being a co-owner. The documents relied on by him, more particularly the decision of the revenue authorities, do not establish both title and possession. A detailed discussion was made on the effect of Section 15 and 16 of the A.P. Forest Act, along with the documents marked on behalf of defendants. It took note of the fact that though a portion of the property was sold as per the evidence of the Plaintiff, there is no proof.

48. Immediately after the judgment of the High Court dated 20.07.2018, a review was filed on behalf of the plaintiff on 18.11.2018. Shockingly, Defendant No. 1, who filed a common written statement along with the Defendant No. 2 and, thus, took a stand that the suit property is a forest land which becomes part of a reserved forest area, in line with the stand taken by the Defendant No. 3, who was impleaded pending the first appeal, constituted a committee on 12.07.2019 on an application said to have been filed by the Plaintiff in the year 2017, which was obviously pending the first appeal.

49. More surprisingly, the District Forest Officer did not appear before the Committee and based upon a report submitted, it was held that the suit property is required to be excluded in favour of the plaintiff. This was done despite the fact that the District Collector, who was a party to the suit, took a specific stand, and in view of the judgment which attained finality, that the suit land is forest land, the District Collector has got no jurisdiction at all to deal with it in any manner especially in the light of Section 15 and 16 of the A.P. Forest Act. We do not wish to say anything more on this, though wisdom has dawned upon defendants again, as could be seen from the affidavit filed by the State before this Court reiterating the original stand.

50. The aforesaid decision was taken by the District Collector after the judgment of the First Appellate Court. It was accordingly marked as a court exhibit in the review. Thereafter, it was taken up for hearing and disposed of on 19.03.2021. The Learned Judge who delivered an elaborate judgment in the first appeal was transferred to Andhra Pradesh on establishment of the High Court at Amravati. The review came to be filed before another Learned Judge. The impugned order

was passed in the purported exercise of the power of review, by virtually reversing all the findings rendered in the appeal, while placing reliance upon evidence which on the face of it was inadmissible and, therefore, void from its inception, rendered by an authority which had absolutely no jurisdiction at all.

51. While doing so, the High Court in review jurisdiction once again reconsidered the evidence produced by the Defendants. In the process, the High Court fixed a heavy onus on the Defendants ignoring the fact that on the earlier occasion the Plaintiff had miserably failed to prove his title. Incidentally, it was held that Section 5 of the A.P. Forest Act which speaks about the bar of a suit can only be applied during the pendency of proceedings under the A.P. Forest Act and not thereafter. Despite no challenge either to the proceedings under the A.P. Forest Act and that too in the absence of proper and necessary parties, an adverse inference was drawn by taking note of the statement made by DW-1 who was only a Forest Officer and, therefore, not having any direct connection with the action taken. Various admissions made by the plaintiff in his deposition were conveniently ignored. The High Court went on to criticize the conflicting stand taken by two wings of the State while ignoring the fact that Defendant No. 1 had absolutely no say.

SUBMISSIONS OF THE APPELLANTS

52. Ms. Aishwarya Bhati, Learned Additional Solicitor General, appearing for the appellants, submitted that the Forest Conservation Act, 1980 defines a forest which is inclusive of all types of forests. The extensive inclusion would take in its sweep even the private forests. Revenue records do not confer title. The High Court clearly exceeded its jurisdiction in review by entertaining a re-hearing and virtually acted as an appellate court. The Respondents did not satisfy the court on the title, which finding has not been touched.

SUBMISSIONS OF THE RESPONDENTS

53. Mr. Neeraj Kishan Kaul, Learned Senior Counsel appearing for the respondents, vehemently contended that the proceedings before the Forest Settlement Officer have become final. Even the trial court has held that the plaintiff had title. Once title is proved, possession has to follow. As there is an error apparent on the face of record, the power of review has been exercised correctly. The finding that Section 5 of the A.P. Forest Act, has got no application is correct, as there is no

attempt to interdict the proceedings. As there is no apparent perversity, this Court need not interfere with the impugned order.

DISCUSSION

54. We have already recorded the facts in detail. It is a classic case where the officials of the State who are expected to protect and preserve the forests in discharge of their public duties clearly abdicated their role. We are at a loss to understand as to how the High Court could interfere by placing reliance upon evidence produced after the decree, at the instance of a party which succeeded along with the contesting defendant, particularly in the light of the finding that the land is forest land which has become part of reserved forest.

55. There is a distinct lack of jurisdiction on two counts – one is with respect to an attempt made to circumvent the decree and, the second is in acting without jurisdiction. The land belongs to the Forest Department and therefore, Defendant No. 1 had absolutely no role in dealing with it in any manner. Proceeding under the A.P. Land Revenue Act, 1317 F. has got no relevancy or connection with a concluded proceeding under the A. P. Forest Act. The proceeding under the A. P. Forest Act was concluded on 11.11.1971. Thereafter, without any jurisdiction, an order was passed under Section 87 of the A.P. Land Revenue Act, 1317 F.

56. The High Court on the earlier occasion had given a clear finding that even at the time of declaration under the A.P. Land Revenue Act, 1317 F, these lands were not shown as private lands by the defendant, among other factual findings. It is indeed very strange that the High Court which is expected to act within the statutory limitation went beyond and graciously gifted the forest land to a private person who could not prove his title. While disposing of the first appeal, the High Court exercised its power under Order XLI Rule 22 of the CPC 1908 for partly reversing the trial court decree. Even otherwise, there were concurrent findings in so far as dismissal of the suit for injunction is concerned. In our considered view, the High Court showed utmost interest and benevolence in allowing the review by setting aside the well merited judgment in the appeal by replacing its views in all material aspects.

57. Let us alternatively examine the question of maintainability of a suit for the relief of declaration. The suit filed is not maintainable as the plaintiff has not challenged the proceedings under Section 15 of

A. P. Forest Act. These have become final and conclusive in view of the express declaration provided under the statute in Section 16 of A. P. Forest Act. Rather, the plaintiff filed an application for denotification before the Government which was rejected. Neither the State Government, which rejected the said application, nor the Forest Settlement Officer has been made as party defendants in the suit, with the State arrayed as respondent represented by the Principal Secretary, Forest Department, at a later stage in the appeal. Though, the Forest Officer of the Forest Department may be an interested party, the authority who otherwise could answer is the Forest Settlement Officer. He is the one who concluded the proceedings. In any case, the said exercise is irrelevant as the Plaintiff could not prove his title nor does there lie any relevance to the action taken under the A.P. Land Revenue Act, 1317 F. Furthermore, there is no specific challenge to the concluded proceedings under the A. P. Forest Act. The Plaintiff has merely asked for declaration of title and permanent injunction restraining the Defendants from interfering with possession.

58. We, thus, conclude that the impugned judgment does not stand the legal scrutiny as it is ridden with both factual and legal errors.

59. Accordingly, the appeal stands allowed. The impugned judgment stands set aside by restoring the judgement rendered in A.S. No. 145 of 1994. We consider it appropriate to impose cost of Rs. 5,00,000/- each on appellants and respondents to be paid to the National Legal Services Authority (NALSA) within a period of two months from the date of this judgment. The appellant State is free to enquire into the lapses committed by the officers in filing collusive affidavits before the competent court, and recover the same from those officers who are responsible for facilitating and filing incorrect affidavits in the ongoing proceedings. The Contempt Case No. 624 of 2021 pending before the High Court is directed to be closed. I.A. No.65196/2021 is dismissed. All other pending applications stand closed.

Headnotes prepared by: Divya Pandey

Result of the case: Appeal allowed.

[2024] 5 S.C.R. 143 : 2024 INSC 328

Yash Raj Films Private Limited
v.
Afreen Fatima Zaidi & Anr.

(Civil Appeal No. 4422 of 2024)

22 April 2024

[Pamidighantam Sri Narasimha* and Aravind Kumar, JJ.]

Issue for Consideration

Respondent no.1-complainant decided to go to watch a movie on the silver screen with her family. However, she found that the movie did not contain the song, which was widely circulated for promoting and publicising the movie. Whether there is any 'deficiency' in the provision of the entertainment service that the consumer has availed by paying the consideration through the purchase of a ticket. The complainant alleges that there is 'deficiency' in the service because what was shown in the film was not as per what was promised. Whether it is an 'unfair trade practice' giving rise to a cause of action.

Headnotes

Consumer Protection Act, 1986 – Legal implications of a promotional trailer – Contractual relationship – Unfair trade practice – Complainant did not find a song in a movie, which was widely circulated for promoting and publicising movie – Consumer complaint filed – The District forum dismissed the complaint – The State Commission held that the appellant has engaged in an unfair trade practice as the song in the promotional trailer was widely circulated but not shown in the film – The NCDRC held that the exclusion of the song from the movie will also constitute a deficiency, as defined in s.2(1)(g) of the C.P. Act, if the song is impliedly promised, but is later omitted while exhibiting the movie – Correctness:

Held: A promotional trailer is unilateral – It is only meant to encourage a viewer to purchase the ticket to the movie, which is an independent transaction and contract from the promotional trailer – A promotional trailer by itself is not an offer and neither intends to nor can create a contractual relationship – Since the promotional trailer is not an offer, there is no possibility of it

* Author

becoming a promise – Therefore, there is no offer, much less a contract, between the appellant and the complainant to the effect that the song contained in the trailer would be played in the movie and if not played, it will amount to deficiency in the service – The transaction of service is only to enable the complainant to watch the movie upon the payment of consideration in the form of purchase of the movie ticket – This transaction is unconnected to the promotional trailer, which by itself does not create any kind of right of claim with respect to the content of the movie – The promotional trailer does not fall under any of the instances of "unfair method or unfair and deceptive practice" contained in clause (1) of s.2(1)(r) that pertains to unfair trade practice in the promotion of goods and services – Nor does it make any false statement or intend to mislead the viewers – Furthermore, the burden is on the complainant to produce cogent evidence that proves unfair trade practice but nothing has been brought on record in the present case to show the same – Therefore, no case for unfair trade practice is made out in the present case. [Paras 14, 18]

Case Law Cited

Tata Press Ltd v. Mahanagar Telephone Nigam Limited [1995] Supp. 2 SCR 467 **: (1995) 5 SCC 139;** *Arulmighu Dhandayudhapaniswamy Thirukoil, Palani, Tamil Nadu v. Deptt. of Post Offices* [2011] 10 SCR 43 **: (2011) 13 SCC 220;** *Lakhanpal National Ltd v. MRTP Commission* [1989] 2 SCR 979 **: (1989) 3 SCC 251;** *KLM Royal Dutch Airlines v. Director General of Investigation and Registration* [2008] 14 SCR 245 **: (2009) 1 SCC 230;** *Ludhiana Improvement Trust, Ludhiana. v. Shakti Cooperative House Building Society Ltd* [2009] 6 SCR 12 **: (2009) 12 SCC 369 – referred to.**

Books and Periodicals Cited

Halsbury's Laws of England, Vol. 22 (5th edn, LexisNexis 2012), Para 240; Pollock and Mulla, The Indian Contract and Specific Relief Acts, Vol. I (14th edn, LexisNexis 2013), p. 42 – referred to.

List of Acts

Consumer Protection Act, 1986.

List of Keywords

Consumer Protection; Promotional trailer; Contractual relationship; Unfair trade practice; Deficiency of service; Independent transaction; Offer; Promise; Right of claim; False statement; Misleading of viewers; clause (1) of section 2(1)(r) of Consumer Protection Act, 1986.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4422 of 2024

From the Judgment and Order dated 18.02.2020 of the National Consumers Disputes Redressal Commission, New Delhi in RP No. 156 of 2018

Appearances for Parties

Deepak Biswas, Abhishek Malhotra, Ms. Subhalaxmi Sen, Raghav Shukla, Ms. Sonali Jain, Advs. for the Appellant.

Ms. Aishwarya Bhati, A.S.G., Mohd. Zahid Hussain, Ms. Mumtaz Javed Shaikh, Zeeshan Zaidi, Ms. Ruchi Kohli, Vatsal Joshi, Ms. Ruchi Gour Narula, Ishaan Sharma, Vedansh Anand, Navanjay Mahapatra, Shashwat Parihar, Amrish Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. What are the legal implications of a promotional trailer, popularly known as a 'promo', or a teaser that is circulated before the release of a movie? Does it create any contractual relationship or obligations akin to it? Is it an unfair trade practice if the contents of the promotional trailer are not shown in the movie? These questions have arisen in the context of a consumer dispute wherein the consumer courts have allowed the complaint alleging deficiency of service based on a 'contractual obligation' and 'unfair trade practice'. For the reasons to follow, we have held that promotional trailers are unilateral and do not qualify as offers eliciting acceptance, and as such they do not transform into promises, much less agreements enforceable by law. We have also held that the facts do not indicate adoption of

an unfair trade practice under the Consumer Protection Act, 1986. Before we delve into the analysis to draw our conclusions, the short facts necessary for the case are as follows.

2. The appellant is a known film producer. It produced a film called 'Fan' in the year 2016. Before the release of the film, the appellant circulated a promotional trailer, both on television and online, which contained a song in the form of a video.

   2.1 The respondent no. 1 ('complainant'), a teacher in a school in Aurangabad, states that having watched the promotional trailer of the film, she decided to go to watch the movie on the silver screen with her family. However, she found that the movie did not contain the song, even though the song was widely circulated for promoting and publicising the movie. She filed a consumer complaint before the District Consumer Redressal Forum wherein she has stated that she decided to watch the movie after watching the song in the promotional trailer, with the expectation of watching the song in the theatre. However, to her disappointment, she found that the song was not played in the movie. She alleges that due to this, she felt cheated and deceived by the appellants and has undergone mental agony. In view of the above, she claimed Rs. 60,550 as damages.

3. In a short order dated 29.04.2016, the District Consumer Redressal Forum dismissed the complaint on the ground that there is no relationship of consumer and service provider.

   3.1 Against the above order, the complainant filed an appeal before the State Commission, which was allowed by order dated 22.09.2017. The State Commission held that entertainment services are covered under the definition of 'service' and the appellant is a service provider. Apart from holding that there is deficiency in service, the State Commission held that the appellant has engaged in an unfair trade practice as the song in the promotional trailer was widely circulated but not shown in the film. Under these circumstances, the State Commission awarded Rs. 10,000 as compensation for mental harassment and Rs. 5,000 as cost to the complainant.

3.2 The appellant carried the matter to the National Consumer Disputes Redressal Commission[1]. By the order impugned,[2] the NCDRC held that a consumer would feel deceived if a song that is shown in the promotional trailer is not played in the film, thereby amounting to an unfair trade practice. Further, there is deficiency of service as playing the song in the trailer leads to an implied promise that it will be played in the film. In its own words, the NCDRC held as follows:

> "*7. When the producer of a movie shows the promos of the said movie on TV Channels, etc. and such promos include a song, any person watching the promo would be justified in believing that the movie would contain the song shown in the said promos, unless the promo itself contains a disclaimer that the song will not be a part of the movie. If a person likes the song shown in the promo and based upon such liking decides to visit a cinema hall for watching the said movie for a consideration, he is bound to feel deceived, disappointed and dejected if the song shown in the promo is not found in the film. The practice of including a song in the promo of a film shown widely on TV Channels but excluding the said song while exhibiting the movie, in my opinion, constitutes an unfair trade practice. The obvious purpose behind such an unfair trade practice is to draw the potential viewers to the cinema hall by luring them with the song which forms part of the promo and thereby making gain at the cost of the viewer if the song does not form part of the movie for which consideration is paid by the viewer. The exclusion of the song from the movie will also constitute a deficiency, as defined in Section 2(1)(g) of the C.P. Act, if the song is impliedly promised, but is later omitted while exhibiting the movie.*"

4. Before we proceed to delineating and applying the test for 'deficiency of service' and 'unfair trade practice' under the Consumer Protection Act, 1986[3], it is necessary to set out the context in which a promotional

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1 Hereinafter 'NCDRC'.

2 In Revision Petition No. 156 of 2018, order dated 18.02.2020.

3 Hereinafter 'the Act'.

trailer would or would not create a contractual relationship or any other right or liability between the producer and the consumer.

5. A promotional trailer is an advertisement for a film. It is a settled position of law that commercial speech, which includes advertisements, is protected through freedom of speech under Article 19(1)(a) of the Constitution, subject to the reasonable restrictions in Article 19(2).[4] It is also a settled position that commercial speech that is deceptive, unfair, misleading, and untruthful is excluded from such constitutional protection and can be regulated and prohibited by the State.[5] Subject to these restrictions, the producer/ advertiser has the freedom to creatively and artistically promote his goods and services.

6. Information dissemination is one of the primary purposes of advertising: an advertisement informs existing and potential consumers about the presence and availability of certain goods and services in the market, their features and qualities, and their uniqueness and comparability with market competitors and substitutes. However, that is not the only purpose of an advertisement. An advertisement is not only informational but also a means of creative and artistic expression. It can allure, entice, capture the attention, and pique the interest of consumers through features that may not directly relate to information about the product or service. Advertisements build brand loyalty and reputation, and promote an image and ethos of not only the product being advertised but also the manufacturer/ service provider. Advertisements contain unique taglines, jingles, visuals, etc. that are intended to grab the attention of the viewer and become associated and synonymous with the product or service itself.

7. A song, dialogue, or a short visual in a promotional trailer may be seen in the context of the multifarious uses of advertisements. These could be used to popularise or to create a buzz about the release of the film, rather than to purely represent information about the contents of the film. Viewers could associate these with the film and may be interested or encouraged to watch the film. However, the kind of right or liability a promotional trailer creates would entirely

4 *Tata Press Ltd v. Mahanagar Telephone Nigam Limited* [1995] Supp. 2 SCR 467 : (1995) 5 SCC 139, paras 17-18 and 25.

5 ibid, para 17.

depend on the civil and statutory legal regime. The complainant has invoked the jurisdiction of the consumer court and therefore, it is necessary to analyse the issues in view of the provisions of the Consumer Protection Act, 1986.

8. The Consumer Protection Act has been enacted to protect the interests of consumers and for that purpose, to establish authorities for the settlement of consumer disputes. A 'consumer' has been defined in Section 2(1)(d) as a consumer of goods or services. A consumer of goods is one who buys any goods, and a consumer of a service is one who hires or avails of any service, for a consideration, except when such goods or services are for a commercial purpose.[6] A consumer can file a 'complaint', which is defined in Section 2(1)(c) of the Act,[7] alleging *inter alia* 'deficiency in service' and 'unfair trade practice'.

9. *Deficiency of Service*: In this context, the definition of 'deficiency' and 'service' are important. The term 'service has been defined in Section 2(1)(o) of the Act as follows:

> *"**2. Definitions.—**(1) In this Act, unless the context otherwise requires,—*

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6 Section 2(1)(d) of the Act defines 'consumer' as follows':
"***2. Definitions**.—(1) In this Act, unless the context otherwise requires,—*
(d) "consumer" means any person who,—
(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment, when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose"

7 The relevant portion of Section 2(1)(c) of the Act defining 'complaint' is as follows':
"*(c) "complaint" means any allegation in writing made by a complainant that—*
(i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
*****
(iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;
*****
with a view to obtaining any relief provided by or under this Act;"

> *(o) "service" means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, financing insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service;"*

There is no doubt about the fact that any person watching a movie after remitting the necessary consideration becomes a consumer of service. The service in this case is that of entertainment.

10. The question for our consideration is whether there is any 'deficiency' in the provision of the entertainment service that the consumer has availed by paying the consideration through the purchase of a ticket. The complainant alleges that there is 'deficiency' in the service because what was shown in the film was not as per what was promised. Now, the definition of 'deficiency' becomes relevant and it is defined in Section 2(1)(g) of the Act as follows:

> *"**2. Definitions.—**(1) In this Act, unless the context otherwise requires,—*
>
> *(g) "deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service;"*

11. As per the definition, there is deficiency when there is a fault, imperfection, shortcoming or inadequacy in the quality, nature, and manner of performance that is required to be maintained *either in terms of a law* or *in terms of a contract*.[8] To appreciate the allegation of deficiency, it is necessary to refer to certain portions of the complaint:

> *"3. The Complainant states that, her children are big fans of Shahrukh Khan and after watching the promos of the*

8 *Arulmighu Dhandayudhapaniswamy Thirukoil, Palani, Tamil Nadu v. Deptt. of Post Offices* [2011] 10 SCR 43 : (2011) 13 SCC 220, para 18.

> *song 'Jabra Fan' they decided to go to the movie 'Fan' to watch the song 'Jabra Fan' on silver screen. She had given 2 option (1) Jungle Book and the second one was 'Fan' to both the children namely Nabeel and Flora. Out of two option they preferred the later one because of song 'Jabra Fan' to enjoy on celluloid.*
>
> *4. The Complainant states that, she accordingly convinced her mother-in-law, father-in-law, sister and brother-in-law for the movie by saying that, the film is looking great and the song 'Jabra Fan' which is now become jingle, is also there for the entertainment which will feel great on the silver screen. She bought 7 Tickets of first day first show on 15.04.2016, show time 6.10 p.m. Friday of PVR Cinema of the row G-4 to G-10 of Rs. 150/- each which cost her Rs. 1050/. The copy of all the Tickets are dated 15.04.2016 are annexed herewith and marked as Annexure 'A'.*
>
> ***
>
> *7. The Complainant states that, as the song was not shown in the entire movies the family members and in started teasing her that, why she planned for such a movie which is not having a single song and a song 'Jabra Fan' which become anthem is shown in promos of the film. She has gone through mental agony because of Respondents act."*

It is evident from the above that the deficiency alleged in the complaint arises out of the complainant's own expectation that the song would be a part of the movie. It is assumed that there is deficiency of service as the movie did not contain the song.

12. The fallacy in this argument is in assuming that a promotional trailer is an offer or a promise. It is under this misplaced assumption that the complainant has assumed that the subsequent formation of a contract to watch the movie is not in compliance with the promise allegedly made through the promotional trailer. We will explain this in terms of the law of contracts.

13. The essential element of an 'offer' or 'proposal' for the formation of a contract has not been satisfied in the present case. A person

makes an offer or 'proposal' when he signifies his willingness to do something with a view to obtain the assent of another person.[9] When the other person signifies his assent, the proposal gets accepted and becomes a 'promise'.[10] A proposal is therefore a prerequisite to a 'promise' and a 'contract'.[11]

14. A promotional trailer is unilateral. It is only meant to encourage a viewer to purchase the ticket to the movie, which is an independent transaction and contract from the promotional trailer. A promotional trailer by itself is not an offer and neither intends to nor can create a contractual relationship.[12] Since the promotional trailer is not an offer, there is no possibility of it becoming a promise. Therefore, there is no offer, much less a contract, between the appellant and the complainant to the effect that the song contained in the trailer would be played in the movie and if not played, it will amount to deficiency in the service. The transaction of service is only to enable the complainant to watch the movie upon the payment of consideration in the form of purchase of the movie ticket. This transaction is unconnected to the promotional trailer, which by itself does not create any kind of right of claim with respect to the content of the movie.

15. *Unfair Trade Practice*: While we have held that no contract is formed on the basis of the promotional trailer and as such, there is no deficiency of service, there is a further question for our consideration, i.e., whether it is an 'unfair trade practice' giving rise to a cause of action. If it is found to be an unfair trade practice, the Act provides for compensation and other remedies.

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9 Section 2(a) of the Indian Contract Act, 1872 defines 'proposal' as follows:
*"**2. Interpretation-clause**.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—*
(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;"

10 Section 2(b) of the Indian Contract Act, 1872 defines 'promise' as follows:
"(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;"

11 Section 2(h) of the Indian Contract Act, 1872 defines 'contract as follows:
"*(h) An agreement enforceable by law is a contract;*"
'Agreement' has been defined in Section 2(e) as follows:
"*(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;*"

12 It is well-established in contractual jurisprudence that an advertisement generally does not constitute an offer and is merely an 'invitation to offer' or 'invitation to treat'. See *Halsbury's Laws of England*, vol 22 (5th edn, LexisNexis 2012), para 240; Pollock and Mulla, *The Indian Contract and Specific Relief Acts*, vol I (14th edn, LexisNexis 2013), p. 42.

16. The term 'unfair trade practice' is defined in Section 2(1)(r) of the Act and the relevant portions are as follows:

> *"**2. Definitions.—**(1) In this Act, unless the context otherwise requires,—*
>
> *(r) "unfair trade practice" means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely:—*
>
> *(1) the practice of making any statement, whether orally or in writing or by visible representation which,—*
>
> *****
>
> *(ii) falsely represents that the services are of a particular standard, quality or grade;*
>
> *****
>
> *(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;"*

17. In various decisions,[13] this Court has held that a false statement that misleads the buyer is essential for an 'unfair trade practice'.[14] A false representation is one that is false in substance and in fact, and the test by which the representation must be judged is to see whether the discrepancy between the represented fact and the actual fact would be considered material by a reasonable person.[15] Further, "*statements of the nature which are wilfully made knowingly false, or made recklessly without honest belief in its truth, and made with the purpose to mislead or deceive will definitely constitute a false or misleading representation. In addition, a failure to disclose a material fact when a duty to disclose that fact has arisen will also constitute*

13 *Lakhanpal National Ltd v. MRTP Commission* [1989] 2 SCR 979 : (1989) 3 SCC 251, para 7; *KLM Royal Dutch Airlines v. Director General of Investigation and Registration* [2008] 14 SCR 245 : (2009) 1 SCC 230, paras 16-20; *Ludhiana Improvement Trust, Ludhiana. v. Shakti Cooperative House Building Society Ltd* [2009] 6 SCR 12 : (2009) 12 SCC 369, paras 18-23.

14 ibid.

15 *Lakhanpal National Ltd* (supra), para 7.

a false or misleading representation."[16] Therefore, only substantive and material discrepancies are covered under 'unfair trade practice'.

18. The ingredients of 'unfair trade practice' under Section 2(1)(r)(1) are not made out in this case. The promotional trailer does not fall under any of the instances of "unfair method or unfair and deceptive practice" contained in clause (1) of Section 2(1)(r) that pertains to unfair trade practice in the promotion of goods and services. Nor does it make any false statement or intend to mislead the viewers. Furthermore, the burden is on the complainant to produce cogent evidence that proves unfair trade practice[17] but nothing has been brought on record in the present case to show the same. Therefore, no case for unfair trade practice is made out in the present case.

19. There is another important distinction that we must bear in mind, i.e., the judicial precedents on this point do not relate to transactions of service relating to art. Services involving art necessarily involve the freedom and discretion of the service provider in their presentation. This is necessary and compelling by the very nature of such services. The variations are substantial, and rightly so. Therefore, the standard by which a court of law judges the representation, followed by the service, must be different and must account for the creative element involved in such transactions.

20. In view of the above reasons and conclusions, we set aside the findings of the impugned order that there is deficiency of service and unfair trade practice, and allow the present appeal.

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

Headnotes prepared by: Ankit Gyan

Result of the case: Appeal allowed.

16 *KLM Royal Dutch Airlines* (supra), para 20.

17 *Ludhiana Improvement Trust* (supra), para 23.

[2024] 5 S.C.R. 155 : 2024 INSC 353

Ajay Ishwar Ghute & Ors.
v.
Meher K. Patel & Ors.

(Civil Appeal No. 4786 of 2024)

30 April 2024

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

Issue for Consideration

This Hon'ble Court was considering a challenge to an Order of the High Court disposing of a writ petition in terms of a "Minutes of Order" filed by the Advocates, and signed by the parties to the petition, without impleading the affected parties.

Headnotes

Practice and Procedure – Considerations by the Court while passing an order in terms of "Minutes of Order" – Order passed by the Court based on the "Minutes of Order" is not a consent order, it is an order in invitum – Court must record brief reasons indicating the application of mind.

Held: An Order passed in terms of "Minutes of Order" is an order in invitum – The Court must first examine whether it will be lawful to pass an order in terms of the "Minutes of Order" – The Court must consider whether all necessary parties have been impleaded to the proceedings in which the "Minutes of Order" have been filed – The Court must consider whether third parties will be affected by the order sought in terms of the "Minutes of Order" – If the Court is of the view that necessary parties were not impleaded, the Court ought to allow the Petitioner to implead them – On the failure of the Petitioner to implead them, the Court must decline to pass an order of disposing of the Petition in terms of the "Minutes of Order" – The reason is that an order of the Court passed without hearing the necessary parties would be illegal – Only if the Court is satisfied that an order in terms of the "Minutes of the Order" would be legal, the Court can pass an order in terms of the "Minutes of Order" – While passing an order in terms of the "Minutes of Order", the Court must record brief reasons indicating the application of mind. [Para 17]

Practice and Procedure – Practice of advocates drafting "Minutes of Order" was evolved to save time – Advocates

* Author

who sign and tender the "Minutes of Order" have a greater responsibility.

Held: Reliance placed on the Judgment of this Hon'ble Court in *Speed Ways Picture Pvt. Ltd. and Anr. v. Union of India and Anr.*[1996] Supp. 7 SCR 636 : (1996) 6 SCC 705 : 1996 INSC 1202 where this Hon'ble Court considered the practice of passing orders in terms of "Minutes of Order" – For the convenience of the Court and as a matter of courtesy, the advocates draft "Minutes of Order" containing what could be incorporated by the Court in its order – Perhaps this practice was evolved to save the time of the Court – The advocates who sign and tender the "Minutes of Order" have greater responsibility – Before they sign the "Minutes of the order", the advocates have an important duty to perform as officers of the Court to consider whether the order they were proposing will be lawful – They cannot mechanically sign the same – After all, they are the officers of the Court first and the mouthpieces of their respective clients after that. [Para 18]

Civil Law – Order XXIII of Code of Civil Procedure, 1908 – Filing of Consent Terms – Court has jurisdiction to decline to pass a consent order, if the same is tainted with illegality – Consent Terms not binding on persons who were not parties to the Consent Terms.

Held: Even if parties file consent terms, while accepting the consent terms in terms of Rule 3 of Order XXIII of the Code of Civil Procedure, 1908, the Court is duty-bound to look into the legality of the compromise – The Court has the jurisdiction to decline to pass a consent order if the same is tainted with illegality – An order passed by the Court in terms of consent terms is a consent order, which will not bind the persons who were not parties to the consent terms, unless they were claiming through any of the parties to the consent terms. [Para 19]

Practice and Procedure – Summary of conclusions regarding the concept of "Minutes of Order".

Held: This Hon'ble Court summarized its findings on the concept of "Minutes of Order" as – (a) The practice of filing "Minutes of Order" prevails in the Bombay High Court – As a courtesy to the Court, the advocates appearing for the parties to the proceedings tender "Minutes of Order" containing what could be

recorded by the Court in its order – The object is to assist the Court; (b) An order passed in terms of the "Minutes of Order" tendered on record by the advocates representing the parties to the proceedings is not a consent order – It is an order in invitum for all purposes; (c) Before tendering the "Minutes of Order" to the Court, the advocates must consider whether an order, if passed by the Court in terms of the "Minutes of Order," would be lawful – After "Minutes of Order" is tendered before the Court, it is the duty of the Court to decide whether an order passed in terms of the "Minutes of Order" would be lawful – The Court must apply its mind whether the parties who are likely to be affected by an order in terms of the "Minutes of Order" have been impleaded to the proceedings; (d) If the Court is of the view that an order made in terms of the "Minutes of Order" tendered by the advocates will not be lawful, the Court should decline to pass an order in terms of the "Minutes of Order"; and (e) If the Court finds that all the parties likely to be affected by an order in terms of the "Minutes of Order" are not parties to the proceedings, the Court will be well advised to defer passing of the order till all the necessary parties are impleaded to the proceedings. [Para 20]

Case Law Cited

Speed Ways Picture Pvt. Ltd. and Anr. v. Union of India and Anr. [1996] Supp. 7 SCR 636 *:* **(1996) 6 SCC 705 : 1996 INSC 1202 – referred to.**

List of Acts

Code of Civil Procedure, 1908; Constitution of India.

List of Keywords

Minutes of Order, Filing of Consent Terms, Responsibility of Advocates signing Minutes of Order.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4786 of 2024

From the Judgment and Order dated 20.07.2023 of the High Court of Judicature at Bombay in RP No.7 of 2023 and WP No.2584 of 2022

Appearances for Parties

Rajesh Vishnu Adrekar, Ms. Usha Nandini V., Advs. for the Appellants.

Karl Tamboli, Ms. Tahira Karanjawala, Arjun Sharma, Purazar Fouzdar, Ms. Varuna Juneja, Jai Vardhan Malaviya for M/s. Karanjawala & Co., Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Aadarsh Dubey, Mrs. Preet S. Phanse, Prashant R. Dahat, Puneet Yadav, Sourabh Gupta, Ujjwal Choudhary, T. R. B. Sivakumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. The main issue that arises in this case is whether the High Court was justified in passing a drastic order in the exercise of writ jurisdiction under Article 226 of the Constitution of India permitting the 1st and 2nd respondents (writ petitioners) to construct a compound wall under police protection. The order passed by a Division Bench of the High Court on 16th March 2022 is in terms of the "Minutes of Order" tendered to the Court by the advocates representing the parties duly signed by them. The practice of passing orders based on "Minutes of Order" submitted by the advocates representing the parties prevails perhaps only in the High Court of Judicature at Bombay **(for short, 'the Bombay High Court')**. The present appellants applied for a review of the order dated 16th March 2022, which has been rejected by the impugned order dated 20th July 2023. Even the order dated 16th March 2022 is under challenge in this appeal.

FACTUAL ASPECTS

2. A few factual aspects will have to be noted. Arbitration Petitions were filed under Section 9 of the Arbitration and Conciliation Act, 1996 (for short, 'Arbitration Act') before a Single Judge of the Bombay High Court. One petition was filed by the 1st respondent against one Urvaksh Naval Hoyvoy and others. Taz Naval Nariman and another filed the other petition. Consent terms were filed in the Arbitration Petition preferred by the 1st respondent. It appears that during the pendency of the proceeding of the Arbitration Petition, Urvaksh Naval Hoyvoy was arrested by police based on a First Information Report. In terms of the consent terms dated 28th April 2018, the learned Single

Judge passed an order dated 30th April 2018. Further, order dated 10th May 2018 passed by the learned Single Judge records that the process of handing over possession of the suit property by the respondents to the 1st respondent has commenced. The dispute in the Arbitration Petitions related to the lands of Parsi Dairy Farm.

3. The 7th respondent in Arbitration Petition No. 451 of 2018 filed an interim application in the disposed of Arbitration Petitions more than two years after filing consent terms. It records that the High Court had directed the police to give police protection to the parties for completing the process of handing over possession. A compound wall was to be constructed in terms of the consent terms. The occasion for filing the application arose as, according to the 7th respondent in the Arbitration Petition, local persons obstructed the work of the construction of the compound wall. The learned Single Judge of the Bombay High Court disposed of the interim application by his order dated 12th February 2021. The relevant portion of the said order reads thus:

> **"2**.....
>
> In the application it is stated that in order to safeguard the suit property, the parties tried to build a wall on the suit property and which is in their possession. **On commencement of the work of building the wall, the parties have faced several difficulties and which are enumerated in paragraphs 5(a) to 5(d) of the application. It is stated that local persons have time and again obstructed building of the wall and despite several requests made to the Talasari Police Station, nothing has been done.** It is stated that a wall is being built on the suit property in order to secure the same and though assistance of the police was sought on several occasions, the local villagers time and again interfered with the building of the said wall and the police have rendered no assistance in that regard.
>
> .....
>
> **3.**.....
>
> **4. In these circumstances, it is directed that the police/ Tahasildar/ Collector/ Gram Panchayat office and all**

other concerned Government Authorities shall offer all assistance to the applicant and the other interested respondents (respondent Nos.2 to 8) to construct a wall to safeguard the suit property. It is further directed that the local Police Station shall ensure that these directions are strictly complied with and no person is allowed to interfere with the construction of the wall on the suit property."

(emphasis added)

4. It must be noted here that the persons who had admittedly obstructed the construction of the wall were not parties to the proceedings of either the Arbitration Petition or the interim application.

5. It appears that an application was filed to the Deputy Superintendent of Land Records at Talasari by the 1st respondent and five others for measuring the lands subject matter of the Arbitration Petition situated at village-Varvada, taluka-Talasari, district-Palghar. The Deputy Superintendent of Land Records, in his letter dated 21st November 2021, informed the 1st respondent that several persons named in the letter had objected to carrying out a survey. The letter records that as objections in writing have been submitted, conducting the hearing and holding an enquiry was necessary. We may note that in the letter, the names of some of the appellants are mentioned in the list of persons who objected to the survey.

6. A very curious step was taken by the 1st and 2nd respondents thereafter. They filed a Writ Petition under Article 226 of the Constitution of India, being Writ Petition No. 2584 of 2022. The grievance in the said Writ Petition was regarding non-compliance with the orders in the aforesaid Arbitration Petition by the government authorities regarding carrying out the survey and construction of the compound wall. The persons who raised objections to the survey were not impleaded in the Writ Petition. In the Writ Petition, a Division Bench directed the District Collector Palghar and the Superintendent of Police, district Palghar, to remain present before the Court through video conference. On 9th March 2022, the Division Bench passed an order. Paragraph 3 of the said order reads thus:

> "3. From the annexures to the Writ Petition it appears that this is a clear case of political pressure being exerted

on the Government officials like the Collector and the Superintendent of Police [see pages 252 read with 259D annexed to the Writ Petition]. However, orders of the Court cannot be breached by any individual or organization by creating unrest and the authorities cannot be heard to say that they are unable to tackle such lawlessness. We therefore request the Advocate General to go through the Writ Petition and assist the Court. Stand over to 14th March, 2022, when the Collector and the Superintendent of Police shall remain present."

7. Mr Dattartraya Tulshidas Shinde, the Superintendent of Police of Palghar district, filed an affidavit dated 14th March 2022 before the High Court. The affidavit notes that when the work of construction of the compound wall in terms of the order in the Arbitration Petition commenced, the local tribals gathered an impression that it was an attempt to illegally dispossess some of them who were declared owners of certain lands. He stated that the tribals insisted that the lands be demarcated before constructing the compound wall. The Superintendent of Police has referred to his meeting held on 11th March 2022 with the learned Advocate-General of the State, the Collector of the District and the Superintendent of Land Records of the District. The affidavit further records that the Deputy Superintendent of Land Records agreed to provide staff for carrying out demarcation. In paragraphs 9 and 10 of his affidavit, the Superintendent of Police stated thus:

"9. **If while constructing the aforesaid wall if appropriate and adequate provision for access is made, enabling those agriculturists who own and possess various parcels of lands that are likely to get land locked because of the erection of the compound wall, to reach their respective agricultural lands owned and possessed by them, one of the important for obstructions to the compound wall, at hand of the tribals, will get resolved.**

10. If an assurance is given to the tribals who legally own and possess various parcels of land that are likely to get covered by the proposed erection of the compound wall that they are not going to dispossessed or ousted, much

less illegally by the erection of the compound wall itself, in any view, major reason for obstruction to the erection of the compound wall, by the tribals, will disappear.**"**

(emphasis added)

8. On 14th March 2022, Mr Mahesh Ingale, the District Superintendent of Land Records, who is a survey officer under the Maharashtra Land Revenue Code, 1966 (for short, 'the MLR Code'), filed an affidavit. In paragraph 9 of his affidavit, he stated thus:

> **"**9. **I say that after the measurement, as aforesaid, was carried out and the original records maintained by my office were verified in that context it appears that, there are various lands situate within survey number 173 in respect of which, as a result of proceedings initiated in the Bombay Tenants and Agricultural Lands Act, various persons have become owners of the lands of various pockets that have been marked in red colour, in the map, which has been produced on 14.03.2022 before this Hon'ble Court. There are also certain persons to whom the petitioner and others have sold small portions of the lands and thus these persons have become owners and are in possession thereof. If a compound wall is constructed as desired by the petitioner, the aforesaid pieces of land owned by the third parties and lawfully possessed by them are likely to get land locked.** Therefore, in my submission, while constructing the aforesaid compound wall, appropriate arrangements will have to be made to provide due access to these lawful owners and occupiers of various parcels of lands that is likely to be get land-locked on account of the construction of the proposed wall.**"**
>
> **(emphasis added)**

It is pertinent to note that the land bearing survey no. 173 is a part of the property which is the subject matter of Arbitration Petition in which consent terms were filed.

9. The Division Bench did not notice the specific contentions raised by both the Government officers and did not direct the 1st and 2nd respondents to implead the affected tribals as parties. Instead of

either directing impleadment of the affected parties or dismissing the Writ Petition for non-joinder of necessary parties, the Division Bench passed an order in terms of the "Minutes of Order" dated 16th March 2022 signed by the advocate for 1st and 2nd respondents and Panel-B counsel representing all Government officers including the Superintendent of Police, the Collector and Superintendent of Land Records. One Sambhaji Kharatmol purported to sign as an advocate for interveners. The relevant part of the "Minutes of Order" makes interesting reading. Paragraph 2 reads thus:

> "2. Mr. Kumbhakoni, the Learned Advocate General for the State of Maharashtra, has tendered the plan showing the land of Mrs. Meher Khushru Patel and Others (Parsi Dairy Farm) S No. 173/1,2,3,4,5,6,7,8,10,15,16,18, S. No. 55, 61, 200 and 202 Situated at Village – Varwada, Taluka – Talasari, Dist. – Palghar. The same is taken on record and marked as 'X' are stated to belong to third parties. However, the survey numbers mentioned against serial no. 1. 5. 8 and 10 to 12 in the legend in the plan marked 'X' are now confirmed by the Petitioners to belong to the Petitioners' firm – Parsi Dairy Farm."

Paragraph 4 notes both the affidavits dated 14th March 2022, which we have referred to above and records that the statements of the said officers were accepted. The "Minutes of Order" provides for issuing a direction to the survey authorities to carry out the demarcation of the boundary and a direction to the police to provide protection for carrying out the measurement and construction of the compound wall. Clause (iii) of paragraph 6 of the "Minutes of Order" reads thus:

> "6.....
>
> (i) .....
>
> (ii) .....
>
> (iii) The Construction of the boundary wall as per the order dated 12th February 2021 by the Learned Single Judge in the Arbitration Petition no. 451 of 2018, shall be carried out by the Petitioners simultaneously with the aforesaid work of demarcation and marking of points. **The Petitioners shall ensure that sufficient**

> **access is provided for the other owners of land whose property falls within the confines of the boundary wall in such a manner that the dame do not become land locked by virtue of the construction of the boundary wall."**
>
> **(emphasis added)**

Thus, the fact that the third parties would be affected by the construction of the compound wall is noted in the "Minutes of Order". The Writ Petition was disposed of on 16th March 2022 by a cryptic order directing that the Writ Petition stands disposed of in terms of the "Minutes of Order" taken on record and marked "X" for identification. Paragraphs 2 and 3 of the said order read thus:

> "2. The Minutes of the Order are signed by the learned Advocate appearing for the Petitioners, the Learned AGP appearing for Respondent Nos. 1 to 6 and 10 to 12 along with the Advocate General as well as the learned Advocate appearing for the Interveners / farmers – Shankar Kharpade, Raghu Kharpade, Ganu Kharpade, Sadu Kharpade, Sonu Paadvi, Pradeep Savji Urade, Ajay Kharpade, Suresh Kharvade and Sarita Kharvade carrying farming activities on land bearing Survey No. 390 (part).
>
> 3. The above Writ Petition is disposed of in terms of the Minutes of the Order dated 16th March, 2022."

Reasons were not recorded for passing an order in terms of the 'Minutes of Order'. A Government counsel signed the "Minutes of Order" notwithstanding a clear stand taken in the affidavits dated 14th March 2022 filed by the senior Government officers who had emphasized that tribals were likely to be affected by the construction of the compound wall. The Government pleader, as an officer of the Court, owed a duty to the Court to point out the requirement of impleading necessary parties who were tribals. Even the bench did not take note of the admitted fact that third parties would have been affected by the construction of the compound wall that was permitted to be constructed under police protection. The Court ignored the fundamental principle that the issue of whether the third parties' properties would be landlocked due to the construction of the wall could be decided only after hearing the concerned parties. The

least the Court could have done was to direct that a notice of survey should be issued to the affected tribals. Even that was not done.

10. The present appellants sought a review of this order. The contentions raised by them can be briefly stated as follows:

a) Out of 30 review petitioners, review petitioner nos. 7 to 18 were purportedly shown as interveners in the "Minutes of Order", though they had not engaged any advocate;

b) The said interveners never met the advocate who is shown to have signed the "Minutes of Order" on their behalf;

c) The appellants had rights in respect of the several properties which were likely to be adversely affected by the construction of the compound wall; and

d) The elementary principles of natural justice were not followed before permitting the construction of a compound wall under police protection.

A Division Bench dismissed the review petition by the impugned order. The Court held that if, according to the appellants, any illegality has been committed, notwithstanding the observations made in the order dated 16th March 2022, the appellants can raise an appropriate grievance before the appropriate forum.

11. The order dated 9th February 2024 passed by this Court on the present appeal reads thus:

> **"**We direct the State Government to comply with the earlier order of filing the affidavit. The said affidavit to be filed within a period of two weeks from today.
>
> The minutes of the order on page 63 of the Petition record the statement of the owners, which reads thus:
>
> > "iii...The Petitioners shall ensure that sufficient access is provided for the other owners of land whose property falls within the confines of the boundary wall in such a manner that the same do not become land locked by virtue of the construction of the boundary wall."
>
> We direct the petitioners before the High Court who are parties here to file an affidavit stating the names of the

owners who are referred to in Clause iii of the minutes of the order. The said affidavit to be filed within a period of two weeks.

The learned counsel appearing for the petitioners will take instructions whether the petitioners want to stand by the allegations made by him against the sitting Judges of the High Court, the members of the Bar and the learned Advocate General.

List on 11th March, 2024."

A further order dated 11th March 2024 was passed, which reads thus:

" Notwithstanding the order dated 9th February, 2024, the petitioners before the High Court have chosen not to disclose the names of the parties who are referred in the Minutes of the Order.

The learned senior counsel appearing for the petitioners before the High Court and the learned counsel appearing for the State assure the Court that within two weeks from today, they will place on record the names and other details of the parties who are referred in clause (3) of the Minutes of the order dated 16th March, 2022. The learned senior counsel appearing for the petitioners before the High Court seeks time to file a proper affidavit in terms of the order dated 9th February, 2024.

List on 5th April, 2024."

An affidavit dated 24th March 2024 was filed by the 1st and 2nd respondents in compliance with the orders dated 9th February 2024 and 11th March 2024. They stated that a boundary wall was constructed between March 2022 and June 2022 after the survey was carried out. They stated that the compound wall had been built in such a manner that no person was landlocked or in any manner inconvenienced. In the affidavit, they have given details of the land owned by the Parsi Dairy Farm (the land subject matter of Arbitration Petitions) and the names of several persons who are owners of the lands adjacent to the land of the Parsi Dairy Farm. It is claimed in the affidavit that notwithstanding the construction of the compound wall, the owners of the adjacent lands continue to enjoy unhindered and unfettered access to their respective land.

SUBMISSIONS IN BRIEF

12. The learned counsel for the appellant submitted that the impugned order passed based on the "Minutes of Order" is completely illegal and vitiated by the non-joinder of necessary parties. The learned senior counsel for the 1st and 2nd respondents and the learned counsel for the State defended the impugned order by submitting that no one has been prejudiced due to the construction of the compound wall.

13. During the earlier hearings, we had repeatedly suggested to the learned senior counsel appearing for the 1st and 2nd respondents that the only proper course would be to remand the Writ Petition with a direction to implead persons claiming to be affected by the construction of the compound wall, as it seems to be an admitted position that several persons are likely to be affected by the construction of the compound wall in terms of the orders passed in the Writ Petition. However, the 1st and 2nd respondents did not accept the suggestion. Hence, we are called upon to decide this appeal on merits.

CONSIDERATION OF SUBMISSIONS

14. We have already quoted what the Deputy Superintendent of Police and the Superintendent of Land Records stated in their respective affidavits filed on 14th March 2022. In so many words, both of them stated on oath that the tribals who own and possess various parcels of adjacent lands were likely to be affected by the construction of the compound wall. In fact, in paragraph 9 of his affidavit, the District Superintendent of Land Records, who is the survey officer of the district under the MLR Code in categorical terms stated that if the compound wall is constructed as desired by the petitioners in the Writ Petition (1st and 2nd respondents herein), pieces of lands owned and lawfully possessed by third parties are likely to get landlocked.

15. Now, we come to the "Minutes of the Order". According to the latest affidavit of the 1st and 2nd respondents, several tribals claim to be owners of the lands adjacent to those claimed by the 1st and 2nd respondents. The "Minutes of the Order" refers to the officers' affidavits. Sub-clause (iii) of clause 6, which we have quoted above, records that the writ petitioners shall ensure that sufficient access is provided for the other owners of the land whose property falls within the confines of the boundary wall in such a manner that their lands do not become landlocked. Even assuming that advocate

Sambhaji Kharatmol was authorized by nine interveners to sign, the fact remains that several other owners or occupants of the lands likely to be affected by the compound wall were not impleaded as parties to the petition. Without even adverting to the factual aspects brought on record by two responsible Government officers in their affidavit dated 14th March 2022, the Division Bench mechanically passed an order in terms of the "Minutes of the Order" and disposed of the Writ Petition. Now we have a scenario where, under police protection, survey work and construction of the compound wall have been carried out by 1st and 2nd respondents. An illegality has been allowed to be perpetrated under the protection of the police. As noted earlier, even the Government counsel did not perform his duty by submitting before the Court as an officer of the Court about the failure to implead the necessary parties.

PRACTICE OF PASSING ORDERS IN TERMS OF "MINUTES OF ORDER" FILED BY THE ADVOCATES

16. Now, we deal with the concept of "Minutes of Order", which is peculiar only to the Bombay High Court. This Court, in the case of ***Speed Ways Picture Pvt. Ltd. and Anr. v. Union of India and Anr.***[1] had an occasion to consider the practice of passing orders in terms of "Minutes of Order". Paragraphs 5 and 6 of the said decision reads thus:

> **"5.** The basis upon which the review petition was decided is, in our view, not correct. Counsel for the appellants and the respondents put it in writing that a judgment of this Court and a Full Bench judgment of the High Court covered the matter. The writ petition in that High Court could, therefore, not succeed. This could have been orally stated and recorded by the Court. **As a courtesy to the Court, the practice of long standing is to put statements such as these in writing in the form of "minutes of order" which are tendered and on the basis of which the Court passes the order: "Order in terms of minutes". The signatures of counsel upon "minutes of order" are intended for identification so as to make the order binding upon the parties' counsel represented. An order in terms of minutes is an order**

1 [1996] Supp. 7 SCR 636 : (1996) 6 SCC 705

> **in invitum, not a consent order. It is appealable and may be reviewed.**
>
> **6.** It would be a different matter if the order of the court was passed on "Consent Terms", i.e., on a statement above the signatures of counsel which expressly stated it was "by consent". The order of the court in such event would read: "Order in terms of consent terms."

(emphasis added)

17. As the order passed in terms of the "Minutes of Order" is an order in invitum, when a document styled as "Minutes of Order" signed by the advocates for the parties is tendered on record, the Court must first examine whether it will be lawful to pass an order in terms of the "Minutes of Order". The Court must consider whether all necessary parties have been impleaded to the proceedings in which the "Minutes of Order" have been filed. The Court must consider whether third parties will be affected by the order sought in terms of the "Minutes of Order". If the Court is of the view that necessary parties were not impleaded, the Court ought to allow the petitioner to implead them. On the failure of the petitioner to implead them, the Court must decline to pass an order of disposing of the petition in terms of the "Minutes of Order". The reason is that an order of the Court passed without hearing the necessary parties would be illegal. The Court must remember that though the parties may say that they have agreed to what is recorded in the "Minutes of Order", the order passed by the Court based on the "Minutes of Order" is not a consent order. It is an order in invitum. Only if the Court is satisfied that an order in terms of the "Minutes of the Order" would be legal, the Court can pass an order in terms of the "Minutes of Order". While passing an order in terms of the "Minutes of Order", the Court must record brief reasons indicating the application of mind.

18. For the convenience of the Court and as a matter of courtesy, the advocates draft "Minutes of Order" containing what could be incorporated by the Court in its order. Perhaps this practice was evolved to save the time of the Court. The advocates who sign and tender the "Minutes of Order" have greater responsibility. Before they sign the "Minutes of the order", the advocates have an important duty to perform as officers of the Court to consider whether the order

they were proposing will be lawful. They cannot mechanically sign the same. After all, they are the officers of the Court first and the mouthpieces of their respective clients after that.

19. Even if parties file consent terms, while accepting the consent terms in terms of Rule 3 of Order XXIII of the Code of Civil Procedure Code, 1908, the Court is duty-bound to look into the legality of the compromise. The Court has the jurisdiction to decline to pass a consent order if the same is tainted with illegality. However, an order passed by the Court in terms of compromise recorded in the consent terms is a consent order which will not bind the persons who were not parties to the consent terms unless they were claiming through any of the parties to the consent terms.

20. We summarise our conclusions regarding the concept of the "Minutes of Order" as follows:

a) The practice of filing "Minutes of Order" prevails in the Bombay High Court. As a courtesy to the Court, the advocates appearing for the parties to the proceedings tender "Minutes of Order" containing what could be recorded by the Court in its order. The object is to assist the Court;

b) An order passed in terms of the "Minutes of Order" tendered on record by the advocates representing the parties to the proceedings is not a consent order. It is an order in invitum for all purposes;

c) Before tendering the "Minutes of Order" to the Court, the advocates must consider whether an order, if passed by the Court in terms of the "Minutes of Order," would be lawful. After "Minutes of Order" is tendered before the Court, it is the duty of the Court to decide whether an order passed in terms of the "Minutes of Order" would be lawful. The Court must apply its mind whether the parties who are likely to be affected by an order in terms of the "Minutes of Order" have been impleaded to the proceedings;

d) If the Court is of the view that an order made in terms of the "Minutes of Order" tendered by the advocates will not be lawful, the Court should decline to pass an order in terms of the "Minutes of Order"; and

e) If the Court finds that all the parties likely to be affected by an order in terms of the "Minutes of Order" are not parties to the proceedings, the Court will be well advised to defer passing of the order till all the necessary parties are impleaded to the proceedings.

FINDINGS ON FACTS OF THE CASE

21. In the facts of the case, the senior district-level officials of the State had stated on oath that the construction of the compound wall, in respect of which relief was sought in the Writ Petition, would affect the rights of several third parties. However, the Court completely ignored the same. Even in clause 6 (iii) of the "Minutes of Order", there was enough indication that the compound wall, if not appropriately constructed, would affect the rights of owners of the other lands. Therefore, it was the duty of the Court to have called upon the 1st and 2nd respondents to implead the persons who were likely to be affected. The 1st and 2nd respondents could not have pleaded ignorance about the names of the concerned parties as they have referred to the owners of the other lands in the "Minutes of Order". However, the Division Bench of the High Court has failed to make even an elementary enquiry whether third parties will be affected by the construction of the compound wall under police protection. Hence, the order dated 16th March 2022 passed in the Writ Petition in terms of the "Minutes of Order" is entirely illegal and must be set aside. The Writ Petition will have to be remanded to the High Court to decide the same in accordance with the law.

22. The construction of the compound wall is complete; therefore, while remanding the Writ Petition to the High Court, we must clarify that the construction will be subject to the final decision in the Writ Petition. After remand, the High Court will have to call upon the 1st and 2nd respondents to implead necessary parties to the petition. If required, the Court must decide who the necessary parties to the petition are. It will always be open for the appellants to apply for impleadment. While determining who the necessary and proper parties are, the appellants' application will have to be considered by the High Court. It follows that on the failure of the 1st and 2nd respondents herein to implead the necessary parties, the High Court will be well within its power to dismiss the Writ Petition and pass an order of restoration of *status quo ante* by directing demolition of the compound wall.

23. Hence, we pass the following order:

a) We set aside the order dated 16th March 2022 in Writ Petition No. 2584 of 2022 and the order dated 20th July 2023 in the Review Petition and restore Writ Petition No. 2584 of 2022 to the file of the High Court;

b) We direct the Registrar (Judicial) of the Bombay High Court to list the restored Writ Petition before the roster Bench on the first day of re-opening of the Court after the ensuing summer vacation. The parties to the appeal shall appear before the Court on that day as they will not be entitled to any further notice of the Writ Petition;

c) It will be open for the appellants to apply for impleadment in the Writ Petition on all available grounds;

d) After the remand, the High Court will decide whether all the necessary parties likely to be affected by the construction of the compound wall in terms of the "Minutes of Order" were impleaded as party respondents. While doing so, the case of the petitioners shall also be considered;

e) If the Court concludes that the 1st and 2nd respondents had not impleaded necessary parties to the Writ Petition and within a reasonable time if the 1st and 2nd respondents fail to implead the necessary parties, the High Court will be free to follow the logical course of dismissing the Writ Petition. While doing so, the High Court will have to order the restoration of the *status quo ante* by directing the demolition of the compound wall; and

f) After the 1st and 2nd respondents implead all the necessary parties to the Writ Petition, the same shall be decided finally in accordance with law. We clarify that construction of the compound wall made by the 1st and 2nd respondents shall be subject to the final outcome of the restored petition. Therefore, if the construction is found to be illegal or if it is found that it adversely affects the rights of the third parties, the High Court may pass an order of demolition of the compound wall or a part thereof.

24. The appeal is partly allowed on the above terms.

25. A copy of this judgment will be immediately forwarded to the Registrar (Judicial) of the Bombay High Court.

26. We record the assurance of the learned counsel appearing for the appellants that they will not press complaints filed by them against the sitting or former Judges of the Bombay High Court, members of the Bar and the learned Advocate-General. We clarify that if the appellants have commenced any proceedings based on the complaints, the same shall stand disposed of.

Headnotes prepared by:
Vidhi Thaker, Hony. Associate Editor
(*Verified by*: Shadan Farasat, Adv.)

Result of the case:
Appeal partly allowed.

[2024] 5 S.C.R. 174 : 2024 INSC 320

Babu Sahebagouda Rudragoudar and Others
v.
State of Karnataka

Criminal Appeal No. 985 of 2010

19 April 2024

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

Issue for Consideration

Whether the High Court was justified in deciding the appeal as a first Court on independent appreciation of evidence and recording its own findings to hold the accused appellants (A-1, A-2 and A-3) guilty of charge u/s. 302 r/w. s.34 IPC.

Headnotes

Code of Criminal Procedure, 1973 – s.378 – Appeal in case of acquittal – Scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court:

Held: It is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles: (a) That the judgment of acquittal suffers from patent perversity; (b) That the same is based on a misreading/omission to consider material evidence on record; (c) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record – The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court. [Paras 39 and 40]

Penal Code, 1860 – s. 302 r/w. s. 34 – Prosecution case that accused A-1, A-2, A-3 and A-4 armed with weapons attacked victim-son of PW-1, PW-1, PW-2, PW-3, PW-4 and PW-5 – Accused belaboured son of PW-1 – As a result, he died – PW-1 ran away hid behind the bushes – After sunset, he returned to his village and told them about the incident – Next day, in morning a written complaint filed before police station – Charge-sheet filed – The Trial Court discarded prosecution

* Author

story and acquitted accused-appellants (A-1, A-2 and A-3) along with other accused, however, the High Court reversed the acquittal of A-1, A-2 and A-3 and convicted these accused u/s. 302 r/w. s.34 IPC – Correctness:

Held: It was alleged in the report that the complainant-PW-1 along with PW-2, PW-3, PW-4 and PW-5 (servants, who had accompanied the deceased to erect a bund in their land) witnessed the incident wherein, however, none other than the deceased received a single injury in the incident – The witnesses PW-2, PW-6 and PW-15 admitted that it was raining incessantly in the village for almost three days – In such circumstances, the reason assigned by the complainant(PW-1) for the deceased and the four servants(PW-2, PW-3, PW-4 and PW-5) to have gone to the agricultural land, i.e., for putting up a bund is totally unacceptable – Testimony of PW-1 suffers from patent infirmities, contradictions and inherent loopholes which brings him within the category of wholly unreliable witness – There is a grave contradiction on the aspect as to whether the report was submitted by the complainant(PW-1) in the form of a written complaint or whether the oral statement of complainant(PW-1) was recorded by the police officials at his home leading to the registration of FIR(Exhibit P-10) – Further, PW-6 (who claimed to be an eye witness of the incident) categorically stated that it was he who had informed the family members, the informant PW-1 – Thus, the case set up by prosecution that complainant, PW-1 was an eye-witness to the incident, is totally contradicted by evidence of PW-6 – The conduct of the family members of the deceased and the other villagers in not taking any steps to protect the dead body for the whole night and instead, casually going back to their houses without giving a second thought as to what may happen to the mortal remains of the deceased, lying exposed to the elements is another circumstance which creates a grave doubt in the mind of the Court that no one had actually seen the incident and it was a case of blind murder which came to light much later – There is no logical explanation for the presence of the deceased and the servants in their field on the date and time of the incident – Further, the High Court heavily relied upon the circumstance of recoveries of weapons made at the instance of the accused as incriminating evidence – However, as was rightly pointed out that the complainant (PW-1) admitted in his cross-examination that he was shown the weapons of the offence by the police on the date of incident itself – In light

of the legal principles, none of the essential mandates governing an appeal against acquittal were adverted to by Division Bench of the High Court which proceeded to virtually decide the appeal as a first Court on independent appreciation of evidence and recorded its own findings to hold the accused appellants(A-1, A-2 and A-3) guilty of the charge u/s. 302 r/w. s.34 IPC – Thus, the impugned judgment rendered by the High Court cannot be sustained. [Paras 44, 47, 53, 41]

Evidence Act, 1872 – s. 27 – Requirement under law so as to prove a disclosure statement recorded:

Held: The statement of an accused recorded by a police officer u/s. 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the Investigating Officer during interrogation which has been taken down in writing – The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of State of Uttar Pradesh v. Deoman Upadhyaya – Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him – The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of incriminating fact(s). [Paras 59 and 60]

Evidence Act, 1872 – s. 60 – Oral evidence must be direct:

Held: As per Section 60 of the Evidence Act, oral evidence in all cases must be direct – The section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section – In case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same. [Para 61]

Evidence Act, 1872 – s.27 – Exhibiting memorandum – Proof of contents – Narration of events – Disclosure statements resulting into discovery of weapons:

Held: It is settled that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents – While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which

transpired leading to the recording of the disclosure statement – In the instant case, perusal of the extracted part of the evidence of the Investigating Officer(PW-27), in the backdrop of the exposition of law laid down by this Court, the interrogation memos of the accused A-2(Exhibit P-15) and A-1 (Exhibit P-16), it is clear that the Investigating Officer(PW-27) gave no description at all of the conversation which had transpired between himself and the accused which was recorded in the disclosure statements – Thus, these disclosure statements cannot be read in evidence and the recoveries made in furtherance thereof are *non est* in the eyes of law – The Investigating Officer(PW-27) also stated that in furtherance of the voluntary statements of accused(A-1 and A-2), he recovered and seized two axes and one koyta produced by A-1 in the field and one jambiya produced by A-2 – The Investigating Officer(PW-27) nowhere stated in his deposition that the disclosure statement of the accused resulted into the discovery of these weapons pursuant to being pointed out by the accused – The Investigating Officer(PW-27) further stated that he arrested accused A-3, recorded his voluntary statement and seized two sickles – However, neither the so called voluntary statement nor the seizure memo were proved by the Investigating Officer(PW-27) in his evidence – Thus, neither the disclosure memos were proved in accordance with law nor the recovery of the weapons from open spaces inspire confidence. [Paras 66-69]

Case Law Cited

Rajesh Prasad v. State of Bihar and Another [2022] 3 SCR 1046 **: (2022) 3 SCC 471;** *H.D. Sundara & Ors. v. State of Karnataka* [2023] 14 SCR 47 **: (2023) 9 SCC 581;** *Mohd. Abdul Hafeez v. State of Andhra Pradesh* **(1983) 1 SCC 143;** *Subramanya v. State of Karnataka* [2022] 14 SCR 828 **: 2022 SCC Online SC 1400 – relied on.**

State of Uttar Pradesh v. Deoman Upadhyaya [1961] 1 SCR 14 **: AIR (1960) SC 1125;** *Ramanand @ Nandlal Bharti v. State of Uttar Pradesh* [2022] 5 SCR 162 **: (2022) SCC OnLine SC 1396 – referred to.**

List of Acts

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

List of Keywords

Section 378 of the Code of Criminal Procedure, 1973; section 27 of the Evidence Act, 1872; Scope of interference by the High Court; Reversing judgment of acquittal; Patent perversity; Misreading/omission to consider material evidence; Wholly unreliable witness; Memorandum of confession of the accused; Discovery of fact; Oral evidence; Exhibiting memorandum; Proof of contents; Narration of events; Disclosure statements resulting into discovery of weapons.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.985 of 2010

From the Judgment and Order dated 14.09.2009 of the High Court of Karnataka Circuit Bench at Dharwad in CRLA No. 2215 of 2005

Appearances for Parties

Basavaprabhu S. Patil, Sr. Adv., Geet Ahuja, Anirudh Sanganeria, Samarth Kashyap, Aman Banka, Advs. for the Appellants.

Aman Panwar, A.A.G., V. N. Raghupathy, Manendra Pal Gupta, Shivam Singh Baghal, Harsh Gattani, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. The appellants herein, namely, Babu Sahebagouda Rudragoudar(A-1), Alagond Sahebagouda Rudragoudar(A-2) and Mudakappa @ Gadegappa Rudragoudar(A-3) along with Sahebagouda Gadageppa Rudragoudar(A-4), Basappa Avvanna @ Huvanna Giradi @ Chigari (A-5) and Basappa Dundappa @ Dondiba Hanjagi (A-6) were subjected to trial in Sessions Case No. 28 of 2002 in the Court of the learned Fast Track Court I, Bijapur for charges pertaining to offences punishable under Sections 143, 147, 148, 506(2) and Section 302 read with Section 149 of the Indian Penal Code, 1860 (hereinafter being referred to as 'IPC').

2. For the sake of convenience, the appellants shall hereinafter be referred to as A-1, A-2 and A-3.

3. The learned trial Court proceeded to discard the prosecution story and acquitted the accused appellants(A-1, A-2 and A-3) along with A-4, A-5 and A-6 vide judgment dated 23rd July, 2005.

4. The State of Karnataka challenged the said judgment recording acquittal of A-1 to A-6 by filing Criminal Appeal No. 2215/2005 before the High Court of Karnataka. The Division Bench of High Court vide its judgment dated 14th September, 2009 proceeded to allow the appeal; reversed the acquittal of A-1, A-2 and A-3 and convicted these accused for the offence punishable under Section 302 read with Section 34 IPC and sentenced them to undergo imprisonment for life and to pay a fine of Rs. 50,000/- each within a period of six months and in default, to further undergo imprisonment for two years. The appeal as against A-5 and A-6 was dismissed, while appeal qua A-4 stood abated on account of his death. Out of the fine amount to be realised, a sum of Rs. 10,000/- was ordered to be paid to the State Government and the balance amount of Rs. 1,40,000/- was ordered to be paid to the complainant(PW-1).

5. The judgment dated 14th September, 2009 rendered by the learned Division Bench of the High Court reversing the acquittal of the accused appellants and convicting and sentencing them as above is assailed in the present appeal.

Brief facts: -

6. The complainant, Chanagouda(PW-1) owns agricultural lands and a house in village Babanagar, Bijapur, Karnataka. It is alleged by the prosecution that in the morning of 19th September, 2001, the deceased Malagounda, son of complainant, along with labourers/ servants Revappa(PW-2), Siddappa(PW-3), Hiragappa(PW-4) and Suresh(PW-5) had gone to put up a bund (check dam) in their land. At about 12 o' clock in the afternoon, the complainant(PW-1) packed lunch for these five persons and proceeded to the field where the farming operations were being undertaken. The work continued till 3.30 p.m. and thereafter, the four servants(PW-2, PW-3, PW-4 and PW-5), along with the deceased Malagounda and the complainant(PW-1) proceeded to the village. They had reached near the land of one Ummakka Kulkarni at about 4.00 pm, where A-1, A-2, A-3 and A-4 suddenly came around and exhorted that the way the complainant party had murdered Sangound, they would take revenge upon the members of the complainant party in the same manner. A-1 holding

a *jambai*, A-2 holding an axe, A-3 holding a sickle and A-4 holding an axe, belaboured Malagounda, as a result of which he fell down. The assailants thereafter threatened the complainant(PW-1) that if he tried to intervene, he too would meet the same fate as his son. Fearing for his own life, the complainant(PW-1) ran away and hid behind the bushes in order to avoid being beaten by the accused.

7. After sunset, the complainant(PW-1) returned to the village and narrated about the incident to his family members. A written complaint of this incident came to be submitted by the complainant(PW-1) at Tikota Police Station on 20th September, 2001 at 4.00 am in the morning whereupon FIR(Exhibit P-10) was registered and investigation commenced. After conclusion of investigation, a charge sheet came to be filed against the appellants(A-1, A-2, A-3) and other accused(A-4, A-5 and A-6) for the offences punishable under Sections 143, 147, 148, 506(2) and Section 302 read with Section 149 IPC in the Court of jurisdictional Magistrate. The case being exclusively sessions triable was committed to the Court of Sessions Judge, Bijapur where charges were framed against the accused for the above offences. The accused persons pleaded not guilty and claimed trial. The prosecution examined as many as 27 witnesses, exhibited 24 documents and 17 material objects to prove its case. The accused, upon being questioned under Section 313 of Code of Criminal Procedure, 1973(hereinafter being referred to as 'CrPC') claimed that they were innocent and had been falsely implicated in the case. However, no evidence was led in defence. For the sake of convenience, the details of the prosecution witnesses are enlisted below: -

PW-1	Chanagouda (complainant)(eye witness)
PW-2	Revappa (eye witness)
PW-3	Siddappa (eye witness) (hostile)
PW-4	Hiragappa (eye witness)
PW-5	Suresh (eye witness) (hostile)
PW-6	Basagonda (eye witness)
PW-7	Appasaheb (last seen witness)
PW-8	Sabu (panch witness)
PW-9	Basu (panch witness)

PW-10	Ramu (panch witness)
PW-11	Bhimanna (panch witness)
PW-12	Sangond (panch witness)
PW-13	Shantinath (panch witness)
PW-14	Sakrubai (mother of the deceased) (hearsay witness)
PW-15	Shankargouda (eye witness)
PW-16	Siddappa (hearsay witness)
PW-17	Dr. Anilkumar (Medical Jurist)
PW-18	Shetteppa (Retd. ASI) (registered the FIR) (Poujadar)
PW-19	Veerbhadrayya (Carrier Constable)
PW-20	Dayanand (Photographer)
PW-21	Raju (Scribe of Sketch Map)
PW-22	Shrishail (Carrier Constable)
PW-23	Ratansing (Assistant Sub-Inspector)
PW-24	Chandrashekhar (Investigating Officer)
PW-25	Jaganath (PSI)
PW-26	Mohammadsharif (Assistant Sub-Inspector)
PW-27	Basanagouda (Police Inspector, State Intelligence, Bangalore) (2nd Investigating Officer)

8. Upon hearing the arguments advanced by the prosecution and the defence counsel and after thoroughly appreciating the evidence available on record, the trial Court proceeded to hold that the prosecution could not prove the charges levelled against the accused beyond all manner of doubt and acquitted all the six accused vide judgment dated 23rd July, 2005 with the following pertinent findings: -

   (i) That in the charge sheet, the prosecution had involved A-5 and A-6. However, none of the witnesses examined by the prosecution spoke a single word incriminating A-5 and A-6 either individually or vicariously and this circumstance casted serious doubts in the mind of the Court with regard to the conduct of the witnesses to implicate A-1 to A-4 while exonerating A-5 and A-6.

   (ii) That PW-1, PW-2, PW-3, PW-4, PW-5 and PW-6 gave contradictory versions regarding exact identities/names of the assailants.

(iii) PW-4 who was a coolie and had worked along with the deceased Malagounda did not implicate A-4 in the crime.

(iv) Basagonda(PW-6), projected to be an eye witness gave evidence contradicting the evidence of PW-2 and PW-4.

(v) Rudrappa, son of PW-6 was one of the accused in the murder of Sangound, son of A-4 and thus, the said witness had a motive to speak against A-1 to A-4.

(vi) Likewise, another projected eyewitness, namely, Shankargouda(PW-15), did not state about the presence of A-4 at the time of incident.

(vii) The trial Court further found that it was admitted by the eye witnesses(PW-6 and PW-15) that it had rained in the village continuously for three days prior to the incident and thus, the theory put forth by the complainant that the deceased and the four labourers(PW-2 to PW-5) had gone to the field for raising a bund was improbable as during the spell of incessant rainfall, it would not have been possible to carry out such an operation and for that matter, any other farming activity.

9. At para 15 of the judgment, the trial Court concluded as below: -

> "…In view of conflicting nature of evidence of these eye witnesses, it is clear that their evidence is not consistent with the prosecution case and it has a different version with reference to each witness. Hence a serious doubt arises as to the truthfulness of the prosecution."

10. The trial Court discussed evidence of ASI, Tikota Police Station(PW-18), wherein he admitted that police visited the place of incident in the night only. It was also noted that complainant(PW-1) admitted that the complaint was made after the police had visited the place of incident.

11. PW-2 stated in his cross examination that the police came to the village at about 10 or 11 am and recorded his statement at the police station at that time only i.e. at 12 o' clock. Taking this into consideration, the trial Court recorded a categoric finding that complaint(Exhibit P-1) was a post-investigation document and as such, it was hit by Section 162 CrPC and did not have any evidentiary worth. This conclusion was recorded in Para 17 of the judgment which is extracted hereinbelow for the sake of ready reference: -

> "According to the cross – examination of P.W.2, the police came to the village at about 10 or 11 a.m. He called by the police and they went to the place and the police inspected the dead body. P.W.2 is very much specific that they went to the place along with the police at 11p.m. and thereafter went to the police station at 12 O' clock in the night. According to P.W.2, the police have recorded his statement in the police station at that time only i.e., at 12 O clock. This goes to show that the police were aware of the offence at 11.00 p.m. on 19.09.2001. P.W.6., who claims to be an eye witness, returned to the house at about 5-00 or 6-00 p.m. and informed the incident to the children of his uncle viz., he informed Pargouda, Shankargouda and Chanagouda. But, however, P.W.1 was hiding near the bushes at his land and if what P.W.6 says is true, then in that case, P.W.1 was in the house at 5-00 or 6-00 pm only. Nothing prevented P.W.1 to rush immediately to the police station which was 10 Kms away and to file the complaint. Even P.W.6 further admits that he told the incident to these persons and they had told him that they will go to the police station and it was 6-00 or 7-00 p.m., at the time. Even if that is the case, P.W.1 has to offer explanation as to why he filed the complaint at 4.00 a.m. When the admissions of this witness are taken into account, the police were aware of the murder at about 11 p.m. in the night and they had even visited the place of offence. Nothing prevented the police who visited the place of offence to record the statement of P.W.1 at his house and the delay for six hours as per the evidence of P.W.1 or as to the evidence of P.W.6, the delay of eight hours is not explained by the prosecution. If already the statements of the witnesses were recorded at the village only after seeing the dead body, then in that case Ex.P1 which is the complaint, is hit by Section 162 of CrPC and cannot have evidentiary value."

12. The trial Court also concluded that the opinion of the Medical Officer regarding time of death of the deceased totally contradicted the case set up by the prosecution witnesses in their evidence regarding the time of incident.

13. Regarding the seizure of weapons/articles, the trial Court noted at para 19 that the complainant(PW-1) admitted in his cross-examination that the police had shown him the weapons of offence on the date of incident itself. However, as per the Investigating Officer(PW-27), the weapons were shown to have been recovered on 1st October, 2001 and, therefore, evidence of complainant(PW-1) totally contradicted the claim of the Investigating Officer(PW-27) that he had seized the weapons in furtherance of the disclosure statements of the accused.

14. Taking note of these inherent lacunae, infirmities and contradictions in the prosecution evidence, the trial Court proceeded to hold that the prosecution case was full of inconsistencies and infirmities and that it had failed to prove the charges against the accused beyond all manner of doubt. Accordingly, the accused appellants(A-1, A-2 and A-3) and other three accused(A-4, A-5 and A-6) were acquitted of the charges.

15. The State preferred an appeal under Section 378(1) read with 378(3) CrPC challenging the acquittal of the accused. The learned Division Bench of High Court of Karnataka partly allowed the said appeal vide judgment dated 14th September, 2009 and while reversing the acquittal of the accused A-1, A-2 and A-3 as recorded by the trial Court, convicted and sentenced them as above. The appeal against A-4 stood abated on account of his death. The appeal against A-5 and A-6 was dismissed upholding their acquittal.

16. The instant appeal has been instituted at the instance of the accused appellants(A-1, A-2 and A-3) for assailing the judgment dated 14th September, 2009 rendered by the learned Division Bench of the High Court of Karnataka, Circuit Bench, Gulbarga whereby the acquittal of the appellants has been reversed and they have been convicted and sentenced to suffer life imprisonment.

Submissions on behalf of the appellants: -

17. Learned counsel representing the appellants urged that the view taken by the High Court in reversing the acquittal of the appellants recorded by the trial Court by a well-reasoned judgment is totally contrary to the settled principles laid down by this Court regarding scope of interference in an appeal against acquittal.

18. Learned counsel urged that the appellate Court should be very slow to intervene with the acquittal of an accused as recorded by the trial

Court. Acquittal can be reversed only if the findings recorded by the trial Court are found to be patently illegal or perverse or if the only view possible on the basis of the evidence available on record points towards the guilt of the accused. If two views are possible, the acquittal recorded by the trial Court should not be interfered with unless perversity or misreading of evidence is reflected from the judgment recording acquittal.

19. Learned counsel further urged that the learned Division Bench of the High Court, while rendering the judgment reversing acquittal of the appellant barely referred to the findings on the basis of which the trial Court had acquitted the accused by extending them the benefit of doubt. Rather, the High Court went on to record its own fresh conclusions after re-appreciation of the evidence. Such an approach is *de hors* the well-settled principles governing consideration of an appeal against acquittal and hence, the impugned judgment deserves to be set aside.

20. They advanced pertinent submissions assailing the judgment of the High Court seeking acquittal of the accused appellants.

21. It was urged that the complainant(PW-1), father of the deceased Malagounda and the four labourers(PW-2, PW-3, PW-4 and PW-5) abandoned the deceased victim whom they claimed to have seen being belaboured with their own eyes. They neither made any efforts to take stock of the victim's condition nor was the matter reported to the police promptly which makes it clear that the so called eye witnesses actually never saw the incident happening with their own eyes and a case of blind murder has been foisted upon the appellants on account of prior enmity.

22. The attention of this Court was drawn to the following excerpts from the evidence of complainant, Chanagouda(PW-1):-

> "**….Again I returned back and went near my land and entered the bushes to hide myself. I sat at that place up to 6 or 7 PM in the evening. After the sun-set I returned to my village. I told the incident to my family members. In the night myself and my brothers and relatives went to the place and saw the dead body. Thereafter we informed to the police. The cousins informed about the incident to the police. At that time the police came to our house and took me to the police**

station. The police enquired me and I informed them about the incident and they made a writing. It was about 2 or 3 AM in the morning. In the morning hours the police came to the place. I now see the complaint at ex.P.1, and it bears my signature at Ex.p.1(a)….

….The police recorded what I have stated to them in the police station. Thereafter I signed to that writing. On the next day the police have taken my statement. The Poujadar recorded my statement. The inspector also questioned me. It is not correct to suggest that the inspector has not recorded my statement…..

….My relatives did not made a telephone call and personally went to the police station and brought the police. At that time initially the police came and thereafter the Poujadar came. They came to our house. The poujadar questioned me what has happened. I told the Poujadar what I was knowing. The poujadar made a writing about it. The writing was made after the police visited the place of incident…..

…..Myself and my relatives went to see the dead body in the night and at that time it was 10 to 11 PM. When we returned to house it was 10 or 11 PM. Phone facilities are available in our village. I did not made any telephone call to the police. I also did not tell-to my relatives to make a telephone call to the police station. Shivanagouda and Banagouda are my other two sons. Both of them are educated. They were present in the house when I returned from the land. When I told my son about the incident, they went on motor-cycle to the police station but did not made any telephone call to the police station. My son Shivanagouda and Sangond went on the motor-cycle to the police station. They went to the police station at about 12 o'clock in the night. The distance between Tikota Police Station and my village is 10 KMS…..

….**On the day of incident only the police showed the weapon of offence..**"

(emphasis supplied)

23. In this very context, the attention of the Court was drawn to the evidence of ASI Tikota Police Station(PW-18), who recorded the FIR(Exhibit P-10) wherein he admitted that he did not know whether prior to 4.00 am on that day, the information of the murder was already provided at the police station.

24. Learned counsel thus urged that the police had already been informed about the incident by none other than the sons of the complainant(PW-1) around 12 o' clock in the night and hence, there was no reason as to why the FIR was not registered immediately on receiving such information.

25. Learned counsel contended that the complainant(PW-1) admitted in cross examination that the Poujadar scribed a complaint and he was made to append his signatures thereupon. It was submitted that the said complaint was not produced on record. Hence, there is a genuine doubt regarding the FIR(Exhibit P-10) being a subsequently created post investigation document.

26. He then referred to the statement of Revappa(PW-2) who admitted in cross-examination that the police came to the village at about 10 or 11 pm and he was sleeping in his house when the call came from the police. A police officer from Tikota Police Station came to call him. He along with the police officer went to the place of incident where the dead body was lying. The time was about 11.00 pm. They went to the police station at 12 o' clock in the night where his statement was recorded.

27. The Court was taken through the statement of Hiragappa(PW-4) who also stated that police came to their village at 8.00 or 9.00 pm in the night. They inquired from him and he divulged as to how the incident had happened. He and the other witnesses were questioned and their statements were noted whereafter they proceeded to the crime scene. They all went to the police station at about 11.00 pm in the night. He travelled in the police jeep. His statement was again recorded at the Police Station around 12'o clock or 1.00 am.

28. Learned counsel also referred to the statement of Basagonda(PW-6) who claimed to be an eye witness of the incident and urged that the witness stated about the presence of only two servants with the deceased Malagounda while he was allegedly being assaulted by the accused. Most significantly, he did not state about the presence

of the complainant(PW-1) at the crime scene. PW-6 admitted in his cross-examination that he returned to his house at about 5 to 6 pm and informed about the incident to the children of his uncle and Paragouda, Shankargouda and Chanagouda(PW-1). Many people had gathered when he spoke about the incident. It was submitted that this version of PW-6 completely belies and eclipses the claim of the complainant(PW-1) that he had seen the incident with his own eyes because, if the complainant(PW-1) had himself witnessed the occurrence, there was no occasion for PW-6 to collect all the family members including the complainant(PW-1) and inform them about the incident.

29. The evidence of PW-15, another alleged eye witnesses was criticised and it was submitted that the conduct of this witness who happens to be a cousin of PW-1, in casually going away to his farmland despite witnessing the brutal assault and not taking any steps to inform the police or the close relatives clearly shows that he is a cooked up witness and was not present at the crime scene.

30. The statement of Dr. Anil Kumar(PW-17) was referred to and it was submitted that the Medical Jurist conducted autopsy upon the dead body at about 9.00 am on 20th September, 2001 and gave pertinent opinion that the time of death of the victim was 18 to 24 hours before the autopsy being carried out. In cross-examination, he admitted that decomposition had set in the dead body and that the time of death was more than 24 hours prior to the examination. Thus, it was submitted that the time of incident as portrayed in the evidence given by the so called eye witnesses is totally contradicted by the opinion of the Medical Jurist.

31. It was also contended that the Investigating Officer(PW-27) has given false evidence regarding the disclosure statements made by the accused and the recoveries of the weapons effected in furtherance thereof, because the complainant(PW-1) clearly admitted in his evidence that the police had showed him the weapons on the very day of the incident.

32. It was also contended that neither the disclosure statements nor the recovery memos bear the signatures/thumb impressions of the accused and hence, the recoveries cannot be read in evidence or attributed to the accused appellants.

33. Learned counsel for the appellants vehemently urged that the learned Division Bench of the High Court was not justified in causing interference into the well-reasoned judgment of acquittal rendered by the learned trial Court and reversing the acquittal of the accused appellants and that too, without recording any finding that the trial Court's judgment was perverse or that no view except the one warranting conviction of the accused was possible upon appreciation of evidence as available on record. On these grounds, he implored the court to set aside the impugned judgment and restore the acquittal of the appellants.

Submissions on behalf of Respondent-State: -

34. *Per contra*, learned counsel appearing for the respondent State vehemently and fervently opposed the submissions advanced by learned counsel for the appellants. He urged that learned Division Bench of the High Court, while considering the appeal against acquittal, thoroughly reappreciated the evidence available on record and arrived at an independent and well considered conclusion that the depositions of the eye witnesses PW-1, PW-2, PW-4, PW-6 and PW-15 were convincing and did not suffer from any significant contradictions or infirmities so as to justify the decision of the trial Court in discarding their evidence and acquitting the accused of the charges. The FIR(Exhibit P-10) was promptly lodged at 4.00 am in the morning of 20th September, 2001. There was no such delay in lodging the report which could cast a doubt on the truthfulness of the prosecution story. The so called contradictions and discrepancies highlighted by the trial Court in the evidence of the eyewitnesses for doubting their evidentiary worth are trivial and insignificant and acquittal of accused as recorded by the learned trial Court disregarding the testimony of the eyewitnesses is based on perverse and unacceptable reasoning. Learned counsel thus urged that the High Court was perfectly justified in reversing the acquittal of the accused appellants by the impugned judgment which does not require interference in this appeal.

35. We have given our thoughtful consideration to the submissions made at bar and have gone through the judgments of the trial Court and High Court as well as the evidence available on record.

Discussion and Conclusion: -

36. First of all, we would like to reiterate the principles laid down by this Court governing the scope of interference by the High Court in an appeal filed by the State for challenging acquittal of the accused recorded by the trial Court.

37. This Court in the case of ***Rajesh Prasad v. State of Bihar and Another***[1] encapsulated the legal position covering the field after considering various earlier judgments and held as below: -

> **"29.** After referring to a catena of judgments, this Court culled out the following general principles regarding the powers of the appellate court while dealing with an appeal against an order of acquittal in the following words: (*Chandrappa case* [*Chandrappa* v. *State of Karnataka*, (2007) 4 SCC 415]
>
> > "*42*. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
> >
> > *(1)* An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
> >
> > *(2)* The Criminal Procedure Code, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
> >
> > *(3)* Various expressions, such as, "substantial and compelling reasons", "good and sufficient

1 [2022] 3 SCR 1046 : (2022) 3 SCC 471

grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

38. Further, in the case of ***H.D. Sundara & Ors. v. State of Karnataka***[2] this Court summarized the principles governing the exercise of appellate jurisdiction while dealing with an appeal against acquittal under Section 378 of CrPC as follows: -

> "**8.1.** The acquittal of the accused further strengthens the presumption of innocence;
>
> **8.2.** The appellate court, while hearing an appeal against acquittal, is entitled to reappreciate the oral and documentary evidence;
>
> **8.3.** The appellate court, while deciding an appeal against acquittal, after reappreciating the evidence, is required to consider whether the view taken by the trial court is a possible view which could have been taken on the basis of the evidence on record;
>
> **8.4.** If the view taken is a possible view, the appellate court cannot overturn the order of acquittal on the ground that another view was also possible; and
>
> **8.5.** The appellate court can interfere with the order of acquittal only if it comes to a finding that the only conclusion which can be recorded on the basis of the evidence on record was that the guilt of the accused was proved beyond a reasonable doubt and no other conclusion was possible."

39. Thus, it is beyond the pale of doubt that the scope of interference by an appellate Court for reversing the judgment of acquittal recorded by the trial Court in favour of the accused has to be exercised within the four corners of the following principles:-

(a) That the judgment of acquittal suffers from patent perversity;

(b) That the same is based on a misreading/omission to consider material evidence on record;

(c) That no two reasonable views are possible and only the view consistent with the guilt of the accused is possible from the evidence available on record.

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2 [2023] 14 SCR 47 : (2023) 9 SCC 581

40. The appellate Court, in order to interfere with the judgment of acquittal would have to record pertinent findings on the above factors if it is inclined to reverse the judgment of acquittal rendered by the trial Court.

41. In light of the above legal principles, if we go through the impugned judgment, we find that none of these essential mandates governing an appeal against acquittal were adverted to by learned Division Bench of the High Court which proceeded to virtually decide the appeal as a first Court on independent appreciation of evidence and recorded its own findings to hold the accused appellants(A-1, A-2 and A-3) guilty of the charge under Section 302 read with Section 34 IPC and sentenced them to imprisonment for life.

42. Thus, on the face of record, the judgment of the High Court causing interference with the acquittal of the accused appellants as recorded by the trial Court is contrary to the principles established by law.

43. Keeping the above scenario in mind, we now proceed to analyse the evidence and shall assign our reasons regarding the impugned judgment being flawed, with reference to the material infirmities and lacunae in the prosecution case.

44. The place of occurrence is admittedly at a distance of 10 kms from Police Station Tikota. The complainant(PW-1), father of the deceased Malagounda claiming to be an eye witness of the incident deposed that he lodged a complaint(Exhibit P-1) at the police station at 4 am, which resulted into registration of FIR(Exhibit P-10). It was alleged in the report that the complainant along with PW-2, PW-3, PW-4 and PW-5(servants, who had accompanied the deceased Malagounda to erect a bund in their land) witnessed the incident wherein, the assailants including the appellants herein, assaulted and killed the deceased by inflicting injuries with sharp weapons. It may be noted that even though the complainant(PW-1), the deceased and the labourers were all going together and the assailants were six in number, none other than the deceased Malagounda received a single injury in the incident.

45. Relevant portions from the evidence of complainant(PW-1) have been extracted and highlighted above and on going through the same, we find that his testimony suffers from patent infirmities, contradictions and inherent loopholes which brings him within the category of wholly unreliable witness.

46. The complainant(PW-1) stated in his evidence that he saw the brutal assault launched by the appellants and A-4(Sahebagouda) on his son Malagounda which took place at 4.00 pm or 5.00 pm in the evening of 19th September, 2001. While the incident was going on, he hid amongst the bushes so as to avoid being harmed by the assailants. The complainant did not state anything about the accused going away from the crime scene after the incident. However, he claimed that he returned back to his house just after sunset. The incident took place in the month of September and thus, it can be presumed that sunset must have occurred around 6:15 to 6.30 pm. The complainant stated that on reaching home, he divulged about the incident to his family members and soon thereafter, he and his cousins (as per his version in examination-in-chief) and his sons Shivanagouda and Banagouda(as per cross-examination) went to the Police Station Tikota and informed the police about the incident.

47. Apparently, thus, the close relatives of the deceased had gone to the police station in the late hours of 19th September itself. If this version was true then, in natural course, these persons were bound to divulge about the incident to the police and their statement/s which would presumably be about an incident of the homicidal death would have mandatorily been entered in the Daily Dairy of the police station if not treated to be the FIR. However, the Daily Diary or the *Roznamcha* entry of the police station corresponding to the so called visit by the relatives of the deceased to the police station was not brought on record which creates a grave doubt on the genuineness of the FIR(Exhibit P-10). The complainant(PW-1) admitted in cross examination that the Poujadar came to his house and he narrated the incident to the officer who scribed the same and thereafter, the complainant appended his signatures on the writing made by the Poujadar. However, ASI Tikota Police Station(PW-18) testified on oath that complainant(PW-1) came to the police station and submitted a written report which was taken as the complaint of the incident. He did not state anything about any complaint being recorded at the house of the complainant prior to lodging of the report. Thus, there is a grave contradiction on this important aspect as to whether the report was submitted by the complainant(PW-1) in the form of a written complaint or whether the oral statement of complainant(PW-1) was recorded by the police officials at his home leading to the registration of FIR(Exhibit P-10). The non-production of the Daily Dairy maintained at

the police station assumes great significance in the backdrop of these facts. Apparently thus, the FIR(Exhibit P-10) is a post investigation document and does not inspire confidence.

48. Shivanagouda and Banagouda, the educated sons of the complainant(PW-1), who were the first persons to approach the police station(as stated by PW-1 in cross-examination) were not examined by the prosecution. The complainant(PW-1) also stated that his relatives personally went to the police station and brought the police to the village. The factum of the police having arrived at the village at about 10.00 pm or 11.00 pm was also stated by PW-2 and PW-4**.**

49. A very important fact which is evident from the evidence of Basagonda(PW-6) who claimed to be an eye witness of the incident is that he did not state about the presence of the complainant(PW-1) at the place of incident while the victim was being assaulted. PW-6 stated that he returned to his house at about 5.00 pm or 6.00 pm and then he informed the family members, i.e., Paragouda, Shankargouda and Chanagouda(PW-1). Thus, the case set up by prosecution that complainant, Chanagouda(PW-1) was an eye-witness to the incident, is totally contradicted by evidence of PW-6 who categorically stated that it was he who had informed the family members, the informant Chanagouda (PW-1) being one of them, about the incident at 6.00 or 7.00 pm and that they responded saying that they would be going to the police station for filing a report.

50. Thus, the claim of complainant(PW-1) that he was an eye witness to the incident is totally contradicted by the statement of PW-6. The conduct of the family members of the deceased and the other villagers in not taking any steps to protect the dead body for the whole night and instead, casually going back to their houses without giving a second thought as to what may happen to the mortal remains of the deceased, lying exposed to the elements is another circumstance which creates a grave doubt in the mind of the Court that no one had actually seen the incident and it was a case of blind murder which came to light much later. As a matter of fact, if at all the sequence of events as emanating from the evidence of the prosecution witnesses was having even a grain of truth, then it cannot be believed that the dead body would be abandoned in this manner or that even the police officials would not put a guard at the crime scene.

51. Added to that, the version of Medical Jurist(PW-17) who stated in his cross-examination that the dead body of the deceased Malagounda was in a stage of decomposition and that the time of death was more than 24 hours prior to the autopsy done at 9.00 a.m. on 20th September, 2001 creates further doubt in the mind of the Court on the theory of the so called eye witnesses that the incident happened at 4.00 pm on 19th September, 2001.

52. The witnesses Revappa(PW-2), Basagonda(PW-6) and Shankargouda(PW-15) admitted that it had been raining incessantly in the village for almost three days. In such circumstances, the reason assigned by the complainant(PW-1) for the deceased Malagounda and the four servants(PW-2, PW-3, PW-4 and PW-5) to have gone to the agricultural land, i.e., for putting up a bund is totally unacceptable. Since it was raining incessantly, there could not be any possibility for these people to have made an attempt to put up a bund on the land.

53. Thus, there is no logical explanation for the presence of the deceased and the servants in their field on the date and time of the incident. It seems that not only did the complainant party create eye witnesses of the incident but has also suppressed the true genesis of the occurrence.

54. PW-1 and PW-6 admitted that Sangound, son of the accused A-4 had been murdered in front of their house and that the accused party was carrying a grudge that deceased Malagounda had murdered the boy. PW-6 also admitted that deceased Malagounda, his father[(complainant)(PW-1)] and two brothers(Shivanagouda and Banagouda) were arraigned as accused for the murder of Sangound(son of A-4). The incident of murder of Sangound happened two years prior which is far too remote in point of time so as to impute motive to the appellants that in order to seek revenge, they had murdered the deceased Malagounda.

55. It has been laid down by this Court in a catena of decisions that motive acts as a double-edged sword. Hence, the very fact that members of the prosecution party were arraigned as accused in the murder of Sangound, son of A-4, this could also have been the motive for the prosecution witness to rope in the accused appellants for the murder of Malagounda.

56. The High Court heavily relied upon the circumstance of recoveries of weapons made at the instance of the accused as incriminating evidence. However, as was rightly pointed out by learned counsel representing the accused appellants, the complainant(PW-1) admitted in his cross-examination that he was shown the weapons of the offence by the police on the date of incident itself.

57. At this stage, we would like to note that the Investigating Officer(PW-27) who investigated the matter, claims to have effected the recoveries in furtherance of the disclosure statements of the accused and testified as below to prove the procedure of disclosure and the discoveries: -

> "On 1.10.2001 PSI Tikota produced accused Babusaheb Sahebgouda Biradar and Alagond Sahebgouda Biradar who were interrogated and recorded vol. statement of both accused persons. I now see the vol. statement or Alagond which is at Ex.P.15. It bears my signature and the LTM of Alagond. I now see the vol. statement of Babu and it is marked as Ex.P.16 and it bears my signature and the LTM of Babu Biradar. I recorded vol. statement of Babu Sahebgouda Pudragoudar and Alagond Sahebgouda Biradar. And accordingly conducted seizure panchanama and seized two axes and one koyta produced by Pudragoudar i.e. Babu Sahebgouda Pudragoudar, in the field of Anasari. And accordingly also seized one Jambiya produced by Alagond Biradar. I recorded the statements of Krishnaji Govindappa Kulkarni. On 2.10.2001 produced both the accused before the Hon'ble Court. On 3.10.01 I arrested accused Mudakappa Gadigoppa@ Sahebgouda Pudragoudar and the interrogated to him and also recorded his voluntary statement. As per the vol. st. conducted seizure panchanama and seized two sickles, 0 pen shirt which was blood stained, bush-shirt which was blood stained which were belonging to accd. Gradi and one plastic carry bag.Which articles are kept in land of Basappa Gradi."

58. We would now discuss about the requirement under law so as to prove a disclosure statement recorded under Section 27 of the Indian Evidence Act, 1872(hereinafter being referred to as 'Evidence Act') and the discoveries made in furtherance thereof.

59. The statement of an accused recorded by a police officer under Section 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the Investigating Officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in the case of ***State of Uttar Pradesh v. Deoman Upadhyaya***[3].

60. Thus, when the Investigating Officer steps into the witness box for proving such disclosure statement, he would be required to narrate what the accused stated to him. The Investigating Officer essentially testifies about the conversation held between himself and the accused which has been taken down into writing leading to the discovery of incriminating fact(s).

61. As per Section 60 of the Evidence Act, oral evidence in all cases must be direct. The section leaves no ambiguity and mandates that no secondary/hearsay evidence can be given in case of oral evidence, except for the circumstances enumerated in the section. In case of a person who asserts to have heard a fact, only his evidence must be given in respect of the same.

62. The manner of proving the disclosure statement under Section 27 of the Evidence Act has been the subject matter of consideration by this Court in various judgments, some of which are being referred to below.

63. In the case of ***Mohd. Abdul Hafeez v. State of Andhra Pradesh***[4]***,*** it was held by this Court as follows: -

> **"5.** ….If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person."

3 [1961] 1 SCR 14 : AIR 1960 SC 1125

4 (1983) 1 SCC 143

64. Further, in the case of ***Subramanya v. State of Karnataka***[5], it was held as under: -

> **"82.** Keeping in mind the aforesaid evidence, we proceed to consider whether the prosecution has been able to prove and establish the discoveries in accordance with law. Section 27 of the Evidence Act reads thus:
>
> > ***"27. How much of information received from accused may be proved. —***
> >
> > *Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."*
>
> **83.** The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the discovery of a fact relevant under Section 27 of the Evidence Act.
>
> **84.** If, it is say of the investigating officer that the accused appellant while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes etc., then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence etc. When the accused while in custody makes such statement before the two independent witnesses (panch-witnesses) the exact statement or rather the exact words uttered by the accused

5 [2022] 14 SCR 828 : 2022 SCC Online SC 1400

should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch-witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or blood stained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter." (emphasis supplied)

65. Similar view was taken by this Court in the case of ***Ramanand @ Nandlal Bharti v. State of Uttar Pradesh***[6], wherein this Court held that mere exhibiting of memorandum prepared by the Investigating Officer during investigation cannot tantamount to proof of its contents. While testifying on oath, the Investigating Officer would be required to narrate the sequence of events which transpired leading to the recording of the disclosure statement.

66. If we peruse the extracted part of the evidence of the Investigating Officer(PW-27)(reproduced *supra*), in the backdrop of the above exposition of law laid down by this Court, the interrogation memos of the accused A-2(Exhibit P-15) and A-1 (Exhibit P-16), it is clear that the Investigating Officer(PW-27) gave no description at all of the conversation which had transpired between himself and the

6 [2022] 5 S.C.R. 162 : 2022 SCC OnLine SC 1396

accused which was recorded in the disclosure statements. Thus, these disclosure statements cannot be read in evidence and the recoveries made in furtherance thereof are *non est* in the eyes of law.

67. The Investigating Officer(PW-27) also stated that in furtherance of the voluntary statements of accused(A-1 and A-2), he recovered and seized two axes and one *koyta* produced by A-1 in the field of Ansari and one *jambiya* produced by A-2. The Investigating Officer(PW-27) nowhere stated in his deposition that the disclosure statement of the accused resulted into the discovery of these weapons pursuant to being pointed out by the accused.

68. The Investigating Officer(PW-27) further stated that he arrested accused A-3, recorded his voluntary statement and seized two sickles. However, neither the so called voluntary statement nor the seizure memo were proved by the Investigating Officer(PW-27) in his evidence.

69. Thus, we are of the firm opinion that neither the disclosure memos were proved in accordance with law nor the recovery of the weapons from open spaces inspire confidence and were wrongly relied upon by the High Court as incriminating material so as to reverse the finding of the acquittal recorded by the trial Court.

70. The evidence of seizure of weapons of the offence is not trustworthy and was rightly discarded by the trial Court.

71. In addition thereto, we may note that admittedly, the prosecution did not procure any serological opinion to establish blood group, if any, on the weapons so recovered. Thus, the recoveries are otherwise also meaningless and an exercise in futility.

72. Thus, neither the evidence of the eye witness is trustworthy nor did the prosecution provide any corroboration to the vacillating evidence of the so called eye witnesses. We have already held that the FIR(Exhibit P-10) was a post investigation document. Thus, the entire prosecution case comes under the shadow of doubt.

73. Resultantly, we are of the firm opinion that the view taken by the trial Court in the judgment dated 23rd July, 2005 recording acquittal of accused is a plausible and justifiable view emanating from the discussion of the evidence available on record. The trial Court's judgment does not suffer from any infirmity or perversity. Hence, the

High Court was not justified in reversing the well-reasoned judgment of the trial Court thereby turning the acquittal of the accused appellants into conviction.

74. The impugned judgment dated 14th September, 2009 rendered by the High Court cannot be sustained and is hereby reversed. The accused appellants are acquitted of all the charges. They are on bail and need not surrender. Their bail bonds are discharged.

75. The appeal stands allowed accordingly.

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

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeal allowed.

[2024] 5 S.C.R. 203 : 2024 INSC 347

Raj Reddy Kallem
v.
The State of Haryana & Anr.

(Criminal Appeal No. 2210 of 2024)

08 April 2024

[A.S. Bopanna and Sudhanshu Dhulia, JJ.]

Issue for Consideration

Appellant was convicted u/s.138 of the Negotiable Instruments Act, 1881. Additionally, an FIR was also filed against the appellant u/ss.406, 420, 120B, IPC. Parties agreed to compound the offence at the appellate stage and a settlement was reached. But, the appellant could not pay the amount within the time stipulated in the settlement agreement. However, eventually, entire amount was paid by him but, the complainant did not agree for compounding of the offence. Complainant, if can be compelled by the courts to give consent for compounding of the matter.

Headnotes

Negotiable Instruments Act, 1881 – s.138 – Compounding of offence – "Consent":

Held: Even though the complainant was duly compensated by the accused yet the complainant does not agree for the compounding of the offence, the courts cannot compel the complainant to give 'consent' for compounding of the matter – Mere repayment of the amount cannot mean that the appellant is absolved from the criminal liabilities u/s.138 – However, in the present case, the appellant was in jail for more than 1 year before being released on bail and had also compensated the complainant and in compliance of the order passed by this Court, he deposited an additional amount of Rs.10 lacs towards interest for delayed payment – Thus, there is no purpose now to keep the proceedings pending in appeal before the lower appellate court – Even though the complainant is unwilling to compound the case but, in the facts and circumstances of the present case the proceedings must come to an end – Quashing of a case is different from compounding – All the criminal proceedings qua appellant arising out of FIR No.35 of 2014 pending before Chief Judicial Magistrate, quashed – Since, criminal appeals filed by appellant against his conviction u/s.138 are also pending, said proceedings also quashed – Hence, all the pending criminal appeals

against the appellant in the present matter quashed in exercise powers u/Article 142 of the Constitution of India – Impugned order of High Court as also the conviction and sentence awarded by trial court, set aside. [Paras 12,14]

Penal Code, 1860 – ss.406, 420, 120B – Appellant took advance money from the complainant but failed to supply the machine – FIR against the appellant in addition to proceedings u/s.138, Negotiable Instruments Act, 1881 – Allegations that from the very beginning the appellant had the intention of cheating the complainant:

Held: As far as FIR case u/ss.406, 420, 120B is concerned, there is no merit in the allegations that the appellant from the very beginning had the intention of cheating the complainant – Though, the appellant failed to procure and supply the machine even after taking the advance money from the complainant but there is nothing on record to show that the appellant had any ill intention of cheating or defrauding the complainant from the very inception – Transaction between the parties was purely civil in nature which does not attract criminal law in any way. [Para 13]

Negotiable Instruments Act, 1881 – ss.147, 138 – Offences to be compoundable:

Held: As per s.147, all offences punishable under the Negotiable Instruments Act are compoundable – However, unlike s.320 of CrPC, the NI Act does not elaborate upon the manner in which offences should be compounded – In cases of s.138, the accused must try for compounding at the initial stages instead of the later stage, however, there is no bar to seek the compounding of the offence at later stages of criminal proceedings including after conviction, like the present case. [Para 12]

Case Law Cited

Damodar S. Prabhu v. Sayed Babalal H. [2010] 5 SCR 678 **: (2010) 5 SCC 663***; K.M Ibrahim v. K.P Mohammed & Anr.* [2009] 15 SCR 1300 **: (2010) 1 SCC 798***; O.P Dholakia v. State of Haryana & Anr.* **(2000) 1 SCC 762***; JIK Industries Limited & Ors. v. Amarlal V. Jamuni & Anr.* [2012] 3 SCR 114 **: (2012) 3 SCC 255***; Meters and Instruments Private Ltd. And Another. v. Kanchan Mehta* [2017] 10 SCR 66 **: (2018) 1 SCC 560 – referred to.**

List of Acts

Negotiable Instruments Act, 1881; Penal Code, 1860; Constitution of India.

List of Keywords

Compounding of offence; Consent for compounding of offences under Section 138, Negotiable Instruments Act, 1881; Unwillingness to compound the case; Quashing; Complete justice; Transaction civil in nature; Intention of cheating or defrauding.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2210 of 2024

From the Judgment and Order dated 29.11.2022 of the High Court of Punjab and Haryana at Chandigarh in CRMM No.54820 of 2022

Appearances for Parties

Ashish Kumar Tiwari, Adv. for the Appellant.

Birender Bikram, DAG, Samar Vijay Singh, Keshav Mittal, Ms. Sabarni Som, Fateh Singh, M. K. Dua, Shantanu Sagar, Anil Kumar, Gunjesh Ranjan, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Leave granted.

2. The brief facts leading to this appeal are that in the year 2012 Respondent No.2-complainant placed a purchase order for the supply of *"Promotec Fiber Laser Cutting Machine"* to the company (M/s Farmax) of the appellant. For the said purchase, an advance amount of Rs.1,55,00,000 was paid to the company of the appellant. All the same, for some reasons, M/s Farmax failed to procure and supply this machine to respondent No.2-complainant. Thereafter, the appellant issued 5 cheques to the complainant towards return of the advance money. Admittedly, some of these cheques were dishonoured and in Nov-Dec 2013 the complainant initiated proceedings under section 138 of the Negotiable Instruments Act (hereinafter referred to as "NI Act"). Additionally, in January 2014 complainant filed a complaint

under Section 156(3) of Criminal Procedure Code (hereinafter referred to as 'CrPC') which led to an FIR No.35 of 2014 at Police Station Mahesh Nagar (Ambala) under Sections 406, 420 and 120B of Indian Penal Code (hereinafter referred to as 'IPC') against the appellant, wherein it was said that the appellant had wrongfully retained the hard-earned money of the complainant and had cheated her. The charge sheet dated 21.07.2014 under Sections 406, 420 r/w 120B of IPC was filed against the appellant and trial commenced in the said FIR case.

3. In NI Act case, the trial court vide order dated 25.05.2015/29.05.2015 convicted the appellant under Section 138 of the NI Act and sentenced him to 2 years of rigorous imprisonment along with direction to pay the amount of cheques. In the appeal filed by appellant before the Additional Sessions Judge, both sides made an effort to settle the dispute and consequently the matter was placed before the Lok Adalat, where after negotiations, parties reached a settlement. Consequently, the Additional Session Judge, Pre-Lok Adalat, Amabala passed the settlement order dated 05.12.2015 where the appellant agreed to pay back the entire amount of Rs.1.55 crore, which was to be paid within a period of about 16 months. Once the entire amount was paid, the entire proceedings under Section 138 of NI Act as well as offences under Section 406, 420 read with 120B of IPC arising out of the FIR had to be compounded. This was also mentioned in the settlement order dated 05.12.2015, the relevant portion of the said order is reproduced below:

> *"That if appellant shall pay entire amount as per settlement, then the offence u/s 138 of NI Act shall be compounded and FIR bearing No.35 of 2014 u/s 420, 406, 120-B, PS Mahesh Nagar, Ambala Cantt. shall be treated either as quashed or offences shall be treated as compounded."*

However, the appellant could not discharge his liability in terms of the settlement and the Additional Sessions Judge passed an order dated 11.07.2016 holding that the settlement dated 05.12.2015 stood frustrated.

4. During 2016-2020, appellant approached various courts including this Court seeking an extension of time to pay back the amount and meanwhile a substantial amount has been paid to the complainant. Finally, this matter came before this Court in SLP(Crl) No.10560 of

2019 filed by the appellant's wife and this court vide order dated 29.11.2019 passed an order directing the appellant's wife to deposit Rs.20 lacs before the trial court within three weeks as only Rs.20 lacs was the outstanding amount out of the total amount of Rs.1.55 crore at that relevant time. Appellant's wife failed to comply with this Court's order dated 29.11.2019 and that SLP was dismissed vide order dated 14.02.2020.

5. Thereafter, the appellant approached the trial court and presented a Demand Draft dated 12.02.2020 of Rs.20 lacs in favour of the complainant as repayment towards the remaining amount of Rs.20 lacs. In this application, the appellant prayed that criminal proceedings pending against the appellant, initiated on the instance of the complainant, should either be compounded or quashed. However, considering the submission of counsel of the complainant that SLP in which the appellant's wife was directed to deposit the amount before the trial court has already been dismissed, the trial court vide order dated 09.02.2021 refused to accept the Demand Draft presented by the appellant by noting that such an application is not maintainable.

6. This order dated 09.02.2021, where the trial court refused to accept the DD for the remaining Rs.20 lacs, was challenged by the appellant before the High Court through an application under Section 482 of CrPC. Vide impugned order dated 29.11.2022, the High Court dismissed the application of appellant on the ground that the appellant failed to deposit the remaining Rs. 20 lacs within the time stipulated (3 weeks) in the Supreme Court order dated 29.11.2019. Now, the appellant is before us in the present appeal.

7. On 14.03.2023, this Court passed an interim order directing the appellant to deposit Rs.20 lacs before the trial court and sought a compliance report from the trial court. This Court order dated 14.03.2023 reads as follows:

> *"The petitioner shall deposit the sum of ₹ 20 lakhs before the trial court within two weeks. The trial court shall pass an order recording the deposit and also indicate whether the petitioner has duly complied with the present order.*
>
> *A copy of this order shall be communicated directly to the Judicial Magistrate First Class, Ambala (seized of Criminal Case No. 78 of 2014 arising out of FIR 35 of 2014).*

The trial court shall then report compliance to the Registry to this Court.

List after three weeks."

Pursuant to the aforesaid order of this Court, appellant submitted two cheques of amount Rs.10 lacs each before the trial court and the trial court forwarded a compliance report to this Court mentioning that appellant has duly complied with the interim order dated 14.03.2023 Thereafter, on the next date of hearing on 08.08.2023, this Court recorded the compliance of its previous order and directed the appellant to further deposit Rs.10 lacs towards interest for delayed payment. To make the matter clear, we would like to reproduce that interim order of this Court, which read as follows:

"It is submitted that the petitioner has deposited ₹20 lakhs in trial court, having regard to the delay in payment (8 years). In the circumstances of the case, justice would demand that the petitioner deposits a further sum of ₹10 lakhs towards interest for the delayed payment (working out to 6% p.a. for the last 8 years). This amount shall be deposited in Court within four weeks from today. The demand draft which has been deposited before the trial court shall be re-validated, in case it has expired in the meanwhile.

List after six weeks."

8. Trial Court vide order dated 01.09.2023 noted the compliance of the above order of this Court. In this way, the appellant has by now returned the entire due amount and also paid Rs.10 lacs more towards the interest for the delayed payment. When the matter again came up for hearing on 12.02.2024, this Court recorded that the entire amount had been paid and, at the request of both sides, granted time to both sides to draw a settlement. Later on, 11.03.2024, the counsel representing the appellant stated that a settlement had been reached between the parties whereas counsel for respondents sought some time to verify the same, and consequently, the matter was adjourned for today.

9. Today, we heard both sides again. The counsel of Respondent No.2 i.e., the complainant states that there is no settlement between

the parties and the complainant is not willing to compromise the matter. After the passing of the previous order dated 11.03.2024, Respondent No.2 (Complainant) has also filed an affidavit stating that no settlement has been reached between the parties as alleged by the appellant. On the other side, the counsel of the appellant contended that since the appellant has paid back the entire amount of Rs.1.55 crore and has also paid a further sum of Rs.10 lacs towards the interest, there is no ground left for continuing criminal proceedings against the appellant.

10. The significant fact here is that pending appeals before Additional Sessions Judge against the appellant's conviction under Section 138 of the NI Act, initially both the sides had entered into a settlement in the Lok Adalat, where they agreed that if the appellant compensates the complainant by repaying the entire amount of Rs.1.55 crore then they would get the offences compounded or quashed. However, the trial court by order dated 11.07.2016 declared the settlement as frustrated on the ground that the appellant could not pay the complainant on the deadlines stipulated in the said settlement and the trial court might have been right in doing so because settlement itself had a clause which read as follows:

> *"5. That in case of default of making payment well in time according to dates mentioned above, the settlement shall be frustrated with immediate effect and then appeal shall be decided on merit."*

Be that as it may, it is also true that the complainant had accepted the amount from the appellant later when the appellant approached higher courts showing his willingness to pay the amount as agreed between the parties.

11. As per section 147 of the NI Act, all offences punishable under the Negotiable Instruments Act are compoundable. However, unlike Section 320 of CrPC, the NI Act does not elaborate upon the manner in which offences should be compounded. To fill up this legislative gap, three Judges Bench of this Court in ***Damodar S. Prabhu v. Sayed Babalal H.*** ***(2010) 5 SCC 663***, passed some guidelines under Article 142 of the Constitution of India regarding compounding of offence under Section 138 of NI Act. But most importantly, in that case, this Court discussed the importance of compounding offence

under Section 138 of the NI Act and also the legislative intent behind making the dishonour of cheque a crime by enacting a special law. This Court had observed that:

> *"**4.** ..... What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.*
>
> ***5.** Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts....."*

Further, after citing authors pointing towards compensatory jurisprudence within the NI Act, this Court observed that:

> *"**18.** It is quite obvious that with respect to the offence of dishonour of cheques, it is the compensatory aspect of the remedy which should be given priority over the punitive aspect."*

12. This Court has time and again reiterated that in cases of section 138 of NI Act, the accused must try for compounding at the initial stages instead of the later stage, however, there is no bar to seek the compounding of the offence at later stages of criminal proceedings including after conviction, like the present case (*See:* ***K.M Ibrahim v. K.P Mohammed & Anr.*** ***(2010) 1 SCC 798*** and ***O.P Dholakia*** *v.* ***State of Haryana & Anr. (2000) 1 SCC 762***).

In the case at hand, initially, both sides agreed to compound the offence at the appellate stage but the appellant could not pay the amount within the time stipulated in the agreement and the complainant now has shown her unwillingness towards compounding of the offence, despite receiving the entire amount. The appellant has paid the entire Rs.1.55 crore and further Rs.10 lacs as interest.

As far the requirement of 'consent' in compounding of offence under section 138 of NI Act is concerned, this Court in ***JIK Industries Limited & Ors. v. Amarlal V. Jamuni & Anr.*** ***(2012) 3 SCC 255*** denied the suggestion of the appellant therein that 'consent' is not mandatory in compounding of offences under Section 138 of NI Act. This Court observed that:

> *"**57.** Section 147 of the Negotiable Instruments Act reads as follows:*
>
> *"**147. Offences to be compoundable**.—Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), every offence punishable under this Act shall be compoundable."*
>
> ***58.** Relying on the aforesaid non obstante clause in Section 147 of the NI Act, the learned counsel for the appellant argued that a three-Judge Bench decision of this Court in Damodar [(2010) 5 SCC 663 : (2010) 2 SCC (Civ) 520 : (2010) 2 SCC (Cri) 1328] , held that in view of non obstante clause in Section 147 of the NI Act, which is a special statute, the requirement of consent of the person compounding in Section 320 of the Code is not required in the case of compounding of an offence under the NI Act.*
>
> ***59.** This Court is unable to accept the aforesaid contention for various reasons……"*

Further this Court observed in para 89 of the said judgement that:

> *"Section 147 of the NI Act must be reasonably construed to mean that as a result of the said section the offences under the NI Act are made compoundable, but the main principle of such compounding, namely, the consent of the person aggrieved or the person injured or the complainant cannot be wished away nor can the same be substituted by virtue of Section 147 of the NI Act."*

This Court in ***Meters and Instruments private Ltd. And Another. v. Kanchan Mehta*** ***(2018) 1 SCC 560*** after discussing the series of judgments including the ***JIK Industries Ltd.*** (supra) observed that even in the absence of 'consent' court can close criminal

proceedings against an accused in cases of section 138 of NI Act if accused has compensated the complainant. The exact words of this Court were as follows:

> *"**18.3.** Though compounding requires consent of both parties, even in absence of such consent, the court, in the interests of justice, on being satisfied that the complainant has been duly compensated, can in its discretion close the proceedings and discharge the accused."*

In our opinion, ***Kanchan Mehta*** (supra) nowhere contemplates that 'compounding' can be done without the 'consent' of the parties and even the above observation of ***Kanchan Mehta*** (supra) giving discretion to the trial court to 'close the proceedings and discharge the accused', by reading section 258[1] of CrPC, has been held to be 'not a good law' by this Court in the subsequent 5 judges bench judgement in ***Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re*, (2021) 16 SCC 116**[2].

All the same, in this particular given case even though the complainant has been duly compensated by the accused yet the complainant does not agree for the compounding of the offence, the courts cannot compel the complainant to give 'consent' for compounding of the matter. It is also true that mere repayment of the amount cannot mean that the appellant is absolved from the criminal liabilities under Section 138 of the NI Act. But this case has some peculiar facts as well. In the present case, the appellant has already been in jail for more than 1 year before being released on bail and has also compensated the complainant. Further, in compliance of the order dated 08.08.2023, the appellant has deposited an additional amount of Rs.10 lacs. There is no purpose now to keep the proceedings pending in appeal before the lower appellate court. Here, we would like to point out that quashing of a case is different from compounding.

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1 **258. Power to stop proceedings in certain cases.—**In any summons-case instituted otherwise than upon complaint, a Magistrate of the first class or, with the previous sanction of the Chief Judicial Magistrate, any other Judicial Magistrate, may, for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment and where such stoppage of proceedings is made after the evidence of the principal witnesses has been recorded, pronounce a judgment of acquittal, and in any other case, release the accused, and such release shall have the effect of discharge.

2 Para 20.

This Court in **JIK Industries Ltd.**[3](Supra) distinguished the quashing of case from compounding in the following words:

> *"Quashing of a case is different from compounding. In quashing the court applies it but in compounding it is primarily based on consent of the injured party. Therefore, the two cannot be equated."*

In our opinion, if we allow the continuance of criminal appeals pending before Additional Sessions Judge against the appellant's conviction then it would defeat all the efforts of this Court in the last year where this Court had monitored this matter and ensured that the complainant gets her money back.

13. As far as FIR case under Sections 406, 420, 120B of IPC against the appellant is concerned, in any case we do not find any merit in the allegations that the appellant from the very beginning had the intention of cheating the complainant. It is a fact that the appellant failed to procure and supply the 'machine' even after taking the advance money from the complainant but there is nothing on record to show that the appellant had any ill intention of cheating or defrauding the complainant from the very inception. The transaction between the parties was purely civil in nature which does not attract criminal law in any way.

14. Even though complainant is unwilling to compound the case but, considering the totality of facts and circumstances of the present case which we have referred above, we are of the considered view that these proceedings must come to an end. We, therefore, allow this appeal and set aside the impugned order of High Court dated 29.11.2022. We also quash all the criminal proceedings qua appellant arising out of FIR No.35 of 2014 at P.S Mahesh Nagar, Ambala pending before Chief Judicial Magistrate, Ambala. Since, criminal appeals filed by present appellant against his conviction under Section 138 of the NI Act are also pending, we deem it appropriate that the said proceedings should also be quashed. Hence, in order to do complete justice, we exercise our powers under Article 142 of the Constitution of India, and hereby quash all the pending criminal appeals on the file

3 [2012] 3 SCR 114 : Para 43.

of Additional Sessions Judge, Ambala Cantt., against the appellant in the present matter, and set aside the conviction and sentence awarded to the appellant by the trial court.

15. We also direct the trial court to hand over the Demand Drafts totalling the amount of Rs.30 lacs to the complainant which were deposited in the trial court in pursuance of this Court's orders, if not handed-over till now.

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

Headnotes prepared by: Divya Pandey

Result of the case: Appeal allowed.

[2024] 5 S.C.R. 215 : 2024 INSC 340

Global Credit Capital Limited & Anr.
v.
Sach Marketing Pvt. Ltd. & Anr

(Civil Appeal No. 1143 of 2022)

25 April 2024

[Abhay S. Oka* and Pankaj Mithal, JJ.]

Issue for Consideration

(i) Whether there can be debt within the meaning of sub-section (11) of section 5 of the Insolvency and Bankruptcy Code, 2016; (ii) What is the test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 of the 2016 Code; (iii) Is it necessary to ascertain what is the real nature of the transaction reflected in the writing, while deciding the issue whether a debt is a financial debt or an operational debt; (iv) When is the debt, an operational debt.

Headnotes

Insolvency and Bankruptcy Code, 2016 – Whether there can be debt within the meaning of sub-section (11) of section 5 of the 2016 Code.

Held: There cannot be a debt within the meaning of sub-section (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof. [Para 20 (a)]

Insolvency and Bankruptcy Code, 2016 – sub-section (8) of s. 5 – What is the test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 of the 2016 Code.

Held: Sub-section (8) of section 5 defines "financial debt" – The definition incorporates the expression "means and includes" – The first part of the definition, which starts with the word "means", provides that there has to be a debt along with interest, if any, which is disbursed against the consideration for the time value of money – The word "and" appears after the word "money" – Before the words "and includes", the legislature has not incorporated a comma – After the word "includes", the legislature has incorporated categories (a) to (i) of financial debts – Thus, the test to determine whether a debt is a financial debt within

* Author

the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money – The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5. [Paras 12 and 20 (b)]

Insolvency and Bankruptcy Code, 2016 – Is it necessary to ascertain what is the real nature of the transaction reflected in the writing, while deciding the issue whether a debt is a financial debt or an operational debt.

Held: While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing – The written document cannot be taken for its face value. [Paras 20 (c) and 14]

Insolvency and Bankruptcy Code, 2016 – When is the debt, an operational debt:

Held: Where one party owes a debt to another and when the creditor is claiming under a written agreement/ arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the 'service' subject matter of the transaction. [Para 20 (d)]

Case Law Cited

Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited & Ors. [2020] 8 SCR 291 **: (2020) 8 SCC 401;** *Phoenix ARC Private Limited v. Spade Financial Services Limited & Ors.* [2021] 15 SCR 1079 **: (2021) 3 SCC 475;** *Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.* [2019] 10 SCR 381 **: (2019) 8 SCC 416 – relied on.**

Swiss Ribbons Private Limited and Anr. v. Union of India & Ors [2019] 3 SCR 535 **: (2019) 4 SCC 17;** *Tuticorin Alkali Chemicals & Fertilisers Ltd., Madras v. Commissioner of Income Tax, Madras* [1997] Supp. 1 SCR 528 **: (1997) 6 SCC 117;** *Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private*

Limited [2022] 2 SCR 212 **: (2022) 7 SCC 164;** *New Okhla Industrial Development Authority v. Anand Sonbhadra* [2022] 5 SCR 319 **: (2023) 1 SCC 724;** *V.E.A. Annamalai Chettiar & Ors. v. S.V.V.S. Veerappa Chettiar & Ors.* **AIR 1956 SC 12 – referred to.**

List of Acts

Insolvency and Bankruptcy Code, 2016.

List of Keywords

sub-section (11) of section 5 of Insolvency and Bankruptcy Code, 2016; sub-section (8) of section 5 of Insolvency and Bankruptcy Code, 2016; Means and include in sub-section (8) of section 5 of Insolvency and Bankruptcy Code, 2016; Debt; Financial debt; Operational debt; Nature of transaction; Written agreement; Service; Debt connection or co-relation with service; Time value of money.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1143 of 2022

From the Judgment and Order dated 07.10.2021 of the National Company Law Appellate Tribunal in CAAT (I) No.180 of 2021

With

Civil Appeal Nos. 6991-6994 of 2022

Appearances for Parties

Gopal Jain, Sr. Adv., Ms. Mithu Jain, Advs. for the Appellants.

C.U. Singh, Sr. Adv., N.P.S. Chawla, Sujoy Datta, Ms. Kinjal Goyal, Ms. Kashish Chhabra, Ms. Bidya Mohan, Ashish Rana, Abhishek Anand, Mohak Sharma, Karan Batura, Siddharth Naidu, Ms. Anusuya Sadhu Sinha, M/s. KSN & Co., Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Abhay S. Oka, J.

1. These appeals take exception to the separate impugned judgments and orders dated 7th October 2021 and 29th October 2021 passed by the National Company Law Appellate Tribunal (for short, 'the

NCLAT'). In Civil Appeal no.1143 of 2022, the issue involved is whether the first respondent is a financial creditor within the meaning of sub-section (7) of Section 5 of the Insolvency and Bankruptcy Code, 2016 (for short, 'the IBC'). The corporate debtor, in this case, is M/s. Mount Shivalik Industries Limited. The impugned judgment and order dated 7th October 2021 holds that the first respondent is a financial creditor. As far as Civil Appeal nos.6991-6994 of 2022 are concerned, the issue is whether the 1st to 4th respondents therein are financial creditors of the same corporate debtor - M/s. Mount Shivalik Industries Limited. The impugned judgment dated 29th October 2021 follows the impugned judgment in Civil Appeal no.1143 of 2022.

FACTUAL ASPECTS

2. A brief reference to the factual aspects of Civil Appeal no.1143 of 2022 must be made to understand the controversy. There were two agreements of 1st April 2014 and 1st April 2015 between the corporate debtor and the first respondent. The agreements were in the form of letters addressed by the corporate debtor to the first respondent. By the agreement/letter dated 1st April 2014, the corporate debtor appointed the first respondent as a 'Sales Promoter' to promote beer manufactured by the corporate debtor at Ranchi (Jharkhand) for twelve months. One of the conditions incorporated by the corporate debtor in the said letter/agreement was that the first respondent should deposit a minimum security of Rs.53,15,000/- with the corporate debtor, which will carry interest @21% per annum. The letter provided that the corporate debtor will pay the interest on Rs.7,85,850/- @21% per annum. The terms of the agreement/letter dated 1st April 2015 are identical. The only difference is that under the second agreement/letter, the corporate debtor was to pay the interest on Rs.32,85,850/- @21% per annum.

3. The Oriental Bank of Commerce invoked the provisions of Section 7 of the IBC against the corporate debtor. The National Company Law Tribunal (for short, 'the NCLT') admitted the application under Section 7 of the IBC by the order dated 12th June 2018. It imposed a moratorium under Section 14 of the IBC. The second respondent was appointed as the Interim Resolution Professional. Initially, the first respondent filed a claim with the second respondent as an operational creditor. The claim was withdrawn, and on 19th September 2018, the first respondent filed a claim with the second respondent

as a financial creditor. By a communication dated 7th October 2018, the second respondent informed the first respondent that the first respondent's claim was accepted partly as an operational debt and partly as a financial debt. After the first respondent submitted Form-B, the second respondent rejected the claim on the ground that the first respondent could not be considered a financial creditor. Therefore, an application was moved before the NCLT under sub-section (5) of Section 60 of the IBC by the first respondent seeking a direction to the second respondent to admit the first respondent's claim as a financial creditor. During the pendency of the said application before the NCLT, the Committee of Creditors approved a resolution plan submitted by M/s. Kals Distilleries Pvt. Ltd. The second respondent applied to the NCLT to approve the resolution plan based on the approval. On 18th January 2021, the NCLT rejected the application made by the first respondent. Aggrieved by the said order, the first respondent preferred an appeal before the NCLAT. By the impugned judgment and order dated 7th October 2021, the NCLAT held that the first respondent was a financial creditor and not an operational creditor. The NCLT, on 13th October 2021 approved the resolution plan of M/s. Kals Distilleries Pvt. Ltd. (Respondent no.6 in Civil Appeal nos.6991-6994 of 2022) in the CIRP of the corporate debtor.

4. In Civil Appeal nos.6991-6994 of 2022, the second respondent is the resolution professional. The corporate debtor is the same as in the other appeal. The fifth respondent had provided financial assistance to the corporate debtor of Rs.75,00,000/-. The fourth respondent provided financial assistance to the corporate debtor of Rs.1,62,00,000/-. The first respondent advanced a sum of Rs.25,00,000/- to the corporate debtor. The third respondent advanced a sum of Rs.1,00,000/- to the corporate debtor. The Resolution Professional rejected the claims of the four creditors as financial creditors. Therefore, they filed separate applications before the NCLT by invoking sub-section (5) of Section 60 of the IBC. The NCLT rejected the applications. In the appeals preferred by them before the NCLAT, the NCLAT allowed the appeals by relying upon its judgment, which is the subject matter of challenge in Civil Appeal no.1143 of 2022.

SUBMISSIONS

5. The learned senior counsel appearing for the appellants in support of Civil Appeal no. 1143 of 2022 submitted that the first respondent

is an operational creditor going by the agreements dated 1st April 2014 and 1st April 2015. The reason is that the agreements indicate that the corporate debtor appointed the first respondent to render services to promote the beer manufactured by the corporate debtor. He relied upon the definition of "operational debt" under sub-section (21) of Section 5 of the IBC. He submitted that both the agreements provided for paying a minimum security deposit by the first respondent as a condition for being appointed as Sales Promoter of the corporate debtor. He submitted that there was no intention on the part of the corporate debtor to avail any financial facility from the first respondent. He submitted that the amount paid towards the security deposit is not the money disbursed to the corporate debtor towards financial facilities availed by the corporate debtor. He submitted that the security deposit paid by the first respondent would not qualify as a financial debt defined under sub-section (8) of Section 5 of the IBC. The learned senior counsel relied upon a decision of this Court in the case of ***Swiss Ribbons Private Limited and Anr. v. Union of India & Ors.***[1]. He also relied upon a decision of this Court in the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr. v. Union of India & Ors.***[2]. He submitted that the NCLAT was unnecessarily impressed by the acknowledgement of liability and booking of interest component towards the security deposit, despite the fact that it cannot be given the overriding effect over the law. He relied upon the decisions of this Court in the cases of ***Tuticorin Alkali Chemicals & Fertilisers Ltd., Madras v. Commissioner of Income Tax, Madras***[3] and ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Private Limited***[4]. He submitted that booking or payment of interest is not the only criterion for ascertaining whether the debt is a financial debt. The learned senior counsel, therefore, urged that the view taken by the NCLAT in the impugned judgment is entirely fallacious. He submitted that the NCLAT has virtually rewritten the concepts of financial and operational debts incorporated in the IBC.

6. On facts, the learned senior counsel submitted that the payment of the security deposit by the first respondent is a condition precedent

1 [2019] 3 SCR 535 : (2019) 4 SCC 17

2 [2019] 10 SCR 381 : (2019) 8 SCC 416

3 [1997] Supp. 1 SCR 528 : (1997) 6 SCC 117

4 [2022] 2 SCR 212 : (2022) 7 SCC 164

for being appointed as a Sales Promoter of the corporate debtor. The intent of the agreements is to appoint the first respondent as the Sales Promoter and not to avail any financial facilities from the first respondent. The amount paid by the first respondent does not constitute financial facilities extended to the corporate debtor. There was no intention to raise finance from the first respondent, who was appointed as a Sales Promoter. The learned senior counsel also relied upon the decisions of this court in the cases of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited v. Axis Bank Limited & Ors.***[5], ***Phoenix ARC Private Limited v. Spade Financial Services Limited & Ors.***[6] and ***New Okhla Industrial Development Authority v. Anand Sonbhadra***[7]**.** Lastly, it is submitted that in the case of an invoice involving any transaction, the delay in payment attracts interest liability. Therefore, the payment of interest is not the sole criterion for ascertaining whether a debt is a financial debt. He would, thus, submit that the appeals deserve to be allowed.

7. The learned senior counsel appearing for the first respondent submitted that the true nature of the agreements will have to be examined for deciding the nature of the debt. He pointed out several factual aspects, including the corporate debtor's acknowledgement of the liability of payment of interest on security deposit for the Financial Years 2014-2015, 2015-2016, 2016-2017 and 2017-2018. The corporate debtor deducted TDS on the interest payable to the first respondent for three financial years. He submitted that the three criteria, namely, disbursal, time value of money and commercial effect of borrowing, are satisfied in the case of the present transaction. He also relied upon the decision of this Court in the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited***[5]**.** He submitted that it was very clear from the terms of the agreement that the money was repayable after a fixed tenure without a deduction or provision for forfeiture. An interest @21% per annum was the consideration for the time value of money. The learned counsel submitted that the NCLAT was right in going into the issue of the true nature and effect of the transaction reflected in the agreements. Relying upon the decision of this Court in the case of ***Pioneer Urban***

5 [2020] 8 SCR 291 : (2020) 8 SCC 401

6 [2021] 15 SCR 1079 : (2021) 3 SCC 475

7 [2022] 5 SCR 319 : (2023) 1 SCC 724

Land and Infrastructure Ltd[2]*,* the learned counsel submitted that clause (f) of sub-section (8) of Section 5 of the IBC is a "catch all" and "residuary" provision which includes any transaction having the commercial effect of borrowing and any transaction which is used as a tool for raising finance.

8. The learned senior counsel submitted that the agreements entered into were the tools for raising finance, and no actual services have ever been rendered to the first respondent or other lenders. Therefore, in view of the law laid down by this Court in the case of ***V.E.A. Annamalai Chettiar & Ors. v. S.V.V.S. Veerappa Chettiar & Ors.***[8]*,* the true effect of the transaction has been taken into consideration. It is pointed out that the corporate debtor has established a practice of raising finance through private entities in the garb of security deposit under various services agreements. The learned counsel, therefore, submitted that no fault can be found with the impugned judgment.

9. The learned counsel appearing for the second respondent-Resolution Professional, supported the appellants by contending that the money advanced by the first respondent cannot be categorised as a financial debt. Therefore, the first respondent was an operational creditor. He relied upon the definition of "operational debt" under sub-section (21) of Section 5 of the IBC. He submitted that the security deposit was not meant to reorganize the corporate debtor's debts. He submitted that the agreements are service agreements by which the corporate debtor agreed to take services from the first respondent for consideration. Therefore, the security deposit was obviously to ensure the performance of the terms of the agreements by the first respondent. He submitted that accounting treatment cannot override the law and the definition of "operational debt" under the IBC. He submitted that none of the ingredients of clauses (a) to (f) of sub-section (8) of Section 5 are present in the case at hand. In this case, there is no disbursal of debt. He submitted that there was no financial contract between the corporate debtor and the first respondent. Lastly, he submitted that in view of the judgment dated 29th September 2018 of the NCLAT on an application filed by M/s. New View Consultants Pvt. Ltd., the second respondent categorised

8 AIR 1956 SC 12

the first respondent as operational creditor. He would, therefore, submit that the view taken by the NCLAT was not correct.

CONSIDERATION OF SUBMISSIONS ON THE CONCEPT OF FINANCIAL AND OPERATIONAL DEBT

10. Sub-section (11) of Section 3 of the IBC defines 'debt', which reads thus:

> **"3.** In this Code, unless the context otherwise requires,-
>
> .. ..
>
> (11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;
>
> .. .."

Thus, a debt has to be a liability or obligation in respect of a claim that is due from any person. Sub-section (11) uses the words "means" and "includes". Financial debt and operational debt are included in the definition of debt. Thus, financial debt or operational debt must arise out of a liability or obligation in respect of a claim.

11. "Claim" is defined under sub-section (6) of Section 3 of the IBC, which reads thus:

> **"3.** In this Code, unless the context otherwise requires,-
>
> .. ..
>
> (6) "claim" means –
>
> (a) a right to payment, whether or not such right is reduced to judgment, fixed, disputed, undisputed, legal, equitable, secured, or unsecured;
>
> (b) right to remedy for breach of contract under any law for the time being in force, if such breach gives rise to a right to payment, whether or not such right is reduced to judgment, fixed, matured, unmatured, disputed, undisputed, secured or unsecured;
>
> .. .."

Clause (a) shows that every right to receive payment is a claim, whether or not such right is reduced to a judgment. A right to receive payment is a claim, even if disputed, undisputed, secured, or unsecured. The right to receive payment can be either legal or equitable. Clause (b) includes the right to remedy for a breach of contract under any law for the time being in force. Thus, a liability or obligation is not covered by the definition of "debt" unless it is in respect of a claim covered by sub-section (6) of Section 3 of the IBC.

12. Sub-section (8) of Section 5 of the IBC defines "financial debt", which reads thus:

> **"5.** In this Part, unless the context otherwise requires,-
>
> .. ..
>
> **(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes–**
>
> (a) money borrowed against the payment of interest;
>
> (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;
>
> (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
>
> (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
>
> (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
>
> **(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;**
>
> [Explanation. -For the purposes of this sub-clause,-

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, "allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]

(g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clause (a) to (h) of this clause."

(emphasis added)

The definition incorporates the expression "means and includes". The first part of the definition, which starts with the word "means", provides that there has to be a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The word "and" appears after the word "money". Before the words "and includes", the legislature has not incorporated a comma. After the word "includes", the legislature has incorporated categories (a) to (i) of financial debts. Hence, the cases covered by categories (a) to (i) must satisfy the test laid down by the earlier part of the sub-section (8). The test laid down therein is that there has to be a debt along with interest, if any, and it must be disbursed against the consideration for the time value of money. This Court had an occasion to deal with the definition of "financial debt" in its various

decisions. The first decision is in the case of ***Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited***[5]. Paragraphs 46 to 50 read thus:

> **"The essentials for financial debt and financial creditor**
>
> **46.** Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become "financial debt" for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursal against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). **The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein.** In any case, the definition, by its very frame, cannot be read so expansive, rather infinitely wide, that the root requirements of "disbursement" against "the consideration for the time value of money" could be forsaken in the manner that any transaction could stand alone to become a financial debt. **In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of "financial debt" only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as "financial debt" within**

the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

49. Expounding yet further, in our view, the peculiar elements of these expressions "financial creditor" and "financial debt", as occurring in Sections 5(7) and 5(8), when visualised and compared with the generic expressions "creditor" and "debt" respectively, as occurring in Sections 3(10) and 3(11) of the Code, the scheme of things envisaged by the Code becomes clearer. The generic term "creditor" is defined to mean any person to whom the debt is owed and then, it has also been made clear that it includes a "financial creditor", a "secured creditor", an "unsecured creditor", an "operational creditor", and a "decree-holder". Similarly, a "debt" means a liability or obligation in respect of a claim which is due from any person and this expression has also been given an extended meaning to include a "financial debt" and an "operational debt".

49.1. The use of the expression "means and includes" in these clauses, on the very same principles of interpretation as indicated above, makes it clear that for a person to become a creditor, there has to be a debt i.e. a liability or obligation in respect of a claim which may be due from any person. A "secured creditor" in terms of Section 3(30) means a creditor in whose favour a security interest is created; and "security interest", in terms of Section 3(31), means a right, title or interest or claim of property created in favour of or provided for a secured creditor by a transaction which secures payment for the purpose of an obligation and it includes, amongst others, a mortgage. Thus, any mortgage created in favour of a creditor leads to a security interest being created and thereby, the creditor becomes a secured creditor. However, when all the defining clauses are read together and harmoniously, it is clear that the legislature has maintained a distinction amongst the expressions "financial creditor", "operational creditor", "secured creditor" and "unsecured creditor". Every secured creditor would be a creditor; and every financial creditor would also be a creditor but every secured creditor may not be a financial creditor. As noticed, the expressions "financial debt" and "financial creditor", having their specific and distinct connotations and roles in insolvency and liquidation process of corporate persons, have only been defined in Part II whereas the expressions "secured creditor" and "security interest" are defined in Part I.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression "financial creditor" is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial creditor, by its own direct involvement in a

functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor.

50.1. Keeping the objectives of the Code in view, the position and role of a person having only security interest over the assets of the corporate debtor could easily be contrasted with the role of a financial creditor because the former shall have only the interest of realising the value of its security (there being no other stakes involved and least any stake in the corporate debtor's growth or equitable liquidation) while the latter would, apart from looking at safeguards of its own interests, would also and simultaneously be interested in rejuvenation, revival and growth of the corporate debtor. Thus understood, it is clear that if the former i.e. a person having only security interest over the assets of the corporate debtor is also included as a financial creditor and thereby allowed to have its say in the processes contemplated by Part II of the Code, the growth and revival of the corporate debtor may be the casualty. Such result would defeat the very objective and purpose of the Code, particularly of the provisions aimed at corporate insolvency resolution.

50.2. Therefore, we have no hesitation in saying that a person having only security interest over the assets of corporate debtor (like the instant third-party securities), even if falling within the description of “secured creditor” by virtue of collateral security extended by the corporate debtor, would nevertheless stand outside the sect of

> "financial creditors" as per the definitions contained in sub-sections (7) and (8) of Section 5 of the Code. Differently put, if a corporate debtor has given its property in mortgage to secure the debts of a third party, it may lead to a mortgage debt and, therefore, it may fall within the definition of "debt" under Section 3(10) of the Code. However, it would remain a debt alone and cannot partake the character of a "financial debt" within the meaning of Section 5(8) of the Code."
>
> (emphasis added)

A Bench of three Hon'ble Judges of this Court in the case of ***Phoenix ARC Private Limited***[6] dealt with the issue in greater detail. It also dealt with the concept of the time value of money. In paragraphs 44 to 47 of the said decision, this Court held thus:

> "**44.** Section 5(8) IBC provides a definition of "financial debt" in the following terms:
>
> XXX XXX XXX
>
> **G.3.2. Financial creditor and financial debt**
>
> **45.** Under Section 5(7) IBC, a person can be categorised as a financial creditor if a financial debt is owed to it. Section 5(8) IBC stipulates that the essential ingredient of a financial debt is disbursal against consideration for the time value of money. This Court, speaking through Rohinton F. Nariman, J., in Swiss Ribbons (P) Ltd. v. Union of India [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] has held : (SCC p. 64, para 42)
>
> > "42. A perusal of the definition of "financial creditor" and "financial debt" makes it clear that a financial debt is a debt together with interest, if any, which is disbursed against the consideration for time value of money. It may further be money that is borrowed or raised in any of the manners prescribed in Section 5(8) or otherwise, as Section 5(8) is an inclusive definition. On the other hand, an "operational debt" would include a claim in respect of the provision of goods or

> services, including employment, or a debt in respect of payment of dues arising under any law and payable to the Government or any local authority."
>
> (emphasis supplied)

46. In this context, it would be relevant to discuss the meaning of the terms "disburse" and "time value of money" used in the principal clause of Section 5(8) IBC. This Court has interpreted the term "disbursal" in Pioneer Urban Land & Infrastructure Ltd. v. Union of India [Pioneer Urban Land & Infrastructure Ltd. v. Union of India, (2019) 8 SCC 416 : (2019) 4 SCC (Civ) 1] in the following terms : (SCC p. 511, paras 70-71)

> "70. The definition of "financial debt" in Section 5(8) then goes on to state that a "debt" must be "disbursed" against the consideration for time value of money. "Disbursement" is defined in Black's Law Dictionary (10th Edn.) to mean:
>
> '1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.'

71. In the present context, it is clear that the expression "disburse" would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression "disbursed" refers to money which has been paid against consideration for the "time value of money". In short, the "disbursal" must be money and must be against consideration for the "time value of money", meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money."

47. The report of the Insolvency Law Committee dated 26-3-2018 has discussed the interpretation of the term "time value of money" and stated:

> "1.4. The current definition of "financial debt" under Section 5(8) of the Code uses the words " [Ed. : The matter between two asterisks has been emphasised in original.] includes [Ed. : The matter between two asterisks has been emphasised in original.] ", thus the kinds of financial debts illustrated are not exhaustive. The phrase " [Ed. : The matter between two asterisks has been emphasised in original.] disbursed against the consideration for the time value of money [Ed. : The matter between two asterisks has been emphasised in original.] " has been the subject of interpretation only in a handful of cases under the Code. **The words "time value" have been interpreted to mean compensation or the price paid for the length of time for which the money has been disbursed. This may be in the form of interest paid on the money, or factoring of a discount in the payment.**"
>
> (emphasis added)"

In the case of ***Pioneer Urban Land and Infrastructure Ltd. & Anr***[2], this issue was dealt with in paragraphs 76 and 77, which read thus:

> **"76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing.** We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression "borrow" and the meaning of the expression "commercial". They are set out hereinbelow:
>
> > "borrow.—vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball

> uphill of the direct path to the hole:make sure you borrow enough."
>
> ***
>
> "commercial.—adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4.(of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television."

77. A perusal of these definitions would show that even though the petitioners may be right in stating that a "borrowing" is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression "borrow" is wide enough to include an advance given by the homebuyers to a real estate developer for "temporary use" i.e. for use in the construction project so long as it is intended by the agreement to give "something equivalent" to money back to the homebuyers. The "something equivalent" in these matters is obviously the flat/apartment. **Also of importance is the expression "commercial effect". "Commercial" would generally involve transactions having profit as their main aim.** Piecing the threads together, therefore, so long as an amount is "raised" under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the "commercial effect" of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have "commercial" interests in the same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects would, in fact, be subsumed within Section 5(8)(f) even

without adverting to the Explanation introduced by the Amendment Act."

(emphasis added)

FINDINGS ON FACTUAL ASPECTS

13. In light of the interpretation put by this Court to the definition of financial debt, it is necessary to come back to the facts of the case. The relevant agreements for our consideration are in the form of letters dated 1st April 2014 and 1st April 2015. The corporate debtor addressed the letters to the first respondent. The relevant part of the agreement/letter dated 1st April 2014 reads thus:

".. .. ..

SACH MARKETING PVT LTD

JHARKHAND

Dear Sir,

We are pleased to appoint you as our SALES PROMOTER for promotion of Beer at Ranchi (Jharkhand) on the following terms and conditions:

1. **You will be allowed Rs.4,000/- per month for your promote work.**
2. You will be working in close coordination with company's Marketing Manager for the aforementioned area, who shall convey the instructions in writing to you.
3. The selling rates of our beer shall be decided by the company from time to time and you will not change them without prior confirmation from the company. Further, you shall not commit to any party about any rebate or any discount etc without prior authorization from us.
4. The appointment shall be w.e.f. 1st April, 2014 for a period of 12 months ending 31st March, 2015.
5. The settlement of commission as stated above in point no.1 shall be on quarterly basis.

6. Notwithstanding anything provided above this appointment in terms hereof may be terminated by us during the term of appointment aforesaid by giving to you thirty days notice in writing in this behalf from the date of dispatch of notice.

7. You shall not be entitled upon termination of this agreement or appointment within the terms hereof to claim any damages or compensation from the company for such termination or consequent thereupon or otherwise relative thereto against the other.

8. Forthwith upon determination of this agreement appointment you shall cease all dealings on behalf of the company and shall deliver custody of all premises, stock, cash negotiable instruments, papers and documents and other items and things of the company coming into the custody of these presents.

9. The company reserve the right to appoint any, other party as Sales Promoter for, areas mentioned above.

10. You have to deposit minimum security of Rs.53,15,000/- with the Company which will carry interest @21% p.a. We will provide you interest on Rs.7,85,850/- @21% per annum.

Please acknowledge receipt and as a token of your acceptance of above terms conditions.

Please sign duplicate copy of this letter and return the same to us for our records.

Thanking you,

.. .."

(emphasis added)

As seen from clause (4), the agreement was only for twelve months ending on 31st March 2015. Therefore, on 1st April 2015, another letter was issued by the corporate debtor to the first respondent, incorporating identical terms and conditions. The only difference is

that the agreement's duration was up to 31st March 2016. Clause (10) of the agreement/letter dated 1st April 2015 reads thus:

> ".. .. ..
>
> #10 You have to deposit minimum security of Rs.53,15,000/- with the Company which will carry interest @21% per annum.
>
> We will provide you interest on Rs.32,85,850/- @21% per annum. Please acknowledge receipt and as a token of your acceptance of above terms and conditions.
>
> .. .."

14. Where one party owes a debt to another and when the creditor is claiming under a written agreement/arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the 'service' subject matter of the transaction. The written document cannot be taken for its face value. Therefore, it is necessary to determine the real nature of the transaction on a plain reading of the agreements. What is surprising is that for acting as a Sales Promoter of the beer manufactured by a corporate debtor, only a sum of Rs.4,000/- per month was made payable to the first respondent. Apart from the sum of Rs.4,000/- per month, there is no commission payable to the first respondent on the quantity of sales. Clause (6) provides for termination of the appointment by giving thirty days' notice. Though clause (10) provides for the payment of the security deposit by the first respondent, it is pertinent to note that there is no clause for the forfeiture of the security deposit. The amount specified in clause (10) has no correlation whatsoever with the performance of the other conditions of the contract by the first respondent. As there is no clause regarding forfeiture of the security deposit or part thereof, the corporate debtor was liable to refund the security deposit after the period specified therein was over with interest @21% per annum. Since the security deposit payment had no correlation with any other clause under the agreements, as held by the NCLAT, the security deposit amounts represent debts covered by sub-section (11) of Section 3 of the IBC. The reason is that the right of the first respondent to seek a refund of the security deposit with interest is a claim within the meaning of sub-section (6) of Section 3 of the IBC

as the first respondent is seeking a right to payment of the deposit amount with interest. Therefore, there is no manner of doubt that there is a debt in the form of a security deposit mentioned in the said two agreements.

15. Sub-section (21) of Section 5 defines "operational debt", which reads thus:

> **"5.** In this Part, unless the context otherwise requires,-
>
> .. ..
>
> (21) "operational debt" means a claim in respect of the provision of goods or services including employment or a debt in respect of the payment of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;
>
> .. .."

The second part of the definition which deals with the payment of dues arising under any law, will not apply. However, for the applicability of the first part, the claim must be concerning the provisions of goods or services. Therefore, in the case of a contract of service, there must be a correlation between the service as agreed to be provided under the agreement and the claim. The reason is that the definition uses the phraseology "a claim in respect of the provision of goods or services". Assuming that both the agreements are genuine in the sense that they reflect the true nature of the transaction, the only claim under the agreements which will have any connection with the services rendered by the first respondent will be the claim of Rs.4,000/- per month as provided in clause (1) of both the agreements. Only this claim can be said to be concerning the provision of services. Therefore, by no stretch of imagination, the debt claimed by the first respondent can be an operational debt. We are conscious of the fact that the provision for payment of interest by the corporate debtor by itself is not the only material factor in deciding the nature of the debt. But, in the facts of the case, the payment of the amount mentioned in clause (10) of the letter has no relation with the service supposed to be rendered by the first respondent.

16. Now, coming back to the definition of a financial debt under sub-section (8) of Section 5 of the IBC, in the facts of the case, there is no doubt that there is a debt with interest @21% per annum. The provision made for interest payment shows that it represents consideration for the time value of money. Now, we come to clause (f) of sub-section (8) of Section 5 of the IBC. The first condition of applicability of clause (f) is that the amount must be raised under any other transaction. Any other transaction means a transaction which is not covered by clauses (a) to (e). Clause (f) covers all those transactions not covered by any of these sub-clauses of sub-section (8) that satisfy the test in the first part of Section 8. The condition for the applicability of clause (f) is that the transaction must have the commercial effect of borrowing. "Transaction" has been defined in sub-section (33) of Section 3 of the IBC, which includes an agreement or arrangement in writing for the transfer of assets, funds, goods, etc., from or to the corporate debtor. In this case, there is an arrangement in writing for the transfer of funds to the corporate debtor. Therefore, the first condition incorporated in clause (f) is fulfilled.

17. To decide whether the second condition had been fulfilled, it is necessary to refer to the factual findings recorded in the impugned judgment. The NCLAT has referred to the letter dated 26th October 2017 addressed by the corporate debtor to the first respondent. We have perused a copy of the said letter annexed to the counter. By the said letter, the corporate debtor informed the first respondent that for the year 2016-2017, the corporate debtor had provided the interest amounting to Rs.18,06,000/- in the books of the corporate debtor and that the sum will be credited to the account of the first respondent on the date of payment of TDS. In paragraph 21 of the impugned judgment, it is held that the financial statement of the first respondent for the Financial Year 2017-2018 shows revenue from the interest on the security deposit. It is also held that the amounts were treated as long-term loans and advances in the financial statement of the corporate debtor for the Financial Year 2015-2016. Moreover, in the financial statement of the corporate debtor for the Financial Year 2016-17, the amounts paid by the first respondent were shown as "other long-term liabilities". Therefore, if the letter mentioned above and the financial statements of the corporate

debtor are considered, it is evident that the amount raised under the said two agreements has the commercial effect of borrowing as the corporate debtor treated the said amount as borrowed from the first respondent.

CONCLUSION

18. Therefore, we have no hesitation in concurring with the NCLAT's view that the amounts covered by security deposits under the agreements constitute financial debt. As it is a financial debt owed by the first respondent, sub-section (7) of Section 5 of the IBC makes the first respondent a financial creditor.

19. The contracts subject matter of the Civil Appeal Nos. 6991 to 6994 of 2022 are in the form of letters, which provide for similar clauses as in the case of agreements subject matter of Civil Appeal No. 1143 of 2022.

SUMMARY

20. Subject to what is held above, we summarize our legal conclusions:

a. There cannot be a debt within the meaning of sub-section (11) of section 5 of the IB Code unless there is a claim within the meaning of sub-section (6) of section 5 of thereof;

b. The test to determine whether a debt is a financial debt within the meaning of sub-section (8) of section 5 is the existence of a debt along with interest, if any, which is disbursed against the consideration for the time value of money. The cases covered by categories (a) to (i) of sub-section (8) must satisfy the said test laid down by the earlier part of sub-section (8) of section 5;

c. While deciding the issue of whether a debt is a financial debt or an operational debt arising out of a transaction covered by an agreement or arrangement in writing, it is necessary to ascertain what is the real nature of the transaction reflected in the writing; and

d. Where one party owes a debt to another and when the creditor is claiming under a written agreement/ arrangement providing for rendering 'service', the debt is an operational debt only if the claim subject matter of the debt has some connection or co-relation with the 'service' subject matter of the transaction.

OPERATIVE PART

21. For the reasons recorded earlier, we hold that the view taken by the NCLAT under the impugned judgments and orders is correct and will have to be upheld. Therefore, we confirm the impugned judgments and dismiss the appeals with no order as to costs. The Resolution Professional shall continue with the CIRP process in accordance with the impugned judgments.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals dismissed.

[2024] 5 S.C.R. 241 : 2024 INSC 358

Life Insurance Corporation of India
v.
The State of Rajasthan and Ors.

(Civil Appeal No. 3391 of 2011)

30 April 2024

[Pamidighantam Sri Narasimha* and Aravind Kumar, JJ.]

Issue for Consideration

Whether the Rajasthan Stamp Law (Adaptation) Act, 1952 or the Rajasthan Stamp Act, 1998 applies to the facts of the present case; whether the state government has the legislative competence to impose and collect stamp duty on policies of insurance as per Entry 91 of List I r/w Entry 44 of List III; whether the 1952 Act requires the purchase of insurance stamps from and payment of stamp duty to the Rajasthan government for insurance policies issued within the state; whether, in the facts of the present case, the appellant is liable to pay stamp duty.

Headnotes

Rajasthan Stamp Law (Adaptation) Act, 1952 – Rajasthan Stamp Rules, 1955 – Indian Stamp Act, 1899 – s.3; Schedule I – Rajasthan Stamp Act, 1998 – Constitution of India – Entry 44 of List III, Entry 91 of List I – Power of the State to levy and collect stamp duty on insurance policies executed within the State – Appellant issued various insurance policies within the State of Rajasthan however, purchased insurance stamps from the State of Maharashtra – Demand for payment of stamp duty by the State of Rajasthan – Validity:

Held: State of Rajasthan has the power to impose and collect stamp duty on insurance policies under Entry 44 of List III, albeit such duty must be imposed as per the rate prescribed by a Parliamentary legislation under Entry 91 of List I – For the execution of insurance policies within the state of Rajasthan, the appellant is bound to purchase India Insurance Stamps and pay the stamp duty to the State of Rajasthan – s.3 of Indian Stamp Act, 1899 as adapted to the State of Rajasthan is the charging provision as per which the appellant must pay stamp duty to the state government on insurance policies executed within the state – The rate at which stamp duty is payable on policies of insurance under the 1952 Act has been

* Author

adopted from Schedule I of the central Act, in accordance with Entry 91 of List I – The charging provision has thus been validly enacted by the state government under Entry 44 of List III – Therefore, the state government in the present case can impose stamp duty on the issuance of insurance policies within its territory and require the payment of such stamp duty by the appellant – Hence, the commencement of proceedings for recovery of stamp duty under the state law and the rules made thereunder was legal, valid, and justified – However, in the facts and circumstances of the present case, the state government shall not demand and collect the stamp duty as per the orders dtd.16.09.2004, 16.10.2004, 11.10.2004, 01.11.2004, and 28.10.2004 – Impugned judgment of the High Court affirmed. [Paras 16, 37, 31, 38]

Rajasthan Stamp Law (Adaptation) Act, 1952 – Rajasthan Stamp Act, 1998 – s.3 – Insurance policies issued between 1993-94 to 2001-02 – Stamp duty leviable under the 1952 Act or the 1998 Act:

Held: Stamp duty must be levied as per the law in force as on the date of execution of the instrument – The charging provision i.e. s.3 of the 1998 Act, imposed stamp duty on every instrument mentioned in the Schedule that is executed in the state on or after the date of commencement of the Act – 1998 Act came into force only on 27.05.2004 – Hence, at the time that the relevant instruments were executed, the 1952 Act was still in force and the stamp duty was leviable under the same. [Para 8]

Rajasthan Stamp Law (Adaptation) Act, 1952 – ss.2, 3(v), (vi) – Application of Indian Stamp Act, 1899 – Adaptations – Schedule I of the 1899 Act – Rajasthan Stamp Rules, 1955 – rr.2 (d), 3 – Liability to pay stamp duty under the 1952 Act:

Held: r.3, r/w r.2(d), provides that the stamps issued by the State government will indicate the payment of stamp duty chargeable on an instrument – Therefore, the stamp must be issued by and the stamp duty must be paid to the State government for an instrument to be 'duly stamped' under the 1952 Act – State has the power to collect stamp duty under s.3 of the Indian Stamp Act, 1899 as adapted to the state of Rajasthan that provides that an instrument shall be chargeable with the duty of the amount indicated in the Schedule if it is executed within the state of Rajasthan – The mandate of s.3 is also found in r.3 that provides for "mode of payment" – r.3, read with r.2(d), provides that the duty with which any instrument is chargeable

shall be paid by means of a stamp issued by the state government – The relevant event flowing from s.3 and r.3 authorising the levy and imposition of stamp duty is the execution of the policy of insurance within the state – The liability to purchase the stamps from the state of Rajasthan is therefore clear and unambiguous – Consequently, for instruments executed within the state, the purchase of stamps from outside the state will equate to evasion of stamp duty and the instrument will not be 'duly stamped'. [Paras 22, 26]

Rajasthan Stamp Law (Adaptation) Act, 1952 – s.3A(1) – Appellant issued various insurance policies within the state of Rajasthan and was required to affix stamps by paying stamp duty on such policies – It wrote to the Collector, Jaipur regarding the non-availability of 'Agents License Fee stamps' – Plea of the appellant that in view of the letter of the Treasury Officer, Jaipur dated 07.10.1991 stating that 'India Insurance Stamps' are the property of the central government and their supply and distribution is not related to their department, they were compelled to purchase the stamps from Maharashtra, without which they could not have issued the insurance policies in the state of Rajasthan – High Court without taking note of the aforesaid letter held that the correspondence of the appellant with the department pertained to Agents License Fee stamps and even if the stamps were unavailable, the appellant was duty-bound to pay the stamp duty to the state government in cash as provided under s.3A(1) – Propriety:

Held: High Court evidently did not take note of the letter dated 07.10.1991 – Further, it entirely failed to consider sub-section (4) which excludes instruments under Entry 91, List I from the application of s.3A – Therefore, the High Court also erred in holding that the appellant could have paid the stamp duty in cash – In view of the above circumstances, the appellant had no choice but to purchase the insurance stamps from outside the state – While it made every endeavour to purchase the stamp from within the state, due to the letter by the department and the lack of mechanism for payment of stamp duty under the 1952 Act in case of unavailability of insurance stamps, it was unable to purchase the stamps and pay the stamp duty to the Rajasthan government. [Para 36]

Constitution of India – Seventh Schedule – Stamp duty – Entry 91 of List I, Entry 63 of List II, and Entry 44 of List III – Distribution of legislative competence:

Held: A combined reading of the constitutional scheme shows that the power to prescribe the rate of duty is mutually exclusive and has been clearly demarcated between the Parliament and the legislatures of the state – Insurance policies, which are the relevant instrument for the purpose of the present case, fall under Entry 91 of List I for the purpose of prescription of rate of duty – This means that only the Parliament holds the exclusive power and the legislative competence under the Constitution to prescribe the rate of stamp duty on insurance policies. [Para 12]

Rajasthan Stamp Law (Adaptation) Act, 1952 – Indian Stamp Act, 1899 – Constitution of India – Article 254; Entry 44, List III:

Held: In the present case, the imposition of stamp duty by the state government was under the 1952 Act, which is a state law that has been enacted under Entry 44 of List III, and has received Presidential assent as contemplated under Article 254 – Article 254(2) clearly stipulates that when a state law with respect to a matter in the Concurrent List is repugnant to the provisions of an earlier law made by the Parliament or an existing law with respect to that matter, then the law passed by the state shall prevail in that state "if it has been reserved for the consideration of the President and has received his assent" – The 1952 Act that occupies the field in the present case has undisputedly received Presidential assent and hence it prevails over the Indian Stamp Act, 1899 so far as the state of Rajasthan is concerned. [Para 29]

Tax/Taxation – Tax law – Plea that the rate of taxation is an essential component for a valid imposition of tax and since the State legislature cannot prescribe the rate of stamp duty on insurance policies, there can be no valid imposition of stamp duty on these instruments by way of a state enactment:

Held: Rejected – Even if the State legislature cannot prescribe the rate of stamp duty, it can levy such duty at the rate as provided by the Parliament – In the present case, while it is true that the State cannot prescribe the rate of duty on insurance policies, that by itself does not mean that there is ambiguity or lack of clarity regarding the rate of such duty – Rather, the rate of duty is unambiguous, clear, and defined by the Parliament and is adopted by the state to levy and collect stamp duty. [Para 18]

Constitution of India – Entry 44 of List III; Entry 91 of List I – Contention as regards whether Entry 44 of List III is a taxation entry:

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Held: Entry 44 of List III is a taxation entry that falls under the Concurrent List – State legislature has the legislative competence to impose and collect stamp duty on policies of insurance under Entry 44 of List III, as per the rate prescribed by the Parliament under Entry 91 of List I. [Para 19]

Case Law Cited

VVS Rama Sharma v. State of Uttar Pradesh [2009] 5 SCR 1159 **: (2009) 7 SCC 234;** *Govind Saran Ganga Saran v. Commissioner of Sales Tax* [1985] 3 SCR 985 **: (1985) Supp SCC 205;** *Mathuram Agrawal v. State of Madhya Pradesh* [1999] Supp. 4 SCR 195 **: (1999) 8 SCC 667 – distinguished.**

State of West Bengal v. Kesoram Industries [2004] 1 SCR 564 **: 7 (2004) 10 SCC 201;** *State of Karnataka v. State of Meghalaya* [2022] 18 SCR 516 **: (2023) 4 SCC 416;** *Bar Council of Uttar Pradesh v. State of Uttar Pradesh* [1973] 2 SCR 1073 **: (1973) 1 SCC 261;** *Vijay v. Union of India* [2023] 15 SCR 293 **: (2023) SCC OnLine SC 1585 : 2023 INSC 1030;** *Government of Andhra Pradesh v. P. Laxmi Devi* [2008] 3 SCR 330 **: (2008) 4 SCC 720;** *UP Electric Supply Co Ltd v. R.K. Shukla* [1970] 1 SCR 507 **(1969) 2 SCC 400;** *M. Karunanidhi v. Union of India* [1979] 3 SCR 254 **: (1979) 3 SCC 431;** *Balaji v. ITO* [1962] 2 SCR 983 **: AIR (1962) SC 123;** *Municipal Council, Kota, Rajasthan v. Delhi Cloth and General Mills Co. Ltd, Delhi* [2001] 2 SCR 287 **: (2001) 3 SCC 654 – referred to.**

List of Acts

Rajasthan Stamp Law (Adaptation) Act, 1952; Indian Stamp Act, 1899; Rajasthan Stamp Act, 1998; Rajasthan Stamp Rules, 1955; Constitution of India.

List of Keywords

Stamp duty; Liability to pay stamp duty; Evasion of stamp duty; Imposition and collection of stamp duty on policies of insurance; Purchase of insurance stamps; Payment of stamp duty; Insurance policies issued/executed within the State; Recovery of stamp duty; Stamp duty chargeable on instrument; Rate of stamp duty on insurance policies; Purchase of stamps from outside the State; 'duly stamped'; Taxation entry.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 3391 of 2011

From the Judgment and Order dated 21.02.2011 of the High Court of Rajasthan at Jaipur in DBCSA No. 670 of 2004

With

Civil Appeal Nos. 3849, 3393, 3394 and 3395 of 2011

Appearances for Parties

N. Venkatraman, A.S.G., C.Paramasivam, Nishant Sharma, V. Chandrasekara Bharthi, Ms. Amitha Chandramouli, Rahul Vijayakumar, Shivshankar G., Rakesh K. Sharma, Advs. for the Appellant.

Dr. Manish Singhvi, Sr. Adv., Ms. Shubhangi Agarwal, Apurv Singhvi, Rohan Darade, Milind Kumar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Pamidighantam Sri Narasimha, J.

1. The issue for consideration is whether the state of Rajasthan has the power and jurisdiction to levy and collect stamp duty on policies of insurance issued within the state. For the reasons to follow, we have rejected the contention of the Life Insurance Corporation, the appellant herein, regarding the lack of legislative competence of the state and have also affirmed the power to levy and collect stamp duty under the Rajasthan Stamp Law (Adaptation) Act, 1952[1] and the rules made thereunder. While dismissing the appeal, we have however set aside certain findings of the High Court and granted relief to the appellant in the facts and circumstances of the case. We will first refer to the necessary facts before analysing the provisions and drawing our conclusions.

2. *Facts*: The appellant issued various insurance policies within the state of Rajasthan between 1993-94 and 2001-02. As per the prevailing law relating to stamp duty, the appellant was required to affix stamps

1 Hereinafter '1952 Act'.

by paying stamp duty on the policies of insurance issued by it in accordance with the Indian Stamp Act, 1899, as adapted to the state of Rajasthan by the 1952 Act.

2.1 On 19.08.1991, the appellant wrote to the Collector, Jaipur regarding the non-availability of 'Agents License Fee stamps'. On 07.10.1991, the Treasury Officer, Jaipur replied to the appellant that 'India Insurance Stamps' are the property of the central government and their supply and distribution is not related to their department.

2.2 On 15.04.2004 and 06.05.2004, the Inspector General (Registration and Stamps) Rajasthan, Ajmer issued a letter to the appellant to deposit a sum of Rs. 1.19 crores for causing loss of revenue to the state of Rajasthan as it had purchased insurance stamps between 1993-94 and 2001-02 from the state of Maharashtra for insurance policies that were issued within the state of Rajasthan. Pursuantly, the Additional Collector (Stamps), Jaipur issued a show-cause notice under Section 37(5) of the Rajasthan Stamp Act, 1998[2] for payment of the amount.

2.3 By order dated 16.09.2004, the Additional Collector (Stamps), Jaipur confirmed the show-cause notice and directed the appellant to deposit the amount. It was held that the correspondence between the appellant and the department pertained to Agents Fee Stamps and not India Insurance stamps that are affixed on insurance policies and were available at the relevant time. Similar orders were passed on 16.10.2004 for Rs. 1.07 crores, 11.10.2004 for Rs. 1.18 crores, 01.11.2004 for Rs. 1.87 crores, and 28.10.2004 for Rs. 43.68 lakhs. The appellant also challenged these orders by way of separate writ petitions, which have been disposed of in the judgment impugned before us.[3]

2.4 The appellant filed a writ petition challenging the order of the Additional Collector dated 16.09.2004, which came to be

2 Hereinafter '1998 Act'.

3 In D.B. Civil Writ Petition No. 3418/2006, D.B. Civil Writ Petition No. 3419/2006, and D.B. Civil Writ Petition No. 3420/2006, and D.B. Civil Writ Petition No. 8187/2004, judgment dated 21.02.2011 ('impugned judgment').

dismissed by the High Court single judge[4] on the ground that the appellant has an alternative efficacious remedy of filing a revision under Section 65 of the Rajasthan Stamp Act.

2.5 The appellant preferred a writ appeal before the division bench, which was initially disposed of by an order dated 11.12.2004 wherein the High Court directed the Chief Secretary of the Rajasthan government to constitute a High Powered Committee under his chairmanship to decide the matter by a reasoned order. It was also held that if either party is dissatisfied with the decision of the committee, they could file for revival of the writ appeal. The Committee constituted pursuant to this order rejected the appellant's representation, due to which the writ appeal was restored and decided in the impugned judgment[5].

3. *Reasoning of the High Court*: It is necessary to briefly discuss the reasoning of the High Court in dismissing the writ appeal and confirming the imposition of stamp duty. The High Court relied on Sections 2, 3(v), and 3A of the 1952 Act read with Rules 2(d) and 3 of the Rajasthan Stamp Rules, 1955. Section 2 provides that subject to the other provisions of this Act, the Indian Stamp Act, 1899 shall apply to the whole state of Rajasthan on and from 01.04.1958. Section 3(v) provides that reference in the Indian Act to 'government' shall, unless the context otherwise requires, be construed as reference to the state government. Section 3A(1) provides for payment of stamp duty in cash when stamps are not available for sale.

3.1 Rule 2(d) of the Rajasthan Stamp Rules, 1955 defines government as state government and Rule 3 provides for the mode of payment of stamp duty to the state government.

3.2 Relying on these provisions, specifically Section 3A(1), the High Court held that the appellant should have paid the stamp duty in cash and the receipt would be affixed on the instrument as envisaged under this provision. It was also held that there was no legal sanction under the scheme of the Act that permits the appellant to purchase such stamps from outside the state in case

4 In S.B. Civil Writ Petition No. 7013 of 2004, judgment dated 08.10.2004

5 In D.B. Civil Special Appeal (Writ) No. 670/2004, judgment dated 21.02.2011 ('impugned judgment).

of non-availability.[6] It further held that in any case, only Agents License Fee stamps were unavailable while the imposition of stamp duty was on India Insurance Stamps.[7]

3.3 Relying on Rule 2(d) that defines 'government' as meaning government of Rajasthan and Rule 3 that mandates payment of stamp duty to the state government, the High Court held that the stamps must only be purchased from the Rajasthan government.[8] The only exception provided is under Section 3A when the person can deposit cash with the government treasury in case of non-availability of stamps and affix the receipt of challan with the instrument.[9] The 1952 Act and the 1955 Rules do not permit the appellant to purchase stamps from outside the state that do not bear the superimposition of the words 'Rajasthan' or letters 'RAJ' as provided in the Explanation to Rule 3.[10] On such reading of the law and facts, the High Court upheld the order of the Collector dated 16.09.2004.

4. The High Court also dealt with the arguments by the parties on the competence of the state government to impose stamp duty on insurance policies based on the distribution of legislative fields in the Seventh Schedule on stamp duty. The High Court held that Entry 91 of List I (Union List) empowers the Parliament to enact a law relating to rate of stamp duty in respect of various instruments, including policies of insurance. Entry 44 of List III (Concurrent List) empowers both the Parliament and state legislatures to enact laws with respect to "*stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty*".

4.1 The High Court held that the 1952 Act has been enacted under Entry 44, List III and has received Presidential assent. It does not occupy the field covered by Entry 91 of List I as it does not fix or prescribe the rate of duty for insurance stamps but only provides for the collection of stamp duty. The High Court

6 Impugned judgment, p. 15

7 ibid.

8 ibid, p.17

9 ibid.

10 ibid.

hence rejected the submission by the appellant that the state government does not have the power to demand payment for insurance stamps as they fall under the Union List.

4.2 It also rejected the appellant's reliance on this Court's judgment in *VVS Rama Sharma v. State of Uttar Pradesh*[11] by differentiating it as in that case, there was no state law that had received Presidential assent and instead the consideration was under Rule 115A of the UP Stamp Rules, 1942.[12] Since the 1952 Act had received Presidential assent, it was held to be a special law that has overriding effect, which was not the case in *VVS Rama Sharma* (supra) where the Indian Stamp Act read with rules framed by the state of UP was applicable.[13] It also differentiated the case on facts as *VVS Rama Sharma* (supra) pertained to the commission of criminal offences under the Indian Penal Code and the Indian Stamp Act, 1899.[14]

5. *Submissions by the appellant*: The learned ASG, Mr. N. Venkataraman, appeared on behalf of the appellant and has made two primary arguments. The gist of his submission is: *First*, that on the basis of Entry 91 of List I, Entry 63 of List II, and Entry 44 of List III, the state of Rajasthan does not have the legislative competence to impose and collect stamp duty on insurance policies as the same falls under the Union List. *Second*, that the show-cause notice and the proceedings are under the 1998 Act, which does not provide for imposition of stamp duty by the state on policies of insurance. Alternatively, even if the 1952 Act applies, the appellant had no option but to purchase the stamps from Maharashtra due to their admitted unavailability and in view of Section 3A(4) of the 1952 Act. The detailed arguments are as follows:

5.1 Learned ASG has relied on Entry 47 of List I on insurance and Entry 91 of List I that empowers the Parliament to prescribe the rate of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, *policies of insurance*, transfer of shares, debentures, proxies and receipts.

11 [2009] 5 SCR 1159 : (2009) 7 SCC 234

12 Impugned judgment, p. 19

13 ibid, p. 20

14 ibid.

He has argued that since insurance falls under the Union list and more specifically, since only the Union can prescribe the rate of stamp duty on insurance policies, the state government cannot demand that the stamp duty on insurance policies must necessarily be paid to it and that the stamps cannot be purchased from other states. He relied on *VVS Rama Sharma* (supra) on the point that a state cannot require that insurance stamps, which are property of the central government, must be purchased only from that particular state when the insurance policy is issued within its territory. Challenging the imposition of stamp duty by the state government, the learned ASG has further submitted that a levy of stamp duty is in the nature of tax and that there is no valid imposition of tax unless there is a rate of taxation. Relying on *Govind Saran Ganga Saran v. Commissioner of Sales Tax*[15] and *Mathuram Agrawal v. State of Madhya Pradesh*[16], he has submitted that the rate of stamp duty must be clearly and unambiguously ascertainable, without which there is no valid tax law. Since the state does not have the domain competence to prescribe the rate of stamp duty in the present case, it cannot validly impose and demand the payment of such duty. Lastly, the learned ASG has argued that Entry 44 of List III is not in the nature of a taxation entry by relying on *State of West Bengal v. Kesoram Industries*[17] and *State of Karnataka v. State of Meghalaya*[18]. He submits that it is well-settled in taxation law that entries pertaining to taxation are clearly demarcated between the Union List and the State List. There is no head of taxation in the Concurrent List. Hence, the state government cannot impose stamp duty on the appellant by claiming legislative competence under Entry 44 of List III.

5.2 Apart from arguing that levy of stamp duty by the state is contrary to the constitutional scheme, the learned ASG has also argued that stamp duty cannot be imposed in the present case under the specific state enactments. He has argued that the 1998 Act applies in the present case as the notice for

15 [1985] 3 SCR 985 : 1985 Supp SCC 205, para 6

16 [1999] Supp. 4 SCR.195 : (1999) 8 SCC 667, para 12

17 [2004] 1 SCR 564 : (2004) 10 SCC 201

18 [2022] 18 SCR 516 : (2023) 4 SCC 416, para 92

recovery has been issued under Section 37(5) of the 1998 Act. Section 3 of the 1998 Act is the charging provision that provides that instruments shall be chargeable with duty of the amount indicated in the Schedule. By comparing entry 47 of Schedule I of the Indian Stamp Act, 1899 (which provides the rates of stamp duty for various kinds of policies of insurance) and the Schedule under the 1998 Act, he has argued that there is no parallel entry in the Schedule of the 1998 Act that provides the rate of stamp duty on insurance policies. Since Section 3 only provides for imposition of stamp duty as per rates prescribed in the Schedule and there is no such rate of duty indicated, the state government cannot demand stamp duty from the appellant on insurance policies. Alternatively, the learned ASG has argued that even if the 1952 Act applies, as considered by the High Court in the impugned judgment, the stamp duty could not have been paid to the Rajasthan government in the present case due to the admitted unavailability of India Insurance stamps with the treasury. Relying on the letter from the department dated 07.10.1991, he argued that the High Court erred in holding that only Agents License Fee stamps were unavailable when the letter clearly mentioned India Insurance stamps. Further, the letter also stated that these stamps are central government property and their supply and sale is not related to the state government. Relying on this letter by the department, the learned ASG has submitted that the government could not have then demanded payment of stamp duty in 2004. Lastly, he has argued that the High Court's reliance on Section 3A to hold that the duty could have been paid in cash in case of unavailability of stamps is misplaced as sub-clause (4) of Section 3A clearly stipulates that the provision does not apply to payment of stamp duty chargeable on instruments specified in Entry 91 of List I. Since insurance policies are an instrument that fall under this entry, Section 3A does not apply to it and the appellant could not have paid the stamp duty in cash. The High Court erred in its conclusion as it had entirely failed to consider this sub-clause. A similar provision is also contained in Section 4(4) of the 1998 Act. Hence, he concluded that there was no way for the appellant to have paid stamp duty to the Rajasthan government and they had to purchase the stamps

from outside the state as non-payment of duty would lead to evasion and an unstamped insurance policy would not be admissible in evidence.

6. *Submissions by the respondent*: Dr. Manish Singhvi, learned senior counsel for the state, has argued that the state has the power to impose and collect stamp duty on insurance policies under Entry 44 of List III. He has argued that while the power to prescribe the rate of such duty falls within the exclusive domain of the Parliament, the power to collect and impose the duty and to frame a charging provision lies with the Parliament and the state legislatures under Entry 44 of the Concurrent List, which is a *sui generis* provision. The legislative competence of the states extends to collecting stamp duty on instruments specified in Entry 91 of List I but does not extend to prescribing the rate of duty for such instruments. The power to prescribe the rate of stamp duty is clearly demarcated between the Union and the states through Entry 91 of List I and Entry 63 of List II. The state government can impose the duty at such rate that is prescribed by the Parliament. He has also argued that Entry 44 of List III is a taxation provision, as has been clearly held in *Bar Council of Uttar Pradesh v. State of Uttar Pradesh*[19].

6.1 Dr. Manish Singhvi further submits that the 1952 Act applies since the period of levy is for policies issued between 1993-94 to 2001-02, which is prior to the 1998 Act coming into force (on 27.05.2004). The 1952 Act received Presidential assent and hence prevailed over the Indian Stamp Act, 1899 in the state as per Article 254(2). Section 3(vi) of this Act adopts the Schedule from the central Act for the purpose of rate of stamp duty. Hence, the stamp duty must be paid to the state government for insurance transactions occurring within the territory of the state after the 1952 Act came into force as per the rate prescribed in entry 47 of Schedule I of the Indian Stamp Act. Alternatively, he has argued that even if the 1998 Act applies, Sections 90 and 91 of that Act have the effect of adopting the Indian Stamp Act with respect to instruments contained in Entry 91 of List I. Lastly, he has differentiated the present case from *VVS Rama Sharma* (supra) as that case

19 [1973] 2 SCR 1073 : (1973) 1 SCC 261

pertained to the registration of a criminal case against the officers of LIC for non-payment of stamp duty and the lack of criminal intent, leading to the quashing of FIR.

7. *Issues*: Having heard the learned ASG for the appellant and Dr. Manish Singhvi for the respondent, the following issues arise for our consideration:

I. Whether the 1952 Act or the 1998 Act applies to the facts of the present case?

II. Whether the state government has the legislative competence to impose and collect stamp duty on policies of insurance as per Entry 91 of List I read with Entry 44 of List III?

III. Whether the 1952 Act requires the purchase of insurance stamps from and payment of stamp duty to the Rajasthan government for insurance policies issued within the state?

IV. Whether, in the facts of the present case, the appellant is liable to pay stamp duty?

I. Applicable Law

8. It is first important to determine whether stamp duty in the present case can be imposed under the 1952 Act or the 1998 Act. The High Court has relied on the provisions of the 1952 Act while arriving at its conclusion. We agree with the High Court on this aspect as the stamp duty must be levied as per the law in force as on the date of execution of the instrument.[20] In the present case, the insurance policies were issued between 1993-94 to 2001-02. Section 3 of the 1998 Act[21], which is the charging provision, imposes stamp duty on every instrument mentioned in the Schedule that is executed in the state on or after the date of commencement of the Act. The 1998 Act came into force only on 27.05.2004 by way of a notification. Hence,

20 *Vijay v. Union of India* [2023] 15 SCR 293 2023 : SCC OnLine SC 1585, 2023 INSC 1030, para 11

21 The relevant portion of Section 3 of the 1998 Act reads:
*"**3. Instrument chargeable with duty.—** Subject to the provisions of this Act and the exemptions contained in the Schedule, the following instruments shall be chargeable with duty of the amount indicated in the Schedule as the proper duty therefor respectively, that is to say,—*
(a) every instrument mentioned in that Schedule, which, not having been previously executed by any person, is executed in the State on or after the date of commencement of this Act;
(b) every instrument mentioned in that Schedule, which, not having been previously executed by any person, is executed out of the State on or after the said date, relates to any matter or thing done or to be done in the State and is received in the State, or relates to any property situate in the State."

at the time that the relevant instruments were executed, the 1952 Act was still in force and the stamp duty is leviable under the same.

II. Legislative Competence

9. The learned ASG has forcefully contended that the state does not have the power to collect and levy stamp duty on insurance policies under the state enactment as only the Union can prescribe the rate of stamp duty for such instruments. He has taken us through the constitutional scheme on the fields of legislation under the Seventh Schedule on matters of stamp duty. The relevant entries are Entry 91 of List I, Entry 63 of List II, and Entry 44 of List III, which have been extracted here for reference:

Entry 91 of List I:

> "*91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.*"

Entry 63 of List II:

> "*63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.*"

Entry 44 of List III:

> "*44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.*"

10. Article 246 of the Constitution states that the Parliament has the exclusive power to make laws with respect to any matter in List I, the Parliament and the legislatures of any state have the power to make laws with respect to any matter in List III, and the legislature of any state has the exclusive power to make laws for such state or any part thereof with respect to any matter in List II.[22]

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22 Article 246 reads:
"***246. Subject-matter of laws made by Parliament and by the Legislatures of States.***—*(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").*
(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of

11. Reading the relevant entries of the Seventh Schedule in the context of Article 246, the distribution of legislative competence with respect to legislation on stamp duty is as follows. The Parliament has the exclusive power to legislate on the *rate of stamp duty* with respect to certain instruments, namely: bills of exchange, cheques, promissory notes, bills of lading, letters of credit, *policies of insurance*, transfer of shares, debentures, proxies and receipts, under Entry 91 of List I. As per Entry 63 of List II, the legislatures of the states have the exclusive power to legislate on the *rate of stamp duty* with respect to documents other than those specified in Entry 91 of List I for their state or any part of their state. In other words, there is a distribution of instruments between the Parliament and the state legislatures as regards the legislative competence to fix rates of stamp duty. However, as per Entry 44 of List III, the Parliament and the legislatures of the states have concurrent powers to legislate on stamp duties (other than duties or fees collected by means of judicial stamps), but not including rates of stamp duty.

12. A combined reading of the constitutional scheme shows that the power to prescribe the rate of duty is mutually exclusive and has been clearly demarcated between the Parliament and the legislatures of the state.[23] Insurance policies, which are the relevant instrument for the purpose of the present case, fall under Entry 91 of List I for the purpose of prescription of rate of duty. This means that only the Parliament holds the exclusive power and the legislative competence under the Constitution to prescribe the rate of stamp duty on insurance policies. There is no dispute regarding this point.

13. The issue however that falls for our consideration is whether the state government can enact a law that imposes stamp duty on insurance policies by using the rate prescribed by the Parliament by sourcing legislative competence through Entry 44 of List III.

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any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").
(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").
(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included [2] [in a State] notwithstanding that such matter is a matter enumerated in the State List."

23 *VVS Rama Sharma* (supra), paras 14-15

14. This Court in *VVS Rama Sharma* (supra) has answered this question in the affirmative and has held that under Entry 44 of List III, "*the power to levy stamp duty on all documents, is concurrent. But the power to prescribe the rate of such levy is excluded from Entry 44 of List III and is divided between Parliament and the State Legislatures.*"[24] Therefore, the charging provision for imposition of stamp duty, even on documents contained in Entry 91 of List I, can be enacted by both the Parliament and the state legislatures, subject to the provisions of Article 254.[25] These principles have been summarised in *VVS Rama Sharma* (supra) as follows:

> "*23. As mentioned earlier, under Entry 44 of List III, the power to levy stamp duty on all documents is concurrent. But the power to prescribe the rate of such levy is excluded from Entry 44 of List III and is divided between Parliament and the State Legislatures. If the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate will belong to Parliament, and for all other instruments or documents, the power to prescribe the rate belongs to the State Legislature under Entry 63 of List II. Therefore, the meaning of Entry 44 of List III is that excluding the power to prescribe the rate, the charging provisions of a law relating to stamp duty can be made both by the Union and the State Legislature, in the concurrent sphere, subject to Article 254 in case of repugnancy. So, in the case at hand, it is Entry 91 of List I of the Seventh Schedule which would be applicable and the States do not have the power to circumvent a Central law.*"

15. In a recent judgment in *Vijay v. Union of India*,[26] this Court has again held that *the power to levy stamp duty on all documents is concurrent* under Entry 44 of List III. Only the power to prescribe the rate of such duty is with the Parliament, and subject to Entry 91 of List I, with the state legislatures.[27]

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24 ibid, para 14

25 ibid, para 15

26 [2023] 15 SCR 293 : 2023 SCC Online SC 1585, 2023 INSC 1030

27 ibid, para 12

16. From the above precedents, it is clear that the state of Rajasthan has the power to impose and collect stamp duty on insurance policies under Entry 44 of List III, albeit such duty must be imposed as per the rate prescribed by a Parliamentary legislation under Entry 91 of List I.

17. In view of the above explanation, the issue relating to legislative competence raised by the learned ASG conclusively ends. However, the learned ASG has raised additional arguments regarding the requirements of a valid tax law and on whether Entry 44 of List III is a taxation entry. Although we find these submissions to be unnecessary, we will deal with them as they have been raised.

18. Relying on this Court's decisions in *Govind Saran Ganga Saran* (supra) and *Mathuram Agarwal* (supra), the learned ASG has argued that the rate of taxation is an essential component for a valid imposition of tax. Since the state legislature cannot prescribe the rate of stamp duty on insurance policies, he has argued that there can be no valid imposition of stamp duty on these instruments by way of a state enactment. This argument must be rejected in view of the above conclusion that even if the state legislature cannot prescribe the rate of stamp duty, it can levy such duty at the rate as provided by the Parliament. Both the decisions relied on by the learned ASG pertain to cases where the charging provision was ambiguous in defining an essential component of a valid tax law, i.e., the subject of the tax, the person who is liable to pay the tax, and the rate at which the tax is to be paid[28]. In the present case, while it is certainly true that the state cannot prescribe the rate of duty on insurance policies, that by itself does not mean that there is ambiguity or lack of clarity regarding the rate of such duty. Rather, the rate of duty is unambiguous, clear, and defined by the Parliament and is adopted by the state to levy and collect stamp duty. Hence, this submission must be rejected.

19. The other submission by the learned ASG that there is no taxation entry in the Concurrent List is based on this Court's decisions in *Kesoram Industries* (supra) and *State of Karnataka v. State of Meghalaya* (supra). The learned ASG has pointed us to relevant portions of these judgments. However, it must be noted that these judgments pertain to taxation entries, rather than to entries on stamp duty. While stamp

28 *Mathuram Agarwal* (supra), para 6

duty is certainly in the nature of a tax,[29] it has not been specifically considered by this Court in these judgments. A three-judge bench of this Court in *Bar Council of Uttar Pradesh v. State of UP* (supra) held that payment of stamp duty pertains to the domain of taxation and the imposition of such duty falls in pith and substance under Entry 44 of List III.[30] This judgment came prior to the decisions relied on by the learned ASG but has not been considered by the Court in those cases as they did not pertain to stamp duty. Hence, it is clear that Entry 44 of List III is a taxation entry that falls under the Concurrent List and this submission must also be rejected. We hold that the state legislature has the legislative competence to impose and collect stamp duty on policies of insurance under Entry 44 of List III, as per the rate prescribed by the Parliament under Entry 91 of List I.

III. Liability to Pay Stamp Duty Under the 1952 Act:

20. *Provisions and Imposition of Stamp Duty Under the 1952 Act*: Section 2 of the 1952 Act reads as follows:

> "***2. Application of Indian Act.–****Subject to the other provisions of this Act, the Indian Stamp Act, 1899 (II of 1899) of the Central Legislature as amended from time to time, hereinafter referred to as the Indian Act shall apply to the whole of the State of Rajasthan on and from the 1st day of April, 1958.*"
>
> (emphasis supplied)

21. Section 2 of the 1952 Act adopts the Indian Stamp Act, 1899 and makes it applicable to the state of Rajasthan subject to certain adaptations that are contained in Section 3. Sections 3(v) and 3(vi) are relevant for our purpose, and are as follows:

> "***3. Adaptations.–****For the purposes of section 2,–*
>
> *(v) references in the Indian Act to any Government shall, unless the context otherwise requires, be construed as references to the State Government, that is to say, to the Government of the State of Rajasthan as formed by*

29 *Government of Andhra Pradesh v. P. Laxmi Devi*, [2008] 3 SCR 330 : (2008) 4 SCC 720, para 19

30 *Bar Council of Uttar Pradesh* (supra), para 14

section 10 of the States Re-organisation Act, 1956 (Central Act 37 of 1956):

Provided that in clause (i) of section 3 of the Indian Act, the word "Government" wherever occurring shall mean the State Government as well as the Central Government.

(vi) references in the Indian Act to Schedule I shall be construed as references to the Second Schedule of the Rajasthan Stamp Law (Adaptation) Act, 1952 (Rajasthan Act VII of 1952)"

22. Further, Rules 2(d) and 3 of the Rajasthan Stamp Rules, 1955 read as follows:

"*2(d) "Government" means the Government of the State of Rajasthan*"

"*3. Mode of payment of duty-Except as otherwise provided by the Act, or by these rules, -*

(1) all duties with which any instrument is chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps issued by the Government for the purpose of the Act and these Rules; and

(2) a stamp which by any word or words on the face of it is appropriated to any particular kind of instrument shall not be used for any instrument of any other kind.

Explanation: - For the purpose of clause (1), a stamp of the central Government or of the Government of any covenanting State shall be deemed to have been superimposed with word "Rajasthan" or with the letters "RAJ"."

Rule 3, read with Rule 2(d), provides that the stamps *issued by the state government* will indicate the payment of stamp duty that is chargeable on an instrument. Therefore, the stamp must be issued by and the stamp duty must be paid to the state government for an instrument to be 'duly stamped'[31] under the 1952 Act.

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31 Section 2(11) of the Indian Stamp Act, 1899 as adapted to the state of Rajasthan reads:
*"**2. Definitions**. — In this Act, unless there is something repugnant in the subject or context, —*
(11) "Duly stamped". — "duly stamped", as applied to an instrument, means that the instrument bears an

23. Pursuant to the adaptations by the 1952 Act, the relevant portion of Section 3 and Schedule I of the Indian Stamp Act, 1899 as adapted to the state of Rajasthan by the 1952 Act is as follows:

> "***3. Instruments chargeable with duty.***—*Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore respectively, that is to say—*
>
> *(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the day on which the Act comes into force in the State of Rajasthan;*
>
> *(b) every bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India on or after that day and accepted or paid or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and*
>
> *(c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received in India.*"

Schedule I of the central Act, as adapted to the state of Rajasthan, reads as follows:

> "*SCHEDULE I*
>
> ***Stamp Duty on Instruments***
>
> *(See section 3)*
>
> *[In this Schedule, given under the Indian Stamp Act, 1899, only those articles are reproduced for which no specific provision is made in the Rajasthan Amending Act, No. 7 of 1952.]*
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> ***

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adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in India"

47. Policy of insurance–

D-	LIFE INSURANCE OR GROUP INSURANCE OR OTHER INSURANCE NOT SPECIFICALLY PROVIDED FOR, except such a **RE-INSURANCE**, as is described in Division E of this article—	If drawn singly	If drawn in duplicate for each part.
	(i) for every sum insured not exceeding Rs. 250;	Ten paise.	Five paise.
	(ii) for every sum insured exceeding Rs. 250 but not exceeding Rs. 500;	Ten paise.	Five paise.
	(iii) for every sum insured exceeding Rs. 500 but not exceeding Rs. 1,000 and also for every Rs. 1,000/- or part thereof in excess of Rs. 1,000.	Twenty paise.	Ten paise.
		N.B.- If a policy of group insurance is renewed or otherwise modified whereby the sum insured exceeds the sum previously insured on which stamp-duty has been paid, the proper stamp must be borne on the excess sum so insured.	
	Exemption Policies of life-insurance granted by the Director-General of Post Offices in accordance with rules for Postal Life-Insurance issued under the authority of the Central Government		

24. From reading the above provisions, rules, and the Schedule together, it can be seen that Section 2 of the 1952 Act provides that the Indian Stamp Act, 1899 will apply in the state of Rajasthan subject to certain adaptations. The relevant adaptations for our purpose are that 'government' shall refer to state government (as per Section 3(v) of the 1952 Act) and that reference to Schedule I of the central Act shall be construed as reference to the Second Schedule of the 1952 Act (as per Section 3(vi) of the 1952 Act). The Second Schedule of the 1952 Act prescribes the rates of stamp duty on certain instruments. However, since policies of insurance are specified in Entry 91 of List I, only the Parliament has the legislative competence to prescribe the rate of stamp duty to be imposed on them. Consequently, the Second Schedule to the 1952 Act does not contain any entry on rates of duty for policies of insurance, and rightly so. Rather, when we read Entry 47(D) of Schedule I of the Indian Stamp Act, 1899 as adapted to the state of Rajasthan, we see that the rate that has been prescribed under the central law has been adopted within the state as well.

25. The power to levy and collect stamp duty is relatable to the legislative competence of the state, followed by clear authority of law through statutory prescription. Having recognised the legislative competence of the state of Rajasthan, the state has the power to collect stamp duty under Section 3 of the Indian Stamp Act, 1899 as adapted to the state of Rajasthan that provides that an instrument shall be chargeable with the duty of the amount indicated in the Schedule if it is executed within the state of Rajasthan.

26. The mandate of Section 3 is also found in Rule 3 of the Rajasthan Stamp Rules, 1955 that provides for "*mode of payment*". Rule 3, read with Rule 2(d), provides that the duty with which any instrument is chargeable shall be paid by means of a stamp issued by the state government. The relevant event flowing from Section 3 and Rule 3 authorising the levy and imposition of stamp duty is the execution of the policy of insurance within the state. The liability to purchase the stamps from the state of Rajasthan is therefore clear and unambiguous. Consequently, for instruments executed within the state, the purchase of stamps from outside the state will equate to evasion of stamp duty and the instrument will not be 'duly stamped'.

27. *Differentiating VVS Rama Sharma* (supra): The learned ASG has placed reliance on the following portions of *VVS Rama Sharma* (supra) to contend that the state government cannot demand that insurance stamps must only be purchased from it for policies issued within the state:

> "*29. In the case at hand, it has been stated in the FIR that the Divisional Office of LIC, Varanasi has not purchased the insurance stamps from the Treasury Office of U.P. but the same were purchased from the stamp vendors, outside of State, which caused loss to the State exchequer to the tune of Rs 1,67,21,520.00 to the State Government. So, the sole allegation against the appellants is that they have purchased the insurance stamps from outside the State of U.P. However, as we have already noted that the said act of the appellants cannot be said to be inconsistent with any provisions of the Stamp Act or any other rules. So, the allegation made in the FIR even if proved by the prosecution does not constitute any offence.*
>
> *32. It is wholly immaterial whether the appellants are purchasing the insurance stamps from the State of U.P. or from any other State. In fact, as mentioned earlier, Rule 115-A of the U.P. Stamp Rules itself declares that "Stamps which are the property of the Central Government". That being the legal position, it is legally untenable to contend that the insurance stamps must be purchased from the State of U.P. only.*"
>
> (emphasis supplied)

28. These portions of the judgment must be seen in the context of the facts and the law applicable in that case. While arriving at its conclusion, this Court in *VVS Rama Sharma* (supra) interpretated Rule 115A of the UP Stamp Rules, 1942[32] (these Rules were framed by the state

32 Rule 115A of the UP Stamp Rules, 1942 has been extracted in *VVS Rama Sharma* (supra), para 20 that reads as follows:
"20. Further, Rule 115-A of the Stamp Rules provides for the mode of sale of such stamps. It reads as follows:
"115-A. Stamps which are the property of the Central Government and which are required to be sold

government pursuant to rule-making powers given to states under Sections 74 and 75 of the Indian Stamp Act, 1899[33]) read with the provisions of the Indian Stamp Act, 1899.[34] It was held that since the Stamp Rules have been framed under the central Act, their scope is only to the extent provided in Sections 74 and 75 and they cannot circumvent the provisions of the central Act.[35] In these facts, this Court held that the State of UP could not require that stamps on insurance policies must only be purchased within the state and cannot be validly purchased from other states.

29. The law under consideration in the facts of the present case is different. In the present case, the imposition of stamp duty by the state government is under the 1952 Act, which is a state law that has been enacted under Entry 44 of List III, and has received Presidential assent as contemplated under Article 254.[36] Article 254(2) clearly stipulates that when a state law with respect to a

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to the public through post offices e.g. Central excise revenue stamps, defence (or national) savings stamps, shall be obtained by post offices from local and branch depots and sold to the public in the same manner as ordinary postage stamps.
Tobacco excise duty labels and insurance agent licence fee stamps shall be sold to the public at local and branch depots at which they are stocked."

33 Sections 74 and 75 of the Indian Stamp Act, 1899 read as follows:
*"**74. Powers to make rules relating to sale of stamps. —** The State Government may make rules for regulating–(a) the supply and sale of stamps an stamped papers,*
(b) the persons by whom alone such sale is to be conducted, and
(c) the duties and remuneration of such persons:
Provided that such rules shall not restrict the sale of ten naye paise or five naya paise adhesive stamps.
***75. Power to make rules generally to carry out Act. —**The State Government may make rules to carry out generally the purposes of this Act, and may by such rules prescribe the fines, which shall in no case exceed five hundred rupees, to be incurred on breach thereof."*

34 *VVS Rama Sharma* (supra), paras 18-23

35 ibid.

36 Article 254 of the Constitution reads as follows:
"***254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.—**(1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.*
(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:
Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

matter in the Concurrent List is repugnant to the provisions of an earlier law made by the Parliament or an existing law with respect to that matter, then the law passed by the state shall prevail in that state "*if it has been reserved for the consideration of the President and has received his assent*". The 1952 Act that occupies the field in the present case has undisputedly received Presidential assent and hence it prevails over the Indian Stamp Act, 1899 so far as the state of Rajasthan is concerned.[37]

30. This Court in *VVS Rama Sharma* (supra) did not consider any such law enacted by the state legislature that received Presidential assent and was applicable within the state over the central Act. Further, a stamp duty is a tax,[38] and hence under Article 265[39], its levy and collection must be by the 'authority of law'[40]. In *VVS Rama Sharma* (supra), there was no charging provision that was considered by the Court that required the payment of stamp duty on insurance policies to the government of UP. Rather, the case was concerned with the interpretation of Rules framed by the state under the central Act. Hence, the final conclusion in that case is differentiable on facts and law from the present case.

31. *Conclusions on this issue*: We have undertaken a detailed analysis of the provisions of the 1952 Act and the Rajasthan Stamp Rules, 1955 that impose stamp duty on insurance policies issued by the appellant within the state. Section 3 of Indian Stamp Act, 1899 as adapted to the state of Rajasthan is the charging provision as per which the appellant must pay stamp duty to the state government on insurance policies executed within the state. The rate at which stamp duty is payable on policies of insurance under the 1952 Act has been adopted from Schedule I of the central Act, in accordance with Entry 91 of List I. The charging provision has thus been validly enacted by the state government under Entry 44 of List III. Therefore, the state government in the present case can impose stamp duty on the issuance

37 *UP Electric Supply Co Ltd v. R.K. Shukla* [1970] 1 SCR 507 : (1969) 2 SCC 400, para 9; *M. Karunanidhi v. Union of India* [1979] 3 SCR 254 : (1979) 3 SCC 431, paras 7-8

38 *Government of Andhra Pradesh v. P. Laxmi Devi* (supra), para 19

39 Article 265 reads as follows:
"***265. Taxes not to be imposed save by authority of law.—****No tax shall be levied or collected except by authority of law.*"

40 *Balaji v. ITO* [1962] 2 SCR 983 : AIR 1962 SC 123; *Municipal Council, Kota, Rajasthan v. Delhi Cloth and General Mills Co. Ltd, Delhi* [2001] 2 SCR 287 : (2001) 3 SCC 654

of insurance policies within its territory and require the payment of such stamp duty by the appellant. Under these circumstances, the commencement of proceedings for recovery of stamp duty under the state law and the rules made thereunder is legal, valid, and justified.

IV. Liability of the Appellant in the Facts of the Present Case:

32. The learned ASG has relied on the letter by the Treasury Officer, Jaipur dated 07.10.1991, the contents of which have been extracted hereinunder:

> "*In reference to above it is to submit that Government of India Insurance Stamp is the property of Central Government, whose supply and distribution is not related with this Department.*"

33. From the contents of the letter, it is clear that the department has admitted the non-availability of India Insurance stamps and has also stated that it is not concerned with their supply and distribution as they are the property of the central government. The appellant submits that due to such representation by the respondent-government, they were compelled to purchase the stamps from Maharashtra, without which they could not have issued the insurance policies in the state of Rajasthan. The High Court, in the impugned judgment, has held that the correspondence of the appellant with the department pertained to Agents License Fee stamps.[41] However, it has evidently not taken note of the letter dated 07.10.1991 while arriving at such finding. The High Court has therefore erred in this regard.

34. Further, the High Court has held that even if the stamps were unavailable, the appellant was duty-bound to pay the stamp duty to the state government in cash as provided under Section 3A(1) of the 1952 Act.[42] The relevant portions of Section 3A have been extracted:

> "***3A. Payment of stamp duty in cash**.— (1) Where the State Government or the Collector under instructions of the State Government, by order published in the Official*

41 Impugned judgment, p. 15

42 Impugned judgment, p. 15

Gazette, declares that adhesive or impressed stamps of any denomination are not in stock for sale in sufficient quantity; then, notwithstanding anything contained in this Act or the rules made thereunder and during the period the said order remains in force,—

(i) any instrument chargeable with the stamp duty under this Act may be executed on an unstamped paper;

(ii) the stamp duty chargeable on such instrument under this Act may be paid to or collected by any Government treasury in cash and a receipt or challan therefor shall be duly given by the officer receiving the cash;

(iii) the officer-in-charge of the Government treasury shall, as soon as may be, after the stamp duty chargeable on any such instrument under this Act has been received in cash, make on the instrument for which the stamp duty has been paid in cash, the following endorsement, after due verification that the stamp duty had been paid in cash for such instrument, and after cancelling such receipt or challan so that it cannot be used again, namely:-

'Stamp duty of Rs. ……paid in cash, vide receipt/challan No.……..dated……

(iv) the instrument endorsed under clause (iii) shall be deemed to be duly stamped under this Act and may be used or acted upon as such to all intents and for all purposes;

Explanation.- For the purposes of sub-section (1) "Government treasury" includes a Government sub-treasury and any other place as the State Government may by notification in the Official Gazette, appoint in this behalf.

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(4) Nothing contained in this section shall apply to the payment of stamp duty chargeable on the instruments specified in entry 91 of List I of the Seventh Schedule to the Constitution of India."

35. However, the High Court entirely failed to consider sub-section (4),

despite quoting it, which excludes instruments under Entry 91, List I from the application of Section 3A. Therefore, the High Court has committed an error in holding that the appellant could have paid the stamp duty in cash.

36. In view of the above circumstances, the appellant had no choice but to purchase the insurance stamps from outside the state. While it made every endeavour to purchase the stamp from within the state, due to the letter by the department and the lack of mechanism for payment of stamp duty under the 1952 Act in case of unavailability of insurance stamps, it was unable to purchase the stamps and pay the stamp duty to the Rajasthan government.

37. Therefore, having considered the matter in detail, we finally hold that:

    I. The preliminary issue relating to the applicability of the relevant state law, i.e., the 1952 Act or the 1998 Act, is answered by holding that the Rajasthan Stamp Law (Adaption) Act, 1952 applies to the present case.

    II. We hold that the state legislature has the legislative competence to impose and collect stamp duty on policies of insurance under Entry 44 of List III, as per the rate prescribed by the Parliament under Entry 91 of List I.

    III. We hold that for the execution of insurance policies within the state of Rajasthan, the appellant is bound to purchase India Insurance Stamps and pay the stamp duty to the state of Rajasthan.

    IV. While we have upheld the power and jurisdiction of the state to levy and collect stamp duty on insurance policies, in the facts and circumstances of the case as indicated hereinabove, we direct that the state government shall not demand and collect the stamp duty as per the orders dated 16.09.2004, 16.10.2004, 11.10.2004, 01.11.2004, and 28.10.2004.

38. In conclusion, we dismiss the appeals and affirm the judgment of the High Court dated 21.02.2011 in D.B. Civil Special Appeal (Writ) No. 670 of 2004, D.B. Civil Writ Petition No. 3418 of 2006, D.B. Civil Writ Petition No. 3419 of 2006, D.B. Civil Writ Petition No. 3420 of 2006 and D.B. Civil Writ Petition No. 8187 of 2004. We also set aside certain findings of the High Court to the extent indicated in

issue no. IV and direct the State Government not to demand and collect stamp duty as per the orders dated 16.09.2004, 16.10.2004, 11.10.2004, 01.11.2004, and 28.10.2004.

39. Parties shall bear their own costs.

Headnotes prepared by: Divya Pandey

Result of the case:
Appeals dismissed.