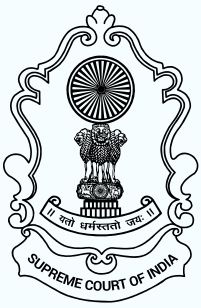

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Contents

[2024] 5 S.C.R. 271 : 2024 INSC 354

Commissioner of Central Excise Belapur
v.
Jindal Drugs Ltd.

(Civil Appeal No. 1121 of 2016)

30 April 2024

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

Issue for Consideration

The issue for consideration is whether an activity of re-labelling of goods i.e. cocoa butter and cocoa powder, by affixing additional labels on both the sides of the packs containing goods, amounts to "manufacture" in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985, for availing the CENVAT Credit and rebate on the duty paid while exporting the said goods.

Headnotes

Central Excise Tariff Act, 1985 – Note 3 to Chapter 18 – Cocoa and Cocoa preparations – Whether re-labelling amounts to 'manufacture' as per Section 2(f) of the Act – Explained:

Held: Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985 (post amendment), which deals with Cocoa and Cocoa Preparations contemplates that if any of the three processes are satisfied, then the activity shall amount to 'manufacture', viz., (i) labelling or re-labelling of containers; or (ii) repacking from bulk packs to retail packs; or (iii) the adoption of any other treatment to render the product marketable to the consumer – In the present case, while upholding the decision of the Customs, Excise and Service Tax Appellate Tribunal, it was held that the activity carried out by the Respondent of relabelling on both sides of the packs containing the goods and thereafter, introducing in the market or sending it for export, amounts to 'manufacture' in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985. [Para 13.3, 15]

Central Excise Tariff Act, 1985 – Amendment to Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985 – Replacing the words 'or' by 'and' – Interpretation of:

Held: By way of the amendment in 2008, the word 'and' was replaced by the word 'or' between the expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs' – Prior to 01.03.2008, the legislative intent was quite clear – The process to

* Author

constitute manufacture should either be labelling or re-labelling of containers and repacking from bulk packs to retail packs – This process was construed to be one whole – In other words, the activity should not only include labelling or re-labelling of containers but the same should relate to repacking from bulk packs to retail packs – This was one activity – However, after the amendment i.e. post 01.03.2008, Note 3 has undergone a change – Now because of substitution of the word 'or' in place of the word 'and' between the two expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs', the earlier composite process of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two independent processes – Labelling or re-labelling of containers is one process and repacking from bulk packs to retail packs has now become another process – Therefore, instead of two activities, Note 3 now contemplates three activities – The composite activity of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two activities i.e. labelling or re-labelling of containers is one and the other is repacking from bulk packs to retail packs. [Paras 13.2, 13.3]

List of Acts

Central Excise Tariff Act, 1985.

List of Keywords

Manufacturing Activity; Re-labelling, CENVAT Credit, Rebate, Indirect Tax.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.1121 of 2016

From the Judgment and Order dated 16.04.2015 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal No. E/86389/13-MUM

With

Civil Appeal Nos. 788-790 of 2022

Appearances for Parties

Rupesh Kumar, Sr. Adv., Mukesh Kumar Maroria, Keval Babubhai Rathod, Shamik Sanjanwala, Shyam Gopal, Sughosh Subramanyam, Rohit Verma, B. Krishna Prasad, Advs. for the Appellant.

V. Sridharan, Sr. Adv., Prakash Shah, Jas Sanghavi, Jasdeep Singh Dhillon, Prabhat Kumar Chaurasia, Yuganthar Singh Chauhan, Rahul Gupta, Prabhat Chaurasia, Yugantar Singh Chauhan, Anirudh Jamwal, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgement

Ujjal Bhuyan, J.

Heard learned counsel for the parties.

2. Issue raised in the present batch of appeals is identical. Therefore, the civil appeals were heard together and are being disposed by this common judgment and order.

3. However, Civil Appeal No. 1121 of 2016 was argued as the lead appeal. Therefore, for the sake of convenience, we would refer to the facts of this appeal.

4. This is an appeal by the revenue under Section 35L (1)(b) of the Central Excise Act, 1944 (referred to hereinafter as 'the Central Excise Act') against the order dated 16.04.2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (briefly 'CESTAT' hereinafter) in Appeal No. E/86389/13-Mum. (Jindal Drugs Limited Vs. Commissioner of Central Excise, Belapur).

   4.1. By the impugned order dated 16.04.2015, CESTAT has allowed the appeal filed by the respondent holding that as per Note 3 to Chapter 18 of the Central Excise Tariff Act, 1985 (referred to hereinafter as 'the Central Excise Tariff Act'), the activity of labelling amounted to manufacture and hence the activity of the respondent fell within the ambit of the definition of manufacture as per the said Note. Therefore, the respondent was eligible for availing the cenvat credit of the duty paid by its Jammu unit and was also eligible for rebate on the duty paid by it while exporting its goods. CESTAT further held that there was no suppression by the respondent and, therefore, the extended period of limitation was not available to the department (revenue).

5. Though facts lie within a narrow compass, nonetheless it is necessary to make a brief reference to the relevant facts for a proper perspective.

5.1. Respondent is engaged in the business of exporting cocoa butter and cocoa powder. Its factory at Jammu manufactures cocoa butter and cocoa powder. Respondent has another unit located at Taloja in the State of Maharashtra. Cocoa butter and cocoa powder manufactured at Jammu are received by the respondent's unit at Taloja. In the Taloja unit, respondent affixed two labels on two sides of the packages of the said goods received from its Jammu factory and cleared the same for export on payment of duty and claimed rebate of the duty paid on the exported goods. Further, respondent availed cenvat credit of the duty paid on those two goods at the time of clearance from Jammu. Respondent also imported cocoa butter and cocoa powder from China and Malaysia, receiving the same in its factory at Taloja.

5.2. The factory of the respondent at Taloja was visited by officials of the appellant and it was found that the respondent was only putting labels on the goods brought from Jammu as well as on the imported goods. As the labels were already fixed on the boxes containing the two goods, additional labels affixed by the respondent did not amount to manufacture since affixing of additional label did not enhance the marketability of the goods which were already marketable.

5.3. In such circumstances, appellant issued show cause cum demand notice dated 09.10.2012 to the respondent to show cause as to why the activity of labelling undertaken by the respondent on the product cocoa butter received from the Jammu unit and also on the imported goods should not be held as activities not amounting to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. It was alleged that respondent had wrongly availed cenvat credit amounting to Rs. 23,02,53,752.00 for the period from June, 2008 to July, 2012 which should not be demanded and recovered under Rule 14 of the Cenvat Credit Rules read with Section 11A(1) of the Central Excise Act (since renumbered as Section 11A (4) of the Central Excise Act with effect from 08.04.2011). It was further alleged that rebate claims amounting to Rs. 13,22,30,368.00 for the period from June, 2008 to July, 2011, were erroneously sanctioned and utilised by the respondent which should not be demanded and recovered under Section 11A(1) of the Central

Excise Act (since renumbered as Section 11A(4) of the Central Excise Act with effect from 08.04.2011). Respondent was also called upon to show cause as to why interest at the appropriate rate on the cenvat credit wrongly availed of and utilised as determined and demanded should not be recovered from it under the provisions of Rule 14 of the Cenvat Credit Rules, 2004 read with Section 11AB of the Central Excise Act (now Section 11AA of the said Act with effect from 08.04.2011).

5.4. Respondent submitted written reply dated 08.02.2013 denying all the allegations made in the show cause notice.

5.5. Following adjudication, the appellant *vide* the order in original dated 25.02.2013 held that cocoa butter received by the respondent at its Taloja unit from its unit at Jammu as well as the imported cocoa butter were already packed in corrugated boxes of 25Kg each. The exported cocoa butter was also in corrugated boxes of 25Kg each. Hence no repackaging activity was undertaken either on the goods received from the Jammu unit or on the imported cocoa butter. Appellant further held that the goods received from the Jammu unit already contained a label. On receipt of the goods at Taloja, two more labels on two sides of the carton were affixed. Appellant concluded that it was a case of additional labelling and not relabelling. Therefore, such labelling at Taloja did not amount to manufacture. After holding that Rule 3 of the Cenvat Credit Rules, 2004 (hereinafter referred to as 'the Cenvat Credit Rules') allows cenvat credit only in a case where the process undertaken amounts to manufacture, respondent held that the process of labelling undertaken by the respondent in its unit at Taloja did not amount to manufacture. Therefore, the cenvat credit availed of by the respondent was contrary to Rule 3 of the Cenvat Credit Rules. Hence, the credit of Rs. 23,02,53,752.00 availed of by it was irregular which was liable to be recovered under Rule 14 of the Cenvat Credit Rules read with Section 11A(1) of the Central Excise Act. Further, appellant held that the respondent had already utilised part of the irregular credit availed of and claimed rebate of Rs. 13,22,30,368.00 during the period from June, 2008 to July, 2012. As the credit availed of was irregular, the rebate sanctioned was erroneous since the respondent was not entitled to take the credit and to utilize the same. Therefore, it was held

that the erroneous refund of Rs. 13,22,60,368.00 was liable to be recovered on which the respondent was also liable to pay interest under Section 11AB/Section 11AA of the Central Excise Act. Proceeding further, appellant held that respondent had suppressed the information from the department that it was only undertaking labelling activity at its Taloja unit which did not amount to manufacture. Thus, with the intention to avail irregular credit, respondent had suppressed the information and claimed that the process undertaken by its unit at Taloja amounted to manufacture. Therefore, there was suppression of material fact with the intent to avail irregular credit. Hence, the respondent was held liable to pay penalty equivalent to the irregular credit availed of under Rule 15(2) of the Cenvat Credit Rules read with Section 11AC of the Central Excise Act. Thereafter, appellant passed the following order:

1. credit of Rs. 23,02,53,752.00 (Rupees twenty three crores two lakhs fifty three thousand seven hundred fifty two only) was wrongly availed and therefore demanded under provisions of Rule 14 of Cenvat Credit Rules read with Section 11A(4) (erstwhile Section 11A(1) of the Central Excise Act.

2. rebate of Rs. 13,22,30,368.00 (Rupees thirteen crores twenty two lakhs thirty thousand three hundred sixty eight only) sanctioned during the period from June 2008 to July 2012 was erroneous as the duty on the exported goods were paid by utilizing the regularly availed credit which was not eligible to the assessee. Hence, the same was demanded under Section 11A(1)/Section 11A(4) of Central Excise Act.

3. interest at the appropriate rate under Rule 14 of the Cenvat Credit Rules read with Section 11AA (erstwhile Section 11AB) of the Central Excise Act, was demanded on the irregular credit availed/erroneous rebate sanctioned.

4. penalty of Rs. 23,02,53,752.00 (Rupees twenty three crores two lakhs fifty three thousand seven hundred fifty two only) under the provisions of Rule 15(2) of Cenvat Credit Rules read with Section 11AC(1)(a) of the Central Excise Act was imposed. However, the penalty would be

reduced to 25% of the above amount if the assessee paid the duty determined along with interest within 30 days of receipt of the order. The reduced penalty of 25% of the amount of duty so determined would be available to the assessee only if the 25% of the penalty was also paid within the period of thirty days of receipt of the order. Otherwise, the penalty imposed under Section 11AC(1)(a) equal to the duty amount would remain.

5.6. Aggrieved by the aforesaid order in original passed by the appellant, respondent preferred appeal before the CESTAT. After hearing the matter, both Judicial Member and Technical Member passed separate orders on 05.01.2015.

5.7. In his order, the Judicial Member recorded that the respondent after clearing the goods in its Jammu unit, received the same in its factory at Taloja and claimed the benefit of notification No. 56/2002-CE(NT) dated 14.11.2002. As per the said notification, the Jammu unit was entitled to refund of the duty paid whereas the Taloja unit was also entitled to avail cenvat credit of the duty paid by the Jammu unit. Judicial Member noted that after receiving the goods at Taloja, respondent affixed two labels on the packages on two different sides and thereafter exported the goods. After referring to the show cause cum demand notice, the Judicial Member opined that the only issue for consideration was whether the labelling/re-labelling or putting additional labels on the containers in the Taloja unit amounted to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. As per Note 3, in relation to products of Chapter 18, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render a product marketable to the consumer shall amount to manufacture. Judicial Member opined that all the three activities are independent and separate. Note 3 to Chapter 18 is a deeming provision whereby the processes mentioned therein, if carried out, would amount to manufacture though there may not be any actual manufacture. In the above context, the Judicial Member held that activities of labelling or re-labelling of containers without enhancing marketability amounted to manufacture. A reading of Note 3 would clearly indicate that the activity of labelling or re-labelling of the containers amounted to manufacture.

Thereafter, it was held that both the Jammu unit and the Taloja unit of the respondent are separate units. Therefore, it could not be said that respondent was availing double benefit. The Taloja unit had rightly availed the cenvat credit of the duty paid at Jammu as well as the countervailing duty paid for the imported goods. Consequently, the rebate claim was correctly sanctioned to the respondent. Therefore, the respondent had rightly availed of the cenvat credit. Since the issue, whether the activity of labelling or re-labelling amounted to manufacture as per Note 3 to Chapter 18 of the Central Excise Tariff Act was related to interpretation of a statutory provision, question of any suppression or misrepresentation of fact by the respondent did not arise. Hence, question of getting the benefit of any extended period of limitation by the appellant for issuing show cause cum demand notice and thereafter passing adjudication order did not arise. In the above background, the Judicial Member set aside the order in original dated 25.02.2013.

5.8. However, the Technical Member did not agree with the view taken by the Judicial Member. He held that no manufacture had taken place in the Taloja unit of the respondent both in respect of the goods manufactured at Jammu as well as the imported goods. He further held that the activity of the respondent in bringing the goods from Jammu to Taloja and thereafter to affix labels so as to avail the benefit of Note 3 to Chapter 18 was not known to the department. Therefore, it was a case of misrepresentation of facts with the intent to avail rebate fraudulently. Consequently, the extended period of limitation was available to the department. That being the position, the Technical Member was of the view that the order in original was justified on all counts and dismissed the appeal.

5.9. In view of the difference of opinion between the Judicial Member and the Technical Member, the matter was placed before the President of CESTAT to nominate a third member to resolve the same.

5.10. Thereafter, pursuant to the order passed by the President, the matter was placed before the third member to resolve the difference of opinion between the Judicial Member and the Technical Member.

5.11. After hearing the matter, the third member passed the order dated 16.04.2015. Referring to Note 3 to Chapter 18, both prior to 01.03.2008 and post 01.03.2008, the third member noted that Parliament has consciously substituted the word 'or' in place of 'and' appearing between the words 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs' to widen the scope of Note 3. According to the third member, any one of the three activities referred to in Note 3 i.e. (i) labelling or re-labelling, (ii) packing or repacking from bulk and retail packing and (iii) adoption of any other treatment to render a product marketable would be deemed to be manufacture. He held that the activity undertaken by the respondent at its Taloja unit i.e. labelling amounted to manufacture. He negated the stand of the revenue that labelling or re-labelling should enhance marketability of the goods as contrary to the plain reading of Note 3. He, therefore, agreed with the Judicial Member that the activity of labelling undertaken by the respondent is covered by Note 3 to Chapter 18 of the Central Excise Tariff Act which amounts to manufacture. Further, he also recorded a finding of fact based on the evidence on record that respondent had repacked the imported cocoa butter in new cartons and exported them after labelling. He thus fully concurred with the view expressed by the Judicial Member that the activity of labelling undertaken by the respondent amounted to manufacture in terms of Note 3 to Chapter 18 of the Central Excise Tariff Act. He also concurred with the view expressed by the Judicial Member that there was no suppression or misrepresentation of material fact by the respondent. Therefore, the extended period was not available to the revenue. He further held that the respondent is entitled to the credit of the duty paid on the goods received from the Jammu unit as well as credit of the countervailing duty paid on the imported goods. That being the position, he held that the credit and the rebate were rightly availed of by the respondent. Question of refund of the same did not arise. Further, no penalty can be imposed on the respondent.

5.12. Following the opinion rendered by the third member, the matter was placed before the two-member Bench of CESTAT. In view of the majority decision, the appeal filed by the respondent was allowed *vide* the order dated 16.04.2015.

6. This Court by the order dated 08.02.2016 had issued notice. Thereafter, the appeal was admitted on 18.11.2019.

7. Respondent has filed counter affidavit supporting the order of CESTAT and has sought for dismissal of the appeal. In response thereto, appellant has filed rejoinder affidavit reiterating the grounds urged in the appeal.

8. Learned counsel for the appellant has laid great emphasis on the fact that the activity undertaken by the respondent at its Taloja unit i.e. putting labels on the two sides of the cartons which were already labelled at Jammu, cannot be said to be a manufacturing activity. Note 3 to Chapter 18 of the Central Excise and Tariff Act cannot be read in a manner to hold that the activity of labelling amounted to manufacture. Learned counsel, therefore, contended that appellant was fully justified in passing the order in original. CESTAT was divided in its opinion as to whether such an activity could be termed as manufacture. The Technical Member had given good reasons as to why such an activity cannot be called manufacture while differing from the view taken by the Judicial Member. The third member has erred in concurring with the view taken by the Judicial Member. He, therefore, submits that the order passed by the CESTAT by way of majority should be interfered with and order in original should be restored.

9. Mr. V. Sridharan, learned senior counsel in his brief submission referred to Note 3 to Chapter 18 of the Central Excise Tariff Act, both prior to its amendment with effect from 01.03.2008 and post amendment. According to him, Parliament has consciously replaced the word 'and' by the word 'or' and post amendment, it is clear that the activity of labelling or re-labelling amounted to manufacture. He, therefore, supports the decision of the CESTAT and seeks dismissal of the appeal.

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

11. The core issue to be considered is whether the activity of labelling carried out by the respondent amounts to manufacture? While contention of the appellant is that the same does not amount to manufacture, on the other hand according to the respondent, as per Note 3 to Chapter 18 of the Central Excise Tariff Act, the above activity amounts to manufacture.

12. The Central Excise Act which has since got subsumed in the Central Goods and Services Tax Act, 2017 was enacted to provide for levy of central duties of excise on goods manufactured or produced in India and for matters connected therewith or incidental thereto.

12.1. Section 2 is the definition clause. 'Manufacture' is defined in Section 2(f) which reads as follows:

> "manufacture" includes any process,-
>
> (i) incidental or ancillary to the completion of a manufactured product;
>
> (ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act (5 of 1986) as amounting to manufacture; or
>
> (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,
>
> and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

12.2. Therefore, the word 'manufacture' includes any process which is incidental or ancillary to the completion of a manufacture product; any process which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act as amounting to manufacture; or any process which in relation to the goods specified in the Third Schedule involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer.

13. Chapter 18 of the Central Excise Tariff Act deals with cocoa and cocoa preparations. Note 3 to Chapter 18 has undergone amendment with effect from 01.03.2008. Prior to the amendment, Note 3 to Chapter 18 read as under:

In relation to products of this Chapter, labelling or re-labelling of containers and repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

13.1. Post 01.03.2008, Note 3 now reads as follows:

In relation to products of this Chapter, labelling or re-labelling of containers or repacking from bulk packs to retail packs or the adoption of any other treatment to render the product marketable to the consumer, shall amount to 'manufacture'.

13.2. Thus by way of the amendment, the word 'and' has been replaced by the word 'or' between the expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs'. Prior to 01.03.2008, the legislative intent was quite clear. The process to constitute manufacture should either be labelling or re-labelling of containers and repacking from bulk packs to retail packs. This process was construed to be one whole. In other words, the activity should not only include labelling or re-labelling of containers but the same should relate to repacking from bulk packs to retail packs. This was one activity. The other activity was adoption of any other treatment to render the product marketable to the consumer. Therefore, the legislature was quite clear that if either of the two processes were followed, the same would amount to manufacture.

13.3. However, after the amendment i.e. post 01.03.2008, Note 3 has undergone a change as indicated above. Now because of substitution of the word 'or' in place of the word 'and' between the two expressions 'labelling or re-labelling of containers' and 'repacking from bulk packs to retail packs', the earlier composite process of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two independent processes. Labelling or re-labelling of containers is one process and repacking from bulk packs to retail packs has now become another process. Therefore, instead of two

activities, Note 3 now contemplates three activities. As pointed out above, the composite activity of labelling or re-labelling of containers and repacking from bulk packs to retail packs has been split up into two activities i.e. labelling or re-labelling of containers is one and the other is repacking from bulk packs to retail packs. The other activity of adopting any other treatment to render the product marketable to the consumers remains the same. Therefore, Note 3, post amendment, as it exists today contemplates three different processes; if either of the three processes are satisfied, the same would amount to manufacture. The three processes are:

(i) labelling or re-labelling of containers; or

(ii) repacking from bulk packs to retail packs; or

(iii) the adoption of any other treatment to render the product marketable to the consumer.

13.4. As already observed above, if any one of the above three processes is satisfied then the same would amount to manufacture.

14. We have already noticed the definition of 'manufacture' in the Central Excise Act. Any one of the processes indicated in Note 3 to Chapter 18 of the Central Excise Tariff Act would come within the ambit of the definition of 'manufacture' under Section 2(f)(ii) of the Central Excise Act.

15. There is no factual dispute as to the activity carried out by the respondent at its Taloja unit. Whether the goods are brought from the Jammu unit or are imported, those are relabelled on both sides of the packs containing the goods at the Taloja unit of the respondent and thereafter, introduced in the market or sent for export. In terms of Note 3 to Chapter 18, this process of re-labelling amounts to 'manufacture'.

16. That being the position, we are of the considered opinion that the view taken by CESTAT is the correct one and no case for interference is made out. This is because all the other aspects are related and hinges upon the core issue. Resultantly, the impugned order of CESTAT dated 16.04.2015 is affirmed and the appeal by the revenue is dismissed.

17. In view of the above decision, Civil Appeal Nos. 788-790 of 2022 would also stand dismissed.

18. However, there shall be no order as to costs.

Headnotes prepared by:
Prastut Mahesh Dalvi, Hony. Associate Editor
(*Verified by:* Abhinav Mukerji, Sr. Adv.)

Result of the case:
Appeals dismissed

[2024] 5 S.C.R. 285 : 2024 INSC 356

New India Assurance Company Ltd. Through its Manager v. M/s Tata Steel Ltd.

(Civil Appeal No. 2759 of 2009)

30 April 2024

[Surya Kant and K.V. Viswanathan,* JJ.]

Issue for Consideration

A claim for 35.08 crores was filed by the insured after the '20 Hi Cold Rolling Mill' was totally destroyed due to fire. Since running of the company was important, the Insured got a new 6 Hi Cold Rolling Mill installed in its unit and commenced production. Admittedly, based on the interim report of the surveyors, a sum of Rs.4,92,80,905/- was released in favour of the Insured by NIACL-insurer. Thereafter, the Insured gave consent for receiving Rs.20.95 Crores as net adjusted loss. However, the NIACL computed depreciation at 60% and settled the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores. The issues arising for consideration are as follows: (i) Was the Reinstatement Value Clause part of the policy; (ii) Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%; (iii) Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in Oswal Plastic Industries.

Headnotes

Insurance – Reinstatement value clause – Whether the memorandum consisting of the Reinstatement Value Clause was a part of the policy – The Insured contended that the memorandum containing the Reinstatement Value Clause was not part of the policy:

Held: The contention of the insured rejected – This is for the reason that before the NCDRC in the written statement filed by the NIACL it was specifically pleaded that copy of the fire policy was not attached with the Reinstatement Value Clause issued along with the policy, so the answering Respondent-insurer (NIACL) was filing the copy of the policy with complete terms and conditions and clauses along with the written statement – In the replication filed by the Insured, there was no denial of this averment. [Paras 31 and 32]

* Author

Insurance – Computation of loss on depreciation basis – Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%:

Held: It emerges clearly that under the main terms of the policy the company was to pay the Insured the value of the property at the time of happening of the destruction (except where NIACL opts to reinstate) – There was a special memorandum attached to the policy – That memorandum was the Reinstatement Value Clause which substituted the basis upon which the amount was payable from the value on the date of destruction to the cost of replacing or reinstating the property i.e. property of the same kind or type but not superior or more extensive than the insured property when new – However, as it transpires the said memorandum ceased to have any force since the Insured was unable and unwilling to replace or reinstate the property – Special Provision 4 (b) of the memorandum applied and rendered the Reinstatement Value Clause ineffective – Also, the Insured under Clause 6(b) of the conditions had an obligation to give NIACL all such further particulars, plans, specifications, books, vouchers and invoices with respect to the claim – It is sufficiently brought out that in spite of the surveyors writing to the Insured repeatedly (on 14.12.1998, 03.05.2002, 24.06.2002 and 07.08.2002), there was no information forthcoming from the Insured about the invoices as proof of the value of the damaged equipment and the cost of the new equipment – Instead, the insured originally undertook that they will reinstate the damaged property; received the on account payment of Rs.4,92,80,905/- and informed NIACL that they have placed order for repair of 20 Hi Cold Rolling Mill – Thereafter by their letter of 16.06.1999, the Insured sought assessment of net adjusted loss at Rs.20.95 Crores – The surveyors of NIACL kept asking for the basic and relevant particulars, the Insured without furnishing the same kept asking for the settlement of the money – NIACL did not completely repudiate the claim – NIACL cannot be faulted for resorting to depreciation method – NIACL was also justified in writing the letter of 12.11.2002 (to increase the depreciation to 60%) because after reviving the demand to reinstate the plant, the Insured failed to furnish the documents required and even admittedly the plant as allegedly reinstated was of 6 Hi Cold Rolling Plant and not 20 Hi Cold Rolling Plant – An additional affidavit was also filed by NIACL before NCDRC to clarify the established practice for computing depreciation – The base figure of Rs. 20.09 crores was kept intact – Insured stood to gain by keeping figure at Rs. 20.09

crores – The depreciation at 60% upheld – Thus, the NIACL rightly ordered the settlement of the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores and ordering the balance amount of 2.88 crores be paid after adjusting the on account payment. [Paras 57, 58, 59, 66, 68, 69, 70, 71]

Insurance – Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in Oswal Plastic Industries:

Held: No clause similar to the memorandum of reinstatement value clause appears to have existed in Oswal Plastic Industries – Oswal Plastic Industries has no application to the facts of the present case. [Para 75]

Case Law Cited

Oswal Plastic Industries v. Manager, Legal Deptt N.A.I.C.O. Ltd. [2023] 1 SCR 985 **: 2023 SCC OnLine SC 43;** *Sri Venkateswara Syndicate v. Oriental Insurance Co. Ltd.* [2009] 14 SCR 57 **: (2009) 8 SCC 507;** *Dharmendra Goel v. Oriental Insurance Co. Ltd.* [2008] 11 SCR 578 **: (2008) 8 SCC 279;** *Sumit Kumar Saha v. Reliance General Insurance Company Ltd.* [2019] 1 SCR 763 **: (2019) 16 SCC 370 – held inapplicable.**

List of Acts

Insurance Act, 1938; IRDA (Protection of Policyholders' Interests) Regulations, 2002.

List of Keywords

Insurance; Reinstatement value clause; Report of the surveyors; Net adjusted loss; Consumer Complaint; Depreciation; Computation of loss on depreciation basis; Cost of replacing or reinstating the property.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2759 of 2009

From the Judgment and Order dated 05.08.2008 of the National Consumers Disputes Redressal Commission, New Delhi in CC No. 233 of 2000

With

Special Leave Petition (Civil) No. 10001 of 2009 and Civil Appeal Nos. 5242-5243 of 2009

Appearances for Parties

Joy Basu, Sanjay Jain, Sr. Advs., Ms. Nandini Gore, Ms. Sonia Nigam, Akhil Abraham Roy, Mohammad Shahyan Khan, Arvind Thapliyal, Siddhant Grover, Surya Kapoor for M/S. Karanjawala & Co., Vishnu Mehra, Ms. Manjeet Chawla, Ms. Harshita Sukhija, Nishank Tripathi, Yuvraj Sharma, Ms. Palak Jain, Mrs. Manik Karanjawala, Mrs. Usha Pant Kukreti, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

K.V. Viswanathan, J.

1. Leave granted in SLP (Civil) No. 10001 of 2009.

2. I.A. No. 48152 of 2022 in Civil Appeal No. 2759 of 2009 is filed by the Respondent [earlier known as M/s Bhushan Steel and Strips Ltd, hereinafter referred to as the "**Complainant**" or the "**Insured**"] seeking change of its name in the proceedings to 'Tata Steel Ltd'. The Complainant/Insured has filed similar IAs in the connected appeals filed by it. It is stated that the name of the Complainant/Insured was changed to 'Bhushan Steel Ltd' in the year 2007. Thereafter while these appeals were pending, the company underwent a Corporate Insolvency Resolution Process and was successfully taken over by 'Tata Steel Ltd' on 27.11.2018 and was renamed as 'Tata Steel BSL Ltd'. Thereafter, it is seen that the Complainant/ Insured further underwent a merger/amalgamation and was finally merged/amalgamated with 'Tata Steel Ltd' w.e.f. 11.11.2021. In view of the said facts, all the applications for change of name are allowed.

3. These are four Civil Appeals arising out of the proceedings in Original Petition No. 233 of 2000 before the National Consumer Disputes Redressal Commission, New Delhi ["**NCDRC**"].

4. Civil Appeal No. 2759 of 2009 has been filed by the New India Assurance Company Limited [hereinafter referred to as "**NIACL**" or the "**Insurer**" or the "**Insurance Company**"] challenging the order dated 05.08.2008 of the NCDRC. By the said order, the NCDRC partly allowed the complaint of the Insured. The NCDRC awarded an amount of Rs.13,15,27,000/- with interest at 10% per annum from the expiry of two months since the submission of survey report dated

11.12.2001, payable to the Insured. The amount already paid by the Insurance Company was ordered to be adjusted and a cost of Rs. 50,000/- was also awarded to the Insured. NIACL, in this Appeal, is aggrieved with the finding that the Complainant's claim must be settled, based on calculating depreciation at the rate of 32% - and not 60%.

5. The Civil Appeal arising out of SLP(Civil) No. 10001 of 2009 has been filed by the Insured/Complainant. The grievance here is against the dismissal of Misc. Application No. 298 of 2008 in Original Petition No. 233 of 2000 seeking review of the order dated 05.08.2008.

6. Civil Appeal Nos. 5242-5243 of 2009 have been filed by the Insured/ Complainant against the main order dated 05.08.2008 (passed in O.P. No. 233 of 2000) and order dated 29.08.2008 (allowing the application for rectification and correcting the figure awarded to Rs. 13,51,27,000/- instead of Rs. 13,15,27,000/-) respectively.

7. The grievance pleaded by the Insured/Complainant in its connected appeals is that the compensation awarded ought to have been greater because, according to it, the base figure on which the depreciation of 32% was computed should have been Rs.28 Crores and not Rs.20,09,95,000/-. The claim was that, so computing, the amount payable by NIACL should have been Rs. 18.91 Crores.

Brief Summary of Facts:

8. The Insured had taken an insurance policy from NIACL for the entire machinery and equipment of its mill by paying a premium of Rs.62,09,655/-. The policy was for the period 29.09.1998 to 28.09.1999. According to the Insured, due to a fire accident on 12.12.1998, the '20 Hi Cold Rolling Mill' fitted with imported equipment was fully destroyed resulting in a loss of Rs. 35.08 crores. The incident of fire was intimated to NIACL on 12.12.1998 itself. Surveyors 'M/s R.K. Singhal and Company Pvt. Ltd.' and subsequently 'M/s A.K. Govil and Associates' and 'M/s P.C. Gandhi' were appointed by NIACL. A claim for Rs. 35.08 crores was filed on 29.01.1999. According to the Insured, this was based upon the quotations received from various manufacturers of the said machinery and the complete details of cost for replacing and/or repairing the machines.

9. The Insured also pleaded that since the running of the company was important, it got a 6 Hi Cold Rolling Mill installed in its unit and commenced production by spending Rs.29.60 crores apart from excise duties.

10. Admittedly, based on the interim report of the surveyors, a sum of Rs.4,92,80,905/- was released in favour of the Insured by NIACL on 24.03.1999. According to the Insured, after the release of the amount, it placed an order with 'M/s Flat Products Equipments (India) Limited' ["**M/s Flat Products**"] for reinstating the 20 Hi Cold Rolling machine by replacing the totally damaged and partially damaged parts for a total sum of Rs.25 crores, and paid Rs.3,75,00,000/- to M/s Flat Products by way of advance payment. Further, a sum of Rs.47.50 lacs on account of inspection charges of mill housing and Rs. 25 lacs for transportation of mill housing were also paid. According to the Insured, though it lost more than Rs. 25 crores, in view of the persistence from the Insurance Company, vide letter dated 16.06.1999, it gave consent for receiving Rs.20.95 Crores as net adjusted loss to avoid loss of time.

11. According to the Insured, since no response was forthcoming and the balance amount was not released, Consumer Complaint bearing Case No. 233 of 2000 was filed by the Insured before the NCDRC on 30.05.2000.

12. According to NIACL, after receipt of the information about the fire accident on 12.12.1998, NIACL immediately appointed the surveyors and soon thereafter, on the basis of the interim survey report, on-account payments were made. The Joint Surveyors submitted their report on 11.12.2001. The vigilance complaints were also closed on 18.01.2002.

13. According to NIACL, it was only on 27.03.2002 that the Insured informed NIACL about the fact of having already installed a new 6 Hi Cold Rolling Mill and requested them for joint inspection with the surveyors. In the Joint Surveyors' Report of 11.12.2001, the loss was assessed at Rs.19.55 crores on replacement basis and Rs.13.51 crores on depreciation basis. The surveyors, on 03.05.2002, requested the Complainant to furnish several information for which there was no response. It was contended by NIACL that the plea of the Insured in their letter of 27.03.2002 that it had placed an order for cold rolling mill on 11.01.1999 and the same was installed in

September-October, 1999 at the cost of Rs. 31.37 crores and the prayer that the replacement should be treated as reinstatement, is completely unacceptable. The machine installed is 6 Hi Cold Rolling as against the damaged mill which was 20 Hi Cold Rolling. According to NIACL, the claim has been rightly settled at Rs.7.88 Crores.

Proceedings before the NCDRC:

14. Though several other points were argued before us by the Insured, the point canvassed before the NCDRC [and pleaded in the Insured's connected Appeals] related only to the calculation of depreciation. The argument taken by the Insured before the NCDRC was that NIACL was not justified in computing depreciation at 60% while the surveyors in the reports had recommended 32% as depreciation. The NCDRC observed that the effort by the Insured to install a lesser capacity 6 Hi Cold Rolling Mill was an *effort in desperation*. It also found the claim to be genuine. Addressing the issue of depreciation, it held that after the initial recommendation in the Joint Surveyors' Report dated 11.12.2001 of computing 32% depreciation, the surveyors were persuaded by the letter of the Insurance Company dated 12.11.2002 to increase the depreciation to 60%. An additional affidavit was called for from the NIACL to justify the depreciation at 60%. After perusing the affidavit, the NCDRC held that there were no standard guidelines for calculating depreciation and that it had been calculated differently for different units. According to the NCDRC, the affidavit quoted the instances of very high depreciation just to suit the convenience of NIACL. It may be mentioned that the affidavit relied on certain cases where depreciation was computed at a maximum rate up to 75% - 80%. The NCDRC held that the issuance of the letter of the Insurance Company to the Surveyors seeking revision of calculation was issued eleven months after the Joint Surveyors' Report dated 11.12.2001 and that this was not a healthy practice. So holding, it maintained the depreciation at 32% and directed the payments as noted above.

Appeal to this Court:

15. The appeal by NIACL seeks depreciation to be fixed at 60%. The Insured also in its appeals has focused only on the issue of depreciation with the argument being that the base figure on which 32% depreciation was calculated should have been Rs.28 crores and not Rs.20.09 crores. There are no other grounds raised in the memo of the appeal.

16. However, the Insured during the course of submission, while candidly admitting that no other point had been raised in the memo of appeal, relied on the judgment in ***Oswal Plastic Industries v. Manager, Legal Deptt N.A.I.C.O. Ltd.*****, [2023 SCC OnLine SC 43]** to contend that the reinstatement value should have been awarded in full and that in the case of reinstatement value no question of depreciation arises. This argument has been dealt with herein below at an appropriate stage.

Contentions of NIACL:-

17. Appearing for NIACL, learned Senior Counsel Mr. Sanjay Jain contended that the insurance policy had a special condition in the form of Reinstatement Value Clause; that there are two methods of settlement of a claim depending on the nature of the policy, namely, the reinstatement value basis and market value basis (or depreciation basis); that under the Reinstatement Value Clause, the method of indemnity was to be the "cost of replacing or reinstating the same i.e. property of the same kind or type but not superior or more extensive than the insured property when new"; that the reinstatement was to be carried out by the Insured within 12 months or within such further extended time; that para 2 of the Special Provisions provided that until expenditure has been incurred by the Insured in replacing/ reinstating the damaged property, the Insurance Company shall not be liable to pay any amount in excess of the amount which would have been payable under the policy, if the said reinstatement clause had not been incorporated; para 4 of the Special Provisions provided that if the Insured expressed its intention to replace/reinstate the damaged property and the Insured is unable or unwilling to replace the damaged property on the same or another site, the reinstatement clause was to be rendered ineffective.

18. Adverting to the impugned judgment, learned Senior Counsel contended that the findings that (i) the insurer, out of sheer desperation, bought the 6 Hi configuration; (ii) the depreciation rate as calculated by the NIACL was erroneous; and (iii) NIACL's letter to the surveyor asking for a revised calculation was not a healthy practice, are all erroneous findings which are completely untenable. According to learned Senior Counsel, the Insured in violation of the undertaking did not take any steps for reinstatement; that there was no delay on the part of the Insurance Company and in fact on account payment of Rs. 4,92,80,905/- had been released as early as

on 24.03.1999; that the NCDRC overlooked the fact that the Insured did not comeback to the Insurance Company with any information for about 08 months and only on 26.11.1999, followed by another letter of 10.02.2000 asked for extension of time limit for reinstatement of the insured property; that the same was accommodated by the NIACL and on 07.03.2000, an extension of 12 months was given and which time limit period was also not adhered to; that the Insured after receiving the interim payment claimed that Rs. 3.75 crores were advanced to M/s Flat Products and the said vendor neither repaired the insured property nor replaced the same; that nearly two years later on 28.06.2001, M/s Flat Products informed the Insured that they had lost their expertise and, as such, the delay could not be attributed to the NIACL; that the Insured informed the NIACL about having installed a 6 Hi Cold Rolling Mill (as against the insured property of 20 Hi Cold Rolling Mill), on 27.03.2002, without revealing the date of actual installation and without giving any comparable specification, which unilateral act cannot be termed as "an act of sheer desperation" as termed by the NCDRC.

19. It is submitted by the learned Senior Counsel that under the aforesaid circumstances, the Reinstatement Value Clause was rendered inoperative. However, the Insurance Company gave another opportunity to act in good faith and provide necessary specification and particulars, which were not provided for, in spite of the undertaking in the letter of 09.07.2002. Hence, by no stretch of imagination could the delay be attributable to the Insurance Company.

20. Insofar as the percentage of depreciation was concerned, it was contended that the NCDRC erroneously disregarded the affidavit filed by the Insurance Company clarifying the standard practice. On the finding about the practice adopted by the Insurance Company as "not being a healthy practice", Mr. Sanjay Jain submitted that the NIACL gave ample opportunities to provide cogent material and it is only upon their failure to furnish the necessary documents, as obligated in the policy, that NIACL was constrained to settle the claim on market value basis by applying the necessary percentage of depreciation. It was contended that in the report of 11.12.2001, the joint surveyors, while arriving at the depreciation rate of 32%, did not have any material. Therefore, it was a prudent act on the part of the NIACL to arrive at a calculation on the basis of market value with the applicable rates of depreciation, after informing the

surveyors that the reinstatement method was not an option any longer. The learned Senior Counsel submitted that the claim was finally assessed by the surveyors, who in their survey report dated 07.12.2002 and after computing the balance life of ten years arrived at the depreciation rate of 60%. Hence, NIACL's conduct in accepting that report could not be said to be arbitrary. It was argued that there was no disagreement on the surveyor's report.

21. The learned Senior Counsel emphasized that even today, the Insured has no definite proof available with regard to the actual age of the mill and as to when it was procured from its vendor; or under what circumstances and condition the same was procured and other essential details. In this background, the assessment made by the surveyors, who are experts, could not be said to be illegal or untenable. The learned Senior Counsel further submitted that the recommendation of depreciation at 32% was at the stage when no material was forthcoming and was not supported by any cogent material and clarity on this aspect emerged only on the report of 07.12.2002. According to the learned Senior Counsel, ground (D) in Civil Appeal Nos.5242-5243 of 2009 records an admission of the Insured about the NCDRC rightly proceeding on depreciation basis.

22. Learned Senior Counsel submitted that there was no ambiguity and hence there is no room for the applicability of doctrine of *contra proferentem*. The survey report of 11.12.2001 was prepared at a premature stage with all relevant disclaimers. Alternatively, it was submitted that under Section 64 UM (2) of the Insurance Act, 1938, the NIACL was entitled to differ from the recommendation of the surveyor.

23. Learned Senior Counsel strongly refuted the reliance placed in the convenience compilation, by the Insured on the judgment in ***Oswal Plastic Industries* (*supra*)**. Learned Senior Counsel contended that ***Oswal Plastic Industries* (*supra*)** was not a case with the Reinstatement Value Clause as a special condition. Learned Senior Counsel contended that unlike in ***Oswal Plastic Industries* (*supra*),** Clause 9 had no application to the facts of the present case. That in any event documents were not provided by the Insured to NIACL. Dealing with Regulation 9(3) of the IRDA (Protection of Policyholders' Interests) Regulations, 2002 ["**IRDA Regulations**"], learned Senior Counsel submitted that the joint surveyors report dated 07.12.2002 was for all intents and purposes the original surveyors report and as

such Regulation 9(3) assuming it to be mandatory had no application. Alternatively, it was contended that Regulation 9(3) is only directory.

24. Insofar as the cross appeal is concerned, the learned Senior Counsel contended that the claim for the base figure as Rs. 28 crores is absolutely unjustified, there being no cogent material to support the same. In fact, the stand of the Insured was that its vendor M/s Flat Products had expressed its inability due to loss of expertise and the same was conveyed two years after receiving the advance. For all these reasons, the learned Senior Counsel prayed that the appeal of NIACL be allowed and the appeals of the Insured be dismissed.

Contentions of the Insured/Complainant: -

25. Mr. Joy Basu, learned Senior Counsel appearing for the Insured, at the very outset, contended that the memorandum containing the Reinstatement Value Clause was never part of the policy document issued by the NIACL. This memorandum, according to the learned senior counsel, was never received by the Insured. Without prejudice to the same, it is contended that Clause 9 of the conditions in the policy has to be read in conjunction with the Reinstatement Value Clause. Since, as per para 4, the Reinstatement Value Clause got extinguished, Clause 9 of the conditions became applicable.

26. Learned Senior Counsel submitted that in terms of Clause 9 where reinstatement/repair is not possible, the surveyor's assessment of reinstatement has to be complied with. Learned senior counsel relied on the judgment in ***Oswal Plastic Industries*** ***(supra)***. Learned Senior Counsel contended that the interpretation of Clause 9 was laid down only by the ***Oswal Plastic Industries*** ***(supra)*** judgment in January, 2023 and as such the Insured should be allowed to canvass the argument based on ***Oswal Plastic Industries*** ***(supra)***. According to learned Senior Counsel, the inability/failure to reinstate as contemplated in the last part of the Clause 9 is the failure of the NIACL. Learned Senior Counsel further contended that it is only with the hope of an expedited settlement that the Insured accepted the lower figure of Rs. 20.95 Crores. Calculating on reinstatement basis, the surveyors in their report of 11.12.2001 arrived at the figure of Rs. 19.55 crores without application of any depreciation. According to the Insured, the amount further due is Rs.11,80,87,699/-.

27. Alternatively, it is submitted by the learned Senior Counsel that even if the market value basis is to be applied, depreciation has to be calculated on the sum insured of Rs. 80 crores. To support this plea, learned Senior Counsel relied on ***Dharmendra Goel vs. Oriental Insurance Co. Ltd. (2008) 8 SCC 279***. Further, without prejudice, it is contended that if depreciation was not to be calculated on the sum insured, then the depreciation has to be calculated on the cost of the new locally sourced 20 Hi Cold Rolling Machine which would cost Rs. 25 crores plus taxes totaling Rs 28 crores. Further, it is contended that the depreciation rate was 32% as mentioned by the surveyors in their report of 11.12.2001 and NIACL has not adduced any reasons for deviating from the recommendation of the surveyors. Learned Senior Counsel submitted that the surveyor's response of 07.12.2002 was "a reluctant response from an embarrassed surveyor" to the letter of NIACL dated 12.01.2002 which, according to the learned senior counsel, was a letter by the insurer asking the surveyors to compute maximum depreciation. In any event, according to the learned Senior Counsel, the doctrine of *contra proferentem* applied and the interpretation in favour of the Insured should have been adopted. It was argued that there was a breach of Regulation 9(3) of the IRDA Regulations. So contending, the learned senior counsel prayed that the appeal of NIACL be dismissed and the cross appeals of the Insured be allowed.

Questions before this Court:

28. In the above background, the questions that arise for consideration are as follows:

i. Was the Reinstatement Value Clause part of the policy?

ii. Was NIACL justified in computing loss on depreciation basis and fixing depreciation at 60%?

iii. Is the Insured justified in claiming reinstatement value by placing reliance on the judgment in ***Oswal Plastic Industries (supra)***?

iv. To what reliefs are the parties entitled?

Discussion and Reasons:

29. At the outset, it is important to set out the crucial clauses of the policy in question.

New India Assurance Company Ltd. Through its Manager v. M/s Tata Steel Ltd.

Fire Policy "C"

In consideration of the insured name in the schedule hereto having paid to the New India Assurance Company Limited (hereinafter called the company) the premium mentioned in the said schedule. THE COMPANY AGREES (subject to the Condition and Exclusions contained herein or endorsed or otherwise expressed hereon) that it after payment of the premium the property Insured described in the said schedule or any part of such property, be destroyed or damaged by:

1. Fire

……

6. ….. During the period of Insurance named in the said schedule or of any subsequent period in respect of which the insured shall have paid and the Company shall have accepted the premium required for the renewal of the policy the Company will pay to the insured the value of the property at the time of the happening of its destruction or the amount of such damage or at its opinion reinstate or replace such property or any part thereof.

Conditions

……

6. (i) On the happening of any loss or damage the insured shall forthwith give notice thereof to the company and shall within 15 days after the loss or damage or such further time as the Company may in writing allow in that behalf, deliver to the company;

a. A claim in writing for the loss or damage containing as particular an account as may be reasonably practicable of all the several articles or items or property damaged or destroyed, and of the amount of the loss or damage thereto respectively, having regard to their value at the time of the loss or,

b. Particular of all other insurance, if any:

> The insured shall also at all times at his own expense produce, procure and give to the company all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents investigation reports (internal/external), proof and information with respect to the claim and the origin and cause of the insured perils and the circumstances under which the loss or damage occurred, and any matter touching the liability or the amount of the liability of the Company as may be reasonably required by or on behalf of the Company together with a declaration on Oath or in other legal form of the truth of the claim and of any matter connected therewith.
>
> No claim under this policy shall be payable unless the terms of this condition have been complied with.

30. Two other important clauses viz., Clause 9 of the Conditions and the memorandum containing the Reinstatement Value Clause are extracted below at the appropriate place in the discussion.

Answer to Question No (i) :-

31. There was a debate at the Bar as to whether the memorandum consisting of the Reinstatement Value Clause (extracted later in the judgment) was a part of the policy. The argument was raised by senior counsel for the Insured who contended that the memorandum containing the Reinstatement Value Clause was not part of the policy. We reject this contention at the outset. This is for the reason that before the NCDRC in the written statement filed by the NIACL, in para 3, it was specifically pleaded as under:

> "The copy of the fire policy at pages 13 to 22 is a true copy of the policy issued by the Respondent. However, the Reinstatement Value Clause issued along with the policy is not attached to the same. The answering Respondent is filing herewith the copy of the policy with complete terms and conditions and clauses as Annexure R-1 to this written Statement."

32. In the replication filed by the Insured, there was no denial of this averment. Hence, we reject the contention of the Insured that the

memorandum of the Reinstatement Value Clause was not the part of the policy. There are other factors which establish that the Reinstatement Value Clause was part of the Policy. They are discussed hereinbelow. Issue (i), set out above, is answered in favor of NIACL.

Discussion of Question No. (ii) :-

33. Coming back to the clauses in the insurance policy, it will be seen that the assurance in the opening clause of the policy was that NIACL will pay to the Insured the value of the property at the time of the happening of its destruction OR the amount of such damage OR at its option, reinstate or replace such property or any part thereof. In the conditions, it was incorporated that the Insured was at all times at its own expense to produce, procure and give to NIACL all such further particulars, plans, specifications, books, vouchers, invoices, duplicates or copies thereof, documents, investigation reports (internal/external), proof and information with respect to the claim and all matters provided for in Clause 6. It is also stipulated that no claim under this policy was payable unless the terms of this condition was complied with.

34. Clause 9 of the Conditions states that if NIACL, at its option, reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of loss or damage, or join with any other company or Insurance in so doing, NIACL shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner, and in no case shall NIACL be bound to spend more in reinstatement than it would have cost to reinstate such property as it was at the time of occurrence of such loss or damage nor more than the sum insured by the Company thereon. Clause 9 reads as follows:

> "9. If the company at its option, reinstate or replace the property damaged or destroyed, or any part thereof, instead of paying the amount of the loss or damage, or join with any other company or insurance, in so doing, the company shall not be bound to reinstate exactly or completely but only as circumstances permit and in reasonably sufficient manner and in no case shall the company be bound to spend more in reinstatement than it would have cost to reinstate such property as it was at the time of the

occurrence of such loss or damage nor more than the sum insured by the Company thereon,

If the Company so elect to reinstate or replace an property the insured shall at his own expense furnish the company with such plans, specifications, measurements, quantities and such other particulars as the company may require, and no acts done, or caused to be done, by the company with a view to reinstatement or replacement shall be deemed an election by the Company to reinstate or replace.

If in any case the Company shall be unable to reinstate or repair the property hereby insured, because of any municipal or other regulations in force affecting the alignment of streets or the construction of buildings or otherwise, the Company shall, in every such case, only be liable to pay such sum as would be requisite to reinstate or repair such property if the same could lawfully be reinstated to its former condition."

35. To the policy is attached the memorandum of the Reinstatement Value Clause which reads as follows:

REINSTATEMENT VALUE CLAUSE

Attached to and forming part of policy No.

It is hereby declared and agreed that in the event of the property Insured under (Items Nos. of) the within policy being destroyed or damaged, the ***basis upon which the amount payable under each of the said items of the policy is to be calculated, shall be the cost of replacing or reinstating on the same, i.e. property of the same kind or type but not superior or more extensive than the insured property when new*** subject to the following Special Provisions and subject also to the terms and conditions of the policy except manner as the same may be varied hereby.

SPECIAL PROVISIONS

1. The work of the replacement or reinstatement (which may be carried out upon another site and in any manner suitable to the requirements of the insured

subject to the liability of the Company not being thereby increased) must be commenced and carried out with reasonable dispatch and in any case must be completed within 12 months after the destruction or damage or within such further time as the company may (during the said 12 months) in writing allow; otherwise no payment beyond the amount which would have been payable under the policy if this memorandum had not been incorporated therein shall be made.

2. Until expenditure has been incurred by the Insured in replacing or reinstating the property destroyed or damaged the company shall not be liable for any payment in excess of the amount which would have been payable under the policy if this memorandum had not been incorporated therein.

3. If at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the property covered had been destroyed exceeds the sum insured thereon at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril insured against by this policy, then the Insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of the policy (it more than one) to which this Memorandum applies shall be separately subject to the foregoing provision.

4. This Memorandum shall be without force or effect if:

   (a) The Insured fails to intimate to the company within 6 months from the date of destruction or damage or such further time as the Company may in writing allow, his intention to replace or reinstate the property destroyed or damaged.

   (b) The Insured is unable or unwilling to replace or reinstate the property destroyed or damaged on the same or another site.

36. The memorandum of the Reinstatement Value Clause stipulates that it was declared and agreed that in the event of the property Insured under the policy being destroyed or damaged,

a. The basis upon which the amount payable under each of the said items of the policy is to be calculated, shall be the cost of replacing or reinstating on the same, i.e. property of the same kind or type but not superior or more extensive than the insured property **when new** subject to the following Special Provisions and subject also to the terms and conditions of the policy except manner as the same may be varied hereby.

b. The Special Provisions stipulate that the work of the replacement or reinstatement must be commenced and carried out with reasonable dispatch and in any case must be completed within 12 months after the destruction or damage or within such further time as the company may (during the said 12 months) in writing allow; otherwise no payment beyond the amount which would have been payable under the policy if this memorandum had not been incorporated therein shall be made.

c. Until expenditure has been incurred by the insured in replacing the property destroyed or damaged, the company shall not be liable for any payment in excess of the amount which would have been payable under the policy if this memorandum had not been incorporated therein.

d. If at the time of replacement or reinstatement the sum representing the cost which would have been incurred in replacement or reinstatement if the whole of the property covered had been destroyed exceeds the sum insured thereon at the breaking out of any fire or at the commencement of any destruction of or damage to such property by any other peril insured against by this policy, then the Insured shall be considered as being his own insurer for the excess and shall bear a rateable proportion of the loss accordingly. Each item of the policy (if more than one) to which this memorandum applies was to be separately subject to the following provisions.

e. This Memorandum was to be without force or effect if

   i. The Insured fails to intimate to the company within 6 months from the date of destruction or damage or such further

time as the Company may in writing allow, his intention to replace or reinstate the property destroyed or damaged.

ii. The Insured is unable or unwilling to replace or reinstate the property destroyed or damaged on the same or another site."

37. It is very clear from the above that the original terms of the policy which provided for payment by NIACL of the value of the property at the time of the happening of its destruction or the amount of such damage was varied and the basis was changed. The changed basis under the Memorandum of the Reinstatement Value Clause was that the amount payable was to be calculated based on the cost of replacing or reinstating the same, i.e. property of the same kind or type but not superior or more extensive than the insured property when new.

38. It is also clear that in view of the Reinstatement Value Clause, the question of NIACL on the facts of the present case opting to reinstate or replace under Clause 9 of the conditions of the policy does not arise and with the same reasoning, the question of the applicability of Clause 9 itself cannot arise.

Relevant Facts as they unfolded:-

39. At this stage, it is important to deal with the correspondence that was exchanged between the parties to bring out as to how under the Reinstatement Value Clause, it was the Insured who attempted to reinstate or replace the property which was destroyed. As will be clear from the sequence of the events, it was the Insured who was either unable to or unwilling thereafter to reinstate the property. Let us see how the facts unfolded. On 12.12.1998 i.e., the date of the fire, the Insured intimated NIACL and requested for the surveyors to be deputed. On 14.12.1998, the surveyors wrote to the Insured requesting for various information including year wise capitalization, balance sheets of the previous two years, copy of the original invoices of affected items as well as fresh proforma invoice and the logbook and any other maintenance record. In the reply of 18.12.1998, crucial information with regard to the original invoice as well as proforma invoice were not furnished. An interim survey report was prepared on 04.02.1999 by the three surveyors in the joint report and that report had the following disclaimer:

> "Based on the physical inspection carried out and limited information made available by the Insured till then, the above surveyors submitted their joint survey report on 22nd December 1998. Subsequently, the underwriters appointed P.C. Gandhi & Associates as another joint surveyors. The joint surveyors visited the insured factory jointly and severally on various dates and carried out detailed physical inspection of the subject machine besides carrying out protracted discussions with the Insured official accompanied by Supplier/Manufacturers of the Mill."

40. The interim survey report noticed that the claim was for Rs.35 Crores and the effective claim excluding excise duty was Rs.30.28 crores. Dealing with the assessment of loss, in Para 14, it was mentioned in the report that the Insured lodged their claim based on the price breakup given by manufacturers which included cost of supply, installation and commissioning but excluded excise, sales tax, transportation and civil works. The report mentioned that the price break-up given was accepted in general at that stage and that comparable cost could not be possible from an alternative source. Most importantly, in Para 14 (1.4), it was provided as under:

> "Policy provides for Reinstatement clause and Insured have confirmed verbally that they would reinstate the damages without any delay. At this stage, reasonable depreciation and salvage are adjusted for considering conservative on Account Payment."

41. This clause also reinforces the fact that Reinstatement Value Clause proving for reinstatement by the Insured was part of the policy. So finding at Para 15, the surveyor in their interim report concluded as under:

> "It may be noted that while assessing the provisional loss, substantial margin has been kept, even after considering the depreciation etc. Based on the limited verification carried out till now, we are of considered opinion that the minimum loss on Reinstatement Value Basis is like to be around Rs. 1500 lacs and the maximum loss on Reinstatement Value Basis after more detailed verifications has been estimated at around Rs. 2500 lacs.

> In consideration of the Insured's request for an On Account Payment, should be Underwriters so desire, they may consider an On Account Payment of upto Rs. 720 Lacs at this stage."

It was clearly mentioned that the report was issued without prejudice, and subject to terms and conditions of the relevant insurance policy.

42. This report was followed by a letter issued by the Insured on 10.02.1999.

> "We undertake that reinstatement of damaged property on account of fire loss caused on 12.12.1998, shall be carried out by us within the stipulated time as per fire policy No.1132160705785. We confirm that suggestions given in the TAC and LPA report will be complied with during the reinstatement of the mill."

On 24.03.1999, on account payment of Rs. 4,98,80,905/- was made.

43. Thereafter, on 10.06.1999, the Insured wrote to M/s Flat Products placing an order for repair of the '20 Hi Cold Rolling Mill' and paying them an amount of Rs. 3.75 crores as 15% advance. It transpires that on 06.10.1999, the Chief Vigilance Officer of NIACL addressed a letter to the General Manager, NIACL furnishing a report about an anonymous complaint received stating that the fire was due to arson and that there has been inflated assessments resulting in approval of huge on account payments. The report concluded that there was no indication that the fire was due to arson but there were indications that the loss could have been assessed for highly inflated amount. The Chief Vigilance Officer sounded a note of caution to the following effect:

> "Therefore, adequate precautions should be taken before a final decision is taken in respect of the claim. We would like to suggest that an opinion of technical expert in the concerned field may be taken regarding extent and assessment of loss in order to arrive at the actual loss sustained by the claimant. You may also examine the feasibility of having into depth technical investigation into various objects of the claim."

44. When matter stood thus on 16.06.1999, the Insured wrote to the surveyors stating as under:

> "However, against contract price of Rs. 25 crores, we agree and confirm to the assessment of the net adjusted loss of Rs. 20,95,00,000/- (Indian Rupees Twenty Crores Ninety Five Lakhs Only) after taking into account the items of salvage & excess as applicable under the terms and conditions of the policy."

45. On 27.10.1999, the Insured wrote a letter to NIACL (inter alia referring to the earlier letters of 21.08.1999, 05.10.1999 & 12.10.1999) stating that in spite of the expiry of ten months, the claim amount has not been settled, and that the supplier was asking them to make further payment otherwise the work would not start. So stating a request was made for the settlement of the claim at the earliest. This was followed by another letter of 26.11.1999 stating that since the claim had not yet been settled they could not progress in the reinstatement of the mill. They also sought extension of 24 months for the reinstatement of the mill.

46. The Insured also wrote a letter of 16.12.1999 referring to their earlier letter of 23.07.1999 to the effect that the original invoices in respect of Cold Rolling Mill were not available with them; that their supplier M/s Flat Products has confirmed that the sale bill of the 20 Hi Cold Rolling Mill is not available with them; they furnished a letter of M/s Mukand Limited, Thane dated 09.12.1999 addressed to M/s Flat Products confirming that two number of Mill Housings were supplied by them to M/s Precision Equipment, a sister concern of M/s Flat Products; a letter of M/s Flat Products dated 09.12.1999 that two numbers of SENDZIMIR were sold to M/s Jawahar Metal Industries Pvt. Limited, the previous name of the Insured and that housing for these mills were procured from M/s Mukand Ltd. vide their invoice dated 23.03.1988 and 09.01.1989.

47. In substance, no concrete information was forthcoming from the Insured, and while claiming that the invoices were not available certain indirect evidence in the form of certificates for part supply were attempted to be furnished. Most importantly these certificates were of dates which were after the fire.

48. Another letter of 10.02.2000 repeating the same request for payment was made by the Insured. The NIACL responded by their letter of 07.03.2000 granting extension of 12 months for reinstatement of the damaged mill. All these clearly indicate that the Reinstatement Value

Clause was part of the policy and that the Insured had agreed to reinstate in accordance with the said clause. Thereafter, the Insured wrote a letter dated 28.04.2000 clearly setting out the following:

> "This has reference to the correspondence in connection with the above referred claim. After detailed discussions on various occasions with the loss assessors appointed by you, we accepted the settlement arrived at by the surveyor on repair loss basis. As desired by the surveyors, we gave a letter of acceptance vide letter dated 16.6.99 for the assessment of the net adjusted loss of Rs. 20.95 Crores after taking into account the items of salvage and excesses as applicable under the terms of the policy (copy enclosed). It is regretted that even after releasing on account payment of Rs. 5 Crore on 24th March, 1999 the matter is lying pending for the last about 1½ year in spite of our various meetings with you and also various letters written from time to time."

49. It is very clear from this letter that the Insured accepted the net adjusted loss of Rs.20.95 Crores and a letter accepting the same dated 16.06.1999 was given to the surveyor. Thereafter, the Insured, getting no response, on 30.05.2000, filed the Consumer Complaint No. 233 of 2000 for the following reliefs:

a) Rs. 15.95 crores on account of balance claim for fire loss.

b) Interest @ 18% from 16.06.1999 till its actual payment.

c) Rs. 73 lacs on account of inspection and transportation charges.

d) Damages @ Rs. 3 crores per month since August, 1999 till the release of payment as prayed for under claim (a).

50. From the written statement, apart from the other facts, it was set out that on 06.10.1999, the Chief Vigilance Officer has suggested that the opinion of technical expert be taken before taking the final decision in the matter. Thereafter, further complaints were received resulting in the appointment of M/s J. Basheer & Associates who submitted their report on 10.04.2000. It was also averred that on 26.07.2000, the CBI approached NIACL with respect to some complaint filed by the Respondent and in that context, the CBI had called the officials of NIACL on 26.07.2000, 20.03.2001, 29.03.2001. Earlier on 16.04.2000,

the CBI requisitioned the Respondent's claim file pertaining to the case. It was averred that on 18.09.2000, NIACL appointed M/s Allianz Zentrum Fur Technik GmBH, Germany who gave their opinion on 26.10.2000. Since that report was not based on physical examination, Allianz was called to do a physical examination and the detailed report came on 10.07.2001. On 11.12.2001, according to NIACL, the Joint Surveyors submitted their report where they assessed the loss of the damaged mill at 19.55 crores on replacement basis and 13.51 crores on depreciation basis. It was only on 18.01.2002, the Chief Vigilance Officer closed the complaints received.

51. It was averred in the Written Statement that on 27.03.2002, the Insured for the first time informed NIACL that they had already installed a new Cold Rolling Mill. An undated letter was annexed purportedly informing the same facts. NIACL averred that the said undated letter was not received. The NIACL submitted that the said letter of 27.03.2002 was sent to the surveyors. In pursuance thereof, the surveyors wrote a letter dated 03.05.2002 requesting for the following information:

i. Copy of the order placed with M/s Flat Products.

ii. Copy of the quotation submitted by M/s Flat Products prior to placement of the order and copy of the inquiry floated by them.

iii. Whether the interest of any financial institutions or banks or any of the sister concerns or private companies exists in the new Mill or not? If yes, please submit relevant documents.

iv. Certificate of the Chartered Accountant confirming date of capitalization for the said Mill. The certificate should endorse all the invoices forming part of the Mill capitalization. One set of invoices may be submitted along with the certificate.

52. There was no response resulting in the surveyors writing another letter of 24.06.2002. On 09.07.2002, the insured sought two week's time to submit the information. With no information forthcoming, on 07.08.2002, once again the surveyors wrote to the Insured. Thereafter, it was submitted that till date the mill has not been reinstated. NIACL submitted that the claim that, at the cost of Rs.31.37 crores, the cold rolling mill was installed, is absolutely incorrect. It was averred that Cold Rolling Mill installed by the complainant is a 6 Hi Cold Rolling Mill whereas the damaged mill was 20 Hi Cold Rolling Mill and that

the two mills are of different models and that 6 Hi Cold Rolling Mill cannot be treated as reinstatement. So contending, it was pleaded that the surveyors had submitted their report on 11.12.2001 in which they had assessed the Insured's loss at Rs.13.51 crores on depreciation basis and Rs.19.55 crores on reinstatement basis and that the Insured has not submitted any document/material for reinstatement.

53. It is also important to note that on 28.06.2001, M/s Flat Products, with whom the insured was on talks with for reinstatement, had written to the Insured clearly indicating in that letter as follows:

> "…. In the meantime, the specialists and designers who were engaged for the manufacturing/repairs of 20 Hi 1250mm wide mill for cold rolling mild steel have left our company and we are now not in position to repair/supply your 20 Hi, 1250mm wide mill for Cold Rolling Mild Steel. This fact was also made known to the Inspecting team from Germany by our Director, Sh. D.D. Sengupta, to survey the loss of the aforesaid machine."

NIACL Letter to Surveyors:-

54. On 12.11.2002, NIACL wrote to the surveyors stating that the insured are unable to produce invoices to establish the cost and age of the mill affected in the said occurrence that considerable time has elapsed and since the Insured has not been able to establish and substantiate its claim, NIACL may consider the claim on depreciated value basis taking into account the maximum depreciation applicable to such mill. The surveyors were asked to have the workings on the above lines.

Response of the Surveyors:-

55. In response, on 07.12.2022, the surveyors wrote to the NIACL stating that in spite of several reminders the Insured as on date had not submitted any clarification/details and as such the matter had remained pending. As requested by the NIACL, an alternative assessment by considering maximum depreciation was submitted with the recommendation of 60% depreciation fixing loss at Rs.7.90 Crores.

56. It was explained that in the report of 11.12.2001, the depreciation was adjusted to 32% considering the average life of the mill as 25 years.

That is 32% on overall for a period of usage of eight years at 4% per year. Eight years were arrived at since the mill was installed in 1989 and the fire was happened in 1999. The balance life of mill was taken as 17 years. In the letter it was clarified that as the machine was running at its optimum capacity, it was their opinion that the residual life as per the calculations should be 40% thereby implying applicable depreciation of 60% and that when 60% depreciation is considered the sum insured is deemed to be adequate. The residual life was taken as less than 10 years. On 03.01.2003, the NIACL addressed a letter to Insured stating that the loss amount as sanctioned would be Rs. 7.88 crores and since Rs. 5 crores (after deducting TDS) has already been paid, the balance amount would be Rs. 2.88 crores.

Answers to Question No. (ii):

a) Adoption of the Depreciation Method

57. From what has been discussed above, it emerges clearly that under the main terms of the policy the company was to pay the Insured the value of the property at the time of happening of the destruction (except where NIACL opts to reinstate). There was a special memorandum attached to the policy. That memorandum was the Reinstatement Value Clause which substituted the basis upon which the amount was payable from the value on the date of destruction to the cost of replacing or reinstating the property i.e. property of the same kind or type but not superior or more extensive than the insured property when new. However, as it transpires the said memorandum ceased to have any force since the Insured was unable and unwilling to replace or reinstate the property. Special Provision 4 (b) of the memorandum applied and rendered the Reinstatement Value Clause ineffective.

58. It is also amply clear that once we revert back to the original policy with its conditions, the Insured under Clause 6(b) of the conditions had an obligation to give NIACL all such further particulars, plans, specifications, books, vouchers and invoices with respect to the claim. It is also set out that no claim under the policy was to be payable unless the terms of these conditions were duly complied with. It is sufficiently brought out that in spite of the surveyors writing to the Insured repeatedly (on 14.12.1998, 03.05.2002, 24.06.2002 and 07.08.2002), there was no information forthcoming from the Insured about the invoices as proof of the value of the damaged equipment

and the cost of the new equipment. Instead, the Insured originally undertook that they will reinstate the damaged property; received the on account payment of Rs.4,92,80,905/- (i.e. Rs.05 Crores minus TDS) and informed NIACL that they have placed order for repair of 20 Hi Cold Rolling Mill to M/s Flat Products and paid them Rs. 3.75 crores. Thereafter by their letter of 16.06.1999, the Insured sought assessment of net adjusted loss at Rs.20.95 Crores. After this, without showing any progress merely letters were written repeatedly asking for early settlement. The scenario was while the surveyors of NIACL kept asking for the basic and relevant particulars, the Insured without furnishing the same kept asking for the settlement of the money.

59. Fortunately for the Insured, NIACL did not completely repudiate the claim. Instead faced with the letters of the Insured dated 16.06.1999 admitting to the value at Rs.20.95 Crores and the letter of M/s Flat Products of 28.06.2001 throwing up their hands and informing the Insured about them having lost their expertise, NIACL resorted to settling the claim under the opening clause of the policy by agreeing to pay the Insured the value of the property at the time of the happening of the destruction. (Depreciation Method)

60. We are not in a position to fault NIACL for resorting to this method of settlement.

b) Quantum of Base Figure: -

61. NIACL also applied depreciation at the rate of 60% on the figure of Rs.20.09 Crores. Whether this was a correct percentage of depreciation was really the only dispute that was adjudicated before the original forum. The Insured has a two-fold case to challenge the basis of settlement adopted by NIACL before this Court. First, they contend that the base figure should have been Rs.28 Crores based on the figure they say M/s Flat Products was to charge them for reinstating the 20 Hi Cold Rolling Mill and after adding taxes to the figure of Rs. 25 crores, they arrive at a base figure of Rs. 28 crores. This contention is totally untenable for the following reasons.

a. Firstly, by their letter of 16.06.1999, they categorically agree and confirm to the assessment of the net adjusted loss at Rs.20.95 Crores.

b. Secondly, there was no proof forthcoming from the Insured. Since no invoices were furnished to state that the value of the

property on the date of the loss was Rs. 25 crores, the post incident certificates produced along with the letter of 09.12.1999 of M/s Mukand Limited and the letter of M/s Flat Products dated 09.12.1999 attempting to make a remote connection with the value of the damaged property do not inspire any confidence. In any event, they are not invoices depicting the value of the property at the time of its installation.

c. In any event, the surveyors, based on their expertise, having assessed the value at Rs.20.09 Crores, there is no reason to countenance the submission that the base figure on which the depreciation should have been calculated was Rs. 28 crores.

c) Percentage of Depreciation: -

62. The next facet of the submission is that even if the value was to be taken as Rs.20.09 Crores of the property, the depreciation should have been computed at 32% as was mentioned in the report of the surveyors dated 11.12.2001. No doubt in the 11.12.2001 report of the joint surveyors while calculating depreciated value basis, 32% was taken by the surveyors but even this report carried a number of disclaimers. First of all, the surveyors state that the report is issued without prejudice and they extract the interim survey report of 04.02.1999. The surveyors set out in para 5.21 as follows:

> "Loss Assessment on Depreciation Basis
>
> (a) It is understood that Insured have not yet completed repairs/reinstatement. The delay in the process was Insured's desired to have additional fund to proceed with repairs, which of course is not warranted under the policy.
>
> (b) Insurer had several issued to be resolved before advising us in November 2001 to proceed with final assessment of loss.
>
> (c) Pending reinstatement, we have assessed the loss on depreciated value basis under summary of assessed loss."

63. As is clear from the above, the NIACL has several issues to be resolved before advising the surveyors to proceed with the assessment in November, 2001 and that pending reinstatement they

had assessed the loss on depreciated value basis. After this report of 11.12.2001, it was the Insured who tried to open the matter again by writing a letter of 27.03.2002 stating that they had already installed a new Cold Rolling Mill. Strangely, this was after the admitted letter of 28.06.2001 by M/s Flat Products stating that they are not in a position to repair the 20 Hi Cold Rolling Mill since the experts have left the company. However, by the letter of 27.03.2002, the Insured wanted to treat the purported installation of 6 Hi Cold Rolling Mill as a valid reinstatement to stake a claim on reinstatement value basis. This claim of the NIACL is that particulars were sought for on 03.05.2002 and 24.06.2002 and the Insured on 09.07.2002 sought two weeks' time to submit the information, but nothing was forthcoming, resulting in the surveyors writing to the Insured again on 07.08.2002. It was in this background that NIACL wrote the letter of 12.11.2002 in the following terms:

> "With reference to the above, we have noted that the insured are unable to produce invoices to establish the actual cost and age of the Mill affected in the said occurrence.
>
> As considerable time has elapsed and since the insured has not been able to establish and substantiate their claim, we may consider the claim on depreciated value basis taking into account the maximum depreciation applicable to such Mill. As such, we request you to let us have our working on the above lines to enable us to put up the matter to the competent authority for their consideration."

64. Learned Senior Counsel Mr. Joy Basu for the Insured argued that this letter was an attempt to goad the surveyors and that the response of surveyors dated 07.12.2002 was a reluctant response from an embarrassed surveyor. We are not prepared to countenance the submission of Mr. Joy Basu, learned Senior Counsel. In fact, the Insured is fortunate that there was no total repudiation for non supply of relevant documents.

65. In fact the sequence of events shows the following; soon after the claim, there was an interim survey of 04.02.1999 where minimum loss on reinstatement value basis was estimated to be around Rs.15 crores and maximum loss on reinstatement value basis was estimated to be Rs.25 crores. An on-account payment of Rs. 7.20

crores was recommended. Thereafter, it is interesting to note that from the 11.12.2001 report that between December, 1998 and July 1999 there were talks and inspections with suppliers/manufacturers and the officials of the Insured. It further appears that the loss assessment exercise was complete by July, 1999 and the report was held back due to investigation by other agencies. This is clear from the following preliminary portion of the 11.12.2001 report:

> "1.00 INSTRUCTIONS
>
> Instructions were received from New India Assurance Co. Ltd. Regional Office II, New Delhi on 13.12.98 by R.K. Singhal & Company Private Ltd. to survey and assess the damage to Insured's 20 HI Rolling Mill due to a fire that broke out in Insured's factory in the evening of 12th December. Accordingly Mr. R.K. Singhal visited Insured's factory on 13th December 98 and carried out a preliminary inspection of the subject machine. A.K. Govil & Associates were subsequently co-opted as joint surveyors by Regional Office vide their Facsimile of 16th December. Their representatives visited Insured factory on 17th December in order to carry out the necessary inspection. Based on the physical inspection carried out and limited information made available by the Insured till then, the above surveyors submitted their join preliminary survey report on 22nd December 1998. Subsequently the underwriters appointed P.C. Gandhi & Associates as another joint surveyors. The joint surveyors visited the Insured factory jointly and severally on various dates and carried out detailed physical inspection of the subject machine besides carrying out protracted discussions with the Insured official accompanied by Suppliers/ Manufacturers of the Mill.
>
> **Accordingly, matter was discussed with insurers several occasions and loss assessment exercise was almost complete by July -1999.**
>
> We understand that insurer had received some complaint concerning subject loss and the matter went into investigations by various agencies one after another.

> Insurer had also referred some matters to us and necessary information and assistance were extended to the insurer as well as concerned agencies.
>
> Insurer have now advised us in the month of November 2001 to submit final loss assessment report.
>
> In view of the above, this final survey report is issued without prejudice and is based on documents submitted by the insured and physical verification carried out by us.
>
> We have in our "Interim Survey Report" dated 04.02.1999 discussed the following in details.
>
> The above details are not being repeated and final survey report may therefore be read in conjunction with our earlier report."
>
> [Emphasis Supplied]

66. This is important because nowhere the 11.12.2001 report makes any reference to the 28.06.2001 letter of M/s Flat Products expressing their inability to reinstate the plant. There is a reference in Para 6.3 of the 11.12.2001 report to a meeting at the plant site on 19.06.2001 wherein the surveyors were given to believe that the Insured still desires to reinstate the mill. However, this was on condition that they will do so only after receiving further payment. Based on the inspection and negotiations that were carried out up to July, 1999, summary of assessed loss in para 5.23 was drawn up. This was fixed for replacement/repair at Rs.19.55 Crores (after deductibles like salvage etc). What is crucial is also that on this figure itself depreciation at 32% was worked out. The base figure was arrived at on reinstatement basis only and the same was adopted for the depreciation basis also. No doubt, depreciation was worked at 32%. This discussion is significant since the grievance of the Insured is that the NIACL ought not to have written the letter of 12.11.2002. We reject this contention. The NIACL was justified in writing the letter of 12.11.2002 because after reviving their demand to reinstate the plant, the Insured failed to furnish the documents required and even admittedly the plant as allegedly reinstated was of 6 Hi Cold Rolling Plant and not 20 Hi Cold Rolling Plant. In this scenario, one cannot fault the NIACL for writing the letter of 12.11.2002 particularly when the report of 11.12.2001 was before the new offer for reinstatement

by the Insured's letter of 27.03.2002. Admittedly the report was based on discussions that took place till July, 1999

67. In fact, the surveyors, after receiving the letter of 10.11.2002 should have reassessed the value on depreciated value basis which would be to value the loss as per the opening clause of the policy i.e. arrive at the value of the property at the time of happening of its destruction. This was not done and in the response of 07.12.2002 the base value was kept at Rs.20.09 Crores and applied depreciation at 60% on the following justification:

> "As the machine was running at its optimum capacity, we are of the opinion that its residual life should not have be less than 10 years i.e. residual life as per our above calculation should be 40% thereby implying maximum applicable depreciation of 60%"

68. The Insured has stood to gain by keeping the base figure at Rs.20.09 Crores as value for the depreciated basis also. That was a value arrived at by the surveyors based on their expert assessment.

69. Dealing with the grievance that 60% depreciation had no basis, the NCDRC called for an additional affidavit from NIACL. The NIACL in the affidavit set out as follows:

> "2. There are no written guidelines for computing depreciation @ 4% per year. However, there is established practice to calculate the depreciation in the case of old machinery @ 5% per year upto maximum of 75% - 80%. The Surveyors M/s. P.C. Gandhi and Associates assessed the claim of M/s. Transpek Industries Ltd. by computing the depreciation of 75%. In the case of M/s. Modem Denim Ltd. the Surveyor applied the depreciation of 50% for 10 years usage considering 20 years machine line. Copy of Surveyor's letter dated 20th December, 2006 is Exhibit R-1. The copy of the Surveyor's report dated 19th March 2003 with respect to M/s. Transpek Industries Ltd. is Exhibit R-2 hereto. The copy of the Surveyor report dated 25th February, 2003 with respect to Modem Denim Ltd. is Exhibit R-3 hereto."

70. The surveyors had offered justification in their response dated 07.12.2002 for providing depreciation at the rate of 60%. The

Additional Affidavit also clarifies the established practice. It should not be forgotten that the base figure of Rs.20.09 crores was kept intact. We set aside the finding of the NCDRC that the practice adopted in the instant case was not a healthy practice by the NIACL. We uphold the percentage of depreciation at 60%. We have not disturbed the base value of Rs.20.09 crores as no arguments on that score were advanced by the NIACL.

71. In view of the above discussion, the NIACL rightly ordered the settlement of the claim on 03.01.2003 stating the loss amount as Rs.7.88 Crores and ordering the balance amount of 2.88 crores be paid after adjusting the on account payment.

Question No.(iii) - Applicability of the Judgment in *Oswal Plastic Industries* *(supra)*

72. The only other question that remains to be answered is the argument based on the judgment in ***Oswal Plastic Industries*** ***(supra)***. Firstly, no factual foundation was placed to raise this submission. Even in the Civil Appeals of the Insured the only ground was based on the correct base figure and the applicable rates of depreciation. In fact, the Insured in ground (D) in Civil Appeal 5242-5243 of 2009 admitted that the NCDRC rightly proceeded to determine the compensation on depreciation basis. Ground (D) reads as follows:

> "Because the Hon'ble National Commission rightly proceeded on the premise that reinstatement of the machine is no longer possible and that the compensation to the appellant is therefore to be determined on depreciation basis, i.e., value of the machine on the date of loss."

73. Further in the case of ***Oswal Plastic Industries*** ***(supra)***, as is clear from para 2 of the said judgment, it appears the policy was on reinstatement value basis. The complainant there claimed that he had purchased the machinery to replace the damage in machinery at the cost of 1,34,07,836/-. However, the surveyor had assessed the loss on reinstatement basis 29,17,500/-. The NCDRC had awarded compensation on depreciated basis. Before this Court, the complainant relied on Clause 9 of the conditions, particularly the second para, which Clause 9 was similar to the Clause 9 in the present case. Even the Insurance Company contended as follows:

> **12.** It is submitted that as rightly observed by the NCDRC that the goods insured were to be replaced on "as is basis" i.e., if the machinery is an old machinery, it is to be replaced by an old machinery and therefore, as the actual reinstatement has not been done by the complainant or by the insurance company and the money is to be paid to the insured on reinstatement basis, one has to find out the value of the machinery on replacement basis i.e., the value of the old machinery, which can be calculated only through deducting the value of the depreciation from the current value of the machinery.

74. It appears that even the Insured does not appear to have disputed that the payment ought to have been on reinstatement basis and the money is to be paid on reinstatement basis. Further, no clause similar to the memorandum of reinstatement value clause appears to have existed in ***Oswal Plastic Industries*** ***(supra).***

75. In any event, independent of the above, no argument was raised in the NCDRC and even in the memo of appeal here based on second para of Clause 9. At the stage of final arguments in the appeals, we are not prepared to permit this ambush argument by allowing the Insured to mechanically rely on ***Oswal Plastic Industries*** ***(supra)*** without establishing the factual similarity by laying an appropriate foundation in the courts below. Hence, ***Oswal Plastic Industries*** ***(supra)*** has no application to the facts of the present case.

IRDA Regulations

76. In so far as the argument based on Regulation 9(3) of the IRDA (Protection of Policyholders' Interests) Regulations, 2002, we find there is no breach thereof. Regulation 9(3) of the IRDA reads as follows:

> **9. Claim procedure in respect of a general insurance policy**
>
> xxx
>
> (3) If an insurer, on the receipt of a survey report, finds that it is incomplete in any respect, he shall require the surveyor under intimation to the insured, to furnish an additional report on certain specific issues as may be required by the insurer. Such a request may be made by the insurer within 15 days of the receipt of the original survey report.

> Provided that the facility of calling for an additional report by the insurer shall not be resorted to more than once in the case of a claim.

77. This clause has no application to the facts of the present case. As has been illustrated above, the second report of 11.12.2001 was based on negotiations held up to July, 1999. Thereafter there were several developments including the Insured's claim to first give up reinstatement and then reintroduce the claim for reinstating the mill. Several letters were written for furnishing crucial documents which were not forthcoming from the Insured. Learned Senior Counsel, Mr. Sanjay Jain contends that NIACL could have repudiated the claim for non supply of documents. Be that as it may, we are not called upon to decide that issue at this stage since NIACL has on its own settled the claim by their letter of 03.01.2003. When NIACL, on the facts of the present case, wrote the letter for assessing on depreciation basis, it is not a case of a clarification being sought in an incomplete report. Hence, on the facts of the present case, we do not find any violation of the Regulation 9(3). In the absence of any ambiguity we also do not find scope for applying the doctrine of *contra proferentem.*

78. A feeble argument was sought to be advanced to the effect that the depreciation should have been calculated on the sum insured. The judgments in ***Sri Venkateswara Syndicate v. Oriental Insurance Co. Ltd*** ***2009 (8) SCC 507*** and on ***Dharmendra Goel*** ***(supra)*** as well as ***Sumit Kumar Saha v. Reliance General Insurance Company Ltd.,*** ***(2019) 16 SCC 370*** cited by the Insured have no application to the facts of the present case. In ***Dharmendra Goel*** ***(supra)*** and ***Sumit Kumar Saha*** ***(supra),*** the claimants never conceded for settlement of the claim at a value lesser and different from the sum insured as in the present case. Hence, there can be no case that the sum insured should be taken as the basis for calculating depreciation.

79. As far as ***Sri Venkateswara Syndicate*** ***(supra)*** is concerned, this Court had held that the insurance company cannot go on appointing surveyors one after another so as to get a tailor-made report to the satisfaction of the officer concerned of the insurance company; and that if for any reason, the report of the surveyors is not acceptable, the insurer has to give valid reason for not accepting the report. This case has no applicability to the facts of the present matter.

80. In this case, as discussed hereinabove, the Insurer was fully justified in writing the letter dated 12.11.2002 to the Surveyor requesting them to re-assess the settlement amount. It was only the final response by the surveyors on 07.12.2002 that gave a clear picture as to the base figure and the applicable rates of the depreciation since the method of settlement was to be the depreciation basis and not reinstatement basis.

81. In view of the above, all the findings to the contrary recorded by the NCDRC are held to be erroneous and are herewith set aside.

Conclusion

82. For the above reasons, we allow Civil Appeal No. 2759 of 2009 of NIACL and set aside the order of the NCDRC in O.P. No. 233 of 2000 dated 05.08.2008. We hold that the claim was rightly settled by the NIACL letter dated 03.01.2003 which determined the loss amount payable at Rs.7.88 crores after applying 60% depreciation. We dismiss Civil Appeal arising out of SLP (Civil) No. 10001 of 2009 and Civil Appeal Nos. 5242-5243 of 2009 filed by the Insured-respondent. Consequently, the Original Complaint OP No.233 of 2000 before the NCDRC will stand dismissed. No order as to costs.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeals disposed of.

[2024] 5 S.C.R. 321 : 2024 INSC 348

Fertilizer Corporation of India Limited & Ors.
v.
M/s Coromandal Sacks Private Limited

(Civil Appeal Nos. 5366-5367 of 2024)

26 April 2024

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

Issue for Consideration

Suspension of legal proceedings as envisaged u/s. 22(1) of the Sick Industrial Companies (Special Provisions) Act, 1985, if would extend to a suit for recovery of money even if the debt sought to be proved in the plaint has not been admitted by the sick industrial company and if so, whether the decree in favour of the original plaintiff could be said to be coram non-judice; and the High Court, if erred in granting 24% compound interest on the principal decretal amount in favour of the original plaintiff.

Headnotes

Sick Industrial Companies (Special Provisions) Act, 1985 – s. 22(1) – Suspension of legal proceedings – Suit for the recovery of money instituted by the original plaintiff-small-scale industrial undertaking against the defendant company during the pendency of proceedings in respect of the defendant company before the BIFR, though later the defendant company ceased to be a sick industrial company – Trial court holding that the defendant company failed to prove that it was a sick industry, decreed the suit granting 12% interest pa on the amount – In appeal, the High Court granted 24% compound interest on the amount due – Suspension of legal proceedings u/s. 22(1), if would extend to a suit for recovery of money even if the debt sought to be proved in the plaint not admitted by the sick industrial company and if so, the decree in favour of the original plaintiff if could be said to be coram non-judice:

Held: Suit instituted by the original plaintiff not hit by the embargo envisaged u/s. 22(1) – Thus, the decree awarded in favour of the original plaintiff by the trial court and modified by the High Court, cannot be said to be coram nonjudice – Suit for recovery was not of a nature which could have proved to be a threat to the properties

* Author

of the defendant sick company or would have adversely impacted the scheme of revival – Suit was a simple suit for recovery of money towards the dues arising under the alleged illegal deductions under the contract – This could not be said to be a proceeding in the nature of execution, distress or the like and thus, not hit by s. 22(1) – Furthermore, the legislature did not intend to include even the proceedings for the adjudication of the liabilities not admitted by a sick company within the protective ambit of s. 22(1) – Such an adjudicatory process only determines the liability of the defendant towards the plaintiff, and does not threaten the assets of the sick company or interfere with the formulation of the scheme unless execution proceedings are initiated pursuant to the completion of such adjudicatory process. [Paras 98, 99, 142]

Sick Industrial Companies (Special Provisions) Act, 1985 – s. 22(1) – Application of mischief rule:

Held: Applying the mischief rule to s. 22(1), it is found there was a vacuum in the legal framework to deal with sick industrial companies and provide ameliorative steps for their revival – 1985 Act was enacted to fill in this vacuum – Mischief which was sought to be dealt with by the enactment of s. 22 was any such legal proceeding which could impact the assets of the sick company and in-turn negatively impact the formulation and implementation of the rehabilitative scheme – This provision was inserted to provide a remedy by ensuring that the multiple recourses available under the law for recovery of debts, etc. were suspended for the period during which the sick company was under the ameliorative shelter of the BIFR – It was to shield the formulation and implementation of the revival scheme from any impediments thereby maximising the chances of revival of sick company, the ultimate object sought to be achieved by the Act. [Para 101]

Sick Industrial Companies (Special Provisions) Act, 1985 – ss. 22(1), 16, 17 and 25 – Benefit of suspension of legal proceedings in respect of sick industrial company u/s. 22(1) – Conditions to be fulfilled for the applicability of s. 22(1):

Held: Firstly an inquiry u/s. 16 must be pending; or any scheme referred to in s. 17 must be under preparation or consideration or a sanctioned scheme must be under implementation; or an appeal u/s. 25 must be pending-in relation the company against whom the legal proceedings sought to be suspended have been initiated – Secondly, the the proceedings must be one from amongst the six

types as described, or of a similar nature, i.e. ejusdem generis to the said six types of proceedings – Thirdly, the proceedings must have the effect of threatening the assets of the sick company and interfering with the formulation, consideration, finalisation or implementation of the scheme. [Paras 63-65, 67, 87, 97]

Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 – Compound interest on the principal decretal amount – Claim of – High Court granted 24%pa compound interest on the principal decretal amount in favour of the original plaintiff-small-scale industrial undertaking from the original defendants, from the date the amounts were determined to have become due till the date of their realisation by the original plaintiff, setting aside the decree of the trial court which granted 12% simple interest in favour the original plaintiff – Correctness:

Held: High Court committed no error in awarding 24% interest to the original plaintiff on its dues as per the provisions of the 1993 Act – However, the period during which the defendant company was a sick company as per the 1985 Act is excluded for the purposes of calculation of interest – For the period during which the defendant company was sick and before the BIFR, it cannot be said that the withholding of the payment of the dues of the original plaintiff was wilful and intentional – Liability of the original defendants was disputed and was finally adjudicated only by way of the impugned judgment, much after the BIFR proceedings had come to an end; and even if the liability of the original defendants was not disputed, or was even acknowledged before the BIFR, recovery of the same could not have been done without the permission of the BIFR in view of the suspension of recovery proceedings by s. 22(1) of the 1985 Act – Thus, the period commencing from the date when original defendant was declared to be a sick company under the 1985 Act going up to the date when it was discharged by the BIFR and declared to be no longer a sick industrial company is excluded from the purview of the applicability of the interest provision under the 1993 Act – Interest would not be calculated for the aforesaid period – Thus, the impugned judgment and order of the High Court is upheld subject to the modification of the period for which interest may be granted – Interest would be calculated at 24% p.a. with monthly compounding. [Paras 140-143]

Interpretation of Statutes – Principle of harmonious construction – Interplay between the Sick Industrial Companies (Special Provisions) Act, 1985 and the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993:

Held: Doctrine of harmonious construction is based on the principle that the legislature would not lightly take away from one hand what it had given with the other – Doctrine provides, that as far as possible, two seemingly conflicting provisions within a statute, or the seemingly conflicting provisions of one statute vis a vis another, should be construed in a manner so as to iron out any conflict – Beneficial provisions of the 1985 Act, was enacted to maximise the chances of revival of sick industrial companies, while the 1993 Act, was enacted with the intention to ensure that small-scale industries are paid their dues in time – This object of the 1993 Act was sought to be achieved by providing a high interest rate, with monthly compounding, so as to act as a deterrent for the buyers – Interest of justice requires that both the 1985 Act and the 1993 Act, which are in the nature of beneficial enactments, should be read harmoniously so as to impart a meaningful construction to the language of each of the enactments. [Paras 119, 125, 136]

Interest – Grant of interest – Concept of :

Held: When interest is awarded by the Court, normal feeling is that it is so awarded by way of penalty or punishment, however, interest in all cases is not granted by way of penalty or punishment – Interest on the delayed payment of the claim amount accrues due to the continuing wrong committed by the wilful withholding of the payment towards the claim, resulting in a continuous injury until such payment is made, or in other words, until the claim is realised. [Paras 106, 107]

Sick Industrial Companies (Special Provisions) Act, 1985 – Legislative scheme of the Act – Object of enactment – Stated. [Paras 48-52, 85]

Sick Industrial Companies (Special Provisions) Act, 1985 – s. 3(1)(o) – Industrial sickness – Concept of. [Paras 48-50]

Sick Industrial Companies (Special Provisions) Act, 1985 – s. 22(1) – Interpretation of – Explained. [Paras 75-84]

**Fertilizer Corporation of India Limited & Ors. v.
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Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 – Object and scope of. [Paras 111, 112, 113, 114]

Case Law Cited

Modi Rubber Ltd. v. Continental Carbon India Ltd. [2023] 3 SCR 1026 **: 2023 SCC OnLine SC 296 – distinguished.**

Jay Engineering Works Ltd. v. Industry Facilitation Council [2006] Supp. 6 SCR 189 **: (2006) 8 SCC 677;** *Tata Motors Ltd. v. Pharmaceutical Products of India Ltd.* [2008] 9 SCR 267 **: (2008) 7 SCC 619;** *Bhoruka Textiles Ltd. v. Kashmiri Rice Industries* [2009] 9 SCR 463 **: (2009) 7 SCC 521;** *Sunil Mittal Properties of Shree Shyam Packaging Industries v. M/s LML Ltd.* **(2011) 123 DRJ 249;** *Saketh India Limited v. W. Diamond India Ltd.,* **2010 SCC OnLine Del 1786;** *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI CINOD Secretariat, Madras* [1992] 2 SCR 999 **: (1992) 3 SCC 1;** *Gram Panchayat and Another v. Shree Vallabh Glass Works Limited and Others* [1990] 1 SCR 966 **: (1990) 2 SCC 440;** *Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd.* [1993] 1 SCR 340 **: (1993) 2 SCC 144;** *Deputy Commercial Tax Officer and Others v. Corromandal Pharmaceuticals and Others* [1997] 2 SCR 1026 **: (1997) 10 SCC 649;** *Raheja Universal Limited v. NRC Limited and Others* [2012] 3 SCR 388 **: (2012) 4 SCC 148;** *Goyal MG Gases Pvt. Ltd. v. SBQ Steels Ltd.* **(2016) SCC OnLine Del 5100;** *M/s Haryana Steel & Alloys Ltd. v. M/s Transport Corporation of India* **(2012) SCC OnLine Del 2140;** *Kusum Products Ltd. v. Hitkari Industries Ltd.* **(2014) SCC OnLine Del 4926;** *FMI Investment Pvt. Ltd. v. Montari Industries Ltd. and Another* **(2012) SCC OnLine Del 5354 – referred to.**

Books and Periodicals Cited

Interpretation of statutes by G.P. Singh; Handbook of Statistics of Indian Economy published by the Reserve Bank of India **– referred to.**

List of Acts

Sick Industrial Companies (Special Provisions) Act, 1985; Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993; Companies Act, 1956; Industrial Development and Regulation Act, 1951; Sick Textile Undertaking (Nationalization) Act, 1974; Aluminium Corporation of India Ltd. (Acquisition and Transfer of Aluminium Undertaking) Act, 1984; Futwah Islampur Lightway Line (Nationalisation) Act, 1985; Industrial Reconstruction Bank of India Act, 1984; Sick Industrial Companies (Special Provisions) Repeal Act, 2003; Sick Industrial Companies (Amendment) Act, 1993; Bombay Village Panchayat Act, 1959; State Financial Corporations Act, 1951; Sick Industrial Companies (Amendment) Act, 1994; Micro Small and Medium Enterprises Development Act, 2006; Constitution of India.

List of Keywords

Suspension of legal proceedings; Suit for recovery of money; Sick industrial company; Coram non-judice; Compound interest; Principal decretal amount; Mischief rule; Revival of sick company; Rehabilitative scheme; Recovery of debts; *Ejusdem generis*; Interest on Delayed Payments; Scaled-down value; Interpretation of statutes; Principle of harmonious construction; Conflicting provisions within a statute; Beneficial provisions; Beneficial enactments; Interest; Continuing wrong; Wilful withholding of the payment; Continuous injury; Industrial sickness.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5366-5367 of 2024

From the Judgment and Order dated 10.06.2022 of the High Court for the State of Telangana at Hyderabad in AS Nos.808 of 2002 and 913 of 2004

Appearances for Parties

Ms. Malvika Trivedi, Sr. Adv., Chirag Joshi, Shailendra Slaria, Ghanshyam Joshi, Advs. for the Appellants.

Sundeep Pothina, Vaibhav Dwivedi, Ms. Ankita Chaudhary, Ms. Archana Pathak Dave, Advs. for the Respondent.

**Fertilizer Corporation of India Limited & Ors. v.
M/s Coromandal Sacks Private Limited**

Judgment / Order of the Supreme Court

Judgment

J. B. Pardiwala, J.

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

INDEX*

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

A. FACTUAL MATRIX

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

2. The appellants herein are the original defendants and the respondent herein is the original plaintiff.

3. The present appeals arise from the impugned common judgment and order dated 10.06.2022 ("**impugned judgment**") passed by the High Court of Telangana at Hyderabad partly allowing the Appeal Suit No. 808 of 2002 and Appeal Suit No. 913 of 2004 respectively preferred by the original defendants and the original plaintiff respectively against the judgment and decree dated 19.09.2001 passed by the Senior Civil Judge, Peddapalli in O.S. No. 37 of 1996 decreeing the suit partly in favour of the original plaintiff.

4. M/s Coromandal Sacks Private Limited, that is, the original plaintiff, is a company registered under the Companies Act, 1956 established with the assistance of the Andhra Pradesh Industrial Development Corporation Limited ("**APIDC**") and is engaged in the manufacturing of High Density Poly Ethylene ("**HDPE**") bags.

5. Fertilizer Corporation of India Ltd. ("**FCIL**"), that is, the defendant company, is a Public Sector Undertaking ("**PSU**") of the Government of India established for the manufacturing of fertilisers and are operating under the administrative control of the Ministry of Chemicals and Fertilizers, Government of India.

6. The original defendants required HDPE bags for the purpose of packaging and supply of fertiliser to their customers. They had been placing orders for the same with the original plaintiff since 1986-87 onwards. The terms and conditions including the technical specifications of the bags and terms of payment were specified in the notices inviting tender ("**NIT**") issued from time to time and the purchase orders issued in pursuance thereof. As per the terms of the NIT, the original defendants were required to make the entire payment within 20 days of the receipt of the bags and approval of the same. The terms of the purchase orders also entitled the original defendants to deduct up to a maximum of 5% of the contract price towards liquidated damages upon delay in supply of bags by the original plaintiff.

i. Case of the original plaintiff before the trial court

7. The case of the original plaintiff before the trial court was that the original defendants placed with it certain purchase orders for the supply of the HDPE bags, which were manufactured by it as per the specifications and duly supplied periodically. The purchase orders were amended from time to time to account for the increase in the number of bags which were required by the original defendants. It was the case of the original plaintiff that in pursuance of the communications exchanged with the original defendants, it supplied 42,000 bags over and above the quantity mentioned in the purchase orders to meet with the urgent requirements of the original defendants, on the understanding that a subsequent purchase order would be issued to account for the extra supply.

8. The grievance of the original plaintiff was that when a formal purchase order was subsequently issued by the original defendants to account for the extra bags supplied by the original plaintiff, the price per bag mentioned in the said order fell short of the price agreed upon between the parties. The original plaintiff was also aggrieved by the deductions made by the original defendants towards the liquidated damages for the alleged delay in supply of the bags and the penalty imposed towards the supply of the alleged poor quality of the bags. The original plaintiff also claimed to have suffered losses due to the refusal of the original defendants to accept 25,000 bags after placing the order, which were printed as per the specifications prescribed by the original defendants and had to be sold as scrap due to non-acceptance by the original defendants.

9. With a view to recover the aforesaid losses, the original plaintiff instituted the civil suit for the recovery of Rs 8,27,100.74/- along with Rs 10,31,803.14/- towards interest up to the date of institution of the suit. A detailed break-up of the claim of the original plaintiff before the trial court is as follows:

S. No.	Particulars	Amount (Rs.)
1.	Towards price difference for 33,000 bags, i.e., from Rs. 8.75/bag to Rs. 10.25/bag	49,500
2.	Towards price difference for 9,000 bags, i.e., from Rs. 8.75/bag to Rs. 9.44/bag	6,210
	Total (Towards price difference for 42000 bags)	**Rs. 55,710.00**
3.	Towards Liquidated Damages deducted by the defendants	1,63,470.75
4.	Towards deduction against penalties	4,89,919.99
5.	Towards loss incurred on 25,000 Bags printed which was sold as waste @ 50% price on account of not taking delivery.	1,18,000.00
	Principal Grand Total	**8,27,100.74**
6.	Towards Interest on Rs. 55,710 from 01.01.1994 to 21.11.1996 at the rate of 24%	38,609.32
7.	Towards Interest on Rs. 1,63,470.75 from 01.01.1994 to 21.11.1996	1,13,298
8.	Towards Interest on delayed payment up to 15.07.1994 as per the Debit Note dated 15.07.1994	3,45,467
9.	Towards interest on Rs. 3,45,467 from 16.07.1994 to 21.11.1996	1,94,900.18
10.	Towards interest on Rs. 4,89,919.99 from 01.01.1994 to 21.11.1996	3,39,534.69
	Total Interest	**10,31,803.14**
	Grand Total	**18,58,903.88**

ii. Case of the original defendants before the trial court

10. The original defendants filed their written statement before the trial court stating that there was no discrepancy in the purchase order issued subsequent to the supply of the extra bags and that the imposition of liquidated damages was justified as per the terms of the NIT and the purchase orders. It was also stated that the deductions imposed as penalty for the supply of poor quality of the bags was also justified and interest @ 24% was not liable to be imposed.

11. The original defendants further stated before the trial court that as they had been declared to be a sick company under Section 3(1)(o) of the Sick Industrial Companies (Special Provisions) Act, 1985 ("**the 1985 Act**"), the suit for recovery was not maintainable as per Section 22(1) of the 1985 Act and thus was liable to be dismissed.

12. The trial court, having regard to the specific pleadings of the parties proceeded to frame 10 issues as tabulated hereinbelow.

S. No.	***Issue***	***Decision of the trial court***
1.	*Whether the plaintiff had supplied 42,000 bags (33,000 + 9,000) on the advice and urgency showed by the defendants on his own?*	*Decided in favour of the plaintiff*
2.	*Whether the defendants after taking and consuming the bags even without placing order can deny the agreed price for the 42,000 bags?*	*Decided in favour of the plaintiff – Rs 55,710/- with interest @ 12% p.a. from 01.01.1994 till realisation*
3.	*Whether the defendants had any right to deduct Rs. 1,63,471/- as Liquidated Damages?*	*Partly decided in favour of the defendants*
4.	*Whether the defendants were entitled to deduct Rs. 4,89,919.99 as penalty. If so, whether it was in accordance with the terms and conditions of order/tender?*	*Decided in favour of the defendants*

5.	*Whether the plaintiff was entitled to interest for the delayed payment as per law?*	*Partly decided in favour of the plaintiff – Interest rate of 12% granted on the payments held as due and delayed.*
6.	*Whether the plaintiff had printed 25,000 bags as per the oral order of the defendants? If so, whether the plaintiff sustained loss at the rate of 50% of the value due to refusal on the part of the defendants to take delivery of the bags?*	*Decided in favour of the plaintiff – Rs 1,18,000/- with interest @ 12% p.a. from 01.01.1994 till realisation.*
7.	*Whether the defendants had called for a fresh tender after placing of the orders to the plaintiff and in which M/s Neptune Polymers, Ahmedabad quoted rate of a bag at Rs. 8.46, the same has become binding on the plaintiff?*	*Decided in favour of the plaintiff*
8.	*Whether the defendants had regularised the supply of 33,000 bags at Rs. 8.46/bag vide P.O. No. 40893 dated 21.04.1994 and same was accepted by the plaintiff?*	*Decided in favour of plaintiff*
9.	*Whether the suit was not maintainable as the defendants have been declared as Sick Industry by the BIFR vide Case No. PUC/C/515/92 dated 06.11.1992?*	*Decided in favour of the plaintiff*
10.	*Whether the suit of the plaintiff was barred by limitation?*	*Decided in favour of the plaintiff*

13. On the issue of applicability of Section 22 of the 1985 Act, it was observed thus by the trial court:

> *"Both sides have not argued on this issue and no material is produced before the Court and no evidence is also*

adduced on this issue. Hence, the defendant company failed to prove that it is a sick industry and the plaintiff's suit is maintainable. I answer this issue in favour of the Plaintiff accordingly"

14. The final decree drawn by the trial court reads thus:

> *"1. That the suit of the plaintiff be and is hereby decreed.*
>
> *2. That the defendants 1 to 4 be and are hereby directed to pay Rs. 55,710/-, Rs. 100,848 and Rs. 1,18,000/- to the plaintiff together with interest @ 12% per annum from 01.01.1994 till realization.*
>
> *3. That the defendants 1 to 4 be and are hereby further directed to pay Rs. 1,72,734/- to the plaintiff together with interest @ 12% per annum from 16.07.1994 till realization.*
>
> *4. That the suit of the plaintiff for the rest of the claim of Rs. 4,89,919/- be and is hereby dismissed.*
>
> *5. That the defendants do pay Rs. 37,169/- to the plaintiff towards the costs of the suit."*

iii. Appeals before the High Court

15. Both the parties went to the High Court in appeal against the aforesaid decision of the trial court. The original plaintiff contended before the High Court, *inter alia*, that the deductions towards the liquidated damages and penalty were wrongly imposed on it by the original defendants, and that the interest at the rate of 24% with monthly compounding ought to have been granted on the delayed payments in light of the provisions of the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993 ("**the 1993 Act**").

16. The original defendants on the other hand contested that the trial court had failed to consider the evidence properly and had wrongly awarded the amounts under different heads to the original plaintiff. The contention as to the applicability of Section 22(1) of the 1985 Act was also raised by the original defendants.

17. The High Court, *vide* the impugned judgment partly allowed both the appeals. The original defendants were allowed to deduct an

amount of Rs 1,63,471/- towards the liquidated damages, whereas the original plaintiff was allowed to recover the amounts deducted towards penalty, price difference in the supply of 42,000 bags and the loss incurred due to the refusal of the original defendants to accept the delivery of 25,000 bags. Pertinently, the High Court accepted the contention of the original plaintiff on the issue of interest and granted 24% compound interest on the amounts due.

18. Despite recording the submissions of the parties on the applicability of Section 22(1) of the 1985 Act, neither any point for determination was framed nor any finding was returned on the same by the High Court.

19. Aggrieved by the impugned judgment, more particularly as regards the awarding of 24% interest in favour of the original plaintiff – which has inflated the principal decretal amount to one of mammoth proportions – the original defendants are before this Court with the present appeals.

B. SUBMISSIONS ON BEHALF OF THE APPELLANTS/ ORIGINAL DEFENDANTS

20. Ms. Malvika Trivedi, the learned senior counsel appearing on behalf of the original defendants submitted that the 1985 Act overrides the 1993 Act as the same was enacted in the larger public interest by the Parliament with a view to secure the directive specified under Article 39 of the Constitution.

21. It was further submitted that the 1993 Act having been enacted to provide for and regulate the payment of interest on delayed payments to the small-scale industries, does not envisage a situation where an industrial undertaking becomes sick and requires a scheme for its revival.

22. It was argued that the provisions of the 1985 Act should be given the widest possible import in light of the fact that the same is a self-contained code containing provisions like the statutory bar on civil suits for recovery of money from sick industrial companies under Section 22 and the non-obstante clause under Section 32 by virtue of which the provisions of the 1985 Act are given an overriding effect. Reliance was placed by the learned senior counsel upon the decisions of this Court in ***Jay Engineering Works Ltd. v. Industry Facilitation Council*** reported in (2006) 8 SCC 677 and ***Tata Motors Ltd. v. Pharmaceutical Products of India Ltd.*** reported in (2008) 7 SCC 619.

23. It was further submitted that the impugned judgment and order passed by the High Court failed to take into consideration the law settled by this Court in ***Bhoruka Textiles Ltd. v. Kashmiri Rice Industries*** reported in (2009) 7 SCC 521 which held that if the jurisdiction of the civil court was ousted in terms of the jurisdictional bar imposed under Section 22 of the 1985 Act, then any judgment rendered by it would be *coram non-judice* and as a result a nullity.

24. To fortify her aforesaid submission, the learned senior counsel argued that the facts of the present case are similar to the facts in ***Bhoruka Textiles*** (supra) as follows:

    I. The defendant company was declared as a sick industrial undertaking under Section 3(1)(o) of the 1985 Act and was referred to the BIFR for its revival on 06.11.1992 and an enquiry under Section(s) 16 and 17 respectively of the 1985 Act was pending in respect of the defendant company at the time of the institution of the suit by the original plaintiff before the trial court.

    II. The suit for recovery of money was instituted by the original plaintiff against the original defendants without obtaining the consent of the BIFR, as mandated by Section 22 of the 1985 Act.

    III. Despite the statutory bar under Section 22 against the institution of a suit for the recovery of money, the trial court decided the suit and decreed it. Even the High Court in the impugned judgment failed to decide the issue of lack of jurisdiction of the trial court in deciding the suit.

25. The learned senior counsel further submitted that the contention of the original plaintiff that the statutory bar under Section 22 of the 1985 Act applies only against a recognized creditor and such debts as are acknowledged before the BIFR during the pendency of the reference application is not the correct understanding of the law and is against the beneficial object of the Act. It was contended that the reliance placed by the original plaintiff on the decision of the Delhi High Court in ***Sunil Mittal Properties of Shree Shyam Packaging Industries v. M/s LML Ltd.*** reported in (2011) 123 DRJ 249 is misplaced as the said decision failed to consider the law settled by this Court in ***Bhoruka Textiles*** (supra) and thus could be termed as *per incuriam*.

26. One another submission made by the learned senior counsel was that out of the total claim put forward by the original plaintiff before the trial court, only the amount of Rs 55,710/- could have been recognized as delayed payment. It was submitted that the deductions made by the original defendants towards liquidated damages and penalty while remitting the payment to the original plaintiff could not have been classified as delayed payment for the purpose of computation of interest under the 1993 Act and the interest could only have been claimed on the undisputed and agreed upon sum under the contract.

27. It was argued that the liability, if any, of the original defendants to pay interest on the amount of Rs 4,89,919.99/- should be limited from the date of the impugned judgment, wherein the High Court while partially modifying the decree awarded by the trial court, awarded the amount as above in favour of the original plaintiff for the first time.

28. It was also argued that the High Court erred in interfering with the exercise of discretion by the trial court in awarding 12% pendente lite interest in favour of the original plaintiff.

29. The learned senior counsel further submitted that the original plaintiff had the option of taking recourse to the mechanism prescribed under Section 6 of the 1993 Act which provides for making a reference of any dispute to the Industry Facilitation Council for acting as an arbitrator or a conciliator. However, by consciously approaching the civil court by way of a suit for recovery of money despite the jurisdictional bar contained under Section 22 of the Act, the original plaintiff must now face the consequences of approaching a non-jurisdictional forum.

30. Lastly, it was submitted by the learned senior counsel that the defendant company remained under BIFR for a period of 21 years and was revived in 2013 after intervention of the Cabinet Committee on Economic Affairs. The economic distress caused by the enforcement of the liability imposed upon the original defendants by the High Court may potentially overwhelm the efforts at revival of the defendant company.

C. SUBMISSIONS ON BEHALF OF THE RESPONDENT/ ORIGINAL PLAINTIFF

31. Mr. Sundeep Pothina, the learned counsel appearing on behalf of the original plaintiff submitted at the outset that Section 22 of the 1985 Act is not applicable to the instant case as neither the debt

came to be acknowledged, nor the name of the creditor company figured before the BIFR. Since, in the case on hand, the original defendants did not include the liability of the original plaintiff in their list of liabilities in accordance with Section 21(a)(i) of the 1985 Act nor in their book of accounts under Section 21(a)(ii) of the 1985 Act nor did it include the original plaintiff company in the list of creditors under Section 21(b) of the 1985 Act at the time of reference or thereafter, the jurisdictional bar available under Section 22 of the 1985 Act cannot be said to be applicable to the suit instituted by the original plaintiff.

32. It was further submitted that the reliance placed by the original defendants on ***Bhoruka Textiles*** (supra) in support of their contention regarding Section 22 of the 1985 Act is misplaced for the following reasons:

I. This Court in ***Bhoruka Textiles*** (supra) decided the issue as to whether the bar under Section 22 of the 1985 Act would apply to a suit for recovery instituted for defaults occurring post the reference of the sick industrial company to the BIFR when the reference was pending. However, the issue in the present case is different and pertains to whether a suit for determination of 'illegal deductions' and 'breach of contract' and liability would be barred by virtue of Section 22 of the Act.

II. In ***Bhoruka Textiles*** (supra), not only the debt but the creditor was also acknowledged before the BIFR and there was no dispute on the issue or size of default. However, in the present case, both the existence and quantum of liability are under dispute. The original defendants have not referred to the original plaintiff as a 'creditor' before any forum.

33. It was further argued that the reliance placed by the original defendants on ***Jay Engineering*** (supra) is also of no avail as in the facts of that case, there was no dispute over the quantum of dues and the sick company therein had reckoned the dues and the liabilities were covered in the revised rehabilitation scheme. Further, the decision in the said case only supports the contention of the original plaintiff that the adjudicatory process of making an award is not barred under Section 22 of the 1985 Act and it is only the execution of such an award against a sick company which is protected under Section 22 of the 1985 Act. Thus, as the civil court in this case was the

adjudicating authority having inherent jurisdiction to decide the suit under Section 9 of the Civil Procedure Code, 1908, the adjudicatory part of determining the liability couldn't be said to have been barred by Section 22 of the Act. It is only the execution of such a decree arrived at as a result of the adjudicatory process which could be said to be barred under Section 22 of the 1985 Act during the period when the sick company is under the protection of the BIFR.

34. The learned counsel further submitted that the reliance placed by the original defendants on the decision of this Court in ***Tata Motors*** (supra) is also misplaced as the said decision pertains to Section 26 of the 1985 Act while the case on hand pertains to the applicability of Section 22 of the 1985 Act. He contended that even the said decision supports the case of the original plaintiff as it explains the distinction between the adjudicatory authority of a civil court and the BIFR and holds that the jurisdiction of a civil court is barred in respect of any matter for which the BIFR or the Appellate Authority for Industrial and Financial Reconstruction ("**AAIFR**") is empowered.

35. The learned counsel, while placing reliance on the decision of the Delhi High Court in ***Sunil Mittal*** (supra), argued that the facts of the present case are squarely covered by the said decision. It was submitted that in the said case, a distinction was drawn between the 'process of assessment' and 'quantified recoveries' and it was held that while the realisation of the latter is stayed by virtue of Section 22 of the 1985 Act, the former, which is the process of finalisation of liability, does not get stayed by operation of Section 22 of the 1985 Act.

36. The learned counsel submitted that the contention of the original defendants that the decision in ***Sunil Mittal*** (supra) is rendered *per-incuriam* as the same failed to consider the decision in ***Bhoruka Textiles*** (supra) is incorrect as the court therein had based its decision on the judgment of a division bench of the Delhi High Court in ***Saketh India Limited v. W. Diamond India Ltd.*** reported in 2010 SCC OnLine Del 1786. The decision in ***Saketh India*** (supra) has exhaustively considered the various decisions of this Court on the issue of applicability of jurisdictional bar under Section 22 of the 1985 Act and thus the decision in ***Sunil Mittal*** (supra) cannot be characterised as *per-incuriam*.

37. The learned counsel submitted that the High Court in its impugned judgment has determined the issue of rate of interest under Section 4 of the 1993 Act. The High Court, after looking into the relevant material, observed that the floor rate charged by the State Bank of India ("**SBI**") for the financial year 1993-94 was 19% and thus awarded interest at 24% which is 5 per-cent points above the floor rate.

38. The learned counsel, in the last, submitted that as opposed to the representations made by the defendant company about its current financial status, the net worth of the defendant company as on 31.03.2022 is in the positive and is at the least not less than 2,000/- crores.

D. ANALYSIS

39. Before adverting to the rival submissions canvassed on either side, we would like to briefly discuss the proceedings in respect of the defendant company before the Board for Industrial and Financial Reconstruction ("**BIFR**") in terms of Section 15 of the 1985 Act.

i. Proceedings in respect of FCIL before the BIFR

40. At the end of financial year 1991-92, the defendant company suffered huge erosion in its net worth and became a sick industrial company. Accordingly, a reference was made to the BIFR in terms of Section 15 of the 1985 Act. Thereafter, the BIFR after hearing the representatives and stakeholders declared the defendant company to be a sick company under Section 3(1)(o) of the 1985 Act vide its order dated 06.11.1992. The BIFR also granted FCIL and the Government of India time till 31.03.1993 to submit their final plan for rehabilitating the company.

41. During the entire period of adjudication of the suit by the trial court and for a part of the period during the pendency of the appeals before the High Court, the defendant company continued to remain a Sick Industrial company with a Special Director appointed by the BIFR and the SBI appointed as the Operating Agency.

42. On 09.05.2013, the Cabinet Committee on Economic Affairs ("**CCEA**") met and took decisions on the revival of the defendant company. The Government of India waived off its loan and interest amounting to Rs. 10,643/- crore and the debt owed to the other PSUs were settled at 30% of their respective dues as on 31.03.2003.

43. Meanwhile, the BIFR in the course of one important hearing looked into the progress towards the revival of the defendant company in detail. After taking into account the developments over the course of 20 years, the BIFR issued the following relevant directions: -

> *"i. The company, M/s Fertilizer Corpn. Of India (Case No. 515/1992) ceases to be a Sick Industrial Company, within the meaning of Section 3(1)(o) of the SICA as its net-worth has turned positive. It is therefore, de-registered from the purview of SICA/BIFR.*
>
> *xxx xxx xxx*
>
> *iv. The Board discharges the State Bank of India from the responsibility of Operating Agency (OA) to the Board.*
>
> *v. All Secured Creditors, Statutory Authorities are at liberty to recover their dues, if any, according to law."*

44. Thus, in view of the directions of the BIFR dated 27.06.2013 referred to above, the defendant company ceased to be a Sick Industrial company during the pendency of the appeals before the High Court.

45. The submissions of the original defendants were focussed on and limited to the following two aspects – jurisdictional bar on the civil court in deciding the suit instituted by the original plaintiff by virtue of Section 22(1) of the 1985 Act; and the legality & validity of the interest rate of 24% per annum awarded by the High Court in the original plaintiff's favour.

ii. Issues for Determination

46. Having heard the parties extensively on the aforesaid aspects and having perused the materials on record, the following two questions fall for our consideration:

I. Whether the suspension of legal proceedings as envisaged under Section 22(1) of the 1985 Act would extend to a civil suit for recovery of money even if the debt sought to be proved in the plaint has not been admitted by the sick industrial company? If so, whether the decree in favour of the original plaintiff could be said to be *coram non-judice*?

II. Whether the High Court was correct in granting 24% compound interest on the principal decretal amount in favour of the original plaintiff?

iii. Overview of Industrial Sickness and the Legislative Scheme of the 1985 Act.

47. Before we proceed to answer the aforesaid issues, we would like to discuss briefly the concept of industrial sickness, the legislative scheme of the 1985 Act and the object behind its enactment. This will help us develop a better contextual understanding of the questions before us.

48. Sickness in industries is a natural fall-out of industrialisation. Industrial sickness can be understood to refer to a situation wherein an industrial unit fails to generate surplus and is incurring losses over a period of time resulting in the erosion of its net-worth. Section 3(o) of the 1985 Act defines a 'sick industrial company' to be one which at the end of a financial year accumulates losses equal to or exceeding its net worth.

49. While there could be numerous causes of sickness, the mismanagement of the industrial unit, faulty planning at the inception of an industry, technical drawbacks, recession in the market, labour disputes, changes in the fiscal policies of the government, unavailability of credit facilities, and non-availability of raw-materials are some of the prominent factors causing industrial sickness.

50. As the Indian economy transitioned from being an agriculture-intensive one towards a more industry-centric one, a growing number of industries suffered huge financial losses resulting in their closure, which in turn led to the loss of employment, government revenue and locking up of the investible funds of banks and financial institutions which were invested in setting up of those industries. In order to curb industrial sickness and its detrimental impacts on the Indian economy, many policies and legislations were enacted over the years by the executive and the legislative wing respectively. The aim of such enactments was two-fold – first, to reduce the incidence of sickness in industries by promoting a conducive industrial climate and secondly, to identify sick companies and take effective remedial steps for revival of such companies and upon failure, to wind them up.

51. One of the first such enactments was the Industrial Development and Regulation Act, 1951 ("**IDRA Act, 1951**") which contained provisions empowering the Central Government to cause investigation into the affairs of an Industrial Company which is to be wound up for the

purpose of reviving such Company in the interest of general public by ensuring production, supply or distribution of articles.

52. Nationalisation of sick industries through legislations was another approach adopted by the government to revive or continue the operation of sick industries in national interest. An enactment brought in with the object of dealing with sickness in the textile industry was the Sick Textile Undertaking (Nationalization) Act, 1974 which, *inter alia*, provided for the reorganisation and rehabilitation of sick textile industries. Similarly, The Aluminium Corporation of India Ltd. (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 and The Futwah Islampur Lightway Line (Nationalisation) Act, 1985 were enacted with similar objects.

53. Industrial Reconstruction Bank of India Act, 1984 was enacted to provide financial assistance to sick industrial companies for their revival. However, the said enactment was repealed thereafter.

54. In 1981, the Reserve Bank of India ("**RBI**") appointed a committee under the chairmanship of late Shri T. Tiwari to look into the causes of industrial sickness, to assess the depth of the problem and to suggest comprehensive and focussed remedial measures to counter the problem of industrial sickness in India. The committee submitted its report suggesting, *inter alia*, the setting up of a quasi-judicial body through a special legislation to handle the cases of industrial sickness. This suggestion of the committee led to the enactment of the 1985 Act.

55. The Statement of Objects and Reasons accompanying the Sick Industrial Companies Bill, 1985 reads as follows:

> *"The ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of banks and financial institutions are of serious concern to the Government and the society at large. The concern of the Government is accentuated by the alarming increase in the incidence of sickness in industrial companies. It has been recognised that in order to fully utilise the productive industrial assets, afford maximum protection of employment and optimise the use of the funds of the banks and financial institutions, it would be*

imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. It would also be equally imperative to salvage the productive assets and realise the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies.

2. It has been the experience that the existing institutional arrangements and procedures for revival and rehabilitation of potentially viable sick industrial companies are both inadequate and time-consuming. A multiplicity of laws and agencies makes the adoption of coordinated approach for dealing with sick industrial companies difficult. A need has, therefore, been felt to enact in public interest a legislation to provide for timely determination by a body of experts of the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered appropriate with utmost practicable despatch.

3. The salient features of the Bill are-

(i) Application of the legislation to the industries specified in the First Schedule to the Industries (Development and Regulation) Act. 1951, with the initial exception of the scheduled industry relating to ships and other vessels drawn by power, which may however be brought within the ambit of the legislation in due course:

(ii) identification of sickness in an industrial company, registered for not less than seven years, on the basis of the symptomatic indices of cash losses for two consecutive financial years and accumulated losses equalling or exceeding the net worth of the company as at the end of the second financial year,

(iii) the onus of reporting sickness and impending sickness at the stage of erosion of fifty per cent, or more of the net worth of an industrial company is being laid on the Board of Directors of such company;

where the Central Government or the Reserve Bank is satisfied that an industrial company has become sick, it may make a reference to the Board, likewise if any State Government, scheduled bank or public financial institution having an interest in an industrial company is satisfied that the industrial company has become sick, it may also make a reference to the Board;

(iv) establishment of Board consisting of experts in various relevant fields with powers to enquire into and determine the incidence of sickness in industrial companies and devise suitable remedial measures through appropriate schemes or other proposals and for proper implementation thereof;

v) constitution of an Appellate Authority consisting of persons who are or have been Supreme Court Judges, senior High Court Judges and Secretaries to the Government of India, etc. for hearing appeals against the order of the Board.

4. The notes on clauses appended to the Bill explain the various provisions of the Bill.

NEW DELHI

THE 22nd August, 1985. VISHWANATH PRATAP SINGH"

56. The preamble to the 1985 Act reads as follows:

> *"An Act to make, in the public interest, special provisions with a view to securing the timely detection of sick and potentially sick companies owning industrial undertakings, the speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures which need to be taken with respect to such companies and the expeditious enforcement of the measures so determined and for matters connected therewith or incidental thereto."*

57. Having discussed the object behind the enactment of the 1985 Act and the developments leading up to its inception, we shall now briefly discuss the scheme and scope of the 1985 Act.

58. The 1985 Act is divided into four chapters. The first chapter contains preliminary provisions including the definitions and a declaration that the 1985 Act is enacted in furtherance of the principles enshrined in clauses (b) and (c) of the Article 39 of the Constitution. The second chapter, *inter alia*, provides for the establishment of the BIFR and the AAIFR and prescribes the term of office and conditions of service of their chairperson and members and also the procedure to be followed by them.

59. The third chapter, which is often described as the soul and essence of the 1985 Act, provides for the methodology that is to be adopted for the purposes of detecting, reviving or even winding up a sick industrial company. Section 15 enables the Board of Directors of a company which has become sick to make reference to BIFR for determination of measures which shall be adopted with respect to the company. The Central Government or the Reserve Bank or the State Government concerned may also make the reference to the BIFR for the same purpose if it has sufficient reasons to believe that a company has become sick. Once a reference is made, it is open to the BIFR to conduct an inquiry for determining whether the company has become sick. If the BIFR is satisfied on completion of the inquiry that the company has become sick, it can adopt any of the measures envisaged in Section 17 of the 1985 Act. When an order is made under Section 17 a scheme with respect to the company shall be prepared by "the operating agency" specified in such order under Section 18. The operating agency may also be directed by the BIFR under Section 21 to prepare, *inter alia*, an inventory of the books of account of the sick company and its assets and liabilities, a list of shareholders and secured and unsecured creditors, a valuation report in respect of the shares and the assets etc. Section 20 provides for the winding up of a sick company where the BIFR is of the opinion that such a company is not likely to become viable in the future. Section 22, which is at the heart of the dispute before us, *inter alia*, provides for the suspension of legal proceedings of the nature as specified in the said section.

60. The fourth chapter, among other things, provides for the detection of potentially sick companies in the initial stages by mandating the Board of Directors of such companies to bring such potential sickness to the knowledge of the BIFR and the shareholders of the companies. Punishment of up to two years imprisonment along with fine is also

prescribed in case of default in complying with the requirement. The issue of mismanagement leading to sickness in companies is sought to be dealt with under Section 24 of the 1985 Act which provides strict measures in case of proved misfeasance, breach of trust, etc. Section 26 bars the jurisdiction of civil courts in respect of matters which the BIFR or the AAIFR are empowered to determine. Section 32 is the non-obstante provision which imparts overriding effect to the 1985 Act over other laws in force except for the two legislations mentioned in the said section itself. The 1985 Act was repealed by the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 which was notified on 01.12.2016.

61. Having discussed in detail the scheme of the 1985 Act and the object and purpose behind its enactment, we shall now proceed to answer the issues framed by us.

iv. Issue No. 1: Whether the suspension of legal proceedings as envisaged under Section 22(1) of the 1985 Act would extend to a civil suit for recovery of money even if the debt sought to be proved in the plaint has not been admitted by the sick industrial company? If so, whether the decree in favour of the original plaintiff could be said to be *coram non-judice*?

62. To answer the issue before us, it is important to first delineate the scope of the relevant provision, which is reproduced hereinbelow:

> ***"22. Suspension of legal proceedings, contracts, etc.—***
>
> *(1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement*

of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority…."

63. Section 22(1) of the 1985 Act provides that subject to the fulfilment of the conditions as described in the sub-section, proceedings of the nature mentioned therein shall remain suspended in respect of a sick industrial company.

64. For the bar under the said sub-section to get attracted, it is necessary that in respect of an industrial company:

I. An inquiry under Section 16 of the 1985 Act is pending; OR

II. A scheme under Section 17 of the 1985 Act is under preparation or consideration; OR

III. A sanctioned scheme is under implementation; OR

IV. An appeal under Section 25 of the 1985 Act is pending.

65. If one of the four conditions as mentioned aforesaid is fulfilled, then notwithstanding anything contained in the Companies Act, 1956 or any other law or the memorandum and articles of association of the industrial company or any other instrument having effect under the Companies Act, 1956 or other law, proceedings in the nature of the following cannot be initiated, and if already initiated, cannot be proceeded with, except with the consent of the BIFR or the AAIFR, as the case may be:

I. Winding up of the industrial company;

II. Execution, distress or the like against any of the properties of the industrial company;

III. Appointment of receiver in respect of any of the properties of the industrial company;

IV. Suit for recovery of money from the industrial company;

V. Suit for enforcement of a security against the industrial company;

VI. Suit for enforcement of a guarantee in respect of loans or advance granted to the industrial company.

66. It is pertinent to mention that prior to the coming into force of the Sick Industrial Companies (Amendment) Act, 1993 w.e.f. 01.02.1994, the proceedings in the nature of a suit as mentioned in (iv), (v) and (vi) in paragraph 65 above were exempt from the ambit of the suspension as envisaged under Section 22(1) of the 1985 Act.

67. Thus, as can be seen from the plain reading of Section 22(1) of the 1985 Act, for an industrial company to avail the benefit of suspension of legal proceedings, two conditions have to be fulfilled – *First*, one of the four requirements as mentioned in paragraph 64 should be satisfied, that is, the industrial company must be at the prescribed stage of proceedings before the BIFR or the AAIFR. *Secondly*, the nature of proceedings sought to be suspended should be one which falls within the ambit of proceedings mentioned in paragraph 65 above.

68. We shall first examine whether the first of the two conditions as mentioned above is satisfied, as the protective shield of Section 22(1) of the 1985 Act is only available so long as the proceedings before the BIFR or the AAIFR are pending. It was observed by a three-judge bench of this Court in ***Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association CSI CINOD Secretariat, Madras*** reported in (1992) 3 SCC 1 thus:

> *"….We are, therefore, of the opinion that the passing of the interim order dated February 21, 1991 by the Delhi High Court staying the operation of the order of the Appellate Authority dated January 7, 1991 does not have the effect of reviving the appeal which had been dismissed by the Appellate Authority by its order dated January 7, 1991 and it cannot be said that after February 21, 1991, the said appeal stood revived and was pending before the Appellate Authority. In that view of the matter, it cannot be said that any proceedings under the Act were pending before the Board or the Appellate Authority on the date of the passing of the order dated August 14, 1991 by the learned Single Judge of the Karnataka High Court for winding up of the company or on November 6, 1991 when the Division Bench passed the order dismissing O.S.A. No. 16 of 1991 filed by the appellant-company against the order of the learned Single Judge dated August 14, 1991. Section 22(1) of the Act could not, therefore, be invoked*

and there was no impediment in the High Court dealing with the winding up petition filed by the respondents…"

(Emphasis supplied)

69. As discussed hereinbefore in paragraph 40 of the judgment, the Board of Directors of the defendant company, passed a resolution dated 20.04.1992 to the effect that the company had become a sick company for the purposes of the 1985 Act and thus a reference to the BIFR was required to be made. In accordance with the resolution, a reference was accordingly made under Section 15(1) of the 1985 Act. Subsequently, a bench of the BIFR took up the reference of the defendant company for consideration and vide order dated 06.11.1992, *inter alia*, decided that the company fulfilled all the criteria prescribed under Section 3(1)(o) of the 1985 Act for being declared a sick company. The bench also granted the defendant company and the Government of India time till 31.03.1993 to submit a proposal for rehabilitation of the company for the consideration of the bench.

70. The defendant company continued to remain a sick company under the 1985 Act and proceedings before the BIFR continued and it was only on 27.06.2013, after a detailed consideration of the progress made by the company towards revival, that the BIFR declared the defendant company to have ceased to be a sick industrial company. Consequently, the defendant company was deregistered from BIFR on the said date.

71. It is the case of the original defendants that the original civil suit for the recovery of money having been filed against the defendant company during the pendency of proceedings before the BIFR, the trial court committed an error in deciding the suit despite the statutory bar as envisaged under Section 22(1) of the 1985 Act.

72. From a perusal of the facts as discussed above, it is clear that the civil suit was instituted by the original plaintiff on 21.11.1996, that is, indeed, during the pendency of the proceedings in respect of the defendant company before the BIFR. Thus, the first condition precedent for the applicability of the restriction under Section 22(1) of the 1985 Act being satisfied, the only aspect that is now required to be determined is whether the suit instituted by the original plaintiff was of a nature as contemplated under Section 22(1).

73. From a bare reading of the provision, it appears that any 'suit for recovery of money' against a sick industrial company shall not lie or be proceeded with during the pendency of the proceedings in respect of such a company before the BIFR or the AAIFR, except with the permission of the BIFR or the AAIFR, as the case may be. However, it has been contended by the original plaintiff that it is not a suit for recovery of money simpliciter is not barred under the provision, and only such suits for recovery of money which are instituted towards recovery of liabilities admitted by the sick company before the BIFR that fall within the protective ambit of Section 22(1).

74. In other words, the contention of the original plaintiff is that if a suit for recovery of money is brought against a sick company during the pendency of proceedings before the BIFR or the AAIFR with respect to the recovery of an acknowledged debt, then such a suit will be hit by Section 22(1) and cannot lie or be proceeded with except with the permission of the BIFR or the AAIFR, as the case may be.

75. This Court including many of the High Courts have had the occasion of interpreting Section 22(1) of the 1985 Act. One of the earliest decisions concerning Section 22(1) was rendered by a two-Judge Bench of this Court in ***Gram Panchayat and Another v. Shree Vallabh Glass Works Limited and Others*** reported in (1990) 2 SCC 440. In the said case, while deciding an appeal against the decision of the Bombay High Court quashing recovery proceedings towards property taxes and other amounts due under the provisions of the Bombay Village Panchayat Act, 1959 against the respondent company therein, which had been declared to be a sick company under the Act, the Bench held:

> *"5. The question is whether the Panchayat could not recover the amount due to it from out of the properties of the sick industrial company without the consent of the Board?*
>
> *xxx xxx xxx*
>
> *7. Section 22(1) provides that in case the enquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration by the Board or any appeal under Section 25 is pending then certain proceedings against the sick industrial company are to be suspended or presumed to be suspended.*

The nature of the proceedings which are automatically suspended are: (1) Winding up of the industrial company; (2) Proceedings for execution, distress or the like against the properties of sick industrial company; and (3) Proceedings for the appointment of receiver. The proceedings in respect of these matters could, however, be continued against the sick industrial company with the consent or approval of the Board or of the appellate authority as the case may be.

xxx xxx xxx

10. In the light of the steps taken by the Board under Sections 16 and 17 of the Act, no proceedings for execution, distress or the like proceedings against any of the properties of the company shall lie or be proceeded further except with the consent of the Board. Indeed, there would be automatic suspension of such proceedings against the company's properties. As soon as the inquiry under Section 16 is ordered by the Board, the various proceedings set out under sub-section (1) of Section 22 would be deemed to have been suspended.

11. It may be against the principles of equity if the creditors are not allowed to recover their dues from the company, but such creditors may approach the Board for permission to proceed against the company for the recovery of their dues/outstandings/overdues or arrears by whatever name it is called. The Board at its discretion may accord its approval for proceeding against the company. If the approval is not granted, the remedy is not extinguished. It is only postponed. Sub-section (5) of Section 22 provides for exclusion of the period during which the remedy is suspended while computing the period of limitation for recovering the dues.

12. In our opinion, the High Court was justified in quashing the recovery proceedings taken against the properties of the company and we accordingly, reject this petition, with no order as to costs."

(Emphasis supplied)

76. One another decision interpreting Section 22(1) of the 1985 Act was delivered by a two-judge bench of this Court in ***Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd.*** reported in (1993) 2 SCC 144. In this case, this Court, while deciding the interplay between the power of recovery under the State Financial Corporations Act, 1951 and the suspension of certain legal proceedings under Section 22 of the 1985 Act, held thus:

> *"10. It was next contended that the right conferred on the Financial Corporation by Section 29 of the 1951 Act is not a 'legal proceeding' but merely an action permitted by statute and, therefore, Section 22(1) will have no application as it only bars legal proceedings for the winding up of any industrial company or for execution, distress or the like against any of its properties or for the appointment of a Receiver in respect thereof. Now Section 22(1) uses the expression 'proceedings' and not 'legal proceedings' which expression is albeit used in the marginal note to the said provision. Mr Rao contended that Section 22 must be read in the light of the marginal note and when so read it becomes obvious that only legal proceedings of the type mentioned in sub-section (1) thereof are barred and not the exercise of a right such as the one conferred by Section 29 of the 1951 Act. In support of his contention that the marginal note can be used as an aid to interpretation he invited our attention to a seven-Judge Bench decision of this Court in Bengal Immunity Company Ltd. v. State of Bihar [(1955) 2 SCR 603, 636 : AIR 1955 SC 661 : (1955) 6 STC 446] . In that case the marginal note to Article 286 of the Constitution was referred to and it was said that it furnished some clue as to the meaning and purpose of the Article. But at the same time the Court pointed out that unlike the marginal notes in the statutes of the British Parliament, the various Articles of the Constitution were passed by the Constituent Assembly with the marginal notes and, therefore, the Court considered it permissible to use the marginal note to understand the meaning and purport of the Article. But so far as statutes are concerned this Court in the case of Board of Muslim Wakfs, Rajasthan v. Radha Kishan [(1979) 2 SCC 468] held in no uncertain*

terms that the weight of the authority was in favour of the view that the marginal note appended to a section cannot be used for construing the section (see paragraph 24 at p. 479). Section 22(1) shorn of the irrelevant part provides that where an appeal under Section 25 relating to an industrial company is pending, then, notwithstanding anything contained in any other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for appointment of a Receiver in respect thereof shall lie or be proceeded with further, except with the consent of the BIFR or, as the case may be, the appellate authority. The purpose and object of this provision is clearly to await the outcome of the reference made to the BIFR for the revival and rehabilitation of the sick industrial company. The words 'or the like' which follow the words 'execution' and 'distress' are clearly intended to convey that the properties of the sick industrial company shall not be made the subject-matter of coercive action of similar quality and characteristic till the BIFR finally disposes of the reference made under Section 15 of the said enactment. The legislature has advisedly used an omnibus expression 'the like' as it could not have conceived of all possible coercive measures that may be taken against a sick undertaking. The action contemplated by Section 29 of the 1951 Act is undoubtedly a coercive measure directed at the take over of the management and property of the industrial concern and confers a further right on the Financial Corporation to transfer by way of lease or sale the properties of the said concern and any such transfer effected by the Financial Corporation would vest in the transferee all rights in or to the transferred property as if the transfer was made by the owner of the property. So also under the said provision the Financial Corporation will have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods. It is, therefore, obvious on a plain reading of Section 29 of the 1951 Act that it permits

coercive action against the defaulting industrial concern of the type which would be taken in execution or distress proceedings; the only difference being that in the latter case the concerned party would have to use the forum prescribed by law for the purpose of securing attachment and sale of property of the defaulting industrial concern whereas in the case of a Financial Corporation that right is conferred on the creditor corporation itself which is permitted to take over the management and possession of the properties and deal with them as if it were the owner of the properties. If the Corporation is permitted to resort to the provision of Section 29 of the 1951 Act while proceedings under Sections 15 to 19 of the 1985 Act are pending it will render the entire process nugatory. In such a situation the law merely expects the corporation and for that matter any other creditor to obtain the consent of the BIFR or, as the case may be, the appellate authority to proceed against the industrial concern. The law has not left them without a remedy. We are, therefore, of the opinion that the word 'proceedings' in Section 22(1) cannot be given a narrow or restricted meaning to limit the same to legal proceedings. Such a narrow meaning would run counter to the scheme of the law and frustrate the very object and purpose of Section 22(1) of the 1985 Act."

(Emphasis supplied)

77. The decisions in ***Gram Panchayat*** (supra) and ***Maharashtra Tubes*** (supra) considered the unamended Section 22(1) of the 1985 Act. However, the said provision came to be amended by the Sick Industrial Companies (Amendment) Act, 1994 which came into effect from 01.02.1994. The suit in question before us having been filed in 1996, it is the amended Section 22(1) which would apply. Thus, we shall now look into some of the decisions wherein the amended Section 22(1) of the 1985 Act was interpreted.

78. The question whether proceedings for the recovery of dues arising after the sanctioning of the scheme would also be covered under the protective umbrella of Section 22(1) of the 1985 Act fell for the consideration of a two-judge bench of this Court in ***Deputy Commercial Tax Officer and Others v. Corromandal***

Pharmaceuticals and Others reported in (1997) 10 SCC 649. This Court, while answering the issue in the negative, distinguished the facts before it from the decisions in ***Gram Panchayat*** (supra) and ***Maharashtra Tubes*** (supra) and held thus:

> *"13. On a fair reading of the provisions contained in Chapter III of Act 1 of 1986 and in particular Sections 15 to 22, we are of the opinion that the plea put forward by the Revenue is reasonable and fair in all the circumstances of the case. Under the statute, the BIFR is to consider in what way various preventive or remedial measures should be afforded to a sick industrial company. In that behalf, BIFR is enabled to frame an appropriate scheme. To enable the BIFR to do so, certain preliminaries are required to be followed. It starts with the reference to be made by the Board of Directors of the sick company. The BIFR is directed to make appropriate inquiry as provided in Sections 16 and 17 of the Act. At the conclusion of the inquiry, after notice and opportunity afforded to various persons including the creditors, the BIFR is to prepare a scheme which shall come into force on such date as it may specify in that behalf. It is in implementation of the scheme wherein various preventive, remedial or other measures are designed for the sick industrial company, steps by way of giving financial assistance etc. by Government, banks or other institutions, are contemplated. In other words, the scheme is implemented or given effect to, by affording financial assistance by way of loans, advances or guarantees or reliefs or concessions or sacrifices by Government, banks, public financial institutions and other authorities. In order to see that the scheme is successfully implemented and no impediment is caused for the successful carrying out of the scheme, the Board is enabled to have a say when the steps for recovery of the amounts or other coercive proceedings are taken against sick industrial company which, during the relevant time, acts under the guidance/ control or supervision of the Board (BIFR). Any step for execution, distress or the like against the properties of the industrial company or other similar steps should not be pursued which will cause delay or impediment in the*

implementation of the sanctioned scheme. In order to safeguard such state of affairs, an embargo or bar is placed under Section 22 of the Act against any step for execution, distress or the like or other similar proceedings against the company without the consent of the Board or, as the case may be, the appellate authority. The language of Section 22 of the Act is certainly wide. But, in the totality of the circumstances, the safeguard is only against the impediment, that is likely to be caused in the implementation of the scheme. If that be so, only the liability or amounts covered by the scheme will be taken in, by Section 22 of the Act. So, we are of the view that though the language of Section 22 of the Act is of wide import regarding suspension of legal proceedings from the moment an inquiry is started, till after the implementation of the scheme or the disposal of an appeal under Section 25 of the Act, it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme. Such amounts like sales tax, etc., which the sick industrial company is enabled to collect after the date of the sanctioned scheme legitimately belonging to the Revenue, cannot be and could not have been intended to be covered within Section 22 of the Act. Any other construction will be unreasonable and unfair and will lead to a state of affairs enabling the sick industrial unit to collect amounts due to the Revenue and withhold it indefinitely and unreasonably. Such a construction which is unfair, unreasonable and against the spirit of the statute in a business sense, should be avoided.

14. The situation which has arisen in this case seems to be rather exceptional. The issue that has arisen in this appeal did not arise for consideration in the two cases decided by this Court in Gram Panchayat v. Shree Vallabh Glass Works Ltd. [(1990) 2 SCC 440] and Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. [(1993) 2 SCC 144] It does not appear from the above two decisions of this Court nor from the decisions of the various High Courts brought to our notice, that in any one

of them, the liability of the sick company dealt with therein itself arose, for the first time after the date of sanctioned scheme. At any rate, in none of those cases, a situation arose whereby the sick industrial unit was enabled to collect tax due to the Revenue from the customers after the "sanctioned scheme" but the sick unit simply folded its hands and declined to pay it over to the Revenue, for which proceedings for recovery, had to be taken. The two decisions of this Court as also the decisions of High Courts brought to our notice are, therefore, distinguishable. They will not apply to a situation as has arisen in this case. We are, therefore, of the opinion that Section 22(1) should be read down or understood as contended by the Revenue. The decision to the contrary by the High Court is unreasonable and unsustainable. We set aside the judgment of the High Court and allow this appeal. There shall be no order as to costs."

(Emphasis supplied)

79. The decision in ***Corromandal Pharmaceuticals*** (supra) was referred to and relied upon by a two-Judge Bench of this Court in ***Jay Engineering*** (supra) which set aside the order of the High Court as it failed to consider that the liabilities of the appellant-sick company therein with respect to the creditor were indisputably a part of the revised rehabilitation scheme. This Court held that if the liabilities of the creditor were duly considered and made a part of the rehabilitation scheme, the bar under Section 22(1) of the 1985 Act would apply, notwithstanding the fact that the liabilities arose after the company was declared to be a sick one. The relevant observations of this court are extracted hereinbelow:

"9. In the said scheme, the award made in favour of the respondents finds place in the category of "dormant creditors". The liabilities of the appellant vis-à-vis Respondent 2 were, therefore, indisputably a subject-matter of the said scheme. The High Court, in our opinion, committed an error in proceeding on the premise that the awarded amount had not been included and could not be included in the sanctioned rehabilitation scheme, the same being part of transactions which took place

after 21-11-1997 ignoring the revised scheme made in the year 2003.

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18. The award of the Council being an award, deemed to have been made under the provisions of the 1996 Act, indisputably is being executed before a civil court. Execution of an award, beyond any cavil of doubt, would attract the provisions of Section 22 of the 1985 Act. Whereas an adjudicatory process of making an award under the 1993 Act may not come within the purview of the 1985 Act but once an award made is sought to be executed, it shall come into play. Once the awarded amount has been included in the scheme approved by the Board, in our opinion, Section 22 of the 1985 Act would apply.

19. If the liabilities of the appellant are covered by the scheme framed under Section 22 of the 1985 Act, the High Court was clearly in error in coming to the conclusion that the provisions thereof are not attracted only because the debt had been incurred after the Company was declared to be a sick one.

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22. The High Court has placed strong reliance on CTO v. Corromandal Pharmaceuticals [(1997) 10 SCC 649] wherein this Court was considering an exceptional situation by reason of the fact that the liability of the sick company for the first time arose after the date of sanctioned scheme and the sick industrial unit was enabled to collect tax due to the Revenue from the exporters thereafter but declined to pay it over to the Revenue wherefor recovery proceedings had to be taken. This Court categorically opined that there cannot be any impediment in the enforcement of the scheme. Section 22 of the 1985 Act provides for a safeguard against impediment that is likely to be caused in the implementation of the scheme. Section 22 was also held to be of wide import as regards suspension of legal proceedings from the moment, the inquiry is started till after the implementation of the scheme or disposal

of the scheme under Section 25 of the 1985 Act. It was categorically held:

"… it will be reasonable to hold that the bar or embargo envisaged in Section 22(1) of the Act can apply only to such of those dues reckoned or included in the sanctioned scheme…."

The ratio laid down in the said decision, therefore, instead of assisting the respondent assists the appellant."

(Emphasis supplied)

80. The original defendants have strongly relied upon the decision of a two-judge bench of this Court in ***Bhoruka Textiles*** (supra). In the said case, the respondent therein, filed a suit for recovery against the appellant, a sick industrial company. The civil court decreed the suit in favour of the respondent therein with the finding that the transaction referred to took place subsequent to the reference of the appellant company to the BIFR and thus the suspension under Section 22(1) of the 1985 Act would not apply. The civil court also held that in the absence of any final order declaring the appellant company as a sick company by the BIFR, mere reference of the said company to the BIFR would not bring the protection under Section 22(1) of the 1985 Act into effect.

81. This Court negatived both the findings noted above and held that the civil court committed a manifest error in holding that the transaction in question was subsequent to the reference, when from the admitted facts it was apparent that it took place prior to the referral. It was observed by the Bench thus:

"7. Chapter III of the Act provides for reference, enquiries and schemes. Section 15 of the Act provides for reference to the Board in terms whereof the Board of Directors of the company is required to make a reference within 60 days from the date of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company. Such reference is made for determination of the measures which may be adopted with respect to the company. The proviso appended thereto, however, entitles the Board of Directors to make a reference within 60 days from the

date of formation of the opinion that the company had become a sick industrial company before the audited accounts of the financial year in question are finalised. Section 16 of the Act empowers the Board to make such enquiry as it may deem fit for determining whether any industrial company has become a sick industrial company, inter alia, upon receipt of a reference with respect to such company under Section 15.

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10. Section 22 of the Act must be interpreted giving a plain meaning to its contents. An enquiry in terms of Section 16 of the Act by the Board is permissible upon receipt of a reference. Thus, reference having been made on 27-12-2001 and the suit having been filed on 17-12-2002, the receipt of a reference must be held to be the starting period for proceeding with the enquiry.

11. The effect of the provisions of the Act has been considered by a three-Judge Bench decision of this Court in Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. [(2008) 7 SCC 619] wherein it, in no uncertain terms, held that SICA is a special statute and, thus, overrides other Acts like the Companies Act, 1956, stating: (SCC p. 635, paras 31-33)

> *"31. SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the civil courts.*
>
> *32. What scheme should be prepared by the operating agency for revival and rehabilitation of the sick industrial company is within the domain of BIFR. Section 26 not only covers orders passed under SICA but also any matter which BIFR is empowered to determine.*
>
> *33. The jurisdiction of the civil court is, thus, barred in respect of any matter for which the Appellate Authority*

> *or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited."*
>
> *12. If the civil court's jurisdiction was ousted in terms of the provisions of Section 22 of the Act, any judgment rendered by it would be coram non judice. It is a well-settled principle of law that a judgment and decree passed by a court or tribunal lacking inherent jurisdiction would be a nullity. In Kiran Singh v. Chaman Paswan [AIR 1954 SC 340] this Court held: (AIR p. 342, para 6)*
>
> > *"6. … It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."*
>
> *(See also Chief Engineer, Hydel Project v. Ravinder Nath [(2008) 2 SCC 350 : (2008) 1 SCC (L&S) 940] , SCC p. 361, para 26.)"*
>
> (Emphasis supplied)

82. A three-Judge Bench of this Court in ***Raheja Universal Limited v. NRC Limited and Others*** reported in (2012) 4 SCC 148 undertook a comprehensive study of the various decisions of this Court on the interpretation of Section 22 of the 1985 Act to clarify the divergences and settle the position of law on the said provision. The relevant observations are as follows:

> *"23. The provisions of SICA 1985 impose an obligation on the sick industrial companies and potentially sick industrial companies to make references to BIFR within the time specified under SICA 1985. Default thereof is punishable under the provisions of SICA 1985. Largely, the proceedings before BIFR are specific to rehabilitation or winding up of*

the sick company and SICA 1985 hardly contemplates adversarial proceedings. The bodies constituted under SICA 1985 would least exercise their jurisdiction to a lis between any party or upon the rival interests of the parties.

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30. Dealing with the language of Section 22 of SICA 1985, this Court in Jay Engg. case [(2006) 8 SCC 677 : AIR 2006 SC 3252] took the view that the said Act shall prevail and though the adjudicatory process of making an award under the 1993 Act would not come under the purview of SICA 1985, once an award is made and sought to be executed, the provisions of Section 22 of SICA 1985 shall take over and such award would not be executable against the sick company, particularly when the party in whose favour the award was made was, as in the present case, included in the category of dormant creditors of the sick company.

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48. All these provisions which fall under Chapter III of SICA 1985 have to be read conjointly and that too, along with other relevant provisions and the scheme of SICA 1985. It is a settled canon of interpretation of statutes that the statute should not (sic) be construed in its entirety and a sub-section or a section therein should not be read and construed in isolation. Chapter III, in fact, is the soul and essence of SICA 1985 and it provides for the methodology that is to be adopted for the purposes of detecting, reviving or even winding up a sick industrial company. Provisions under SICA 1985 also provide for an appeal against the orders of BIFR before another specialised body i.e. Aaifr. To put it simply, this is a self-contained code and because of the non obstante provisions, contained therein, it has an overriding effect over the other laws. As per Section 32 of SICA 1985, the Act is required to be enforced with all its vigour and in precedence to other laws.

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54. Firstly, the facts of these cases are different and distinct and, therefore, conclusions of the Court have to be read

with reference to the facts of the respective cases only and not dehors thereof. Once the dictum of this Court is read with reference to the facts of the respective cases, it would be evident that there is no conflict of views within the ambit of ratio decidendi of the respective judgments to make both of them legal and binding precedents.

55. Despite these judgments and with an intention to clarify the law, we would state that the matters which are connected with the sanctioning and implementation of the scheme right from the date on which it is presented or the date from which the scheme is made effective, whichever is earlier, would be the matters which squarely fall within the ambit and scope of Section 22 of SICA 1985 subject to their satisfying the ingredients stated under that provision. This would include the proceedings before the civil court, Revenue Authorities and/or any other competent forum in the form of execution or distress in relation to recovery of amount by sale or otherwise of the assets of the sick industrial company. It is difficult for us to hold that merely because a demand by a creditor had not been made a part of the scheme, pre- or post-sanctioning of the same for that reason alone, it would fall outside the ambit of protection of Section 22 of SICA 1985.

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58. Section 22 is the reservoir of the statutory powers empowering BIFR to determine a scheme, right from its presentation till its complete implementation in accordance with law, free of interjections and interference from other judicial processes. Section 22(1) deals with the execution, distress or the like proceedings against the company's properties, including appointment of a Receiver. It also specifically provides that even a winding-up petition would not be instituted and no other proceedings shall lie or proceed further, except with the consent of BIFR.

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61. It can safely be perceived that the provisions of Section 22 of SICA 1985 are self-explanatory. They would cease

to operate within their own limitations and not by force of any other law, agreement, memorandum or even articles of association of the company. The purpose is so very clear that during the examination, finalisation and implementation of the scheme, there should be no impediment caused to the smooth execution of the scheme of revival of the sick industrial company. It is only when the specified period of restrictions and declarations contemplated under the provisions of SICA 1985 is over, that the status quo ante as it existed at the time of the consideration and finalisation of the scheme, would become operative. This is done primarily with the object that the assets of the company are not diverted, wasted, taken away and/or disposed of in any manner, during the relevant period.

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69. Sections 22, 22-A, 26 and 32 have to be read and construed conjointly. A common thread of legislative intent to treat this law as a special law, in contradistinction to the other laws except the laws stated in the provisions and to ensure its effective implementation with utmost expeditiousness, runs through all these provisions. It also mandates that no injunction shall be granted by any court or authority in respect of an action taken or to be taken in pursuance of the powers conferred to or by under this Act.

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78. The expression "no proceedings" that finds place in Section 22(1) is of wide spectrum but is certainly not free of exceptions. The framers of law have given a definite meaning to the expression "proceedings" appearing under Section 22(1) of SICA 1985. These proceedings are for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a Receiver in respect thereof.

79. The expression "the like" has to be read ejusdem generis to the term "proceedings". The words "execution, distress or the like" have a definite connotation. These

proceedings can have the effect of nullifying or obstructing the sanctioning or implementation of the revival scheme, as contemplated under the provisions of SICA 1985. This is what is required to be avoided for effective implementation of the scheme. The other facet of the same section is that, no suit for recovery of money, or for enforcement of any security against the industrial company, or any guarantee in respect of any loan or advance granted to the industrial company shall lie, or be proceeded with further without the consent of BIFR. In other words, a suit for recovery and/or for the stated kind of reliefs cannot lie or be proceeded with further without the leave of BIFR. Again, the intention is to protect the properties/assets of the sick industrial company, which is the subject-matter of the scheme.

80. It is difficult to state with precision the principle that would uniformly apply to all the proceedings/suits falling under Section 22(1) of SICA 1985. Firstly, it will depend upon the facts and circumstances of a given case, it must satisfy the ingredients of Section 22(1) and fall under any of the various classes of proceedings stated thereunder. Secondly, these proceedings should have the impact of interfering with the formulation, consideration, finalisation or implementation of the scheme."

(Emphasis supplied)

83. While the decisions in each of the aforesaid cases should be seen in the context of the specific factual situation therein, there is a common thread that binds them all together. All of the aforesaid decisions proceed on the footing that any proceeding which can possibly interfere with the formulation, consideration, finalisation or implementation of a rehabilitation scheme as envisaged under Chapter III of the Act, has to be suspended under Section 22(1) of the 1985 Act.

84. It is the above purpose which the scheme of Section 22(1) seeks to achieve by suspending the proceedings of the nature either mentioned specifically in the provision, or the proceedings of a like nature. Although this Court has interpreted the provision liberally by widening the ambit of its protective umbrella, yet it has also been mindful to

extend such protection only to such cases where the refusal to allow such extension would result in miscarriage of the very purpose of the Act, which is the expeditious revival of sick companies.

85. The ameliorative object of the 1985 Act, as envisaged by the legislature, is sought to be achieved, *inter alia*, by the smooth formulation and implementation of a rehabilitation scheme. Thus, if any impediment exists to the successful execution of the scheme, such an impediment is curtailed at the outset by the embargo provided under Section 22(1) of the 1985 Act.

86. It can be said without a cavil of doubt that the proceedings in the nature of execution or distress by way of appointment of receiver or attachment of immovable property, bank accounts, etc. would affect the assets of a sick company and may inevitably come in the way of the preparation or execution of the rehabilitation scheme. However, to hold that the protective shield of Section 22(1) of the 1985 Act would apply even to those proceedings which do not have any impact on the prospects of successful formulation and implementation of the scheme, and the possibility of revival of the sick company, would run contrary to the object of the Act, which was never to confer absolute immunity or impunity on the sick company.

87. Thus, as explained in paragraph 67 of this judgment, a perusal of the plain text of Section 22(1) of the 1985 Act brings out only two conditions for the suspension of legal proceedings to operate. However, various decisions of this Court, by necessary implication, have read into the said provision a third condition which too has to be fulfilled before a sick company can seek protection of the said provision. This third condition is that for a legal proceeding to be suspended under Section 22(1) of the 1985 Act, it should be shown to be interfering with the formulation, consideration, finalisation or implementation of a rehabilitation scheme.

88. A Single Judge of the Delhi High Court has explained very succinctly these conditions in ***Goyal MG Gases Pvt. Ltd. v. SBQ Steels Ltd.*** reported in 2016 SCC OnLine Del 5100 thus:

> *"25. The applicability of embargo contained in Section 22(1) of SICA requires the cumulative and conjoint satisfaction of two conditions; namely; a) the proceeding sought to be suspended should clearly satisfy the ingredients of*

Section 22(1) and fall within one or more of the categories of proceedings indicated in the said provision and b) additionally, the continuance of the proceeding should have the impact of interfering with the formulation of the scheme.

26. The Supreme Court has also made it clear that the applicability of the embargo contained in Section 22(1) of SICA depends on the facts and circumstances of each individual case; and no principle of universal application can be laid down in all such matters.

27. The use of the expressions "Firstly" and "Secondly", in para 80 of Raheja Universal Ltd. (supra) would make it clear that both the conditions given in the judgment have to be satisfied cumulatively. Even if the suit/proceeding is of the category contemplated in Section 22(1), that by itself will not attract the bar contained in the said provision, unless it additionally has the impact of "interfering with the formulation, consideration, finalisation or implementation of the scheme."

(Emphasis supplied)

89. A Division Bench of the Delhi High Court in ***Saketh India*** (supra) considered the scope of Section 22(1) of the 1985 Act in the context of the object sought to be achieved by it and held that the term 'suit for recovery' as it appears in the said provision must be construed *ejusdem generis*, meaning thereby that only such a suit for recovery which is in the nature of execution or any other coercive enforcement will be suspended by the effect of the provision. The relevant parts of the said decision are extracted hereinbelow:

"5. We think it appropriate, however, to consider the provision of SICA and analyse what it endeavours to achieve. We must immediately take note of the fact that SICA has been repealed by Sick Industrial Companies (Special Provisions) Repeal Act, 2003. While it is yet to be notified, it is significant that provisions akin to Section 22 are conspicuous by their absence in the new Scheme of revival of sick companies inserted in form of Part VIA, namely, "Revival and Rehabilitation of Sick Industrial Companies".

Obviously, empirical analysis discloses that more often than not companies which have sought shelter of SICA have done so to procrastinate, delay and defer clearing its liability, with the obvious intention of coercing creditors into unfair settlements rather than implementing projected schemes supposed to assist in their reconstruction. When the statute is notified, amendments to the Companies Act, 1956 will become effective and all proceedings pending before BIFR will stand abated. To some extent, therefore, the present controversy has been rendered academic.

6. Courts, however, have always been alive to the possible mischief that invocation of SICA can lead to. In a nutshell, where the not worth of a company is reduced to a negative, and the amelioration that is sought is for reviving the company rather than winding it up, the recourse to the Act would be legitimate. There is no justifiable reason, therefore, for all legal proceedings to be immediately even held in abeyance, if not dismissed. We are mindful of the fact that Parliament has incorporated an amendment in the Section with effect from 1.2.1994 in these words — "no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company — shall lie or be proceeded with-further, except with the consent of the Board, or as the case may be, the Appellate Authority". It appears to us that the phrase "recovery of money" must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. We do not find any logic in holding legal proceedings to be not maintainable, or to be liable to be halted unless, even if the debt sought to be proved in the Plaint has not been admitted. Given the delays presently endemic in the justice delivery system if a creditor is disallowed even from proving the indebtedness of a recalcitrant debtor SICA company, it would cause unjustified hardship. Whichever way we look at the matter, there can be no logic in denying legal recourse to a party for proving its debt. In the event that at least the principal

amount, or a substantial part of it stands admitted, either in the suit or by means of a mention in the Scheme placed before the BIFR, the aggrieved party must be permitted to prove its claim. In holding so, the only prejudice that we can conceive of is incurring expenditure in legal fees. When this is weighed against the interests of a person claiming that the company is indebted to it, the balance tilts in favour of the latter. A holistic reading of Section 22(1) of SICA makes it manifestly clear that Parliament's intention was to insulate sick companies only against proceedings for winding-up or for execution, or distress or the like or for enforcement of any security or guarantee. In the case in hand, despite several opportunities granted to the Appellant, it has miserably and perhaps deliberately failed to substantiate that the claim mentioned in the Suit has been reflected in the Scheme placed before the BIFR but even more poignantly, that a scheme was, in fact, pending before BIFR. If an Appeal is pending, has BIFR failed to grant or has withdrawn registration under SICA. We see the conduct of the Appellant as nothing more than an abuse of SICA.

7. The Apex Court has in Deputy Commercial Tax Officer v. Corromandal Pharmaceuticals, (1997) 10 SCC 649 enunciated the law in the context of SICA to be that a cessation of legal proceedings would be justified only if the dues in respect of which adjudication is ongoing is also included in or within the contemplation of the Scheme presented to BIFR. Their Lordships had analysed and distinguished its previous decisions in Gram Panchayat v. Shree Vallabh Glass Works Limited, (1990) 2 SCC 440 as well as Maharashtra Tubes Ltd. v. State of Industrial and Investment Corporation of Maharashtra Ltd., (1993) 2 SCC 144 on the reasoning that in those cases the liability of the sick company had arisen for the first time after the sanction of the Scheme by BIFR.…

8. In Sirmor Sudburg Auto Ltd. v. Kuldip Singh Lamba, [1998] 91 Comp. Cas. 727, R.C. Lahoti, J., as the Learned Single Judge of this Court then was, opined that to be entitled to a stay of legal proceedings under Section 22

of the Act, a mere pendency of the enquiry would not suffice; the claimed dues must be reckoned or included in the sanctioned scheme. A suit for eviction against a sick industrial company is not liable to be stayed under Section 22(1) of the SICA. This decision has been followed by the Division Bench of the Calcutta High Court in Taulis Pharma Ltd. v. Bengal Immunity Ltd., [2002] 108 Comp. Cas. 237. Similar views have also been expressed in Vibgyar Ink Chem (Pvt.) Ltd. v. Safe Pack Polymers Ltd., [1998] 93 Com. Cas. 407, which likewise is a decision of the Division Bench of the Andhra Pradesh High Court which enunciates that "an independent transaction de hors the scheme obviously cannot thus be covered within the ambit of Section 22 of the 1985 Act".

9. Justice Lahoti's view has also been followed by a Single Bench of the Calcutta High Court in Fort William Industries Limited v. Usha Bentron Limited, [2002] 108 Comp. Cas. 176. His Lordship, Dr. Mukundakam Sharma, J. has, in the Cement Corporation of India v. Manohar Basin, 82 (1999) DLT 343 : 1999 (51) DRJ 535 observed that since no documentary proof had been furnished to disclose that any scheme stood sanctioned the so-called SICA bar was not attracted. A Single Bench of the Bombay High Court in Special Steels v. Jay Prestressed Products Ltd., [1991] 72 Comp. Cas. 277 has opined that the pivotal question in connection with the current conundrum concerns the assets of the Company and its functioning, and these would not be jeopardized if a civil suit continues. In Hardip Singh v. Income Tax Officer, Amritsar, [1979] 118 ITR 57 (SC) the winding-up petition was allowed to continue and only when the third and final stage of the dissolution of the Company came to be reached, was the moratorium of Section 22 of the SICA enforced."

(Emphasis supplied)

90. The original plaintiff has placed strong reliance upon the decision of a single judge of the Delhi High Court in ***Sunil Mittal*** (supra). It was held therein that since the liability was neither admitted nor taken into consideration by any rehabilitation scheme, the suit proceedings

could not have been adjourned *sine die* under Section 22(1) of the 1985 Act. The relevant paragraphs are extracted hereinbelow:

> *"21. In view of the aforesaid facts and circumstances of the case, I feel as the FChas not admitted its liability to pay the amount to the tune as claimed by the plaintiff nor such an amount has been reckoned or taken into consideration by any scheme of rehabilitation of the sick defendant company, therefore, the proceedings of the present suit cannot be adjourned sine die. As a matter of fact the defendant has not placed on record any documentary evidence to show that any such scheme has been formulated as yet and if formulated whether the said amount has been taken care of allegedly being owed to the Plaintiff.*
>
> *22. For the aforesaid reasons, I feel that the application of the Defendant totally misconceived and accordingly, the same is dismissed."*
>
> (Emphasis supplied)

91. It has come to our notice that the said decision in ***Sunil Mittal*** (supra) was challenged in appeal before a division bench of the Delhi High Court in ***LML Ltd. v. Sunil Mittal*** reported in 2013 SCC OnLine Del 1766 wherein the bench set aside the decision and held that Section 22(1) of the 1985 Act would apply to the facts of the case. The bench observed that from the record it was clear that the amount as claimed by the plaintiff in the recovery suit was admittedly covered by the scheme and thus the proceeding was liable to be suspended by application of Section 22(1) of the 1985 Act. Thus, the position of law held in ***Sunil Mittal*** (supra), could not be said to have been disturbed, but only its incorrect application to the facts of the specific case was set aside in ***LML Ltd.*** (supra).

92. The decision in ***LML Ltd.*** (supra), on the contrary, fortifies the interpretation of Section 22(1) as was done in ***Sunil Mittal*** (supra) and ***Saketh India*** (supra). The relevant paragraph of the decision in ***LML Ltd.*** (supra) is extracted hereinbelow:

> *"16. The principle of law is thus unambiguous. Where the amount claimed or the liability sought to be set up is covered under the scheme, Section 22(1) will be attracted and there would be an automatic suspension of all legal*

proceedings including a suit for recovery of money. In the present case, the amount Rs. 21,74,490.88 is admittedly a part of the DRS pending before the BIFR. The debt of Rs. 3,00,000/- on account of sales tax dues, the petitioner admits as his liability. Even if this amount is not permitted to be adjusted at this stage as has been pointed out by the learned counsel for the respondent, keeping in view the wide import of the language of Section 22 of the said Act there can be no question of continuing with the suit proceedings. It also cannot be lost sight of the fact that the parties were maintaining a running account; payments were being made from time to time; it would thus not be possible to segregate the element of debt since the question would be whether the debt due to the plaintiff is correctly reflected or a lesser amount is in fact due to him. The language of Section 22 would take into its sweep a situation even where if the full amount is not a part of the DRS. The question of continuation of the suit would not arise."

(Emphasis supplied)

93. In ***M/s Haryana Steel & Alloys Ltd. v. M/s Transport Corporation of India*** reported in (2012) SCC OnLine Del 2140 it was held that the mere contention of the sick company unsubstantiated by any material indicating that the amount forming subject-matter of the recovery suit is covered under the scheme, would not be sufficient to bring the company under the protective ambit of Section 22(1) of the Act. The relevant paragraphs of the said decision are extracted thus:

"11. However, there is another dimension to the said embargo placed on filing of the suit for recovery against a company when the proceedings are pending under the SICA, which is the necessity of the inclusion of the dues payable by the company to the plaintiff in the scheme formulated before the BIFR. It is a settled legal position that it is not by mere pendency of an enquiry under Section 16 of the said Act or preparation of the scheme thereof being under consideration or even filing of an appeal under section 25 before the appellate authority that by itself would entitle the appellant for the said statutory injunction against

the respondent/plaintiff as the benefit of the prohibition or embargo created under section 22 of the Act would come into operation only where the appellant/defendant has disclosed before the Court, that the amounts claimed by the respondent/plaintiff have been duly shown and disclosed in the scheme formulated and laid before the BIFR. The Apex Court in the case of Deputy Commercial Tax Officer v. Corromandal Pharmaceuticals, (1997) 10 SCC 649 enunciated the law to hold that a cessation of legal proceedings would be justified only if the dues in respect of which adjudication is ongoing is also included in the contemplation of scheme presented by BIFR…

xxx xxx xxx

14. In the light of the above settled legal position, analyzing the facts of the case at hand, it is manifest that no material was placed on record by the appellant to show that the amount in respect of which the respondent laid its claim in the said recovery suit was reflected in the scheme laid before the BIFR. The only contention raised by the appellant before the trial court as well as before this Court was that the prohibition or embargo as envisaged in Section 22 would come into operation immediately once the defendant brings to the notice of the Court that an inquiry under Section 16 is pending before the Board or an appeal is pending relating to the said inquiry before the Appellate Authority. Having failed to place any such material on record, this Court is of the clear view that the bar or embargo envisaged under Section 22 of the Act will not apply to the facts of the present case as the appellant cannot take the advantage of the said provision merely because an inquiry under Section 16 was pending before the BIFR or an Appeal under Section 25 against the order of BIFR was pending before the AAIFR."

(Emphasis supplied)

94. In ***Kusum Products Ltd. v. Hitkari Industries Ltd.*** reported in 2014 SCC OnLine Del 4926, a learned Single Judge of the Delhi High Court, relying upon the decision in ***Raheja Universal*** (supra) held that a suit for recovery of money simpliciter will not be liable

to be suspended under Section 22(1) of the 1985 Act. It was observed thus:

> *"3. The aforesaid paragraphs show that the proceedings for which prior permission is required under Section 22 of SICA are proceedings in the nature of execution, distress or like. It is not every suit or every suit for recovery which automatically becomes proceedings in the nature of execution, distress or like, and only such suits of recovery where there would be proceedings which cause liquidation of assets of a sick company, would be those suits which would be hit by the bar of Section 22 of SICA.*
>
> *4. In the present case, the suit for recovery of money is a suit for recovery of money simplicitor. Counsel for the plaintiff does not press the interim applications under Order 38 Rule 5 of Code of Civil Procedure, 1908 (CPC) and Order 39 Rules 1 and 2 CPC. Accordingly, in the subject suit, there is no threat to the liquidation of the assets of the sick company and therefore no prior permission is required under Section 22 of SICA."*
>
> (Emphasis supplied)

95. In ***FMI Investment Pvt. Ltd. v. Montari Industries Ltd. and Another*** reported in (2012) SCC OnLine Del 5354, the High Court undertook a comprehensive analysis of the dictum as laid in ***Raheja Universal*** (supra) and ***Saketh India*** (supra) and held thus:

> *"6. The salient conclusions which can be arrived at from reading of the aforesaid paras in the case of Raheja Universal (supra) are : -*
>
> *(i) The proceedings which are affected by Section 22(1) are proceedings in the nature of execution, distress or the like.*
>
> *(ii) It depends on facts of each case as to whether the suit is hit by Section 22 i.e. all suits including of recovery, are not hit by Section 22(1).*
>
> *(iii) Only those suits which have the effect of execution, distress or like action against the properties of the sick company are hit by Section 22 i.e. where a suit is simply for recovery of moneys, and the properties of a sick*

company are not threatened by the proceedings including interim proceedings such as appointment of receiver, execution, distress or the like, such suits can continue without permission under Section 22.

7. Learned counsel for the defendant no. 2 sought to place reliance on the following three judgments to argue that permission under Section 22 is a sine qua non.

(i) Managing Director, Bhoruka Textiles Ltd. v. Kashmiri Rice Industries (2009) 7 SCC 521;

(ii) Tata Davy Ltd. v. State of Orissa (1997) 6 SCC 669;

(iii) Dr. B.K. Modi v. Morgan Securities and Credits Pvt. Ltd. and Morgan Securities and Credits Pvt. Ltd. v. Dr. B.K. Modi MANU/DE/2779/2012

8. In my opinion, all the three judgments, which have been cited on behalf of defendant no. 2 have no application because the legal position is sufficiently elaborated by the Supreme Court in the judgment of Raheja Universal (supra).

9. None of the aforesaid judgments cited on behalf of defendant no. 2 deal with the issue of interpretation of Section 22 of SICA as has been done by the Division Bench of three Judges in the case of Raheja Universal (supra) and which holds that unless the suit proceedings are in the nature of 'execution, distress or the like', the suit can continue. The judgments relied upon by the defendant no. 2 are judgments which simply hold that once a company is a sick company, permission is required under Section 22 of the SICA, however, none of the judgments cited on behalf of the defendant no. 2 deal with the proposition as incorporated in the later judgment of the Division Bench of three Judges of the Supreme Court in the case of Raheja Universal (supra). Accordingly, it is held that the suit is maintainable.

10. In the present suit for recovery it cannot be said that the suit is of a nature which has impact of or threat to the properties of the defendant No. 1 sick company to affect the scheme of revival. The suit is a simple suit for

recovery under Order 37 CPC not having proceedings, whether interim or final, of execution, distress or the like and hence the suit is not hit by Section 22 of SICA. So far as defendant No. 2/guarantor is concerned, the suit against him will not surely hit any assets of the sick company and hence is not barred under Section 22 of SICA."

(Emphasis supplied)

96. In one recent decision of the Delhi High Court in ***Chhattisgarh Distilleries Ltd. v. Percept Advertising Limited*** reported in 2023 SCC OnLine Del 6417, while considering the question on applicability of Section 22(1) of the 1985 Act, it was held thus:

"8. It is well settled that there was legal duty cast upon the appellant/defendant to bring it to the notice of the Court that it had qualified for the protection under the SICA, and this obligation was not discharged. There is no gainsaying that the aforesaid provision has been interpreted in umpteen number of cases decided by the Apex Court as well as this Court. In the cited case of Saketh India Limited (supra), it was observed that the phrase "recovery of money" must be construed ejusdem generis and accordingly recovery proceedings in the nature of execution or any other coercive enforcement that has been ordained to be not maintainable. There is nothing in the said provision so as to hold the legal proceedings to be not maintainable, or liable to be halted, even if the debt sought to be proved in the plaint has not been admitted. Furthermore, it was observed that there can be no logic in denying legal recourse to a party for proving its debt. The said decision was relied upon by this Court again in the decision of Ralson Industries Ltd. (now known as Da Rubber Industries Ltd) (supra), wherein it was categorically held that the proceedings that can be halted by invoking Section 22 of the SICA should be in the nature of execution, distress or the like."

(Emphasis supplied)

97. From the aforesaid discussion, the position of law on the first issue before us appears to be that for the applicability of Section 22(1) of the 1985 Act, three aspects need to be considered –

I. *First*, an inquiry under Section 16 of the 1985 Act must be pending; or any scheme referred to in Section 17 of the 1985 Act must be under preparation or consideration or a sanctioned scheme must be under implementation; or an appeal under Section 25 of the 1985 Act must be pending – in relation the company against whom the legal proceedings sought to be suspended have been initiated.

II. *Secondly*, the proceedings must be one from amongst the six types as described in paragraph 65 of this judgment, or of a similar nature, i.e. *ejusdem generis* to the said six types of proceedings.

III. *Thirdly*, the proceedings must have the effect of threatening the assets of the sick company and interfering with the formulation, consideration, finalisation or implementation of the scheme.

98. Applying the aforesaid tests to the facts of the present case, we have already observed that requirement (i) is fulfilled. The proceeding in question being a suit for recovery of money, requirement (ii) is also satisfied. However, we are of the considered opinion that the third requirement is not fulfilled. We say so because the suit for recovery was not of a nature which could have proved to be a threat to the properties of the defendant sick company or would have adversely impacted the scheme of revival. The suit was a simple suit for recovery of money towards the dues arising under the alleged illegal deductions under the contract. This cannot be said to be a proceeding in the nature of execution, distress or the like and hence the suit was not hit by Section 22(1) of the 1985 Act.

99. By no stretch of imagination could it be said that the legislature intended to include even the proceedings for the adjudication of the liabilities not admitted by a sick company within the protective ambit of Section 22(1) of the 1985 Act. Such an adjudicatory process only determines the liability of the defendant towards the plaintiff, and does not threaten the assets of the sick company or interfere with the formulation of the scheme unless execution proceedings are initiated pursuant to the completion of such adjudicatory process. In the case of ***Jay Engineering*** (supra), it was rightly observed by this Court in the context of arbitration proceedings under the 1993 Act for the adjudication of claims, that while the execution of an award would definitely be suspended under Section 22(1) of the 1985

Act, the adjudicatory process for arriving at such an award cannot be said to be suspended by the said provision. This position also seems to be justified in light of the fact that the proceedings before the BIFR under the 1985 Act were generally long-drawn and time consuming and it would subserve the interest of justice if a party was prevented even from proving the debt/liability of the sick company for the entirety of that lengthy period.

100. We may also look at Section 22(1) of the 1985 Act by applying the mischief rule of interpretation. G.P. Singh in his authoritative commentary on the interpretation of statutes describes the mischief rule of construction as follows:

> *"The rule which is also known as 'purposive construction' or 'mischief rule', enables consideration of four matters in construing an Act: (i) What was the law before the making of the Act, (ii) What was the mischief or defect for which the law did not provide, (iii) What is the remedy that the Act has provided, and (iv) What is the reason of the remedy. The rule then directs that the courts must adopt that construction which "shall suppress the mischief and advance the remedy.""*

101. Applying the aforesaid rule to Section 22(1) of the Act, we find that there was a vacuum in the legal framework to deal with sick industrial companies and provide ameliorative steps for their revival. The 1985 Act was thus enacted to fill in this vacuum. The mischief which was sought to be dealt with by the enactment of Section 22 was any such legal proceeding which could impact the assets of the sick company and in-turn negatively impact the formulation and implementation of the rehabilitative scheme. This provision was inserted to provide a remedy by ensuring that the multiple recourses available under the law for recovery of debts, etc. were suspended for the period during which the sick company was under the ameliorative shelter of the BIFR. Finally, it can be said that the reason for the remedy was to shield the formulation and implementation of the revival scheme from any impediments thereby maximising the chances of revival of sick company, which was the ultimate object sought to be achieved by the Act.

102. The original defendants have placed strong reliance on 3 decisions of this Court in ***Jay Engineering*** (supra), ***Bhoruka Textiles*** (supra) and

Tata Motors (supra) respectively. We have discussed in the foregoing parts of this judgment as to how this Court in ***Jay Engineering*** (supra) expressly observed that it was not the adjudicatory process, but the execution of an award which would be restricted by Section 22(1) of the 1985 Act. This judgment, thus, only furthers the line of reasoning we have adopted to negate the contention of the original defendants on the applicability of Section 22(1) of the 1985 Act.

103. The decision in ***Bhoruka Textiles*** (supra) dealt with the specific facts in that case and should be read alongwith the decision in ***Raheja Universal*** *(supra)* wherein the scope of Section 22(1) of the 1985 Act was considered in detail by a three-Judge bench. We would also like to observe that the reliance placed by this Court in ***Bhoruka Textiles*** (supra) on the decision in ***Tata Motors*** (supra) seems to be misplaced. The relevant paragraph of ***Bhoruka Textiles*** (supra) is reproduced hereinbelow:

> *"10. Section 22 of the Act must be interpreted giving a plain meaning to its contents. An enquiry in terms of Section 16 of the Act by the Board is permissible upon receipt of a reference. Thus, reference having been made on 27-12-2001 and the suit having been filed on 17-12-2002, the receipt of a reference must be held to be the starting period for proceeding with the enquiry.*
>
> *11. The effect of the provisions of the Act has been considered by a three-Judge Bench decision of this Court in Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. [(2008) 7 SCC 619] wherein it, in no uncertain terms, held that SICA is a special statute and, thus, overrides other Acts like the Companies Act, 1956, stating: (SCC p. 635, paras 31-33)*
>
> > *"31. SICA furthermore was enacted to secure the principles specified in Article 39 of the Constitution of India. It seeks to give effect to the larger public interest. It should be given primacy because of its higher public purpose. Section 26 of SICA bars the jurisdiction of the civil courts.*
> >
> > *32. What scheme should be prepared by the operating agency for revival and rehabilitation of the sick*

industrial company is within the domain of BIFR. Section 26 not only covers orders passed under SICA but also any matter which BIFR is empowered to determine.

33. The jurisdiction of the civil court is, thus, barred in respect of any matter for which the Appellate Authority or the Board is empowered. The High Court may not be a civil court but its jurisdiction in a case of this nature is limited."

12. If the civil court's jurisdiction was ousted in terms of the provisions of Section 22 of the Act, any judgment rendered by it would be coram non judice. It is a well-settled principle of law that a judgment and decree passed by a court or tribunal lacking inherent jurisdiction would be a nullity. In Kiran Singh v. Chaman Paswan [AIR 1954 SC 340] this Court held: (AIR p. 342, para 6)

"6. … It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

(See also Chief Engineer, Hydel Project v. Ravinder Nath [(2008) 2 SCC 350 : (2008) 1 SCC (L&S) 940], SCC p. 361, para 26.)"

104. A perusal of the above indicates that in ***Tata Motors*** (supra), it was Section 26 and not Section 22 of the 1985 Act which was under consideration. As opposed to Section 26 of the Act, which bars the jurisdiction of the civil courts in respect of those matters for which the BIFR or the AAIFR are empowered, Section 22 only places a temporary embargo on the initiation or continuation of legal proceedings in respect of certain matters mentioned therein. Further,

unlike Section 22, where the said suspension can be revoked by seeking express permission of the BIFR or the AAIFR, no such permission can be sought under Section 26 of the 1985 Act. Again, in any view of the matter, the adjudication and determination of a contested liability under a contract is undoubtedly the domain of the civil court or an arbitral tribunal and not that of the BIFR or the AAIFR.

v. ISSUE NO. 2: Whether the High Court was correct in granting 24% Compound Interest on the Principal Decretal Amount in favour of the original Plaintiff?

105. The High Court in its impugned judgment considered, as a separate issue, whether the original plaintiff was entitled to claim 24% compound interest from the original defendants on the delayed payments.

a. Concept of Interest

106. When interest is awarded by the Court, our normal feeling is that it is so awarded by way of penalty or punishment. But interest in all cases is not granted by way of penalty or punishment. In this regard, reference may be made to the decision of this Court in the case of ***Alok Shanker Pandey v. Union of India***, reported in 2007 AIR (SC) 1198, wherein the concept of grant of interest has been explained in the following manner:

> *"It may be mentioned that there is misconception about interest. Interest is not a penalty or punishment at all, but it is the normal accretion on capital. For example, if A had to pay B a certain amount, say ten years ago, but he offers that amount to him today, then he has pocketed the interest on the principal amount. Had A paid that amount to B ten years ago, B would have invested that amount somewhere and earned interest thereon, but instead of that A has kept that amount with himself and earned interest on it for this period. Hence equity demands that A should not only pay back the principal but also interest thereon to B."*

107. The above-noted decision of this Court makes it clear that interest on the delayed payment of the claim amount accrues due to the continuing wrong committed by the wilful withholding of the payment towards the claim, resulting in a continuous injury until such payment is made, or in other words, until the claim is realised.

108. The High Court relied upon the provisions of the 1993 Act to hold that as per Sections 4 and 5 respectively of the said legislation, the original plaintiff, which was a small-scale industrial undertaking, was entitled to claim compound interest @ 24% per annum from the original defendants. As a result, the High Court set aside the decree of the trial court which granted 12% simple interest in favour the original plaintiff.

109. The original defendants are aggrieved by the awarding of 24% interest in favour of the original plaintiff, which they contend has resulted in the principal decretal amount getting inflated exorbitantly. The original plaintiff, on the other hand, has argued that the impugned judgment of the High Court insofar as it deals with the issue of interest cannot be said to suffer from any infirmity and was arrived at after due consideration of relevant material viz. the Handbook of Statistics of Indian Economy published by the Reserve Bank of India, etc. and after hearing the parties at length.

110. The original plaintiff has further submitted that the High Court considered the floor rate charged by the SBI for the financial year 1993-1994, which was 19%, as observed under the Table 74 on Structure of Interest Rates in the Handbook of Statistics of Indian Economy published by the Reserve Bank of India.

111. We shall briefly consider the object and scope of the 1993 Act for a better understanding of the issue before us. The Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance, 1992 was promulgated by the President of India on 23.09.1992. To replace this ordinance, the 1993 Act was enacted on 02.04.1993 and came into force with retrospective effect from 23.09.1992. Subsequently, the 1993 Act was repealed by the Micro Small and Medium Enterprises Development Act, 2006 ("**MSMED Act, 2006**"). The statement of objects and reasons to the 1993 Act reads as under:

> *"A policy statement on small scale industries was made by the Government in Parliament. It was stated at that time that suitable legislation would be brought to ensure prompt payment of money by buyers to the small industrial units.*
>
> *2. Inadequate working capital in a small scale or an ancillary industrial undertaking causes serious*

and endemic problems affecting the health of such undertaking. Industries in this sector have also been demanding that adequate measures be taken in this regard. The Small Scale Industries Board, which is an apex advisory body on policies relating to small scale industrial units with representatives from all the States, governmental bodies and the industrial sector, also expressed this view. It was, therefore, felt that prompt payments of money by buyers should be statutorily ensured and mandatory provisions for payment of interest on the outstanding money, in case of default, should be made. The buyers, if required under law to pay interest, would refrain from withholding payments to small scale and ancillary industrial undertakings.

3. An Ordinance, namely, the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Ordinance, 1992, was, therefore, promulgated by the President on the 23rd September, 1992.

4. The Bill seeks to replace the said Ordinance and to achieve the aforesaid objects."

112. It is evident from the aforesaid statement of objects and reasons that the legislature desired to bring about a legislation which would ensure prompt payment of money to small scale units, as the absence of working capital may have severe impacts on the functioning of small scale and ancillary industries. The 1993 Act envisaged that there should be minimal delay in payments to small scale units. Section 2 of the 1993 Act provides for the certain important definitions which are reproduced hereinbelow:

"(b) "appointed day" means the day following immediately after the expiry of the period of thirty days from the date of acceptance or the day of deemed acceptance of any goods or any services by a buyer from a supplier;

Explanation.—For the purposes of this clause,—

(i)"the day of acceptance" means,—

(a) the day of the actual delivery of goods or the rendering of services; or

(b) where any objection is made in writing by the buyer regarding acceptance of goods or services within thirty days from the day of the delivery of goods or the rendering of services, the day on which such objection is removed by the supplier;

(ii) "the day of deemed acceptance" means, where no objection is made in writing by the buyer regarding acceptance of goods or services within thirty days from the day of the delivery of goods or the rendering of services, the day of the actual delivery of goods or the rendering of services;

(c) "buyer" means whoever buys any goods or receives any services from a supplier for consideration;

xxx xxx xxx

(f) "supplier" means an ancillary industrial undertaking or a small scale industrial undertaking holding a permanent registration certificate issued by the Directorate of Industries of a State or Union territory and includes,—

(i) the National Small Industries Corporation, being a company, registered under the Companies Act, 1956 (1 of 1956);

(ii) the Small Industries Development Corporation of a State or a Union territory, by whatever name called, being a company registered under the Companies Act, 1956 (1 of 1956).]"

113. Section 3 of the 1993 Act provides for the liability of the buyer to make payment to the small-scale industries whereas Section 4 and 5 respectively of the said Act pertain to the date from which and the rate at which interest is payable. Section 5 of the 1993 Act also stipulates that the buyer shall be liable to pay compound interest. Sections 3, 4 and 5 respectively of the 1993 Act, as existing at the time when the dispute between the parties arose, are reproduced thus: -

*"**3. Liability of buyer to make payment** - Where any supplier supplies any goods or renders any services to any buyer, the buyer shall make payment therefor on or*

before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day.

4. Date from which and rate at which interest is payable - *Where any buyer fails to make payment of the amount to the supplier, as required under section 3, the buyer shall, notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force, be liable to pay interest to the supplier on that amount from the appointed day or, as the case may be, from the date immediately following the date agreed upon, at such rate, which is five per cent points above the floor rate for comparable lending.*

Explanation: For the purposes of this section, "floor rate for comparable lending" means the highest of the minimum lending rates charged by scheduled banks (not being co-operative banks) on credit limits in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).

5. Liability of buyer to pay compound interest *- Notwithstanding anything contained in any agreement between a supplier and a buyer or in any law for the time being in force, the buyer shall be liable to pay compound interest (with monthly interest) at the rate mentioned in section 4 on the amount due to the supplier."*

114. On a perusal of Section 3 of the 1993 Act, we find that where any supplier supplies any goods, the buyer shall make payment on or before the date agreed upon between him and the supplier in writing or, where there is no agreement in this behalf, before the appointed day. In the instant case, as per the terms of the NIT, payment was to be made within 20 days from the receipt of the goods.

115. As discussed in the preceding paragraphs of this judgment, the High Court has awarded 24% compound interest on the amounts due to the original plaintiff from the date the amounts were determined to have become due till the date of their realisation by the original plaintiff. While there is no doubt that the rate of interest applicable to the dues of the original plaintiff as determined by the High Court

is correct, we think it is necessary to examine if the compound interest can be said to have continued to accrue even when FCIL was declared a sick company and was awaiting its revival before the BIFR. In other words, it is not the rate of interest but the period for which it is applicable, is the question that is to be determined.

116. We have discussed at length in the foregoing paragraphs of the judgment the object behind the enactment of the 1985 Act. Sickness of industrial companies was considered to be a problem that affected the country at large, and thus the 1985 Act was enacted as per the policy directions contained in Article 39 of the Constitution to provide, *inter alia*, ameliorative steps for the revival of sick companies, and for the expeditious detection of potentially sick companies. In particular, we would like to mention that Section 19 of the 1985 Act provides that the scheme for rehabilitation of a sick company may provide for financial assistance to the sick company by way of loans, advances, reliefs or concessions or sacrifices from the Central Government, a State Government, a public financial institution etc.

117. In the present case, in pursuance of Section 19 of the Act, a number of decisions were taken by the CCEA on 09.05.2013 including the waiver of loans and interest thereon by the Central Government which ran into thousands of crores. As per the document F.No. 18055/13/2012-FCA-1 titled "Gist of the CCEA decisions dated 09th May, 2013" published by the Ministry of Chemicals and Fertilizers, it appears that the dues of the major unsecured creditors were settled at 30% of their dues as on 31.03.2003. Further, the dues of some other parties were settled without any interest or penalty, as otherwise the entire process of revival might have gotten derailed.

118. We have also discussed how Section 22(1) of the 1985 Act suspends any legal proceedings of the nature specified therein if they can potentially interfere with the consideration, sanction or execution of the rehabilitation scheme. The intention behind the sanction and execution of a rehabilitation scheme, without a doubt, is to increase the chances of the revival of the sick company in public interest.

119. Thus, on one hand we have the beneficial provisions of the 1985 Act, enacted to maximise the chances of revival of sick industrial companies, while on the other, we have the 1993 Act, which was enacted with the intention to ensure that small-scale industries are paid their dues in time. This object of the 1993 Act was sought to be

achieved by providing a high interest rate, with monthly compounding, so as to act as a deterrent for the buyers.

120. A preliminary contention was raised by the original defendants that the original plaintiff chose to institute a civil suit for recovery of money, rather than following the process prescribed under Section 6 of the 1993 Act, which provides for the referring of a dispute arising under the 1993 Act to arbitration before the Industry Facilitation Council, and thus for this reason, the suit for recovery, which is expressly suspended under Section 22(1) of the Act, should be held as not maintainable. It was also argued that even otherwise no interest should be granted on the amount claimed as due since the mechanism prescribed under Section 6(2) of the 1993 Act was not followed.

121. Section 6 of the 1993 Act reads as follows:

> *"**6. Recovery of amount due** -*
>
> *(1) The amount due from a buyer, together with the amount of interest calculated in accordance with the provisions of sections 4 and 5, shall be recoverable by the supplier from the buyer by way of a suit or other proceeding under any law for the time being in force.*
>
> *(2) Notwithstanding anything contained in sub-section (1), any party to a dispute may make a reference to the Industry Facilitation Council for acting as an arbitrator or conciliator in respect of the matters referred to in that sub-section and the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply to such dispute as if the arbitration or conciliation were pursuant to an arbitration agreement referred to in sub-section (1) of section 7 of that Act."*

122. We do not find any force in this contention of the original defendants. Section 6 merely provides that for the purpose of recovery of the amounts due under the 1993 Act, a supplier may make a reference to the Industries Facilitation Council, which is established under Section 7A of the 1993 Act. *First*, at the time of the institution of the suit by the original plaintiff, the Industries Facilitation Councils didn't exist as the provision for their establishment was only brought in *vide* an amendment in 1998. *Secondly*, even otherwise, Section 6(2) of the 1993 Act merely provides for an alternate avenue to the supplier in

addition to a suit or any other legal proceedings as mentioned in Section 6(1) of the 1993 Act.

123. It is also pertinent to mention that in the absence of the express permission of the BIFR, Section 22(1) of the 1985 Act suspends any legal proceedings in the nature of execution during the pendency of the scheme before the BIFR, as execution would necessarily result in negatively impacting the assets of a sick company, thereby affecting the preparation, sanction or implementation of scheme and as a net effect, would bring down the chances of revival of the sick company.

124. In the present case, the suit was decreed in favour of the original plaintiff by the trial court *vide* its judgment dated 19.09.2001. However, while the adjudication of the suit of the original plaintiff could not have been said to be barred under Section 22(1) of the 1985 Act as it was for the mere determination of liability of the parties *inter-se*, the execution of decree obtained as a result thereof was expressly suspended during the period as mentioned in the said provision, unless the requisite permission from the BIFR or the AAIFR could be obtained.

125. Interest of justice requires that both the 1985 Act and the 1993 Act, which are in the nature of beneficial enactments, should be read harmoniously so as to impart a meaningful construction to the language of each of the enactments. It was held in ***Jay Engineering*** (supra) on the interplay between the two Acts as follows:

> *"13. The 1993 Act was enacted to provide for and regulate the payment of interest on delayed payments to small-scale and ancillary industrial undertakings and for matters connected therewith.*
>
> *14. The provisions of the 1993 Act, therefore, do not envisage a situation where an industrial company becomes sick and requires framing of a scheme for its revival."*
>
> (Emphasis supplied)

126. In our opinion, it would defy logic to hold that even for the period when the principal decretal amount awarded by the civil court under a decree could not have been realised in lieu of the suspension of execution proceedings, interest would continue to mount on the principal decretal amount. Thus, while there is a stay on proceedings in the nature of distress and execution, etc. against the properties of

the sick company, to safeguard its assets, awarding interest for that very same period, though not expressly barred under any provision of the Act, could not have been the intention of the legislature.

127. Any other interpretation would only lead to an absurd result that as soon as a sick company is revived after the steps taken by the BIFR, and concessions, financial support, etc. provided by the government, it would be prone to the liability of having to pay exorbitant interest that would have accrued on any decree which can be put to execution after the end of BIFR proceedings.

128. The net effect would be that a freshly revived sick company would potentially be saddled with huge amounts, as has happened in the present case because of the impugned judgment, and be at a risk of being rendered sick again, thus defeating the very purpose of the 1985 Act.

129. A two-judge bench of this Court, in a recent decision in ***Modi Rubber Ltd. v. Continental Carbon India Ltd.***, reported in 2023 SCC OnLine SC 296 decided the issue as to whether it was open to an unsecured creditor to not accept the scaled down value of its dues, as computed in the rehabilitation scheme, and wait for the revival of the sick company to recover its debt with interest post the rehabilitation. This Court, after an exhaustive consideration of the object of the 1985 Act, answered the issue in the negative and held as follows:

> *"40. The short question, which is posed for the consideration of this Court is:—*
>
> *"Whether on approval of a scheme by the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985, an unsecured creditor has the option not to accept the scaled down value of its dues, and to wait till the scheme for rehabilitation of the respondent - sick company has worked itself out, with an option to recover the debt with interest post such rehabilitation?"*
>
> *xxx xxx xxx*
>
> *49. Thus, the primary concern of the Board would be the revival of the sick company and to save the sick company from winding up. That is why with a view to see that there*

is no impediment in framing the rehabilitation scheme and to get out the sick company from sickness. Section 22 provides for suspension of legal proceedings, contracts etc. On a bare reading of Section 22 and Section 22A of SICA, it appears that these two provisions primarily ensure that the scheme prepared by BIFR does not get frustrated because of certain other legal proceedings and to prevent untimely and unwarranted disposal of the assets of the sick industrial company. These sections clearly state certain restrictions which will impact upon the implementation of the scheme as well as on the assets of the company.

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53. Keeping in mind the statement of objects and reasons for enactment of SICA, 1985 and the powers exercised by the BIFR and the primary concern to revive the sick industry for which the rehabilitation scheme is to be framed under Section 18, the question posed is required to be considered.

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56. The operating agency is defined under Section 3(i) and it means any public financial institution, State-level institution, scheduled bank or any other person as may be specified by general or special order as its agency by the Board. No other persons including the unsecured creditors comes into picture like preparing the scheme under Section 18. Section 18 of the SICA does not provide that at the time of preparing of the scheme under Section 18 or when it is sanctioned by the Board, the unsecured creditors are required to be heard. The only provision for the consent required is Section 19 and the agency/ person, who is required to give the financial assistance, its consent is required. Once the rehabilitation scheme/ scheme under Section 18 prepared by the operating agency is sanctioned by the BIFR, which may include the scaling down the value of dues of the unsecured creditors, the same shall bind all, otherwise the rehabilitation scheme shall not be workable at all and the object and purpose of enactment of the SICA, 1985 will be frustrated. If some

persons/unsecured creditors and/or even the labourers are permitted to get out of the purview of the scheme and thereafter permitting such or some of the unsecured creditors to wait till the scheme for rehabilitation of the sick company has worked itself out, in that case, the scheme shall not be workable at all. To make the company viable, the concerned persons including the unsecured creditors have to sacrifice to some extent otherwise the revival efforts shall fail.

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59. If the submission on behalf of the unsecured creditors, which has been accepted by the High Court in the case of Continental Carbon India Ltd. (supra) that an unsecured creditor can opt out of the scheme sanctioned by the BIFR under the SICA, 1985 and is allowed not to accept the scaled down value of its dues and may wait till the scheme for rehabilitation of the sick company has worked itself out, with an option to recover the debt post such rehabilitation is accepted/allowed, in that case, the minority creditors may frustrate the rehabilitation scheme, which may frustrate the object and purpose of enactment of SICA, 1985.

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61. Thus, minority creditors and that too some unsecured creditors cannot be permitted to stall the rehabilitation of the sick company by not accepting the scaled down value of its dues. Unless and until there is a sacrifice by all concerned, including the creditors, financial institutions, unsecured creditors, labourers, there shall not be any revival of the sick industrial company/company.

62. Now, so far as the submission on behalf of the unsecured creditors that the unsecured creditors should have an option not to accept the scaled down value of its dues and to wait till the scheme for rehabilitation of the sick company has worked itself out, with an option to recover the debt post such rehabilitation is concerned, the same has no substance and cannot be accepted. It is required to be noted that in a given case, because of

the scaling down of the value of the dues of the creditors, the company survives. The company has survived in view of the rehabilitation scheme because of the sacrifice/ scaling down the value of the dues of the creditors including the financial institutions. How such a benefit can be permitted to be given to the unsecured creditors, who does not accept the scaled down value of its dues. Such an unsecured creditor cannot be permitted to take the benefit of the revival scheme, which is at the cost of other creditors including the financial institutions and even the labourers.

63. Now, so far as the view taken by the High Court that the unsecured creditor had an option not to accept the scaled down value of its dues and can wait till the scheme for rehabilitation of the company has worked itself out with an option to recover the debt with interest post such rehabilitation is accepted, in a given case, the sick company, which has been able to revive because of the scaling down the value of the dues, may again become sick, if the entire dues of the unsecured creditors are to be paid thereafter. It may again lead to becoming such a revived company again as a sick company. If such a thing is permitted, in that case, it will again frustrate the object and purpose of enactment of the SICA, 1985.

64. Now, so far as the submission on behalf of the unsecured creditors that to compel the unsecured creditors to accept the scaled down value of its dues would tantamount to and would be violative of Article 300A of the Constitution of India is concerned, the same has also no substance. Scaling down the value of the dues is under the rehabilitation scheme prepared under Section 18 of the SICA, which has a binding effect on all the creditors. Therefore, the same cannot be said to be violative of Article 300A of the Constitution of India. The law permits framing of the scheme taking into consideration and to provide the measures contemplated under Section 18, therefore, the rehabilitation scheme which provides for scaling down the value of dues of the creditors/unsecured creditors and even that of the labourers cannot be said to be violative

of Article 300A of the Constitution of India as submitted on behalf of the unsecured creditors.

65. In view of the above and for the reasons stated above, the view taken by the High Court of Delhi in Continental Carbon India Ltd. (supra) that on approval of a scheme by the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985, the unsecured creditors has an option not to accept the scaling down value of its dues and to wait till the rehabilitation scheme of the sick company has worked itself out with an option to recover the debt with interest post such rehabilitation is erroneous and contrary to the scheme of SICA, 1985 and the same deserves to be quashed and set aside and is accordingly quashed and set aside."

(Emphasis supplied)

130. It is clear from the aforesaid observations of this Court that the revival of a sick industry should be given utmost priority and any interpretation which may result in a newly revived company becoming sick again should be avoided at all costs. In the case on hand, the decree in favour of the original plaintiff was not a part of the scheme of rehabilitation approved by the BIFR. Had it been so, it is nothing but obvious that the scheme would have proposed to settle the dues of the original plaintiff at a scaled down value, since a similar approach was adopted in the scheme to settle the dues of all the other creditors. In that scenario, the original plaintiff would not have had any other option but to accept the scaled down value and settle its dues as per the dictum in ***Modi Rubber*** (supra).

131. The decree awarded by the trial court was contested by both the parties before the High Court. No material was placed before us to show whether any steps were taken by the original plaintiff to obtain the permission of the BIFR for the execution of the decree of the trial court, or for the inclusion of the said decree in the rehabilitation scheme. At the same time, the original defendants too failed to bring anything on record to show if any steps were taken by them for the inclusion of the dues of the original plaintiff in the rehabilitation scheme.

132. Although the facts of the case on hand are different from the facts in ***Modi Rubber*** (supra), we are of the opinion that the general principles

enunciated in that case are equally applicable in the present case. Thus, only for the reason that the dues of the original plaintiff were not a part of the scheme and thus could not be settled at a scaled-down value, it cannot be held that it will now be open for the original plaintiff to recover its dues along with compound interest for the entire period in a manner that will saddle the defendant company with enormous liability, thereby possibly rendering the entire process of its revival futile. This, in our view, could never have been the object of the 1985 Act and the provisions of the 1993 Act thus have to be harmonised so as to give effect to the true object of the 1985 Act.

133. We also had the occasion to look into the decision of a 2-Judge bench of this Court in ***LML Limited v. Union of India & Others*** reported in (2014) 13 SCC 375 wherein this Court was considering the purport of Section 19 of the MSMED Act, 2006 which is in *pari-materia* to the Section 7 of the 1993 Act. The provisions read as under:

MSMED Act, 2006	**The 1993 Act**
"19. Application for setting aside decree, award or order. No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by anyf court unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, the other order in the manner directed by such court: Provided that pending disposal of the application to set aside the decree, award or order, the court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case, subject to such conditions as it deems necessary to impose."	**"7. Appeal –** No appeal against any decree, award or other order shall be entertained by any court or other authority unless the appellant (not being a supplier) has deposited with it seventy-five per cent. of the amount in terms of the decree, award or, as the case may be, other order in the manner directed by such court or, as the case may be, such authority."

134. In the aforesaid case, the petitioner therein, having become a sick company, filed a reference to the BIFR under Section 15(1) of the 1985 Act. Around the same time, one of the respondents filed a claim petition before the Industries Facilitation Council under Section 6 of the 1993 Act. The 1993 Act was replaced by the MSMED Act, 2006 during the pendency of the proceedings. While the reference of the company remained pending before the BIFR, the Industries Facilitation Council passed an award in the favour of the said respondent, which the petitioner sought to appeal under the Section 34 of the Arbitration and Conciliation Act, 1996. However, both the District Court and the High Court dismissed the challenge petition for not complying with the Section 19 of the MSMED Act, 2006, which mandates that 75% of the decretal/award amount has to be deposited by the appellant before the appeal can be entertained by the appellate court.

135. However, this Court set aside the dismissal orders and held as follows:

> *"9. Having regard to the above position, we are satisfied that this is not a case where we should go into the legal question noted by us in the beginning of our order. We are satisfied that interest of justice shall be subserved if it is directed that failure to deposit the amount as directed by the District Judge, Kanpur Nagar in its order dated 12-5-2011 would not result in dismissal of the arbitration petition filed by the petitioner under Section 34 of the 1996 Act challenging the award dated 22-12-2008. The said arbitration petition may remain pending with the District Judge until the finalisation of scheme by BIFR under Section 18 of the 1985 Act. We order accordingly.*
>
> *10. The special leave petition is disposed of as above. Respondent 3 is granted liberty to apply to BIFR to hear it before finalisation of the scheme. We observe that if such an application is made, BIFR shall hear Respondent 3 before finalisation of the scheme or any other order that may be passed by BIFR terminating the proceedings under 1985 Act."*
>
> (Emphasis supplied)

136. We would also like to advert to the principle of harmonious construction to understand the interplay between the 1985 Act and the 1993 Act. Simply put, the doctrine of harmonious construction is based on the

principle that the legislature would not lightly take away from one hand what it had given with the other. Thus, this doctrine provides, that as far as possible, two seemingly conflicting provisions within a statute, or the seemingly conflicting provisions of one statute vis a vis another, should be construed in a manner so as to iron out any conflict.

137. Section 10 of the 1993 Act provides for an overriding effect to the provisions of the said Act to the extent of inconsistency with any other statute. Similarly, Section 32 of the 1985 Act provides overriding effect to the provisions of the said Act except for the enactments specified therein. Dealing with a case involving the apparent conflict between the two statutes containing overriding provisions, this Court in ***Sarwan Singh v. Shri Kasturi Lal*** reported in (1977) 1 SCC 750 held as follows:

> *"When two or more laws operate in the same field and each contains a non obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration."*
>
> (Emphasis supplied)

138. Similarly, in ***Jay Engineering*** (supra), it was observed by this Court thus:

> *"31. The endeavour of the court would, however, always be to adopt a rule of harmonious construction."*

139. We would also like to refer to a recent decision of the Madras High Court in ***Metafilms India Ltd. v. Assistant Commissioner (CT) (Addl.), Amaindakarai Assessment Circle, Chennai and Others*** reported in (2022) 96 GSTR 272. Although the said decision was rendered in the peculiar facts of the case therein, yet the reasoning behind the same appears to have been similar to the one that we have employed. The relevant parts of the judgment are extracted hereinbelow:

> *"27. Hence, the question would be, in the facts and circumstances of the present case, what is the date, on which, the repayment is due. As we have mentioned*

earlier, the case on hand is very peculiar and appears to have not arisen in any of the earlier litigations and therefore, it requires to be dealt with in a different manner and obviously on such a reasoning, any observation or direction, which we may issue in this judgment, cannot be treated as a precedent.

28. As mentioned above, the appellant was de-registered by the BIFR on February 5, 2013. The first demand notice was issued on March 20, 2013. However, the appellant paid the dues only on April 25, 2015. The question would be, in the facts and circumstances, what would be the date, on which, the repayment of the loan is due.

29. The Department's contention is that it should be the date, on which, the default occurred. If that is to be reckoned as the date, then an order of cancellation of the agreement followed by recovery proceedings should have been taken by the Department, which admittedly has not been done. This is presumably for the reason that from 2003 to 2013, the appellant was before the Board and it was declared as a sick industrial company and in terms of section 22 of the SICA, the respondent-Department was prohibited from proceeding with any recovery against the appellant and this is a statutory prohibition, which binds the respondent-Department.

30. From the representation given by the appellant to the Government dated August 5, 2014, we find that the Sales Tax Department did not appear before the Board on several dates when the case was heard. Be that as it may, the due date for repayment could have never occurred, in the facts and circumstances, between August 1, 2003 when the appellant was referred to the BIFR and May 31, 2006, the appellant was declared as a sick industrial company till its net worth turned positive and it was discharged from the Board on February 5, 2013.

31. Thus, on facts, we hold that the date, on which, the repayment became due for the appellant's case shall be fixed on February 6, 2013. Admittedly, the appellant cleared the entire sales tax on April 25, 2015. Hence, for

the period from February 6, 2013 to April 25, 2015, the appellant is liable to pay interest."

(Emphasis supplied)

140. For the period during which the defendant company was sick and before the BIFR, it cannot be said that the withholding of the payment of the dues of the original plaintiff was wilful and intentional. We say so because *first*, the liability of the original defendants was disputed and was finally adjudicated only by way of the impugned judgment, much after the BIFR proceedings had come to an end; and *secondly*, even if the liability of the original defendants was not disputed, or was even acknowledged before the BIFR, recovery of the same could not have been done without the permission of the BIFR in view of the suspension of recovery proceedings by Section 22(1) of the 1985 Act.

141. Thus, in view of our aforesaid discussion, we deem it fit to exclude the period commencing from the date when FCIL was declared to be a sick company under the 1985 Act going up to the date when it was discharged by the BIFR and declared to be no longer a sick industrial company from the purview of the applicability of the interest provision under the 1993 Act. Thus, while the applicability of the 1993 Act to the dues of the original plaintiff is not disputed, such interest shall not be calculated for the period between 06.11.1992 and 27.06.2013.

E. CONCLUSION

142. The net effect of the aforesaid discussion and findings is as follows:

I. The suit instituted by the original plaintiff before the trial court was not hit by the embargo envisaged under Section 22(1) of the 1985 Act. Thus, the decree awarded in favour of the original plaintiff by the trial court and modified by the High Court, cannot be said to be *coram non-judice.*

II. The High Court committed no error in awarding 24% interest to the original plaintiff on its dues as per the provisions of the 1993 Act. However, the period during which the defendant company was a sick company as per the 1985 Act should be excluded for the purposes of calculation of interest.

143. As a result, the impugned judgment and order of the High Court is upheld subject to the modification of the period for which interest

may be granted as discussed aforesaid. To clarify, the interest will be calculated at 24% p.a. with monthly compounding.

144. The appeals are disposed of in the aforesaid terms. The final amount that may be determined in accordance with the final decree shall be paid to the original plaintiff within a period of 4 weeks from today, failing which interest at the rate of 36% p.a. with monthly compounding shall accrue.

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

146. Parties to bear their own costs.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeals disposed of.

[2024] 5 S.C.R. 400 : 2024 INSC 344

Leonard Xavier Valdaris
v.
Jitendra Ramnayaran Rathod & Ors.

(Criminal Appeal No. 2198 of 2024)

22 April 2024

[Sanjiv Khanna and Dipankar Datta JJ.]

Issue for Consideration

Whether a Single Judge of the High Court can disagree with an earlier order of a Single Judge based on the same set of facts and one trial, and give a conflicting order.

Headnotes

Practice and Procedure – Conflicting Decisions – Two conflicting orders by co-ordinate benches arising out of same set of facts and one trial – Subsequent order to be treated as order referring the matter to larger Bench of two judges for consideration

Held: Single Judge of High Court upheld order passed by the Special Judge framing charge under Section 302 of the Penal Code, 1860 – Order attained finality – Subsequently, another Single Judge of High Court disagreed and directed charge under s.302 not to be framed – Same set of facts and one trial leading to two conflicting orders – Rule 8 of the Bombay High Court Appellate Side Rules, 1960, considered – If Single Judge is of the opinion that the earlier order was unsustainable and contrary to law should have referred to a Division Bench/ two judges Bench – Should not have passed conflicting order – Subsequent decision of the Single Judge to be treated as one differing with the view expressed in the earlier order and as one referring the matter to a larger bench of two Judges/ Division Bench for consideration – Chief Justice of High Court requested to constitute appropriate Bench. [Paras 5, 8-10]

Case Law Cited

Shri Bhagwan & Another v. Shri Ram Chand & Another **[1965] 3 SCR 218 : AIR 1965 SC 1767;** *Eknath Shankarrao Mukkawar v. State of Maharashtra* **[1977] 3 SCR 513 : (1977) 3 SCC 25 – relied on.**

Leonard Xavier Valdaris v. Jitendra Ramnayaran Rathod & Ors.

List of Acts

Penal Code, 1860; Bombay High Court Appellate Side Rules, 1960.

List of Keywords

Conflicting decisions; Coordinate bench; Referring to larger bench.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No.2198 of 2024

From the Judgment and Order dated 20.04.2023 of the High Court of Judicature at Bombay in CRLWP No. 4451 of 2022

Appearances for Parties

Payoshi Roy, S. Prabu Ramasubramanian, Raghunatha Sethupathy B, Bharathimohan M, Avinash Kumar, Advs. for the Appellant.

Rizwan Merchant, Mrs. Yugandhara Pawar Jha, Kunal Verma, Sultan Khan, Sagar Shete, Ms. Lavanya Dhawan, Shivraj Pawar, Shrirang B. Varma, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Nidhi Khanna, Ms. Vimla Sinha, Sanjay Kr. Tyagi, Ms. Harshita Raghuvanshi, Pratyush Shrivastav, Ms. Aarushi Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. Leave granted.

2. A peculiar situation has arisen. A Single Judge of the High Court in Criminal Writ Petition No.4104/2022 titled as "*Archana Maruti Pujari & Ors*. v. *Central Bureau of Investigation & Ors*." decided on 16.12.2022, had upheld the order passed by the Special Judge framing charge under Section 302 of the Indian Penal Code, 1860 (IPC). The order/judgment dated 16.12.2022 was not challenged and has attained finality.

3. By the impugned judgment/order dated 20.4.2023 in Criminal Writ Petition No.4451/2022 titled "*Jitendra Ramnarayan Rathod* v. *Central Bureau of Investigation & Ors*." another Single Judge of the High Court disagreed with the view expressed in the judgment/order dated

16.12.2022 and has directed that the charge under Section 302 of IPC should not be framed.

4. This leads to an incongruous situation where, in the same set of facts and one trial, there are two conflicting orders, one rejecting the challenge to framing of charge under Section 302 of IPC and other directing that the charge under Section 302 of IPC should not be framed.

5. In our opinion, once the Single Judge, while deciding Criminal Writ Petition No. 4451/2022 formed an opinion that the judgment/order dated 16.12.2022 passed by the learned Single Judge was unsustainable and contrary to law, the matter should have been referred to a Division Bench/two-Judges Bench instead of passing a conflicting judgment in the same set of facts. Rule 8 of the Bombay High Court Appellate Side Rules, 1960, reads:

> "Reference to two or more Judges.- If it shall appear to any Judge, either on the application of a party or otherwise, that an appeal or matter can be more advantageously heard by a Bench of two or more Judges, he may report to that effect to the Chief Justice who shall make such order thereon as he shall think fit."

6. Previously, this Court in *Lala* *Shri Bhagwan & Another v. Shri Ram Chand & Another*[1] held that:

> "It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, needed to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question."

7. Similarly, in *Eknath Shankarrao Mukkawar v. State of Maharashtra*[2], this Court stated that:

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1 [1965] 3 SCR 218 : AIR 1965 SC 1767

2 [1977] 3 SCR 513 : (1977) 3 SCC 25

> "When there was a decision of a coordinate court, it was open to the learned Judge to differ from it but in that case the only judicial alternative was to refer it to a larger bench and not to dispose of the appeal by taking a contrary view. Judicial discipline as well as decorum should suggest that as the only course."

8. Accordingly, we are of the opinion that the impugned judgment dated 20.4.2023 would be treated as an order differing with the view expressed in the judgment/order dated 16.12.2022. It would be also treated as an order referring the matter to a larger Bench of two Judges/Division Bench for consideration.

9. The impugned judgment/order is accordingly partly set aside and the appeal is allowed and disposed of in the aforesaid terms. We clarify we have not expressed any opinion on the merits of the case.

10. We request the Chief Justice of the High Court of Judicature at Bombay to constitute an appropriate Bench.

Headnotes prepared by:
Swathi H. Prasad, Hony. Associate Editor
(*Verified by:* Shibani Ghosh, Adv.)

Result of the case:
Appeal disposed of.

[2024] 5 S.C.R. 404 : 2024 INSC 333

Arcadia Shipping Ltd.
v.
Tata Steel Limited and Others

(Civil Appeal No. 5599 of 2024)

16 April 2024

[Sanjiv Khanna* and Dipankar Datta, JJ.]

Issue for Consideration

Whether the Division Bench of the Delhi High Court was correct in setting aside the finding of the Single Judge that the Delhi High Court has no territorial jurisdiction.

Headnotes

Territorial Jurisdiction – Suit by Bhushan Steel & Strips Ltd. (now Tata Steel Limited) – Section 20(c) of the Civil Procedure Code, 1908 – Scope of, Explained.

Held: Section 20(c) of the Civil Procedure Code, 1908 accords dominus litis to the plaintiff to institute a suit within local limits of whose jurisdiction the cause of action, wholly or in part, arises – Situs of the cause of action, even in part, will confer territorial jurisdiction on that court – Two transactions took place – One of sale of goods of galvanised steel in Delhi and one of shipment of goods by Arcadia from Mumbai to Djibouti, Ethiopia – Although Arcadia's involvement was restricted to the second transaction only, the transactions were intrinsically intertwined – The supply order was placed in Delhi and the payment was to be released in Delhi – However, the sale of goods and then their shipment (from Mumbai to Djibouti) was connected and synchronised – Therefore, the Delhi High Court has jurisdiction under Section 20(c) of the CPC as the cause of action arose in part in Delhi. [Paras 7, 8, 10, 13 and 14]

Code of Civil Procedure, 1908 – Order 1, Rules 3 and 7 – Scope of, Explained.

Held: Order 1 Rule 3 of the CPC provides that the plaintiff may join as a defendant in one suit, all persons against whom, the plaintiff claims the right to relief in respect of, or arising out of, the same act or transaction or series of transactions – The claim

* Author

viz. the defendants can be joint, several or in the alternative – It is permissible to file one civil suit, even when, separate suits can be brought against such persons, when common questions of law and fact arise – Order 1 Rule 7 of the CPC permits a plaintiff to join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, can be decided in one suit – As per Order 1, Rules 3 and 7 of the CPC, it was permissible for Bhushan Steel to enjoin in a single suit all the defendants, including Arcadia – The cause of action could not have been adjudicated without impleading all the defendants as parties – Thus, in terms of Order 1 Rule 3 of the CPC, the relief claimed by Bhushan Steel lies against all the defendants, albeit to different extents and arising out of a series of transactions – Thus, Bhushan Steel was within its rights to enjoin all the defendants under a single suit as per Order 1 Rule 7 of the CPC. [Paras 11, 12 and 13]

Bill of Lading – Purpose of, Explained.

Held: A Bill of Lading serves the following purposes: (a) it is receipt of the goods shipped and the terms on which they have been received; (b) it is evidence for the contract of carriage of goods; and (c) it is a document of title for the goods specified therein. [Para 8]

Territorial Jurisdiction – Question of – Stage at which to be decided – At the outset.

Held: The issue of territorial jurisdiction should be decided at the outset rather than being deferred till the matter is resolved. [Para 15]

List of Acts

Code of Civil Procedure Code, 1908.

List of Keywords

Territorial Jurisdiction, Bill of Lading, Dominus Litis, Letters of Credit, Sale of Goods.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5599 of 2024

From the Judgment and Order dated 08.01.2024 of the High Court of Delhi at New Delhi in FAO (OS) (COMM) 19 of 2019

Appearances for Parties

E.R. Kumar, D.P. Mohanty, Ms. Sonal Gupta, Ms. Manisha Arya, Abhishek Thakral, M/S. Parekh & Co., Advs. for the Petitioner.

Joy Basu, Shashank Gautam, Arvind Thapliyal, Surya Kapoor, Ms. Saravna Vasanta, Siddhant Pandey, Rajesh Banati, Ashish Sareen, Anoop George, Kunal Chaterjee, Ms. Aagam Kaur, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Sanjiv Khanna, J.

Leave granted.

2. This order gives reasons and decides a question of territorial jurisdiction under the Code of Civil Procedure, 1908[1].

3. We begin by briefly referring to the facts of the case and pleadings in the plaint - Suit No. 458/2000:

- The original plaintiff is Bhushan Steel & Strips Ltd[2]. Bhushan Steel has merged with Tata Steel Limited (respondent no. 1 before this Court).
- The defendant nos. 1-4 are, TYO Trading Enterprises[3] (respondent no. 2 before this Court), Commercial Bank of Ethiopia[4] (respondent no. 3 before this Court), Arcadia Shipping Limited[5] (appellant before this Court) and M.G. Trading Worldwide Pvt Ltd[6] (respondent no. 4 before this Court).
- Bhushan Steel was, *inter alia*, a manufacturer of galvanized steel corrugated sheets.
- TYO Trading was a company based in Ethiopia that had instructed its agent, M.G. Trading, to place certain supply

1 For short, "Code."

2 For short, "Bhushan Steel".

3 For short, "TYO Trading".

4 For short, "Bank of Ethiopia".

5 For short, "Arcadia".

6 For short, "M.G. Trading".

orders for galvanized steel corrugated sheets with Bhushan Steel.

- Accordingly, M.G. Trading placed orders with Bhushan Steel, at Delhi, for the supply of 400 MT of galvanized steel corrugated sheets.
- TYO Trading had initially opened the Letter of Credit in favour of its agent M.G. Trading.
- Subsequently, the Letter of Credit was transferred in the name of Bhushan Steel, pursuant to which, the material was dispatched by Bhushan Steel, as per the supply orders.
- The material was loaded by the shippers, Arcadia, in their vessel - Winco Pioneer, from a port in Mumbai, India to a port in Djibouti, Ethiopia.
- Arcadia undertook the shipment *vide* two bills of lading -(i) Bill of Lading No. DJB-06 for 200 MT of galvanized steel corrugated sheets and (ii) Bill of Lading No. DJB-07 for 198 MT of galvanized steel corrugated sheets.
- The freight charges for shipping were prepaid by Bhushan Steel to Arcadia.
- Arcadia was directed to deliver the goods to the order of the Bank of Ethiopia, to whom documents had been submitted by Bhushan Steel through their bankers, Punjab National Bank[8]. The documents were to be negotiated under the Letter of Credit. '
- PNB had sent the said documents to the Bank of Ethiopia for making the payments. All formalities for encashing the Letter of Credit had been completed by Bhushan Steel.
- However, Bank of Ethiopia refused to encash the Letter of Credit on the grounds of discrepancies.
- *Vide* fax message dated 25.08.1999, Bhushan Steel was informed by Arcadia that both the shipments had been released to the consignee, TYO Trading, as they had duly presented a Bill of Lading, endorsed by Bank of Ethiopia.

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8 For short, "PNB".

- *Vide* letter dated 07.09.1998, TYO Trading informed Bhushan Steel, through M.G. Trading, that they had made the payment, which would be released by the Bank of Ethiopia.
- The payment was not received by Bhushan Steel. The material was delivered and could not be shipped back to Bhushan Steel.
- Thus, the defendants had taken a contradictory stand. While TYO Trading had stated that they had paid for the goods, the Bank of Ethiopia had refused to honour the Letter of Credit. Arcadia had stated that the material had been released to TYO Trading upon presentation of the Bill of Lading which was duly endorsed by the Bank of Ethiopia. Further, PNB had returned the original documents, including the Bill of Ladings to Bhushan Steel stating that they had received them without any encashment of the Letter of Credit by the Bank of Ethiopia.
- Paragraphs 22 and 29 of the plaint read as under:

> "22. That thus the fact remains that the payment of the said bill of lading has not been paid to the plaintiff and is still liable to be paid to the plaintiff and the plaintiff is fully entitled for an amount of US$ 2,76,510 which is the liability of defendant no.1 and 2 in the event of goods rightly being released by defendant no. 3 after obtaining duly endorsed bill of lading from defendant no. 2, but in case the goods had been released without obtaining the endorsement then it is the liability of defendant nos. 1, 2 and 3 jointly and severally towards plaintiff for making payment thereof as defendant no. 2 cannot escape its liability under any circumstances as if the irrevocable Letter of Credit would not have been issued by defendant no.2 duly transferred in favour of plaintiff, the plaintiff would not have supplied the said goods and since despite the fact that all the conditions of supply was fulfilled by plaintiff of the irrevocable Letter of Credit, the defendant no.2 have not released the payment, therefore the liability of defendant no.2 remains in all eventuality and the liability of defendant no.3 arises if they had delivered the goods without obtaining endorsement from defendant no.2 and as such in

> order to escape their liability defendant no. 3 to establish and prove that they hold with them the original Bill- of Lading duly endorsed by defendant no.2 to release the said goods in favour of defendant no.1, otherwise defendant no.3 cannot escape its liability for payment. This is so the original documents have been returned back unpaid to the plaintiff by their bankers Punjab National Bank and as such it is surprising as to how the goods had been released by defendant no. 3 as confirmed by them in favour of defendant no. 1 vide their fax dated 29th August, 1999.
>
> xxx xxx xxx
>
> 29. That the cause of action arose for the first time when defendant no.4 assigned the said order placed by defendant no.1 in favour of plaintiff; again arose on 23rd June, 1998 when the goods were supplied to defendant no.1 and was sent to defendant no. 3; again arose on 7th September, 1998, when defendant no. 1 confirmed having made the payment to defendant no.2 and assure the early release of the payment; again arose when the documents were returned to the plaintiff on 23rd August, 1999 when the plaintiff enquired about the status of the goods; again arose on 25th August, 1999 when defendant no.3 confirmed having delivered the goods to defendant no.1 and the authority of defendant no.2 and finally arose on 29th November, 1999 when despite the legal notice the defendants failed to release the payment and is a continuing one."

In this manner, it was pleaded that if an endorsement on the Bill of Lading was made by the Bank of Ethiopia, they would be liable. Arcadia would be liable if they were not able to establish and prove that the original Bill of Lading was duly endorsed by the Bank of Ethiopia.

- Accordingly, the defendants were jointly and severally liable.
- Paragraph 30 of the plaint relating to the territorial jurisdiction reads as under:

> "That the cause of action arose at Delhi as the order was placed at Delhi and the payment was to be released at Delhi, therefore this Hon'ble Court has got the Jurisdiction to try and adjudicate upon the present suit."

Bhushan Steel had thus pleaded that the High Court at Delhi possessed territorial jurisdiction to decide the Suit.

4. *Vide* judgement/order dated 20.12.2017, the Single Judge of the High Court at Delhi recording the following findings:

- Bank of Ethiopia had refused to honour the Letter of Credit on account of discrepancies as the goods were shipped late and the documents were presented after the course of negotiation.
- Goods were released and in spite of efforts of Bhushan Steel to call back the shipment, the goods could not be retrieved.
- TYO Trading Enterprises was untraceable and were proceeded *ex-parte*.
- Arcadia had loaded and shipped the goods, however, they failed to divulge the actual recipient in Ethiopia. Arcadia failed to inform Bhushan Steel about their due compliance. Acadia had taken conflicting and inconsistent stands regarding the person to whom the goods were released. The original documents, including the Bills of Lading were returned to Bhushan Steel and were in their possession. Thus, the goods could not have been released by Arcadia without the production of the original Bill of Ladings which were with Bhushan Steel.
- Therefore, the goods were released by Arcadia unauthorisedly and have not been accounted for by them. Accordingly, Arcadia is liable to Bhushan Steel for the loss suffered.[9] Arcadia should pay Bhushan Steel the value of the goods, without any interest.

9 The judgment records that Arcadia had not disclosed who was the 'Principal', who was an undisclosed foreign party. Arcadia had not produced document to show if the freight charges were received on behalf of the 'Principal' etc.

Despite these findings, the Single Judge directed the return of the plaint on the question of territorial jurisdiction, as reproduced below:

> "**Issue No. 1**
>
> 27. This Court agrees with defendant No.3's contention that this Court lacks territorial jurisdiction to entertain and decide the present suit. Apparently, no cause of action arose against defendant No.3 within the jurisdiction of the Court to grant the relief prayed for. Defendant No. 3 carries on its business at Mumbai. It is not at controversy that the goods in question were shipped / loaded at Mumbai, the freight charges were paid there. The goods were to be delivered at Djibouti Port, Ethiopia Apparently, no cause of action whatsoever qua defendant No. 3 arose at Delhi to attract the territorial jurisdiction of this Court. This Court has no jurisdiction to entertain and decide the present suit qua the defendant No. 3. This issue is decided in favour of the defendant No.3 and against the plaintiff.
>
> **Relief**
>
> 28. Since this Court has no territorial jurisdiction to entertain and decide the present suit qua defendant No. 3, the relief claimed by the plaintiff against defendant No. 3 cannot be granted.
>
> 29. Plaint be returned to the plaintiff to be presented before the Court of Competent Jurisdiction, as per law."

5. A Division Bench of the High Court at Delhi, *vide* judgment/order 09.01.2024, allowed an appeal against the judgement/order passed by the Single Judge dated 20.12.2017, in an appeal preferred by Tata Steel Limited.

6. The present appeal has been preferred by the appellant – Arcadia against the judgment/order of the Division Bench of the High Court at Delhi, dated 08.01.2024**.**

7. Arcadia submits that two distinct transactions occurred: first, the sale of goods and second, a shipment of goods from Mumbai to Djibouti. Arcadia emphasizes that their involvement was restricted to the second transaction. Notably, the supply orders, integral to the first transaction, were placed in Delhi. Thus, Arcadia submits that a suit

cannot be brought against them in Delhi, as they were not a part of the first transaction and their businesses were located out of Mumbai.

8. In our opinion, the contention raised by Arcadia has no merit. The transactions are intrinsically intertwined and cannot be compartmentalized into watertight silos. The shipment of goods was linked and connected with the sale of goods by Bhushan Steel through, inter alia, the Bill of Lading. A Bill of Lading essentially serves a tri-fold purpose: (a) it is receipt of the goods shipped and the terms on which they have been received; (b) it is evidence for the contract of carriage of goods; and (c) it is a document of title for the goods specified therein. Consequently, the release of goods by the shipper, Arcadia, hinged upon the presentation of the Bill of Lading by the receiver, TYO Trading at the point of receipt. However, the Bill of Lading necessitated proper endorsement by the Bank of Ethiopia since they were the issuers of the Letter of Credit. Bhushan Steel remained the owner of the goods. In this manner, the actions of Arcadia and the transactions were interconnected with each other. Upon reading paragraphs 22, 29 and 30 of the plaint referred to above and after perusing the facts of the case, it is clear to us that a part of the cause of action had arisen in Delhi.

9. It would be opportune to refer to the provisions of the Code.

10. Section 20(c) of the Code accords dominus litis to the plaintiff to institute a suit within local limits of whose jurisdiction the cause of action, wholly or in part arises.[10] Every suit is based upon the cause of action, and the situs of the cause of action, even in part, will confer territorial jurisdiction on the court. The expression 'cause of action' can be given either a restrictive or wide meaning. However, it is judicially read to mean - every fact that the plaintiff should prove to support their right to the judgment.

11. Order I Rule 3 of the Code states that the plaintiff may join as a defendant in one suit, all persons against whom, the plaintiff claims the right to relief in respect of, or arising out of, the same act or

10 "20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

xxx xxx xxx

(c) the cause of action, wholly or in part, arises.

transaction or series of transactions.[11] The claim viz. the defendants can be joint, several or in the alternative. Thus, it is permissible to file one civil suit, even when, separate suits can be brought against such persons, when common questions of law and fact arise.

12. Order I Rule 7 of the Code permits a plaintiff who is in doubt as to the person from whom they are entitled to obtain redress, to join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, can be decided in one suit.[12]

13. The supply order was placed in Delhi and the payment was to be released in Delhi. Accordingly, the cause of action arose in part at Delhi, in terms of Section 20(c) of the Code. As per Order I Rules 3 and 7 of the Code, it was permissible for Bhushan Steel to enjoin in a single suit all the defendants, including Arcadia. Their claim of right to relief lies against all such defendants. Further, the relief claimed was in respect of or arising out of a series of transactions, the sale of goods and then their shipment, which transactions were connected and synchronized with the relief claimed. The cause of action could not have been adjudicated without impleading all the defendants as parties. Thus, in terms of Order I Rule 3, the relief claimed by Bhushan Steel lies against all the defendants, albeit to different extents and was 'in respect of and arises out of a series of transactions'. Thus, Bhushan Steel was within its rights to enjoin all the defendants under a single suit as per Order I Rule 7 of the Code such that the extent of liability of each defendant could be decided in the same suit.

14. Therefore, the Division Bench of the High Court was right in setting aside the finding recorded by the Single Judge viz issue no. 1 – territorial jurisdiction.

15. However, we must also record that a question of territorial jurisdiction should ordinarily be decided at the outset rather than being deferred

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11 "3. Who may be joined as defendants.—All persons may be joined in one suit as defendants where—
(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and
(b) if separate suits were brought against such persons, any common question of law or fact would arise."

12 "7. When plaintiff in doubt from whom redress is to be sought.— Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties."

till all matters are resolved. In the judgment dated 20.09.2017, the Single Judge held that no liability can be fastened to TYO Trading and Bank of Ethiopia. However, it held that liability could be fastened to Arcadia. In the context of the dispute in question, the different and divergent stands of the defendants, the remedy was to file a civil suit against the defendants, which in the facts was maintainable in Delhi, a part of the cause of action having arisen in Delhi.

16. Hence, the Single Judge erred in upholding Arcadia's contention regarding lack of territorial jurisdiction of the Delhi High Court and absence of any cause of action arising against them in Delhi, based on their businesses being located in Mumbai.

17. For the aforesaid reasons, the present civil appeal is dismissed.

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

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

Result of the case:
Appeal dismissed.

[2024] 5 S.C.R. 415 : 2024 INSC 341

Association For Democratic Reforms
v.
Election Commission of India and Another

(Writ Petition (Civil) No. 434 of 2023)

26 April 2024

[Sanjiv Khanna* and Dipankar Datta,* JJ.]

Issue for Consideration

Petitioners sought directions for re-introduction of the paper ballot system; or that the printed slip from the Voter Verifiable Paper Audit Trail (VVPAT) machine be given to the voter to verify, and put in the ballot box, for counting; and/or that there should be 100% counting of the VVPAT slips in addition to electronic counting by the control unit.

Headnotes

Elections – Electoral Process – Representation of the People Act, 1951 – Conduct of Election Rules, 1961 – Use of Electronic Voting Machines (EVMs) – EVM-VVPAT mechanism – Writ petitions filed on the suspicion of the possibility of manipulation of the EVMs and mismatch in votes cast through EVMs – Directions sought for returning to the paper ballot system; or that the printed slip from the VVPAT machine be given to the voter to verify; and/or for 100% counting of the VVPAT paper trails in addition to electronic counting:

Held: Per Sanjiv Khanna, J. (for himself and Dipankar Datta, J.) EVM consists of three units, namely, the ballot unit, the control unit, and the VVPAT – EVM setup is designed in a rudimentary fashion and the EVM units are standalone and non-networked, i.e., they are unconnectable to any other third-party machine or input source – In case any unauthorised attempt is made to access the microcontroller or memory of the EVM, the Unauthorised Access Detection Mechanism disables it permanently – Advanced encryption techniques and strong mutual authentication or reception capability rules out the deciphering of communication between the EVM units and any unauthorised interaction with the EVM – The programme loaded in the EVM is key hashed and burnt into a One Time Programmable microcontroller chip at the time of manufacturing, thus dispelling any possibility of tampering – All the three units of

* Authors

the EVM have microcontrollers in which the respective firmware is burnt – The burnt programme/code is unalterable and cannot be modified after the EVM is delivered/supplied to Election Commission of India (ECI) – Every key press of the control unit is dynamically coded, making it impossible to decode the signal flowing among the units of the EVM *inter se* – Firmware of the control unit is agnostic to any candidate name or political party symbol – The possibility to hack or tamper with the agnostic firmware in the burnt memory to tutor/favour results is unfounded – The suspicion that EVMs can be manipulated for repeated or wrong recording of vote(s) to favour a particular candidate, rejected – ECI has conducted random VVPAT verification of 5 polling booths per assembly segment/constituency for 41,629 EVMs-VVPATs – More than 4 crore VVPAT slips have been tallied with the electronic counts of their control units – Not even a single case of mismatch (except one which arose on account of failure of the presiding officer to delete the mock poll data) or wrong recording of votes was detected – EVMs subjected to test by technical experts committee from time to time wherein no fault was found – The M3 EVMs currently in use are designed by engineers of BHEL and ECIL and vetted by the aforesaid committee – A number of safeguards and protocols with stringent checks have been put in place, as elucidated – Administrative and technical safeguards of the EVM reviewed in detail – Data and figures do not indicate artifice and deceit – Imagination and suppositions should not lead to hypothesize a wrong doing without any basis or facts – Credibility of the ECI and integrity of the electoral process earned over years cannot be over-ridden by contemplations and speculations – In *N. Chandrababu Naidu v. Union of India*, the direction for counting the VVPAT paper trail in 5 EVMs per assembly constituency or assembly segment in a parliamentary constituency was issued to ensure the highest level of confidence in the accuracy of election results – Giving physical access to VVPAT slips to voters is problematic and impractical and will lead to misuse, malpractices and disputes – Not inclined to modify the directions to increase the number of VVPAT undergoing slip count – Data and the results do not indicate any need to increase the number of VVPAT units subjected to manual counting – EVMs are simple, secure and user-friendly – Moreover, the incorporation of the VVPAT system fortifies the principle of vote verifiability, enhancing the overall accountability of the electoral process – Electoral reforms would be undone by directing reintroduction of the ballot papers – Submission to return to the

ballot paper system, rejected – **Per Dipankar Datta, J. (Concurring)** Use of EVMs in elections in India are not without its checks and balances – Reasonable measures to ensure transparency, such as tallying VVPAT paper trail in 5 EVMs per assembly constituency or assembly segment in a parliamentary constituency with votes polled, are already in place after the decision in *N. Chandrababu Naidu v. Union of India* – The aforesaid exercise of tallying has till date not resulted in any mismatch – This assertion of ECI not proved incorrect by petitioners – Grounds for the reliefs sought lie in the realm of apprehension and suspicion – Petitioners neither able to demonstrate how the use of EVMs in elections violates the principle of free and fair elections; nor were they able to establish a fundamental right to 100% VVPAT slips tallying with the votes cast – Their apprehensions are misplaced – Reverting to the paper ballot system and burdening the ECI with the onerous task of 100% VVPAT slips tallying would be a folly. [Paras 17, 19-21, 42, 58, 62, 68-70, 72, 75 and 10-12, 19]

Elections – Electoral Process – Use of Electronic Voting Machines (EVMs) – EVM-VVPAT (Voter Verifiable Paper Audit Trail) mechanism – Constitution of India – Article 19(1)(a) – Conduct of Election Rules, 1961 – r.49M – 'transparent window' – Alleged modification of the VVPAT in 2017, whereby the glass window on the VVPAT was made translucent/tinted instead of transparent, depriving the voter from knowing whether the vote cast by him was actually registered and counted – Petitioners submitted that a voter's right to be informed u/Article 19(1)(a) *vis-à-vis* the electoral process have two facets- right to know that the vote is recorded as cast; and, secondly that the vote as cast is counted:

Held: Per Sanjiv Khanna, J. (for himself and Dipankar Datta, J.) The test for determining the scope of unenumerated rights is based on tracing them to specific provision of Part III of the Constitution or to the core values which the Constitution espouses – Petitioners were neither able to demonstrate how the use of EVMs in elections violates the principle of free and fair elections; nor were they able to establish a fundamental right to 100% VVPAT slips tallying with the votes cast – While the fundamental right of voters to ensure their vote is accurately recorded and counted is acknowledged, the same cannot be equated with the right to 100% counting of VVPAT slips, or a right to physical access to

the VVPAT slips, which the voter should be permitted to put in the drop box – These are two separate aspects – The former is the right itself and the latter is a plea to protect or how to secure the right – The voters' right can be protected and safeguarded by adopting several measures – Direction in *Subramanian Swamy v. Election Commission of India* for gradual introduction of VVPATs to guarantee utmost transparency and integrity in the system has been implemented – The voter can see the VVPAT slip through the glass window and this assures the voter that his vote as cast has been recorded and will be counted – Further, ECI was categoric that the glass window on the VVPAT has not undergone any change – The term used in r.49M is 'transparent window' – The tinted glass used on the VVPAT printer is to maintain secrecy and prevent anyone else from viewing the VVPAT slips – Voter in the voting compartment who is viewing the glass from the top can have clear view of the slip for 7 seconds – Marginal tint on the VVPAT glass window, or the fact that the cutting and dropping of the slip from the roll in to the drop box of the printer is not visible, does not violate r.49M – The words 'before such slips get cut' in the proviso to r.49M(3) indicate and require that the slip should be cut from the roll after the elector has seen the print through the glass window – Use of glass window prevents damage, smudging, attempt to deface or physically access the VVPAT slip – The rule ensures that the voter is able to see the slip along with the serial number with name of the candidate and the symbol for whom they have voted – **Per Dipankar Datta, J. (Concurring)** A citizen's right 'to freedom of speech and expression' u/Article 19(1) is not absolute and the State by virtue of Article 19(2) can place reasonable restrictions on these rights – The ordainment of r. 49M (3) is that the VVPAT slip should be momentarily visible to the voter; and it is not the requirement of the rule that the VVPAT slip or its copy has to be handed over to the voter – Recording of the vote cast signifying the choice of the voter and its projection on the VVPAT slip, albeit for 7 seconds, is fulfilment of the voter's right of being informed that his/her vote has been duly recorded – As long as there is no allegation of statutory breach, there can be no substitution of the Court's view for the view of the ECI that the light in the VVPAT would be on for 7 seconds and not more – There is in place a stringent system of checks and balances (Form 17A, 17C, r.56D(4), 56-D), to prevent any possibility of a miscount of votes, and for the voter to know that his/her vote has

been counted – Such a system, which is distinctly more satisfactory compared to the system of the yester-years, suitably satisfies the voter's right under Article 19(1)(a) to know that his/her vote has been counted as recorded. [Paras 69, 73, 16, 17]

Directions by Supreme Court – 2024 General Elections underway for constituting the 18th Lok Sabha – Directions issued to further strengthen the integrity of election process:

Held: On completion of the symbol loading process in the VVPATs undertaken on or after 01.05.2024, the symbol loading units be sealed and secured, as directed and be opened, examined and dealt with as in the case of EVMs; the burnt memory/microcontroller in 5% of the EVMs, that is, the control unit, ballot unit and the VVPAT, per assembly constituency/assembly segment of a parliamentary constituency be checked and verified by the team of engineers from the manufacturers of the EVMs, post the announcement of the results, for any tampering or modification, on a written request made by candidates at SI.No.2 or 3, behind the highest polled candidate. [Para 76]

Conduct of Election Rules, 1961 – r.49MA – Petitioner pleaded that r.49MA is draconian, arbitrary, and contrary to law as reference to s.177, Penal Code, 1860 in the written declaration u/r.49MA is wrong and misconceived:

Held: r.49MA permits the elector to raise a complaint if she/he is of the view that the VVPAT paper slip did not depict the correct candidate/political party she/he voted – However, whenever a challenge is made, the voting process must be halted – An overly liberal approach could cause confusion and delay hindering the election process and dissuading others from casting their votes – However, no comments made on the application of s.177, Penal Code, 1860 – ECI stated that only 26 such requests in terms of r.49MA were received, and in all cases, the allegation was found to be incorrect – Plea that any elector should be liberally permitted as a routine to ask for verification of vote, rejected. [Para 74]

Elections – Electoral Process – Use of Electronic Voting Machines (EVMs) – Case laws affirming the efficacy and use of EVMs in the elections, referred to.

Elections – Electoral Process – EVM-VVPAT (Voter Verifiable Paper Audit Trail) mechanism – Suggestions as regards

counting of the VVPAT slips that instead of physically counting the VVPAT slips, they can be counted by a counting machine; and barcoding of the symbols loaded in the VVPATs may be helpful in machine counting:

Held: Suggestions made may be examined by the ECI – These are technical aspects, which will require evaluation and study, and hence no comment made either way. [Para 71]

Elections – Electoral Process – Conduct of Election Rules, 1961 – Voting by Electronic Voting Machines (EVMs) – EVM-VVPAT (Voter Verifiable Paper Audit Trail) mechanism – Free and fair elections – Procedure and safeguards adopted by ECI to ensure free and fair elections and the integrity of the electoral process; features of EVMs; checks and protocols to ensure and ascertain the legitimacy and integrity of the EVMs and the election process; data on the performance of the EVMs; mechanics and safeguards embedded in the EVMs, discussed.

Elections – Electoral Process – Use of Electronic Voting Machines (EVMs) – EVM-VVPAT (Voter Verifiable Paper Audit Trail) mechanism – Advantages – Enumerated.

Conduct of Election Rules, 1961 – Part IV, Chapter II – Voting by EVMs – rr.49L, 49M (3), (6), 49(O), 49 (S), 56-D; Form 17A, 17C – Preparation of the voting machine by returning officer, arrangements at the polling station, admission to the polling stations, and preparation of voting machine for poll.

Constitution of India – Article 32/226 – Writ petitions – Maintainability – Suspicion of infringement of a right, if adequate ground to invoke the writ jurisdiction:

Held: Per Dipankar Datta, J. No – A writ petition ought not to be entertained if the plea is based on the mere suspicion that a right could be infringed – Suspicion that a right could be infringed and a real threat of infringement of a right are distinct and different – To succeed in a claim under Article 32 or 226, one must demonstrate either mala fide, or arbitrariness, or breach of a law in the impugned State action – Though a writ of right, it is not a writ of course – Writ jurisdiction u/Article 32/226 being special and extraordinary, should not be exercised casually or lightly on the mere asking of a litigant based on suspicions and conjectures, unless there is credible/trustworthy material on record to suggest that adverse action affecting a right

is reasonably imminent or there is a real threat to the rule of law being abrogated – It must be shown, at least prima facie, that there is a real potential threat to a right guaranteed by law to the person concerned – Mere suspicion that there may be a mismatch in votes cast through EVMs, thereby giving rise to a demand for a 100% VVPAT slips verification, is not a sufficient ground for the present set of writ petitions to be considered maintainable. [Paras 22, 23, 28]

Doctrines – Doctrine of *res judicata* – Civil Procedure Code, 1908 – s.11 – "public right" in Explanation VI – Applicability to public interest litigations:

Held: Per Dipankar Datta, J. Doctrine of *res judicata* is applicable to writ petitions under Article 32 and Article 226 as well – The inclusion of the term "public right" in Explanation VI of s.11 of the Civil Procedure Code, 1908 aims to avoid redundant legal disputes concerning public rights – Thus, there is no room for debate regarding the application of s.11 to matters of public interest litigation presented through writ petitions – Principle of *res judicata* is not rigid in cases of substantial public interest and Constitutional Courts are empowered to adopt a flexible approach in such cases, acknowledging their far-reaching public interest ramifications – However, this standard is applicable only when substantial evidence is presented to validate the irreversible harm or detriment to the public good resulting from the action impugned – Court must come to the conclusion that the petition raises substantial grounds not previously addressed in litigation – Only then it may consider such a petition; otherwise, it is within its authority to dismiss it at the threshold – This issue at hand of doubting the efficacy of the EVMs has been previously raised before this Court and it is imperative that such issue is concluded definitively now. [Paras 30, 33, 34]

Case Law Cited

In the judgment of Sanjiv Khanna, J. (for himself and Dipankar Datta, J.)

A.C. Jose v. Sivan Pillai and Others [1984] 3 SCR 74 : **(1984) 2 SCC 656;** *Subramanian Swamy v. Election Commission of India* [2013] 14 SCR 565 : **(2013) 10 SCC 500;** *N. Chandrababu Naidu and Others v. Union of India and Another* **(2019) 15 SCC 377;** *Nyaya Bhoomi and Another v. Election Commission of India,* **2018 SCC**

OnLine SC 3919*; Tech for All v. Election Commission of India,* **2019 SCC OnLine SC 2353***; Prakash Joshi v. Election Commission of India,* **2017 SCC OnLine SC 1734;** *Madhya Pradesh Jan Vikash Party v. Election Commission of India; Sunil Ahya v. Election Commission of India; Kamal Nath v. Election Commission of India and Others* [2018] 12 SCR 842 **: (2019) 2 SCC 260 – referred to.**

In the judgment of Dipankar Datta, J. (Concurring)

Daryao and Others v. State of U.P. and Others [1962] 1 SCR 574 **: AIR 1961 SC 1457;** *Direct Recruit Class II Engineering Officers' Association. v. State of Maharashtra and Others* [1990] 2 SCR 900 **: (1990) 2 SCC 715 – followed.**

Election Commission of India v Ashok Kumar [2000] Supp. 3 SCR 34 **: (2000) 8 SCC 216;** *N. Chandrababu Naidu v. Union of India* **(2019) 15 SCC 377;** *D.A.V. College, Bhatinda v. State of Punjab* [1971] Supp. 1 SCR 677 **: (1971) 2 SCC 261;** *Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu* [2015] 11 SCR 1110 **: (2016) 2 SCC 725 – referred to.**

Books and Periodicals Cited

Legal History of EVMs and VVPATs, Edition 1, January 2024, p.654 – referred to.

List of Acts

Representation of the People Act, 1951; Conduct of Election Rules, 1961; Constitution of India; Penal Code, 1860.

List of Keywords

Elections; 2024 General Elections; EVMs; Paper ballots; Paper ballot system; Booth capturing; VVPAT; Ballot box; Ballot unit, Control unit; Manipulation of EVMs; VVPAT slips; Hacking; Tampering; Free and fair elections; First Level Check; Higher mock poll; Two-stage randomization process; First randomization; Second randomization; Strong rooms; Writ jurisdiction; Infringement of right; Doctrine of *res judicata*; Suspicion of infringement of right.

Association For Democratic Reforms v.
Election Commission of India And Another

Case Arising From

EXTRA-ORDINARY ORIGINAL JURISDICTION: Writ Petition (Civil) No. 434 of 2023

(Under article 32 of The Constitution of India)

With

Writ Petition (Civil) Nos. 184 and 277 of 2024

Appearances for Parties

Tushar Mehta, SG, Ms. Aishwarya Bhati, ASG, Gopal Sankaranarayanan, Kapil Sibal, Sanjay R. Hegde, Maninder Singh, Anand Grover, Huzefa Ahmadi, Ms. Haripriya Padmanabhan, Santosh Paul, Sr. Advs., Abhay Anil Anturkar, Asim Sarode, Dhruv Tank, Aniruddha Awalgaonkar, Ms. Surbhi Kapoor, Bhagwant Deshpande, Ms. Neha Rathi, Ms. Kajal Giri, Kamal Kishore, Vishal Sinha, Prashant Bhushan, Nizamuddin Pasha, Rahul Gupta, Ms. Ria Yadav, Ms. Alice Raj, Mrs. Suroor Mandar, Rishabh Parikh, Ms. Aparajita Jamwal, Prateek Kumar, Ruchir Ranjan Rai, Ms. Ashita Chawla, Ajay Sabharwal, Rangasaran Mohan, Amarpal Singh Dua, Kanu Agrawal, Ms. Anupriya Srivastava, Ms. Shivika Mehra, Praneet Pranav, Arvind Kumar Sharma, Pranav Sachdeva, Zulfiker Ali P.S., Ms. Lakshmi Sree P., Augustine Peter, Ms. Lebina Baby, Nizam Pasha, Lzafeer Ahmad B. F., Ms. Aayushi Mishra, Ajay Marwah, Swaroopananda Mishra, Prabhu Ramasubramanian, Navneet Dugar, Bharathi Mohan M., Manoj Kumar A., Santhosh K., Shrutanjay Bharadwaj, Sriharsh Nahush Bundela, Vedant Mishra, Virendra Mohan, Varun K Chopra, Mehul Sharma, M/s. VKC Law Offices, Ms. Tasneem Ahmadi, Mehmood Pracha, R.H.A. Sikander, Ms. Mahima Rathi, Jatin Bhatt, Sanawar, Mohd. Shameem, Ms. Nujhat Naseem, Advs. for the appearing parties.

Petitioner-in-person

Judgment / Order of the Supreme Court

Judgment

Sanjiv Khanna, J.

Delay in refiling is condoned.

2. At the outset, we take on record that the counsel for the petitioners, in unison, have stated that the petitioners do not attribute any motive or

malice to the Election Commission of India[1], or for that matter contend that the Electronic Voting Machines[2] have been tutored or configured to favour or disfavour a candidate or political party. However, due to possibility of manipulating the EVMs there is suspicion and, therefore, this Court should step in to instil confidence in the voters[3] and the people. Voters have the right to know that the franchise exercised by them has been correctly recorded and counted.

3. On a pointed question put by the Court, it was argued, without prejudice and in the alternative, on behalf of the petitioner – Association for Democratic Reforms, that the Court should direct:

   a) return to the paper ballot system; or

   b) that the printed slip from the Voter Verifiable Paper Audit Trail machine[4] be given to the voter to verify, and put in the ballot box, for counting; and/or

   c) that there should be 100% counting of the VVPAT slips in addition to electronic counting by the control unit.

4. Other arguments raised relate to — the alleged modification of the VVPAT in the year 2017, whereby the glass window on the VVPAT was made translucent/tinted instead of transparent, depriving the voter from knowing whether the vote cast by him was actually registered and counted; Rule 49MA of the Conduct of Election Rules, 1961[5] is draconian, arbitrary, and contrary to law as reference to Section 177 of the Indian Penal Code, 1860[6] in the written declaration under Rule 49MA is wrong and misconceived; and lastly, the voters' right to know that the vote as cast is duly registered, being a paramount and indelible fundamental right, any administrative reason and ground raised by the ECI objecting to 100% counting of the VVPAT paper trail should be rejected.

5. Paper ballots were the norm, till EVMs were projected as a viable alternative in 1980s. EVMs were first used in an assembly bye-

1 For short, 'ECI'.

2 For short, 'EVMs'

3 'Voters' and 'Electors' is used interchangeably.

4 For short, 'VVPAT'.

5 For short, '1961 Rules'.

6 For short, 'IPC'.

election in Kerala in 1982. All through the 1980s and early 1990s, the use of EVMs for elections was discussed and debated by politicians and experts in the domain of technology and electoral process, and after due deliberations and review, the EVMs were accepted and embraced. In view of the legal challenge[7] regarding use of EVMs without legislative approval, the Parliament *vide* Act 1 of 1989 amended the Representation of the People Act, 1951[8] allowing the use of EVMs. They were used in the General Elections in 2004 and have been used in each and every General and other election thereafter.

6. ECI maintains that the EVMs have been a huge success in ensuring free, fair and transparent elections across the nation in all elections. They restrict human intervention, checkmate electoral fraud and malpractices like stuffing and smudging of votes, and deter the errors and mischiefs faced in manual counting of ballot papers. While earlier it was apprehended that the introduction of EVMs will lead to hardship and disenfranchisement, independent studies showcase that EVMs have led to increase in voter participation.[9] Yet, it is also true that time and again use of EVMs has been objected to and questioned, not by one but by all political parties and others. There have been several litigations in this Court and the High Courts, albeit the challenge to the use of EVMs has been rejected recording good grounds and reasons.

7. We deem it appropriate to begin this decision by referring to some of the earlier case laws and judgments of this Court on the efficacy and use of EVMs in the elections in this country.

8. This Court in *Subramanian Swamy v. Election Commission of India*,[10] held that a paper trail was an indispensable requirement of free and fair elections. The relevant portion of the judgment is reproduced below:

> "28. From the materials placed by both the sides, we are satisfied that the 'paper trail' is an indispensable

7 See *A.C. Jose* v. *Sivan Pillai and others* [1984] 3 SCR 74 : (1984) 2 SCC 656

8 For short, 'RP Act'.

9 Legal History of EVMs and VVPATs, Edition 1, January 2024, p.654

10 [2013] 14 SCR 565 : (2013) 10 SCC 500

> requirement of free and fair elections. The confidence of the voters in the EVMs can be achieved only with the introduction of the "paper trail". EVMs with Vvpat system ensure the accuracy of the voting system. With an intent to have fullest transparency in the system and to restore the confidence of the voters, it is necessary to set up EVMs with Vvpat system because vote is nothing but an act of expression which has immense importance in a democratic system.
>
> 29. In the light of the above discussion and taking notice of the pragmatic and reasonable approach of ECI and considering the fact that in general elections all over India, ECI has to handle one million (ten lakh) polling booths, we permit ECI to introduce Vvpat in gradual stages or geographical-wise in the ensuing general elections. The area, State or actual booth(s) are to be decided by ECI and ECI is free to implement the same in a phased manner. We appreciate the efforts and good gesture made by ECI in introducing the same. For implementation of such a system (Vvpat) in a phased manner, the Government of India is directed to provide required financial assistance for procurement of units of Vvpat."

Accordingly, to ensure full transparency and confidence of voters, this Court recommended that EVMs be set up with VVPATs. Amendment to the 1961 Rules was notified on 14.08.2013 to introduce the VVPAT mechanism.

9. In ***N. Chandrababu Naidu and Others*** v. ***Union of India and Another***,[11] the petitioners prayed that 50% randomised VVPAT slip verification be conducted in every General and Bye Elections instead of one EVM per assembly constituency or assembly segment in a parliamentary constituency. This Court held as under:

> "9. At the very outset the Court would like to observe that neither the satisfaction of the Election Commission nor the system in vogue today, as stated above, is being doubted by the Court insofar as fairness and integrity

11 (2019) 15 SCC 377

is concerned. It is possible and we are certain that the system ensures accurate electoral results. But that is not all. If the number of machines which are subjected to verification of paper trail can be increased to a reasonable number, it would lead to greater satisfaction amongst not only the political parties but the entire electorate of the country. This is what the Court should endeavour and the exercise, therefore, should be to find a viable number of machines that should be subjected to the verification of Vvpat paper trails keeping in mind the infrastructure and the manpower difficulties pointed out by the Deputy Election Commissioner. In this regard, the proximity to the election schedule announced by the ECI must be kept in mind.

10. Having considered the matter, we are of the view that if the number of EVMs in respect of which Vvpat paper slips is to be subjected to physical scrutiny is increased from 1 to 5, the additional manpower that would be required would not be difficult for the ECI to provide nor would the declaration of the result be substantially delayed. In fact, if the said number is increased to 5, the process of verification can be done by the same team of polling staff and supervisors/officials. It is, therefore, our considered view that having regard to the totality of the facts of the case and need to generate the greatest degree of satisfaction in all with regard to the full accuracy of the election results, the number of EVMs that would now be subjected to verification so far as Vvpat paper trail is concerned would be 5 per Assembly Constituency or Assembly Segments in a Parliamentary Constituency instead of what is provided by Guideline No. 16.6, namely, one machine per Assembly Constituency or Assembly Segment in a Parliamentary Constituency. We also direct that the random selection of the machines that would be subjected to the process of Vvpat paper trail verification as explained to us by Mr Jain, Deputy Commissioner of the Election Commission, in terms of the guidelines in force, shall apply to the Vvpat paper trail verification of the 5 EVMs covered by the present order."

Accordingly, instead of one EVM per assembly constituency or assembly segment in a parliamentary constituency, as stipulated under the erstwhile Guideline 16.6 of the Manual on EVM and VVPAT, it was held that five EVMs per assembly constituency or assembly segment in a parliamentary constituency would be subject to VVPAT verification.

10. This Court *vide* order dated 22.11.2018 dismissed Writ Petition (Civil) No. 1332/2018 titled ***Nyaya Bhoomi and Another*** v. ***Election Commission of India***, seeking return to the ballot paper system instead of EVMs.

11. This Court *vide* order dated 21.05.2019 dismissed Writ Petition (Civil) No. 692/2019 titled ***Tech for All*** v. ***Election Commission of India***, seeking 100% verification of VVPATs against the EVM outcomes, as the issue had already been decided in ***N. Chandrababu Naidu*** (supra).

12. Even earlier, this Court *vide* order dated 30.10.2017 in ***Prakash Joshi*** v. ***Election Commission of India***[12], had rejected a similar prayer with regard to modification of the procedure for counting of votes by use of EVMs, leaving it to the discretion of the ECI. It was observed that this Court was not inclined to enter into the said arena.

13. This Court *vide* order dated 30.09.2022 dismissed Special Leave Petition (Civil) No. 16870/2022 titled ***Madhya Pradesh Jan Vikash Party*** v. ***Election Commission of India*** regarding use of EVMs with costs. This Court observed that:

> "The election process under the representation of the People Act, 1951 is monitored by a Constitutional Authority like Election Commission. Electronic Voting Machines (EVM) process has been utilized in our Country for decades now but periodically issues are sought to be raised. This is one such endeavor in the abstract."

14. Recently, this Court *vide* order dated 22.09.2023 dismissed Writ Petition (Civil) No. 826/2023 titled ***Sunil Ahya*** v. ***Election Commission of India*** seeking independent audit of the source code of EVMs. This Court observed that:

12 2017 SCC OnLine SC 1734

> "The Election Commission is a constitutional entity entrusted under Article 324 of the Constitution with superintendence and control over the conduct of the elections. The petitioner has placed no actionable material on the record of the Court to indicate that the Election Commission has acted in breach of its constitutional mandate. Ultimately, the manner in which the source code should be audited and the way the audit should be dealt with bears on sensitive issues pertaining to the integrity of the elections which are conducted under the superintendence of the Election Commission. On such a policy issue, we are not inclined to issue a direction as sought by the petitioner. There is no material before this Court, at this stage, to indicate that the Election Commission is not taking suitable steps to fulfill its mandate."

15. This Court in ***Kamal Nath v. Election Commission of India and Others***[13], observed that it was without doubt that over the last several decades ECI has built the reputation of an impartial body and a constitutional authority which strives to hold fair election in which the people of this country participate with great trust and faith. The challenge to the EVMs and prayer for conducting VVPAT verification on random basis for 10% of the votes was rejected.

16. We could have dismissed the present writ petitions by merely relying upon the past precedents and decisions of this Court which, in our opinion, are clear and lucid, and as repeated challenges based on suspicion and doubt, without any cogent material and data, are execrable and undesirable. However, we would like to put on record the procedure and safeguards adopted by the ECI to ensure free and fair elections and the integrity of the electoral process. For this purpose, we shall refer to and take on record the features of EVMs.[14] Lastly, we would give two directions, and take on record suggestion(s) for consideration of the ECI.

17. The EVM consists of three units, namely, the ballot unit, the control unit, and the VVPAT. The ballot unit acts as a keyboard or a keypad.

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13 [2018] 12 SCR 842 : (2019) 2 SCC 260

14 In view of the issue raised, we are not dealing with the post counting handling of EVMs.

The ballot unit consists of 16 keys/buttons one of which the voter has to press when he exercises his choice to vote for any candidate. The keys are political party and candidate agnostic. The serial numbers, names of the candidates and the symbols of the political parties/ candidates are physically pasted on the ballot unit so as to enable the voter to identify the corresponding key/button against the respective candidate and the symbol. The control unit, which is also called the master unit, remains with the polling/presiding officer. Before the ballot unit can be used by a voter, the polling/presiding officer is required to press the 'BALLOT' button on the control unit, thereby enabling the voter to cast his vote on the ballot unit. As soon as the voter presses the 'blue button' and casts his/her vote on the ballot unit, an LED against the candidate button glows red and the control unit sends the command to the VVPAT. The VVPAT then prints the VVPAT slip comprising of the serial number, candidate name and the symbol. The VVPAT slip, after being printed, is displayed through the glass window which is illuminated for 7 seconds to enable the voter to know and verify the serial number, the candidate and the symbol for whom they have voted. The VVPAT slip then gets cut from the roll and falls into the box/compartment attached to the VVPAT. The fall sensor in the VVPAT then sends a confirmation to the control unit. The control unit records the vote.

18. The control unit, as explained below in some detail, has burnt memory, which is agnostic and does not have the names of the candidates and symbols allotted to the candidates or political parties. As noted earlier, the polling/presiding officer has to activate the EVM by pressing the 'BALLOT' button on the control unit. The data stored in the control unit, upon the vote being cast, records and counts the button or the key pressed on the ballot unit. The data, therefore, records the total number of votes as cast by the voters, and the key or the button number on the ballot unit pressed by the voters for casting their vote. After the vote is cast and the control unit has recorded the vote, a loud beep sound confirms the registration of the vote.

19. The EVMs are manufactured and supplied to the ECI by two public sector undertakings, namely, Bharat Electronics Limited[15] (which functions under the Ministry of Defence), and Electronic

15 For short, 'BEL'.

Corporation of India Limited[16] (which functions under the Department of Atomic Energy).[17] The EVMs in use after 2013 are referred to as 'M3' EVMs. The EVM setup is designed in a rudimentary fashion and the EVM units are standalone and non-networked, that is, they are unconnectable to any other third-party machine or input source. In case any unauthorised attempt is made to access the microcontroller or memory of the EVM, the Unauthorised Access Detection Mechanism (UADM) disables it permanently. The advanced encryption techniques and strong mutual authentication or reception capability rules out the deciphering of communication between the EVM units and any unauthorised interaction with the EVM.

20. The programme loaded in the EVM[18] is key hashed and burnt into a One Time Programmable microcontroller chip at the time of manufacturing, thus dispelling any possibility of tampering. It is pertinent to note that all the three units of the EVM – ballot unit, control unit and VVPAT, have microcontrollers in which the respective firmware is burnt. The burnt programme/code is unalterable and cannot be modified after the EVM is delivered/supplied by the manufacturer to ECI. Every key press of the control unit is dynamically coded, thus making it impossible to decode the signal flowing among the units of the EVM *inter se*. Further, each key press is recorded with date and time stamp on a real time basis.

21. As mentioned earlier, the firmware of the control unit is agnostic to any candidate name or political party symbol. The control unit only recognises the button/key pressed on the ballot unit. The control unit has a capacity to store up to 2000 vote entries.

22. Apart from the burnt one-time programmable memory, the VVPAT has a flash memory of 4 megabytes. The flash memory of the VVPAT is designed to solely store and recognise a bitmap format file. The VVPAT can store a maximum of 1024 bitmap files containing the symbol, the serial number and name of the candidate. One candidate's name, symbol, and serial number is packed into a single bitmap file

16 For short, 'ECIL'.

17 Collectively referred to as the 'manufacturers'.

18 EVM here refers to the ballot unit, the control unit and the VVPAT unit.

of 4 kilobytes. The VVPAT does not store or read any other software or firmware.[19]

23. The VVPAT flash memory is empty and does not contain any symbol or name related details at the time of supply/delivery to the ECI. VVPATs in this form/state are stored in warehouses. The control units and ballot units are also stored and secured in the warehouses.

24. Five to six months before national or state elections are to be held, the required quantity of the EVMs are taken out from the warehouses and stored in the designated strong rooms. The EVMs, after they are put in the strong room, are subjected to First Level Check[20] by engineers of the manufacturers in the presence of the representatives of the recognised political parties. The FLC is carried out at the district level under the supervision of the District Election Officer.

25. During the FLC, 100% or all machines are checked by casting of vote in each of the 16 buttons on the ballot unit 6 times. Further, 5% of the machines are randomly selected by the representatives of the recognised political parties for a higher mock poll by them. Out of the 5% EVMs; 1200 votes are cast in 1% EVMs, 1000 votes are cast in 2% EVMs and 500 votes are cast in 2% EVMs. The voting result indicated in the control unit is tallied with the VVPAT slip count. A list of 'FLC OK' EVMs is prepared and shared with all the recognised political parties.

26. After check and verification that the EVM is working properly, the control unit of each EVM is sealed with a pink paper seal which is signed by the representatives of the political parties. Thereafter, the plastic cabinet of the EVMs cannot be opened. There is no access to any of the EVM components. Till this stage the VVPAT flash memory is empty and it does not have any data or symbols.

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19 It is apposite to note the difference between firmware and software. Firmware is a form of microcode or instructions embedded into hardware devices to help them operate effectively. Firmware size is usually small and ranges in size of a few kilobytes. Software on the other hand, is installed onto a device and used for interaction, such as browsing the internet, computing, word processing and many more complex tasks. Software usually runs on the top of operating systems and are usually large in size between few hundred kilobytes to gigabytes. Software is upgradable or updatable, and its memory is usually accessible and designed for user interactions. The ECI submits that the VVPATs do not have software as they only have firmware.

20 For short, 'FLC'.

27. 10% of the 'FLC OK' EVMs are taken out for training and awareness purpose in the presence of the recognised political parties. The list of the training and awareness units is also shared with the political parties. These training and awareness units are stored separately in a designated warehouse. EVM demonstration centres are set up at the District Election Office, and at the Returning Officer Headquarter/ Revenue Sub-Division Offices. Mobile demonstration vans are also deployed to cover all polling locations. The EVMs used for training and awareness are thereafter not mingled and are taken back to the designated warehouse.

28. To dispel any scenario of bias or prior knowledge, the verified EVMs undergo a two-stage randomization process. It is submitted that not even the manufacturer of the EVMs would be able to know the allotment of a particular machine for a particular state or constituency. The randomization process is conducted without any human intervention by the EVM Management System software application. The first randomization is conducted to allocate the EVMs Assembly constituency/segment-wise. The second randomization is conducted to allocate the machines polling station wise and for the reserve pool. The randomization process is done in the presence of the representatives of the political parties/candidates and the Central Observers deputed by the ECI. The list of EVMs containing serial number as randomly allocated constituency wise and then to a particular polling station are provided to the representatives of the political parties/candidates.

29. It is important to reiterate that till this stage, particulars of the candidates or the political parties are not loaded or stored in the VVPAT. The flash memory of the VVPAT is blank/empty. The control unit being agnostic to any political party or candidate, only recognises the push button on the ballot unit. It is programmed to compute the number of times all and a particular button/key has been pressed.

30. About 10 to 15 days prior to the date of polling, the symbol loading process is undertaken by using the symbol loading units. The symbols are loaded in the flash memory of the VVPATs in the form of a bitmap file, comprising the symbol of the political party/candidate, serial number and name of the candidate. A laptop/PC with the symbol loading application is used to create a bitmap file comprising the serial number, the candidate name and the symbol. This file is loaded on

VVPAT units by using the symbol loading units. Authorised engineers of the manufacturers and the District Election Officer are involved in the symbol loading process. The whole process takes place in the presence of the candidates or their representatives and a monitor/ TV screen displays the symbol loading process.

31. It is at this stage that the specific button/key on the ballot unit is allocated to each candidate. The sequence/location of button/key allocated to a candidate of a political party is done in alphabetical order on the basis of the name of the candidate, first for the National and State recognised political parties, followed by other State registered parties, and then for independent candidates. Thus, the sequence/ location of the button/key on the ballot unit and the consequent allotment for the purposes of the VVPAT varies from constituency to constituency. For example, candidate or political party 'A' may be allocated button '1' in one parliamentary constituency, whereas button '1' may be allocated to political party 'B' in another constituency.

32. There are 16 buttons/keys on each ballot unit. In case there are more than 15 candidates (one button is for NOTA), more than one ballot units are attached to the control unit. A total of 24 ballot units can be connected to a control unit to make a single EVM set. Therefore, a maximum of 384 candidates (including NOTA) can be catered by the EVM.

33. The advantages of the EVM-VVPAT mechanism are noted below:

- It runs on battery/power-packs and does not require any external power supply.
- Voting is done by pressing a button thereby negating a scenario of invalid vote akin to an invalid paper ballot.
- It does not permit more than 4 votes per minute, thereby deterring and disincentivising booth capturing.
- After the pressing of 'CLOSE' button on the control unit, there is no possibility of voting.
- It ensures quick, error-free and mischief-free counting of votes.
- Voter is instantly able to verify the recording of their vote through the beep sound. Further, the VVPAT slip helps verify that the vote casted is recorded correctly.

- By pressing the 'TOTAL' button on the control unit at any time, the total number of votes polled up to the time of pressing the button is displayed, without indicating the candidate-wise result of votes.
- The original program, which is political party and candidate agnostic, is ported on to the microcontroller of the EVM[21] during the manufacturing at the factory. This process is done way before the elections and it is impossible to know the serial number of any candidate in advance. Thus, it is not possible to pre-program the EVM in a spurious manner.

34. After the symbol loading process is completed, all or 100% of the EVMs, including the VVPATs, are checked by casting one vote by pressing each candidate button, including NOTA. A higher mock poll is also conducted in 5% randomly selected units wherein 1000 votes are cast, and the electronic result is tallied with the VVPAT slip count. The candidates or their representatives are also allowed to choose the 5% EVMs and conduct a mock poll. Once the symbol loading process or the candidate setting is completed, and the mock polls are conducted, the ballot unit of the EVM is also sealed with the thread or plain paper seals. The symbol loaded VVPATs are sealed with address tags. The paper seals and address tags bear the signatures of the representatives of the political parties/candidates.

35. Thus, it is clear that till the symbol loading into the VVPAT is done by using the symbol loading unit, the EVM is blank and has no data/particulars of political parties or candidates. One cannot ascertain and know which button/key in the ballot unit will be allocated to a particular candidate or a political party.

36. It has been highlighted before us by the ECI that the symbol loading process conducted by using symbol loading unit in the VVPAT cannot be equated with the uploading of the software. A bitmap file comprising of the serial number, name of the candidate and the symbol allocated to the particular candidate is uploaded in the symbol loading process. The symbol loading process undertaken by using the symbol loading unit cannot alter or modify the programme/firmware in the VVPAT

21 The EVM, as earlier observed and we clarify here, means the ballot unit, the control unit and the VVPAT unit.

which has been burnt/loaded in the memory. The control unit and the ballot unit are not subjected to the symbol loading process and not touched. The burnt/loaded firmware in the control unit and the ballot unit is and remains candidate and political party agnostic. The control unit acts and functions as the calculator, computing the total votes cast on the basis of the number of times the key/button on the ballot unit are pressed, and the number of times a specific key/button on the ballot unit is pressed.

37. On the polling date, one and a half hours before the start of polling, the presiding officer/polling officer takes out the EVMs and conducts a mock poll of 50 votes. The votes are counted electronically. The VVPAT paper slips are also counted and tallied with electronic votes. Each EVM unit is thereupon again sealed with a paper seal of a different colour. Paper seals are also signed by the candidates or their representatives.

38. The paper seals used from time to time at different stages have a serial number. They also have security features and cannot be replicated. As paper seals are used at different stages, they are given different colours.

39. The polled EVM[22] units are sealed and stored in the strong room in the presence of the candidates or their representatives. The candidates or their representatives are also allowed to put their seals on the lock of the strong room. The strong room is guarded by minimum one platoon of armed security and has CCTV coverage. The candidates or their representatives are allowed to stay and watch the strong room and in case where the entrance to the strong room is not visible, CCTV display facility is provided.

40. The VVPAT paper slips are in a roll form of 1500 slips. The control unit can store up to 2000 votes. In view of the restriction on the number of VVPAT paper slips, each EVM can be used for casting of up to 1500 votes and not more. The control unit is configured in a way that each vote would take about 15 seconds. Thus, in one minute only four votes can be cast. This prevents and checks bogus voting.

22 The EVM, as earlier observed and we clarify here, means the ballot unit, the control unit and the VVPAT unit.

41. As explained earlier and to recapitulate, after each vote is cast by pressing the button on the ballot unit, the VVPAT glass window illuminates and the name, serial number, and symbol of the candidate voted is displayed for 7 seconds to the voter. The display of VVPAT slip informs and assures the voter that the vote as cast has been recorded. Thereafter, the VVPAT printer cuts the slip from the roll and the VVPAT slip drops in the box compartment of the VVPAT. The fall sensor in the VVPAT printer drop box senses and chronicles the fall of the slip in the drop box, and thereupon the control unit records the button/key pressed on the ballot unit. The burnt memory, as noticed above, which records this data is agnostic to the candidates/political parties. The control unit records the serial number of the button/key pressed on the ballot unit by each voter. The presiding officer by pressing the 'TOTAL' key on the control unit can ascertain the total number of votes recorded in the control unit. However, the breakup of votes cast in favour of each candidate is not known. On the counting day, in the presence of the candidates/their representatives, the 'RESULT' key on the control unit is pressed. The control unit displays the number of times each button/key was pressed in the ballot unit on the polling day, thus depicting the result. EVMs are standalone machines which cannot be connected to internet. The EVMs do not have any ports so as to enable a person to have access to the burnt memory.

42. It flows from the above discussion that the possibility to hack or tamper with the agnostic firmware in the burnt memory to tutor/favour results is unfounded. Accordingly, the suspicion that the EVMs can be configured/manipulated for repeated or wrong recording of vote(s) to favour a particular candidate should be rejected. At this stage we would refer to other checks and protocols to ensure and ascertain the legitimacy and integrity of the EVMs and the election process.

43. Part IV, Chapter II of the 1961 Rules, which relates to voting by EVMs, lays down details of preparation of the voting machine by the returning officer, arrangements at the polling station, admission to the polling stations, and preparation of voting machine for poll. The three units of the EVM have to bear the serial number of the unit, name of the constituency, serial number and name of the polling station(s), and the date of poll. Before the commencement of the poll, the presiding officer has to demonstrate to the polling agent and other persons present that no vote has already been recorded in the control unit,

the three units bear the label as prescribed and the drop box of the VVPAT printer is empty. Paper seal is thereupon used for securing the control unit. The presiding officer affixes his own signature on the paper seal and also obtains the signatures of the polling agents who are desirous of affixing the same. The VVPAT and the ballot unit are put in the voting compartment and are connected with the control unit in the manner directed.

44. Before permitting any elector to vote, the polling officer is required to record the electoral roll number of the elector as mentioned in the electoral rolls, signature or thumb impression of the elector, name of the elector and the document produced by the elector in proof of their identification. These particulars are recorded in Form 17A prescribed under Rule 49L of the 1961 Rules. The format prescribed in terms of Form 17A is as under:

Sl.No.	Sl.No. of elector in the electoral roll	Details of the document produced by the elector in proof of his/her identification	Signature/ Thumb impression of elector	Remarks
(1)	(2)	(3)	(4)	(5)
1.				
2.				

Form 17A is required to be signed by the presiding officer.

45. Every elector is permitted to vote in secrecy in the voting compartment of the polling station. They are required to press the blue button or key on the ballot unit against the name and symbol of the candidate/ political party they intend to vote. In terms of the proviso to Rule 49M(3), the elector is entitled to view through the transparent window of the printer of VVPAT, kept along with the ballot unit inside the voting compartment, the printed paper slip showing the serial number, the name and the symbol of the candidate for whom he has voted. Thereupon, the paper slip gets cut and drops into the drop box attached to the VVPAT. No elector is permitted to enter the voting compartment when another voter is inside.

46. Rule 49O deals with the scenario where an elector, even after entering her/his details in Form 17A and having put signature or thumb impression thereon, does not vote. The presiding officer is

then required to make a remark in Form 17A and take the signature or thumb impression of the elector against such remark.

47. Rule 49M(6) deals with the scenario where the elector who has been permitted to vote under Rule 49L or Rule 49P refuses, even after the warning by the presiding officer, to observe the procedure of voting laid down in Rule 49(M)(3). In such a case, the presiding officer, or the polling officer under the direction of the presiding officer, shall not allow such elector to vote. Rule 49M(7) lays down that in such a scenario, a remark to that effect shall be made against the elector's name in Form 17A by the presiding officer under his signature.

48. As per instructions issued by the ECI, the presiding officer is periodically required to check the total number of votes cast as recorded in the control unit with the data as recorded in Form 17A.

49. As per Rule 49S, at the close of the poll, the presiding officer is required to prepare an account of votes recorded in Form 17C. This is a detailed form, which in Part I, requires the presiding officer to mention the total number of electors assigned to the polling station, the total number of voters as entered in the register for voters, that is, Form 17A, the total number of voters who had decided not to vote even after recording their details in Form 17A (Rule 49O scenario), and the total number of voters not allowed to vote (Rule 49M scenario). The form also requires to give details of the total number of votes recorded per voting machine. This total number recorded in the voting machine should tally with the total number of voters entered in Form 17A *minus* the number of voters deciding not to vote and the number of voters not allowed to vote. The details of the paper seals supplied for use, paper seals used, unused paper seals returned to the returning officer etc. are also recorded and entered after the close of the poll.

50. Under Rule 49S of the 1961 Rules, at the time of close of the poll, the presiding officer furnishes attested true copy of the account of votes recorded in Part I of Form 17C to the polling agents of the candidates. He also retains a receipt of the same from the polling agent.

51. Before start of counting of votes, the serial number of the EVMs and the paper seals affixed on the EVMs are verified with details mentioned in Form 17C and are shown to the counting agents. The total votes displayed by pressing the 'TOTAL' button on the control unit is also tallied with the total votes polled as per Form 17C.

52. The counting is done in the presence of the polling agents/candidates by pressing the 'RESULT' button on the control unit. The total votes polled and the total votes polled by each candidate is thereupon displayed on the display panel.

53. In terms of the directions issued by this Court in ***N. Chandrababu Naidu*** (supra), the VVPAT slips of five polling stations per assembly constituency/assembly segment of the parliamentary constituency, are randomly selected and counted. The results are then tallied with the electronic results of the control unit.

54. It may be relevant here to also refer to Rule 56D of the 1961 Rules, which reads as under:

> "56-D. *Scrutiny of paper trail*.—(1) Where printer for paper trail is used, after the entries made in the result sheet are announced, any candidate, or in his absence, his election agent or any of his counting agents may apply in writing to the returning officer to count the printed paper slips in the drop box of the printer in respect of any polling station or polling stations.
>
> (2) On such application being made, the returning officer shall, subject to such general or special guidelines, as may be issued by the Election Commission, decide the matter and may allow the application in whole or in part or may reject in whole, if it appears to him to be frivolous or unreasonable.
>
> (3) Every decision of the returning officer under sub-rule (2) shall be in writing and shall contain the reasons therefor.
>
> (4) If the returning officer decides under sub-rule (2) to allow counting of the paper slips either wholly or in part or parts, he shall—
>
> *(a)* do the counting in the manner as may be directed by the Election Commission;
>
> *(b)* if there is discrepancy between the votes displayed on the control unit and the counting of the paper slips, amend the result sheet in Form 20 as per the paper slips count;

(c) announce the amendments so made by him; and

(d) complete and sign the result sheet."

55. Any candidate, or in his absence an election agent or counting agent, as per the said Rule, can apply in writing to the returning officer to count the printed paper slips in the drop box in respect of any polling station(s). The returning officer, subject to any general or special guidelines issued by the ECI, has to decide the matter and can allow the application in whole or in part, or may reject the application in full if it appears to be frivolous or unreasonable. Every decision of the returning officer is to be in writing and has to contain reasons. If the returning officer decides to allow counting of paper slips, either wholly or in part, he has to do so in the manner prescribed in sub-rule (4) to Rule 56D of the 1961 Rules.

56. As per the ECI guidelines, in case there is any mismatch between the total number of votes recorded in the control unit and Form 17C on account of non-clearance of mock poll data or VVPAT slips, in terms of Rule 56D(4)(b) of the 1961 Rules etc., the printed VVPAT slips of the respective polling stations are counted and considered if the winning margin is equal to or less than total votes polled in such polling stations.

57. At this stage, we would refer to the data on the performance of the EVMs. More than 118 crore electors have cast their votes since EVMs have been introduced. In 2019, about 61.4 crore voters had cast their votes in 10.35 lakh polling stations. 23.3 lakh ballot units, 16.35 lakh control units and 17.40 lakhs VVPAT units were used in the 2019 General Elections. For the purpose of the 2024 General Elections, 10.48 lakh polling stations have been established to enable 97 crore registered voters to cast their votes. 21.60 lakh ballot units, 16.80 lakh control units and 17.7 lakh VVPAT units have been made ready for being used.

58. ECI has conducted random VVPAT verification of 5 polling booths per assembly segment/constituency for 41,629 EVMs-VVPATs. Further, more than 4 crore VVPAT slips have been tallied with the electronic counts of their control units. Not even a single case of mismatch, (except one which we will refer to subsequently), or wrong recording of votes has been detected. Returning officers have allowed VVPAT

slip recounting under Rule 56D in 100 cases since 2017. The VVPAT slip count matched with the electronic count recorded in the control unit in all cases.[23]

59. In the 2019 Lok Sabha Elections, 20,687 VVPAT slips were physically counted, and except in one case, no discrepancy or mismatch was noticed.

60. The discrepancy during mandatory verification of VVPAT slips happened in polling station No. 63, Mydukur Assembly Constituency, Andhra Pradesh during the 2019 Lok Sabha Elections. On verification, it was found that the discrepancy had arisen on account of failure of the presiding officer to delete the mock poll data.[24] While it is not possible to rule out human errors, paragraph 14.5 of Chapter 14 of the Manual on EVM and VVPATs deals with such situations and lays down the protocol which is to be followed.

61. During the course of hearing, our attention was drawn to Rule 49MA which permits an elector to raise a complaint regarding the mismatch between the name and symbol of the candidate shown on paper slip generated by the VVPAT and the vote cast on the ballot unit. Such elector is required to make a written declaration to the presiding officer. There have been 26 such cases in which the electors have complained under Rule 49MA. There is not even a single case in which any mismatch or defect was found.

62. The EVMs have been subjected to test by technical experts committee from time to time. These committees have approved and did not find any fault with the EVMs. The M3 EVMs currently in use are designed by engineers of BHEL and ECIL. These designs are vetted by the technical experts committee.

63. Our attention was drawn to the query of the Parliamentary Committee on Government Assurances regarding the data on discrepancy

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23 The above figures are updated on the basis of the response given by the ECI to the queries raised by the Court on 16.04.2024. The figures given in the counter affidavit filed by the ECI are as follows:
38,156 randomly selected VVPATs have been physically counted and they have tallied with the electronic count of their control unit. Not even a single case of mismatch or transfer of vote meant for candidate A to candidate B has been detected. Counting of VVPAT slips under Rule 56D has been allowed in 61 cases but there is not even a single case of mismatch.

24 The said discrepancy was duly rectified in terms of the protocol laid down in the Manual on EVM and VVPAT.

between the EVM and VVPAT counts in 2019 Lok Sabha Elections. Reliance is placed on a news report published in *The Wire* to submit that the ECI failed to submit the requisite information and revert back to the parliamentary committee despite multiple reminders. The ECI has explained that a reply regarding the said query was sent to the Parliamentary Committee on 05.07.2019.

64. Reliance was placed on a news report of *The Quint* to contend that there were discrepancies in 2019 Lok Sabha Elections, *viz*. the electronic votes recorded in the control unit and the total votes polled/ voter turnout. The ECI has explained that the report referred to in the Quint is with reference to the live voter turnout data uploaded on the website of the ECI during 2019 Lok Sabha Elections. The voter turnout data is dynamic in nature and is uploaded by the ECI on real time approximation by taking inputs from the presiding officers of the polling stations. Inaccuracies were found in the real-time inputs given by the presiding officers. However, there was no mismatch of the data of votes recorded in the EVMs and the data of total votes recorded in Form 17C. The data in the EVM and Form 17C matched and accordingly the results were declared in Form 20.

65. On a question being put by the Court, it was stated that a minimum of 50% of the polling stations are equipped with CCTV cameras. Data from the CCTV cameras is stored and retained at least for a period of 45 days from the date of announcement of the polling results. Similarly, the EVMs are retained in the strong room along with seals etc. as affixed after counting of the votes. The candidates have the right to challenge the poll result by filing an election petition within 45 days from the date of election of the returned candidate. The ECI guidelines/protocol stipulate that confirmation regarding the filing status of election petitions must be obtained from the relevant High Courts. If challenge is made, the EVMs are retained in the strong room along with the seals etc. for a longer period. In cases where no election petitions are filed, the strongrooms are opened and the EVMs are shifted to the warehouse.

66. The ECI has also in its counter affidavit stated that the EVMs have been continuously used in different elections since the year 2000. The electoral outcome had been divergent, favouring or disfavouring different political parties. Details of the political parties with maximum number of seats since 2004 is tabulated as under:

PARTY WITH MAXIMUM NUMBER OF SEATS IN LEGISLATIVE ASSEMBLY ELECTION SINCE 2004

Andhra Pradesh	2004 INC	2009 INC	2014 TDP	2019 YSRCP	
Arunachal Pradesh	2004 INC	2009 INC	2014 INC	2019 BJP	
Assam	2006 INC	2011 INC	2016 BJP	2021 BJP	
Bihar	2005 RJD	2010 JD(U)	2015 RJD	2020 RJD	
Chhattisgarh	2008 BJP	2013 BJP	2018 INC	2023 BJP	
Goa	2007 INC	2012 BJP	2017 INC	2022 BJP	
Gujarat	2007 BJP	2012 BJP	2017 BJP	2022 BJP	
Haryana	2005 INC	2009 INC	2014 BJP	2019 BJP	
Himachal Pradesh	2007 BJP	2012 INC	2017 BJP	2022 INC	
Jammu & Kashmir	2008 JKNC	2014 JKPDP			
Jharkhand	2005 BJP	2009 BJP & JMM	2014 BJP	2019 JMM	
Karnataka	2004 BJP	2008 BJP	2013 INC	2018 BJP	2023 INC
Kerala	2006 CPI(M)	2011 CPI(M)	2016 CPI(M)	2021 CPI(M)	
Madhya Pradesh	2008 BJP	2013 BJP	2018 INC	2023 BJP	
Maharashtra	2004 NCP	2009 INC	2014 BJP	2019 BJP	
Manipur	2007 INC	2012 INC	2017 INC	2022 BJP	

Meghalaya	2008 INC	2013 INC	2018 INC	2023 NPEP	
Mizoram	2008 INC	2013 INC	2018 MNF	2023 ZPM	
Nagaland	2008 NPF	2013 NPF	2018 NPF	2023 NDPP	
Odisha	2004 BJD	2009 BJD	2014 BJD	2019 BJD	
Punjab	2007 SAD	2012 SAD	2017 INC	2022 AAP	
Rajasthan	2008 INC	2013 BJP	2018 INC	2023 BJP	
Sikkim	2004 SDF	2009 SDF	2014 SDF	2019 SKM	
Tamil Nadu	2006 DMK	2011 AIADMK	2016 AIADMK	2021 DMK	
Telangana	2014 TRS	2018 TRS	2023 INC		
Tripura	2008 CIP(M)	2013 CIP(M)	2018 BJP	2023 BJP	
Uttarakhand	2007 BJP	2012 INC	2017 BJP	2022 BJP	
Uttar Pradesh	2007 BSP	2012 SP	2017 BJP	2022 BJP	
West Bengal	2006 CPI(M)	2011 TMC	2016 TMC	2021 TMC	
NCT of Delhi	2008 INC	2013 BJP	2015 AAP	2020 AAP	
Puducherry	2006 INC	2011 AINRC	2016INC	2021 AINRC	

67. We have referred to the data, after elucidating the mechanics and the safeguards embedded in the EVMs to check and obviate wrongdoing, and to evaluate the efficacy and performance of the EVMs. We acknowledge the right of voters to question the working of EVMs, which are but an electronic device that has a direct impact on election results. However, it is also necessary to exercise care and caution when we raise aspersions on the integrity of the electoral process. Repeated and persistent doubts and despair, even without supporting evidence, can have the contrarian impact of creating distrust. This can reduce citizen participation and confidence in elections, essential for a healthy and robust democracy. Unfounded challenges may actually reveal perceptions and predispositions, whereas this Court, as an arbiter and adjudicator of disputes and challenges, must render decisions on facts based on evidence and data. This is the reason why we had re-listed the matters for directions and clarifications on 24.04.2024, when specific points/questions raised were answered by the ECI. The petitioners were also heard.

68. The counsel for the petitioners, on 24.04.2024, drew our attention to a Wikipedia article which states that firmware is a software which provides low-level control of computing device hardware etc. It also states that programmable firmware memory can be reprogrammed via a procedure sometimes called flashing. This is stoutly denied by the officer of the ECI, who states that this would require the EVMs to be re-engineered by the manufacturers. It is submitted that the microcontroller used in the EVM has one-time programable memory, that is, it is unalterable once burned. It is only the VVPAT which has a flash memory component for the purpose of storing the bitmap file. To us, it is apparent that a number of safeguards and protocols with stringent checks have been put in place. Data and figures do not indicate artifice and deceit. Reprogramming by flashing, even if we assume is remotely possible, is inhibited by the strict control and checks put in place and noticed above. Imagination and suppositions should not lead us to hypothesize a wrong doing without any basis or facts. The credibility of the ECI and integrity of the electoral process earned over years cannot be chaffed and over-ridden by baroque contemplations and speculations.

69. The test for determining the scope of unenumerated rights is based on tracing them to specific provision of Part III of the Constitution

or to the core values which the Constitution espouses. While we acknowledge the fundamental right of voters to ensure their vote is accurately recorded and counted, the same cannot be equated with the right to 100% counting of VVPAT slips, or a right to physical access to the VVPAT slips, which the voter should be permitted to put in the drop box. These are two separate aspects – the former is the right itself and the latter is a plea to protect or how to secure the right. The voters' right can be protected and safeguarded by adopting several measures. This Court in ***Subramanian Swamy*** (supra) had directed gradual introduction of VVPATs to guarantee utmost transparency and integrity in the system. This direction was made to safeguard the right of the voters to know that the vote has been correctly recorded in the EVM. The direction has been implemented. The voter can see the VVPAT slip through the glass window and this assures the voter that his vote as cast has been recorded and will be counted. In ***N. Chandrababu Naidu*** (supra), the direction for counting the VVPAT paper trail in 5 EVMs per assembly constituency or assembly segment in a parliamentary constituency was issued, primarily as a precautionary measure rather than a justification or necessity. This decision was aimed at ensuring the highest level of confidence in the accuracy of election results. Giving physical access to VVPAT slips to voters is problematic and impractical. It will lead to misuse, malpractices and disputes. This is not a case where fundamental right to franchise exists only as a parchment, rather, the entire electoral process protocol, and the checks as well as empirical data, ensure its meaningful exercise.

70. VVPAT slip is made of a 9.9 cm x 5.6 cm thermal paper coated with chemical to ensure print retention for about 5 years. It is very soft and sticky, which makes the counting process tedious and slow. The counting process is undertaken through the following steps: the verification of unique ID of the VVPAT, opening of the VVPAT drop box, taking out the paper slips, counting the total number of slips, matching the number of slips with the total votes polled as per Form 17C, segregation of candidate-wise VVPAT slips, making candidate-wise bundles of 25 slips and counting of bundles and leftover slips. There are instances of recounting and reverification of the slips till the candidate-wise tallying is done. Thus, the counting process, it is stated, takes about five hours. The counting is done

by a team of three officers under CCTV coverage and under direct supervision of the supervising officer and the ECI observer of the constituency. Candidates/agents can remain present. We are not inclined to modify the aforesaid directions to increase the number of VVPAT undergoing slip count for several reasons. First, it will increase the time for counting and delay declaration of results. The manpower required would have to be doubled. Manual counting is prone to human errors and may lead to deliberate mischief. Manual intervention in counting can also create multiple charges of manipulation of results. Further, the data and the results do not indicate any need to increase the number of VVPAT units subjected to manual counting.

71. During the course of hearing, it was suggested that instead of physically counting the VVPAT slips, they can be counted by a counting machine. This suggestion, including the suggestion that barcoding of the symbols loaded in the VVPATs may be helpful in machine counting, may be examined by the ECI. These are technical aspects, which will require evaluation and study, and hence we would refrain from making any comment either way.

72. We must reject as foible and unsound the submission to return to the ballot paper system. The weakness of the ballot paper system is well known and documented. In the Indian context, keeping in view the vast size of the Indian electorate of nearly 97 crore, the number of candidates who contest the elections, the number of polling booths where voting is held, and the problems faced with ballot papers, we would be undoing the electoral reforms by directing reintroduction of the ballot papers. EVMs offer significant advantages. They have effectively eliminated booth capturing by restricting the rate of vote casting to 4 votes per minute, thereby prolonging the time needed and thus check insertion of bogus votes. EVMs have eliminated invalid votes, which were a major issue with paper ballots and had often sparked disputes during the counting process. Furthermore, EVMs reduce paper usage and alleviate logistical challenges. Finally, they provide administrative convenience by expediting the counting process and minimizing errors.

73. ECI has been categoric that the glass window on the VVPAT has not undergone any change. The term used in Rule 49M is ‘transparent

window'. The tinted glass used on the VVPAT printer is to maintain secrecy and prevent anyone else from viewing the VVPAT slips. The voter in the voting compartment who is viewing the glass from the top can have clear view of the slip for 7 seconds. Marginal tint on the VVPAT glass window, or the fact that the cutting and dropping of the slip from the roll in to the drop box of the printer is not visible, does not violate Rule 49M. The words 'before such slips get cut' in the proviso to Rule 49M(3) indicate and require that the slip should be cut from the roll after the elector has seen the print through the glass window. Use of glass window prevents damage, smudging, attempt to deface or physically access the VVPAT slip. The rule ensures that the voter is able to see the slip along with the serial number with name of the candidate and the symbol for whom they have voted.

74. Similarly, we would reject the submission that any elector should be liberally permitted as a routine to ask for verification of vote. Rule 49MA permits the elector to raise a complaint if she/he is of the view that the VVPAT paper slip did not depict the correct candidate/political party she/he voted. However, whenever a challenge is made, the voting process must be halted. An overly liberal approach could cause confusion and delay – hindering the election process and dissuading others from casting their votes.[25] ECI has stated that only 26 such requests in terms of Rule 49MA were received, and in all cases, the allegation was found to be incorrect.

75. We have conducted an in-detail review of the administrative and technical safeguards of the EVM mechanism. Our discussion aims to address the uncertainties and provide assurance regarding the integrity of the electoral process. A voting mechanism must uphold and adhere to the principles of security, accountability, and accuracy. An overcomplex voting system may engender doubt and uncertainty, thereby easing the chances of manipulation. In our considered opinion, the EVMs are simple, secure and user-friendly. The voters, candidates and their representatives, and the officials of the ECI are aware of the nitty-gritty of the EVM system. They also check and ensure righteousness and integrity. Moreover, the

25 However, we refrain from making any comments on the application of Section 177 of the Indian Penal Code, 1860.

incorporation of the VVPAT system fortifies the principle of vote verifiability, thereby enhancing the overall accountability of the electoral process.

76. Nevertheless, not because we have any doubt, but to only further strengthen the integrity of the election process, we are inclined to issue the following directions:

(a) On completion of the symbol loading process in the VVPATs undertaken on or after 01.05.2024, the symbol loading units shall be sealed and secured in a container. The candidates or their representatives shall sign the seal. The sealed containers, containing the symbol loading units, shall be kept in the strong room along with the EVMs at least for a period of 45 days post the declaration of results. They shall be opened, examined and dealt with as in the case of EVMs.

(b) The burnt memory/microcontroller in 5% of the EVMs, that is, the control unit, ballot unit and the VVPAT, per assembly constituency/assembly segment of a parliamentary constituency shall be checked and verified by the team of engineers from the manufacturers of the EVMs, post the announcement of the results, for any tampering or modification, on a written request made by candidates who are at Sl.No.2 or Sl.No.3, behind the highest polled candidate. Such candidates or their representatives shall identify the EVMs by the polling station or serial number. All the candidates and their representatives shall have an option to remain present at the time of verification. Such a request should be made within a period of 7 days from the date of declaration of the result. The District Election Officer, in consultation with the team of engineers, shall certify the authenticity/intactness of the burnt memory/ microcontroller after the verification process is conducted. The actual cost or expenses for the said verification will be notified by the ECI, and the candidate making the said request will pay for such expenses. The expenses will be refunded, in case the EVM is found to be tampered.

77. The writ petitions and all pending applications, including the applications for intervention, are disposed of in the above terms.

Dipankar Datta, J.

1. I have had the privilege of reading the opinion authored by brother Hon'ble Khanna, J. His Lordship, in my opinion, has dealt with the legal and techno-legal issues arising in connection with the challenge to the process of polling of votes through Electronic Voting Machines[1] mounted by the writ petitioners and the several intervenors with unmatchable finesse and admirable clarity. I do not recollect any previous decision of this Court having explained the working of the EVMs in such great detail with lucidity and dexterity. The reasons assigned by His Lordship for negating the challenge, without doubt, are cogent and valid. The twin directions in the penultimate paragraph, notwithstanding that the electoral process for constituting the 18th Lok Sabha is in full swing, are in the nature of forward-looking measures to strengthen the electoral system by bringing in more transparency. Such directions do not have the effect of retarding, interrupting, protracting or stalling the counting of votes, and is a course of action that seems to be perfectly permissible in the light of the Constitution Bench decision of this Court in ***Election Commission of India v Ashok Kumar***[2].

2. Though His Lordship's opinion has my whole-hearted concurrence, I have thought of penning a few words to express my own views, keeping in mind the customary challenges that are laid before this Court whenever an election is reasonably imminent, by way of emphasis. Hon'ble Khanna, J. and I are speaking through different judgments, but our voices are not too different.

3. I have heard senior counsel/counsel for the three petitioners suspect, without however attributing any malice to the Election Commission of India[3] (in which vests the superintendence, direction and control of elections per Article 324 of the Constitution of India[4]), the efficacy of exercise of the right of franchise through the EVMs which, according to them, are not entirely reliable and open to manipulation, and that completely tallying the Voter Verifiable Paper Audit Trail[5] slips with

1 EVMs

2 (2000) 8 SCC 216

3 ECI

4 Constitution

5 VVPAT

the votes cast on the ballot unit is the plausible solution to ensure a taint-free election. I have also heard counsel for the petitioning association in the lead matter rely on certain reports to persuade the Court hold that casting of votes through EVMs is not fool-proof and that voting through electronic means has been discontinued by a European nation in compliance with a judicial verdict. He was also heard to suggest, when called upon by the Court regarding the nature of relief the petitioning association seeks, that the electoral process in India should return to the "paper ballot system" upon discontinuance of voting through the EVMs.

4. I place on record that although such a suggestion was subsequently withdrawn by counsel in course of the proceedings that ensued following listing of the writ petitions "For Directions" on 24 April, 2024 to seek clarifications from the ECI on certain points, nothing much turns on it. The withdrawal was more of an attempt to erase the impression we, the Judges forming the Bench, were urged to form by senior counsel for the ECI while arguing that the petitioning association's utter lack of *bona fides* (in invoking this Court's writ jurisdiction under Article 32 of the Constitution) is completely exposed thereby. I have no hesitation to accept the submission of senior counsel for the ECI that reverting to the "paper ballot system" of the bygone era, as suggested, reveals the real intention of the petitioning association to discredit the system of voting through the EVMs and thereby derail the electoral process that is underway, by creating unnecessary doubts in the minds of the electorate.

5. It is of immediate relevance to note that in recent years, a trend has been fast developing of certain vested interest groups endeavouring to undermine the achievements and accomplishments of the nation, earned through the hard work and dedication of its sincere workforce. There seems to be a concerted effort to discredit, diminish, and weaken the progress of this great nation on every possible frontier. Any such effort, or rather attempt, has to be nipped in the bud. No Constitutional court, far less this Court, would allow such attempt to succeed as long as it (the court) has a say in the matter. I have serious doubt as regards the *bona fides* of the petitioning association when it seeks a reversion to the old order. Irrespective of the fact that in the past efforts of the petitioning association in bringing about electoral reforms have borne fruit, the suggestion put forth appeared inexplicable. Question of reverting to the "paper ballot system", on

facts and in the circumstances, does not and cannot arise. It is only improvements in the EVMs or even a better system that people would look forward to in the ensuing years.

6. At the same time, one cannot be oblivious that in a society pledged to uphold the rule of law, none - howsoever high or low – is above the law. Everyone is subject to the law fully and completely, and authorities within the meaning of State in Article 12 of the Constitution are no exception. Concepts of unfettered discretion or unaccountable action has no place in the matter of governance; hence, neither can the ECI nor can any other authority claim to possess arbitrary power over the interests of an individual voter and seek cover from the sunlight of judicial scrutiny if, indeed, a valid cause is set up for interference. After all, "let right be done" is also the motto of our nation like any other civilised State. That the sanctity of the electoral process has to be secured at any cost has never been in doubt.

7. Conducting elections in India is a difficult task, is an understatement; rather, it is a humongous task and presents a novel challenge, not seen elsewhere in the world. India is home to more than 140 crore people and there are 97 crore eligible voters for the 2024 General Elections, which is more than 10% of the world population. These voters represent the largest electorate in the world. The Representation of the People Act, 1951[6] which, to my mind, amidst the vast legislative landscape of the nation is the most important enactment after the Constitution of India, is also the most effective instrument to uphold democratic and republican ideals, which are the hallmarks of our preambular promise. The RoP Act, which has established the legal framework for conducting elections, ensures that each and every citizen has a fair and equal opportunity to exercise his/her right of vote and to participate in the democratic process for electing his/her governor. The duties, functions and obligations to be performed/discharged by the ECI are ordained by the RoP Act, which are paramount and non-negotiable. Being a complete code in itself, the RoP Act reinforces the rule of law and upholds the principles of justice, fairness and transparency. The larger the electorate, greater are the challenges associated with the elections. As it is, the ECI has an onerous responsibility to shoulder and there is absolutely no

6 RoP Act

margin for error. Periodical challenges to electoral processes, which gain momentum particularly when General Elections are imminent, require the ECI as of necessity to raise robust, valid and effective defence to spurn such challenges failing which any adverse judgment by a court is bound to undermine the authority and prestige of the ECI and bring disrepute to it.

8. The 2024 General Elections, which are proposed to be conducted in 7 (seven) phases and presently underway, will entail an estimated expenditure of around Rs. 10,00,00,00,00,000 (Rupees One lakh crore); more than 10 lakh polling booths are required to be setup to facilitate the voting process. The EVMs are carried to the remotest areas of this country, occasionally on the backs of horses and other animals; voting booths have been set up in far-off villages at the foothills of the Himalayan mountains as well as the delta of the Sundarbans which are only accessible through boats. These challenges are unique to India, and the election process has to be considered in this context.

9. Taking an example, West Bengal is the 13th largest state in terms of area, spread over 88,752 sq. km. The density of population of the state is 1028 persons/sq. km. Even a small state like West Bengal is more densely populated than most European nations. This being the scenario, any comparison of the nature which was sought to be drawn on behalf of the petitioning association with a particular European nation, may not be adequately representative since the demographic and logistical challenges in the conduct of elections in each country are unique to it. Also, it was not demonstrated before the Court that the machines put to use in the electoral system of such nation are similar and what was said by its court applies *ex proprio vigore* to India.

10. Electronic voting is not something which is prevalent only in India. Multiple countries use electronic voting in varying degrees in their national elections. However, use of EVMs in elections in India are not without its checks and balances. Reasonable measures to ensure transparency, such as tallying VVPAT paper trail in 5 EVMs per assembly constituency or assembly segment in a parliamentary constituency, are already in place after the decision of this Court in ***N. Chandrababu Naidu v. Union of India***[7]. This measure, as has

7 (2019) 15 SCC 377

been noticed by Hon'ble Khanna, J., was undertaken out of abundant caution and not as an admission of a flaw in the process.

11. The aforesaid exercise of tallying VVPAT paper trail in 5 EVMs with votes cast by the electors has not, till date, resulted in any mismatch. This assertion of the ECI has not been proved to be incorrect by the petitioners by referring to any credible material or data. So long no mismatch is detected even after such an exercise, as directed in ***N. Chandrababu Naidu*** (supra), it would defy the sense of logic and reason of a prudent man to issue a Mandamus to the ECI to arrange for tallying 100% VVPAT slips on the specious ground of the petitioners' apprehension that the EVMs could be manipulated.

12. The petitioning association has relied on the Report titled *'An inquiry into India's Election System: Is the Indian EVM and VVPAT system fit for democratic elections?'* submitted by the Citizens' Commission on Elections[8], to emphasize the vulnerabilities of the current electronic voting system. The CCE Report, on a bare reading, appears to be the culmination of inputs given by domain experts. For whatever such report is worth and though counsel claimed that the efficacy of the voting system through EVMs has been doubted, the CCE Report itself concludes, *inter alia*, that no hacking of any EVM has been detected; what it observes is that there is no guarantee that the EVMs cannot be hacked. This, in essence captures the underlying weakness in the petitioning association's entire case, inasmuch as the only grounds for the reliefs sought lie in the realm of apprehension and suspicion. *In arguendo*, even if the CCE Report is taken on face value and it is believed that the EVM-VVPAT system can be hacked, can it be said that there is absence of a redressal mechanism for the same? Should there be hacking, resulting in violation of a right of an elector in any manner, and if there be proof adequate enough to upturn an election result, the law already has in place a remedy, i.e., an election petition under section 80 of the RoP Act. Such an election petition can be filed not just by an aggrieved candidate, but also by a voter, within 45 (forty-five) days from the date of declaration of the result of election. Since there is already a remedy in law to allay the fears that have been expressed by the petitioners, if and when a discrepancy in the results arises, the

8 CCE Report

Courts are not powerless to uphold the sanctity of the democratic process by appropriate intervention.

13. The petitioning association has also attempted to highlight a public trust deficit with respect to the current voting system by relying on a survey conducted by the Centre for the Study of Developing Societies – Lokniti, which concluded that a majority of the Indian population did not trust the EVMs. It is a private report and I find little reason to trust such a report. Over the years, more and more voters have participated in the election process. Had the voters any doubt regarding the efficacy of the EVMs, I wonder whether the voting percentage would have seen such increase. EVMs have stood the test of time and the increased voting percentage is sufficient reason for us to hold that the voters have reposed faith in the current system and that the report to the contrary, which has been relied on, merits outright rejection.

14. Next, the petitioners submit that their right to be informed under Article 19(1)(a) vis-à-vis the electoral process have two facets. First, a voter has a right to know that the vote is recorded as cast; and, secondly that the vote as cast is counted. These facets need to be dealt with separately.

15. A citizen's right 'to freedom of speech and expression' under Article 19(1) is not absolute; the State by virtue of Article 19(2) can place reasonable restrictions on these rights. There can be no doubt that the electorate has a right to be informed if the votes, as cast, are accurately recorded. The dispute, in the present writ proceedings, centres around the modality of delivering the information. The petitioners have characterised the present procedure, wherein the voter after pressing the 'blue button' and casting his/her vote can see his VVPAT slip for 7 seconds through an illuminated glass window, as inadequate for the voter to verify if his/her vote, as cast, is recorded.

16. To buttress their submission, the petitioners have relied on the proviso to Rule 49M (3) of the Conduct of Election Rules, 1961[9]. The petitioners urge that the ECI is not following the statutory mandate provided in the Election Rules. I am *ad idem* with the interpretation of the relevant rule placed by Hon'ble Khanna, J. The ordainment of Rule 49M (3) is

9 Election Rules

that the VVPAT slip should be momentarily visible to the voter; and it is not the requirement of the rule that the VVPAT slip or its copy has to be handed over to the voter. Recording of the vote cast signifying the choice of the voter and its projection on the VVPAT slip, *albeit* for 7 (seven) seconds, is fulfilment of the voter's right of being informed that his/her vote has been duly recorded. In my considered view, as long as there is no allegation of statutory breach, there can be no substitution of the Court's view for the view of the ECI that the light in the VVPAT would be on for 7 (seven) seconds and not more.

17. We now address the second facet of the argument based on the right guaranteed by Article 19(1)(a) – the voter's right to know that his/her vote, as recorded, has been counted. To deal with this contention, a question comes to my mind – did this right not exist when the "paper ballot system", which the petitioning association wishes to be reverted to, was in vogue? Then, voters would simply drop their paper ballots into a box, for it to be safely ferried away to the counting stations, whereafter the same were counted by election officials far away from the voter's scrutiny, with no way of knowing whether the vote cast by the voter was indeed counted or had not fallen victim to human error and missed from being counted. In the present far more technologically advanced system of the EVM – VVPAT, every voter who enters the polling booth has his/her name recorded, along with an affixation of signature in the Register of Voters maintained by the Presiding Officer, as provided by Form 17A of the Election Rules. Thereafter, the voter presses the desired button on the ballot unit to cast his/her vote, sees a visual confirmation of the same on the transparent VVPAT screen and hears a loud beep. At the end of the voting process, the Presiding Officer is required to record in Form 17C, not just the total number of voters as per the Register of Voters, but also the total number of votes recorded per voting machine as well as those staying away from the voting process despite affixing signature on the register. The total votes polled as per Form 17C is then again tallied with the total votes recorded by the control unit. Rule 56D(4) also provides that if there is any mismatch between these two totals, the printed VVPAT slips of the polling station would be counted. Furthermore, if a voter is aggrieved by a mismatch in the candidate voted for in the ballot unit *vis-a-vis* that recorded in the VVAPT, Rule 49M allows the voter to approach the Presiding Officer. Upon the conclusion of polling, there exists yet

another remedy under Rule 56-D, for a candidate to apply for a count of the VVPAT slips, should any discrepancy be suspected. Thus, it is manifest that there is in place a stringent system of checks and balances, to prevent any possibility of a miscount of votes, and for the voter to know that his/her vote has been counted. There can be no doubt that such a system, which is distinctly more satisfactory compared to the system of the yester-years, suitably satisfies the voter's right under Article 19(1)(a) to know that his/her vote has been counted as recorded.

18. The Republic has prided itself in conducting free and fair elections for the past 70 years, the credit wherefor can largely be attributed to the ECI and the trust reposed in it by the public. While rational scepticism of the *status quo* is desirable in a healthy democracy, this Court cannot allow the entire process of the underway General Elections to be called into question and upended on mere apprehension and speculation of the petitioners. The petitioners have neither been able to demonstrate how the use of EVMs in elections violates the principle of free and fair elections; nor have they been able to establish a fundamental right to 100% VVPAT slips tallying with the votes cast.

19. In view of the foregoing discussion, the petitioners' apprehensions are misplaced. Reverting to the paper ballot system, rejecting inevitable march of technological advancement, and burdening the ECI with the onerous task of 100% VVPAT slips tallying would be a folly when the challenges faced in conducting the elections are of such gargantuan scale.

20. There are two other ancillary issues, to add to the issues already covered in detail by Hon'ble Khanna, J.

21. The first is the very issue of maintainability of writ petitions of the nature presented before us. Should mere suspicion of infringement of a right be considered adequate ground to invoke the writ jurisdiction? In my opinion, the answer should be 'NO'.

22. A writ petition ought not to be entertained if the plea is based on the mere suspicion that a right could be infringed. Suspicion that a right could be infringed and a real threat of infringement of a right are distinct and different.

23. To succeed in a claim under Article 32 or 226, one must demonstrate either *mala fide*, or arbitrariness, or breach of a law in the impugned

State action. Though a writ of right, it is not a writ of course. The writ jurisdiction under Article 32/226 of the Constitution of India being special and extraordinary, it should not be exercised casually or lightly on the mere asking of a litigant based on suspicions and conjectures, unless there is credible/trustworthy material on record to suggest that adverse action affecting a right is reasonably imminent or there is a real threat to the rule of law being abrogated. It must be shown, at least *prima facie,* that there is a real potential threat to a right, which is guaranteed by law to the person concerned.

24. I am not oblivious of two decisions rendered by this Court on the aforesaid issue.

25. A Constitution Bench of this Court in ***D.A.V. College, Bhatinda v. State of Punjab***[10] held thus:

> "5. […] a petition under Article 32 in which petitioners make out a prima facie case that their fundamental rights are either threatened or violated will be entertained by this Court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place."

26. In ***Adi Saiva Sivachariyargal Nala Sangam v. State of Tamil Nadu***[11] a Bench of two Hon'ble Judges of this Court held:

> "12. […] The institution of a writ proceeding need not await actual prejudice and adverse effect and consequence. An apprehension of such harm, if the same is well founded, can furnish a cause of action for moving the Court."

27. While a writ petition may be instituted, if there is a genuine and looming threat of a right being trampled upon, what is, however, clear from the aforesaid decisions is that such threat or apprehension has to be well founded and cannot be based merely on assumptions and presumptions as is found in the present set of writ petitions.

28. The mere suspicion that there may be a mismatch in votes cast through EVMs, thereby giving rise to a demand for a 100% VVPAT slips verification, is not a sufficient ground for the present set of

10 [1971] Supp. 1 SCR 677 : (1971) 2 SCC 261

11 [2015] 11 SCR 1110 : (2016) 2 SCC 725

writ petitions to be considered maintainable. To maintain these writ petitions, it ought to have been shown that there exists a tangible threat of infringement; however, that has also not been substantiated. Thus, without any evidence of malice, arbitrariness, breach of law, or a genuine threat to invasion of rights, the writ petitions could have been dismissed as not maintainable. But, considering the seriousness of the concerns that the Court *suo motu* had expressed to which responses were received from the official of the ECI as well as its senior counsel, the necessity was felt to issue the twin directions in the greater public interest and to sub-serve the demands of justice.

29. Finally, I wish to touch upon one other issue of importance.

30. It is pertinent to reiterate that the doctrine of *res judicata* is applicable to writ petitions under Article 32 and Article 226 as well. The inclusion of the term "public right" in Explanation VI of Section 11 of the Civil Procedure Code, 1908 aims to avoid redundant legal disputes concerning public rights. Given this clarification, there is no room for debate regarding the application of Section 11 to matters of public interest litigation presented through writ petitions.

31. In ***Daryao and others v. State of U.P. and others***[12], a Constitution Bench of this Court emphasized that the rule of *res judicata* is founded on significant public policy considerations rather than being a mere technicality. It was clarified that petitioners seeking to challenge a decision must present new grounds distinct from those previously raised in order to escape the bar of *res judicata.* The Bench articulated this as follows:

> *"31. […] We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same."*

32. Another Constitution Bench of this Court in ***Direct Recruit Class II Engineering Officers' Association. v. State of Maharashtra and others***[13] followed the aforesaid dictum to hold that the principles

12 [1962] 1 SCR 574 : AIR 1961 SC 1457

13 [1990] 2 SCR 900 : (1990) 2 SCC 715

of *res judicata* are not foreign to writ petitions. A reference may be made to the following paragraph:

> *35. […] It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the special leave petition which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave petition. In similar situation a Constitution Bench of this Court in Daryao v. State of U.P. [(1962) 1 SCR 574 : AIR 1961 SC 1457] held that where the High Court dismisses a writ petition under Article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of res judicata. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under Article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea […]".*

33. No doubt, *res judicata* bars parties from re-litigating issues that have been conclusively settled. It is true that this principle is not rigid in cases of substantial public interest and Constitutional Courts are empowered to adopt a flexible approach in such cases, acknowledging their far-reaching public interest ramifications.

34. However, this standard is applicable only when substantial evidence is presented to validate the irreversible harm or detriment to the public good resulting from the action impugned. The Court must come to

the conclusion that the petition is not just an old wine in a new bottle, but rather raises substantial grounds not previously addressed in litigation. Only under these circumstances may it consider such a petition; otherwise, it is within its authority to dismiss it at the threshold.

35. This issue at hand of doubting the efficacy of the EVMs has been previously raised before this Court and it is imperative that such issue is concluded definitively now. Going forward, unless substantial evidence is presented against the EVMs, the current system will have to persist with enhancements. Regressive measures to revert to paper ballots or any alternative to the EVMs that does not adequately safeguard the interests of Indian citizens have to be eschewed.

36. I also wish to observe that while maintaining a balanced perspective is crucial in evaluating systems or institutions, blindly distrusting any aspect of the system can breed unwarranted scepticism and impede progress. Instead, a critical yet constructive approach, guided by evidence and reason, should be followed to make room for meaningful improvements and to ensure the system's credibility and effectiveness.

37. Be it the citizens, the judiciary, the elected representatives, or even the electoral machinery, democracy is all about striving to build harmony and trust between all its pillars through open dialogue, transparency in processes, and continuous improvement of the system by active participation in democratic practices. Our approach should be guided by evidence and reason to allow space for meaningful improvements. By nurturing a culture of trust and collaboration, we can strengthen the foundations of our democracy and ensure that the voices and choices of all citizens are valued and respected. With each pillar fortified, our democracy stands robust and resilient.

38. I conclude with the hope and trust that the system in vogue shall not fail the electorate and the mandate of the voting public shall be truly reflected in the votes cast and counted.

Headnotes prepared by: Divya Pandey

Result of the case:
Writ petitions disposed of.

[2024] 5 S.C.R. 462 : 2024 INSC 352

Swami Vedvyasanand Ji Maharaj (D) Thr LRs
v.
Shyam Lal Chauhan & Ors.

(Civil Appeal No. 5569-5570 of 2024)

30 April 2024

[A.S. Bopanna and Sudhanshu Dhulia, JJ.]

Issue for Consideration

Whether the High Court, while substituting Respondent No.6 as the appellant in the Second Appeal, has followed the correct procedure prescribed under Order XXII Rule 5 of the Code of Civil Procedure.

Headnotes

Code of Civil Procedure – Order XXII Rule 5 – Significance of substitution – Substitution gives the right to the substituted legal representatives to contest the claim of the deceased.

Held: The only purpose of substitution is the continuation of the case – The substitution as LR in a case by itself will not give any title in favour of the person so substituted – It only confers the right to represent the estate of the deceased in the pending proceedings – Despite the limited purpose of substitution of legal representatives, it has its significance in as much as it gives the right to the substituted legal representatives to contest the claim of the deceased. [Paras 10 & 11]

Code of Civil Procedure – Order XXII Rule 5 – Explained

Order XXII Rule 5 CPC mandates that in case of death of plaintiff or defendant, if a question arises as to whether any person is or is not the legal representative of the deceased party, the court shall first determine such a question – Proviso of this Rule is only an enabling provision where the appellate court may before deciding the question refer the matter to a subordinate court to try and record its findings which may be considered by the Appellate Court while taking a final call on the issue. [Para 14]

Code of Civil Procedure – Order XXII Rule 5 – Proviso cannot be construed as delegation of the powers of the Appellate Court to substitute the deceased party, but is merely to assist it in ultimately deciding the issue of substitution

Held: While dealing with the report sent by the subordinate court under Order XXII Rule 5 CPC, the Appellate Court may consider the

findings of the subordinate court and then give its reasons before reaching any conclusion – The proviso to Rule 5 gives discretion to the Appellate Court to make its own separate opinion notwithstanding the opinion of the subordinate court – The proviso cannot be construed to be a delegation of the powers of the Appellate Court to substitute the deceased party, but is merely to assist it in ultimately deciding the issue of substitution – Thus, the Appellate Court 'may' take into consideration the material referred by the subordinate court under Rule 5 of Order 22, CPC along with the objections, if any, against the report while deciding on the substitution of the appellant. [Para 17]

Code of Civil Procedure – Order XXII Rule 5 – Correct procedure not followed by the Appellate Court as it failed to consider the evidence in support of the Respondent No.6 and the objections against the Trial Court report while making its determination on substitution.

Held: The High Court, being the Appellate Court, while substituting Respondent No.6 as the appellant in the Second Appeal did not follow the correct procedure – The High Court has misread Rule 5, as well as the previous order of the Supreme Court, as it failed to consider the objections against the Trial Court report while making its determination on substitution – The High Court did not discuss the evidence in support of the claim of the Respondent No. 6 nor did it consider the objections of the other party on such claims. [Paras 13, 15-16]

Case Law Cited

Jaladi Suguna v. Satya Sai Central Trust [2008] 7 SCR 734 **: (2008) 8 SCC 521 – referred on.**

List of Acts

Code of Civil Procedure, 1908.

List of Keywords

Substitution application; Legal Representatives; Significance of substitution; Appellate Court; Discretion.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 5569-5570 of 2024

From the Judgment and Order dated 19.06.2019 of the High Court of Judicature at Patna in IA Nos. 7 and 8 of 2019 in S.A. No. 169 of 1993

Appearances for Parties

Shyam Divan, Sr. Adv., Sabarish Subramanian, Vishnu Unnikrishnan, C Kranthi Kumar, Naman Dwivedi, Danish Saifi, Advs. for the Appellants.

Krishnan Venugopal, Sr. Adv., Vijay K. Jain, Rohit K. Singh, Pritam Bishwas, Avinash Mathews, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

Leave granted.

2. The present appeals arise out of an order in a pending Second Appeal before the High Court of Judicature at Patna. The necessary facts for our consideration are as follows:

3. Respondent Nos.1 to 4 were plaintiffs in a civil suit where Swami Shivdharmanand Ji Maharaj @ Deo Shankar Tiwary (hereinafter referred to as 'Swami Shivdharmanand') was one of the defendants. It was a title suit seeking declaration regarding the suit property which is situated in Bihar. The suit was dismissed by the Trial Court on 26.03.1991. The First Appellate Court allowed the appeal and decreed the suit. Consequently, the defendant Swami Shivdharmanand filed a second appeal, which is still pending before the Patna High Court.

Meanwhile the defendant, who had filed the second appeal passed away on 20th March, 1999. There were two claimants, or successors of the "Gaddi" of Swami Shivdharmanand, who sought substitution in place of Swami Shivdharmanand in the Second Appeal. These were (a) Swami Triyoganand Ji Maharaj @ Ram Narayan Bind (hereinafter referred to as 'Swami Triyoganand) and (b) Swami Satyanand Ji Maharaj @ Ramjee Singh (hereinafter referred to as 'Swami Satyanand') who is respondent no.6 in the present appeal.

4. Initially, Patna High Court directed the Trial Court to conduct an enquiry in the matter as laid down under Rule 5 of Order 22 of Civil Procedure Code, for the purpose of substitution. The Trial Court did its enquiry and submitted the report before the Patna High Court, where the findings were that Swami Satyanand (i.e., present respondent No.6) is the Legal Representative (hereinafter referred to as 'LR') of Swami Shivdharmanand and is liable to be substituted as the

appellant before the High Court. Objections were filed to the said report by the other party, which is the predecessor-in-interest of the appellant before this Court. The Patna High Court instead of giving a decision based on the report and the objections, passed an order on 24.02.2009, allowing both the parties (Swami Satyanand and Swami Triyoganand) to be substituted as LRs to Swami Shivdharmanand. This order of the Patna High Court came to be challenged by both the parties (i.e., Swami Triyoganand as well as Swami Satyanand), before this Court. This court vide order dated 08.02.2018 had set aside the order of the High Court and remanded the matter to Patna High Court, with directions to consider the report of the Trial Court as well as the 'objections of parties' and then to substitute one of the two parties as appellant, thereby holding that only one of the two claimants should be substituted as appellant/defendant.

5. Consequently, the High Court passed an order dated 30.01.2019 wherein it upheld the findings of the Trial Court on the legal representation and came to the conclusion that Swami Satyanand is the LR of Swami Shivdharmanand. Thus, Swami Satyanand was ordered to be substituted as the appellant in the pending Second Appeal.

6. Now the fact of the matter is that when this order was passed by the High Court on 30.01.2019, Swami Triyoganand too passed away on 04.12.2018 and an adjournment was also sought to bring the LR of Swami Triyoganand on record, but the substitution could not be done. The Patna High Court went ahead and passed the order in favour of Swami Satyanand on the ground that the Trial Court in its report has found Swami Satyanand to be the LR of the appellant-Swami Shivdharmanand, and it is therefore needless to adjourn the matter any further.

7. Subsequently, the appellant before us, i.e., Swami Vedvyasanand Ji Maharaj (hereinafter referred to as Swami Vedvyasanand) moved two applications before the Patna High Court on 22.02.2019. The first was to substitute himself in place of Swami Triyoganand, while the second was to recall the order dated 30.01.2019. Both these applications i.e., IA Nos.7 and 8 of 2019 were taken up and dismissed vide the impugned order on 19.06.2019.

8. In doing so, the reasons given by the High Court are that Trial Court had conducted an enquiry and concluded that the LR of deceased Swami Shivdharmanand is Swami Satyanand. This report was

accepted by the High Court and consequently, Swami Satyanand was substituted and the claim of Swami Triyoganand was dismissed. Since the claim of the deceased appellant-Swami Vedvyasanand is based only on the claim of Swami Triyoganand, the High Court perhaps did not find it appropriate or necessary to even consider his substitution application and therefore rejected the substitution application along with the recall application. Aggrieved by the same, Swami Vedvyasanand had filed the present appeal.

We must further note here that the matter as it stands today is that even Swami Vedvyasanand has passed away and now Sadhavi Sarojanand, who claims to be the legal heir of Swami Vedvyasanand, is seeking substitution as appellant in the pending second appeal before the High Court.

9. We have heard learned senior Counsel for both the parties at length and have perused the material on record.

10. The only purpose of substitution is the continuation of the case. The substitution as LR in a case by itself will not give any title in favour of the person so substituted. It only confers the right to represent the estate of the deceased in the pending proceedings. In ***Jaladi Suguna v. Satya Sai Central Trust*, (2008) 8 SCC 521** this limited right was explained as follows:

> *"15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation*

of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased."

11. Despite the limited purpose of substitution of legal representatives, it has its significance in as much as it gives the right to the substituted legal representatives to contest the claim of the deceased.

12. In the present case, when parties had come before this Court earlier, this Court vide order dated 08.02.2018 had remitted the matter to the High Court to decide the question of legal representatives by taking the report of the Trial Court and the objections into consideration, after hearing both the sides. After the order of this Court, the High Court vide order dated 30.01.2019 had upheld the findings of the Trial Court by concluding that Swami Satyanand is the disciple of Swami Shivdharmanand, while rejecting the claims of the Swami Triyoganand including the appellant, who claimed their right through the deceased Swami Triyoganand. Further, the application to recall the order dated 30.01.2019 moved by the appellant was dismissed vide impugned order on the ground that the appellant claimed himself to be the disciple of Swami Triyoganand and the High Court has already decided to reject the claim of Swami Triyoganand. The High Court ignored the fact that the order dated 30.01.2019 was passed after the death of Swami Triyoganand and without considering the pending substitution application.

13. In our opinion, the High Court while substituting Swami Satyanand (Respondent No.6) as the appellant and dismissing the claim of appellant's predecessor-in-interest i.e., Swami Triyoganand did not follow the correct procedure.

We are not commenting on the merits of the High Court finding on Swami Satyanand being the rightful representative in the case, we are only on the procedure followed by the High Court while doing so.

14. Order 22 Rule 5 of CPC reads as follows:

*"**Determination of question as to legal representative.** — Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or*

a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any, recorded at such trial, its findings and reasons therefor, and the Appellate Court may take the same into consideration in determining the question."

This Rule mandates that in case of death of plaintiff or defendant, if a question arises as to whether any person is or is not the legal representative of the deceased party, the court shall first determine such a question. Proviso of this Rule is only an enabling provision where the appellate court may before deciding the question can refer the matter to a subordinate court to try and record its findings which may be considered by the Appellate Court while taking a final call on the issue.

15. In the case at hand, the High Court had earlier fallen into error by substituting both the claimants as legal representatives of the deceased defendant for the purpose of hearing the appeal and thus, the matter was remanded by this Court vide Order dated 08.02.2018. We are afraid that the High Court has again misread Rule 5 as well as our order, as it failed to consider the objections against the Trial Court report while making its determination on substitution.

16. In the order dated 30.01.2019, the High Court interprets this Court's order as if a request was made to substitute the one who is found to be the legal representative in the enquiry:

"From perusal of the order of the Hon'ble Supreme Court, it appears that the Hon'ble Supreme Court has held that the person who is found to be the legal representative of the deceased-appellant in an enquiry held under Order 22 Rule 5 should be substituted……"

The High Court did not discuss the evidence in support of the claim of the Respondent No. 6 nor did it consider the objections of the other party on such claims. Moreover, there was already another substitution application pending before the Court which was not considered.

17. Proviso to Rule 5 does not say that the Appellate Court can direct the subordinate court to decide the question as to who would be the legal representative, it only provides that the Appellate Court can direct the subordinate court to try the question and return the records to the Appellate Court, along with the evidence and the subordinate court has then to send a report in the form of a reasoned opinion based on evidence recorded, upon which the final decision has to be made ultimately by the Appellate Court, after considering all relevant material. While dealing with the report sent by the subordinate court under Order 22 Rule 5 of CPC, the Appellate Court may consider the findings of the subordinate court and then give its reasons before reaching any conclusion. The words *'the Appellate Court may take the same into consideration in determining the question'* used in the proviso to Rule 5 gives discretion to the Appellate Court to make its own separate opinion notwithstanding the opinion of the subordinate court. The proviso cannot be construed to be a delegation of the powers of the Appellate Court to substitute the deceased party, but is merely to assist it in ultimately deciding the issue of substitution. Thus, the Appellate Court 'may' take into consideration the material referred by the subordinate court under Rule 5 of Order 22, CPC along with the objections, if any, against the report while deciding on the substitution of the appellant.

18. We, therefore, set aside the order dated 19.06.2019 and 30.01.2019, and remit the matter back to the High Court for a fresh decision on substitution.

We reiterate that we have said nothing on the merit of the relative claims of the contenders, our concern and our reasons for yet again sending the matter back were only on the procedure.

19. Accordingly, these appeals stand disposed of along with the pending application(s), if any.

Headnotes prepared by:
Mukund P Unny, Hony. Associate Editor
(*Verified by:* Liz Mathew, Sr. Adv.)

Result of the case:
Appeals disposed of.

[2024] 5 S.C.R. 470 : 2024 INSC 371

A (Mother of X)
v.
State of Maharashtra & Anr.

(Civil Appeal No. 5194 of 2024)

29 April 2024

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

Issue for Consideration

Matter pertains to the opinion of the medical board constituted under the MTP Act to reflect the effect of the pregnancy on the pregnant person's physical and mental health; that the MTP Act and the reproductive right of a pregnant person giving primacy to their consent; and the usage of term 'pregnant person' instead of term 'pregnant woman'.

Headnotes

Medical Termination of Pregnancy Act, 1971 – Termination of pregnancy – 14 year old girl subjected to sexual assault, sought permission to terminate her pregnancy – Denied by the High Court on the ground that the pregnancy exceeded the statutory period of twenty-four weeks – In appeal, this Court on basis of the fresh report of the medical Board, allowed termination of pregnancy – When the said order passed, the minor was in the thirtieth week of her pregnancy – Thereafter, minor girl's parents changing their statements, and matter again before this Court:

Held: Sole and only consideration which must weigh with the Court at this stage is the safety and welfare of the minor – In view thereof, the earlier order passed by this Court is recalled – Said decision made in light of the decisional and bodily autonomy of the pregnant person and her parents – Performing a procedure for termination of an advanced pregnancy, gestational age of the fetus nearing end of thirty first week, is subject to risks involving the well-being and safety of the minor as explained by the medical team at the hospital – Guardians of the girl, namely her parents, also consented for taking the pregnancy to term, as permissible u/s. 3(4)(a) – View of the minor girl and her parents to take the pregnancy to term in tandem of the MTP Act – Furthermore, the

* Author

MTP Act does not allow any interference with the personal choice of a pregnant person in terms of proceeding with the termination – Act or indeed the jurisprudence around abortion developed by the courts leave no scope for interference by family or partner of a pregnant person in matters of reproductive choice – Role of the registered medical practitioners-RMPs and the medical board must be in a manner which allows the pregnant person to freely exercise their choice – In view thereof, the hospital directed to bear all the expenses in regard to the hospitalization of the minor over the past week and in respect of her readmission to the hospital for delivery – In the event that the minor and her parents desire to give the child in adoption after the delivery, the State Government to take all necessary steps. [Paras 19, 32, 33, 35, 36]

Medical Termination of Pregnancy Act, 1971 – ss. 3(1), 3(2-B) – Role of the registered medical practitioners-RMP and medical board under the MTP Act:

Held: The Act protects the registered medical practitioners-RMP and the medical boards when they form an opinion in good faith as to the termination of pregnancy – Fear of prosecution among registered medical practitioners is a barrier for pregnant persons to access safe and legal abortions – Opinion of the RMP is decisive in matters of termination of pregnancy under the MTP Act – Purpose of the opinion of the RMP borrows from the legislative intent of the MTP Act which is to protect the health of a pregnant person and facilitate safe, hygienic, and legal abortion – It is therefore imperative that the fundamental right of a pregnant person is not compromised for reasons other than to protect the physical and mental health of the pregnant person – Medical board, in forming its opinion on the termination of pregnancies must not restrict itself to the criteria u/s. 3(2-B) but must also evaluate the physical and emotional well being of the pregnant person – When issuing a clarificatory opinion the medical board must provide sound and cogent reasons for any change in opinion and circumstances. [Paras 37, 29]

Constitution of India – Art. 21 – Right to reproductive autonomy – Right to abortion – Fundamental right:

Held: Right to abortion is a concomitant right of dignity, autonomy and reproductive choice – This right is guaranteed u/Art. 21 – Decision to terminate pregnancy is deeply personal for any person – Choice exercised by a pregnant person is not merely about their reproductive freedom – Thus, it is imperative that the fundamental

right of a pregnant person is not compromised for reasons other than to protect the physical and mental health of the pregnant person – Opinion of the pregnant person must be given primacy in evaluating the foreseeable environment of the person u/s. 3(3) of the MTP Act – Medical board and the courts need for giving primacy to the fundamental rights to reproductive autonomy, dignity and privacy of the pregnant person by the – Delays caused by a change in the opinion of the medical board or the procedures of the court must not frustrate the fundamental rights of pregnant people – Thus, the medical board evaluating a pregnant person with a gestational age above twenty-four weeks must opine on the physical and mental health of the person by furnishing full details to the court. [Paras 21, 30, 31]

Constitution of India – Art. 21 – Right to reproductive autonomy – Right to abortion – Pregnant person's consent in abortion – Primacy of – Importance of minor's view in termination of pregnancy:

Held: Right to choose and reproductive freedom is a fundamental right u/ Art. 21 – Consent of the pregnant person in matters of reproductive choices and abortion is paramount – Where the opinion of a minor pregnant person differs from the guardian, the court must regard the view of the pregnant person as an important factor while deciding the termination of the pregnancy. [Paras 34, 35]

Gender Identities – Ambit of pregnancy – Enlargement of – Usage of term 'pregnant person' instead of term 'pregnant woman':

Held: Term 'pregnant person' used and recognized that in addition to cisgender women, pregnancy can also be experienced by some non-binary people and transgender men among other gender identities. [Para 21]

Medical Termination of Pregnancy Act, 1971 – s. 3(1) – When pregnancies may be terminated by registered medical practitioners – Protection u/s. 3(1):

Held: s. 3(1) protects the registered medical practitioner from penal provisions against abortion, under IPC, if it is carried out as per the MTP Act – Moreover, no penalty may be attracted to a RMP merely for forming an opinion, in good faith, on whether a pregnancy may be terminated – This is because the MTP Act requires and empowers the RMP to form such an opinion – Its bona fide assured, no aspersions may be cast on the RMP – Same applies to medical

boards constituted u/s. 3(2-C) and 3(2-D) – Opinion of the RMP or the medical board, is indispensable under the scheme of the MTP Act – This inadvertently gives the power to the RMP or the medical board to stand in the way of a pregnant person exercising their choice to terminate the pregnancy – When there is fear or apprehension in the mind of the RMP or the medical board it directly jeopardises the fundamental freedoms of pregnant persons guaranteed under the Constitution – However, the scheme of the MTP Act and the steady line of application of the law by the courts has made it clear that the RMP or the medical board cannot be prosecuted for any act done under the MTP Act in good faith – Opinion of the RMP and the medical board must balance the legislative mandate of the MTP Act and the fundamental right of the pregnant person seeking a termination of the pregnancy. [Paras 22, 23, 25]

Medical Termination of Pregnancy Act, 1971 – s. 3(1) – Permission to terminate the pregnancy – Powers vested in the Courts:

Held: Fundamental rights guaranteed under Part III of the Constitution can be enforced – The courts apply their mind to the case and make a decision to protect the physical and mental health of the pregnant person – In doing so the court relies on the opinion of the medical board constituted under the MTP Act for their medical expertise – Court would thereafter apply their judicial mind to the opinion of the medical board – Thus, the medical board cannot merely state that the grounds u/s. 3(2-B) are not met – Exercise of the jurisdiction of the courts would be affected if they did not have the advantage of the medical opinion of the board as to the risk involved to the physical and mental health of the pregnant person – Thus, a medical board must examine the pregnant person and opine on the aspect of the risk to their physical and mental health. [Para 27]

Medical Termination of Pregnancy Act, 1971 – ss. 5, 3(2-B) – Restriction on the length of the pregnancy for termination – Removal of:

Held: Restriction on the length of the pregnancy for termination is removed, in two instances, firstly u/s. 5 prescribing that a pregnancy may be terminated, regardless of the gestational age, if the medical practitioner is of the opinion formed in good faith that the termination is immediately necessary to save the life of the pregnant person; and secondly u/s. 3(2-B) stipulating that no limit shall apply on the length of the pregnancy for terminating a fetus with substantial

abnormalities – Legislation has made a value judgment in s.3(2-B), that a substantially abnormal fetus would be more injurious to the mental and physical health of a woman than any other circumstance – To deny the same enabling provision of the law would appear prima facie unreasonable and arbitrary – Value judgment of the legislation does not appear to be based on scientific parameters but rather on a notion that a substantially abnormal fetus would inflict the most aggravated form of injury to the pregnant person. [Para 28]

Case Law Cited

X v. State (NCT of Delhi) [2022] 7 SCR 686 **: (2023) 9 SCC 433;** *XYZ v. State of Gujarat* **2023 SCC OnLine SC 1573;** *Z v. State of Bihar* [2017] 8 SCR 212 **: (2018) 11 SCC 572;** *Suchita Srivastava v. Chandigarh Admn.* [2009] 13 SCR 989 **: (2009) 9 SCC 1 – relied on.**

List of Acts

Medical Termination of Pregnancy Act, 1971; Constitution of India.

List of Keywords

Termination of pregnancy; Sexual assault; Order recalled by the Supreme Court; Termination of an advanced pregnancy; Gestational age of the fetus; Well-being and safety of the minor; Reproductive choice; Role of the registered medical practitioners; Role of the medical board; Giving the child in adoption after the delivery; Opinion in good faith; Fear of prosecution among registered medical practitioners; Safe and legal abortions; Fundamental right of a pregnant person; Physical and mental health of the pregnant person; Change in the opinion of the medical board; Right to reproductive autonomy; Right to abortion; Gestational age above twenty-four weeks; Minor's view in termination of pregnancy; Use of term 'pregnant person' instead of term 'pregnant woman'; Cisgender women; Non-binary people; Transgender men; Gender identities; Restriction on the length of the pregnancy for termination; Terminating fetus with substantial abnormalities; Abnormal fetus.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5194 of 2024

From the Judgment and Order dated 04.04.2024 of the High Court of Judicature at Bombay in WPL No. 11208 of 2024

Appearances for Parties

Shantanu M. Adkar, Ms. Bharti Tyagi, Mustafa A. Khan, Advs. for the Appellant.

Ms. Aishwarya Bhati, ASG, Akshaja Singh, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Ms. Yamini Singh, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dr Dhananjaya Y Chandrachud, CJI

Background

1. This appeal emanates from a judgment of a Division Bench of the High Court of Judicature at Bombay dated 4 April 2024 which denied the minor daughter of the Appellant (hereinafter referred to as 'X') permission to terminate her pregnancy. 'X' is a minor, about fourteen years of age and is alleged to have been subjected to sexual assault in September 2023. The incident did not come to the fore till 'X' revealed the incident on 20 March 2024 by which time she was about 25 weeks into her pregnancy. 'X', it has been averred, always had irregular periods and could not have assessed her pregnancy earlier.

2. An FIR was registered with Turbhe MIDC Police Station against the alleged perpetrator on 20 March 2024 for offences punishable under Section 376 of the Indian Penal Code and Sections 4, 8 and 12 of the Protection of Children from Sexual Offences Act 2012. 'X' was taken to a hospital on 21 March 2024 for medical examination and then transferred to the JJ Group of Hospitals, Mumbai for termination of her pregnancy. On 28 March 2024 the medical board of the Grant Government Medical College & Sir JJ Group of Hospitals, Mumbai constituted under the Medical Termination of Pregnancy Act 1971[1] opined that 'X' was physically and mentally fit for termination of her pregnancy subject to the permission of the High Court.

1 MTP Act

3. The Appellant moved the High Court of Judicature at Bombay under Article 226 of the Constitution seeking the termination of pregnancy of her daughter. On 3 April 2024, the medical board issued a 'clarificatory' opinion, without re-examining 'X'. The report denied the termination of pregnancy on the ground that the gestational age of the fetus was twenty-seven to twenty-eight weeks and that there were no congenital abnormalities in the fetus.[2] By the impugned judgment the High Court dismissed the writ petition on the ground that the pregnancy exceeded the statutory period of twenty-four weeks.

4. The Appellant moved this court under Article 136 of the Constitution. The Special Leave Petition was mentioned for urgent orders after the Court had risen on the conclusion of normal working hours at 5:15 pm on 19 April 2024. The Bench reassembled immediately thereafter and had the benefit of hearing the counsel for the Appellant, the Standing Counsel for the State of Maharashtra and Ms Aishwarya Bhati, Additional Solicitor General. While issuing notice, this Court took note of the fact that the report of the Medical Board dated 3 April 2024, which was relied upon by the High Court had not dealt with the impact of the pregnancy on the physical and emotional well-being of 'X'. Accordingly, a fresh Medical Board was directed to be constituted under the Lokmanya Tilak Municipal General Hospital and Lokmanya Tilak Municipal Medical College, Sion, Mumbai.[3] This Court directed that:

> "5. From the material which has been placed on the record, a striking feature which has emerged before this Court, *prima facie*, is that the medical report does not contain an evaluation of the physical and mental status of the minor, particularly having regard to the background leading up to the pregnancy, including the alleged sexual assault. Moreover, it would be necessary that this Court is apprised whether the carrying of the pregnancy to the full term would impact upon the physical and mental well being of the minor who is barely fourteen years old. The Medical Board

2 There is an inexplicable inconsistency on the gestational age in the report of the medical board of the Grant Government Medical College & Sir JJ Group of Hospitals, Mumbai dated 28 March 2024. Point 5 and 6 of the report mention the gestational age as 27 weeks, but the opinion of the board in point 7 mentions the gestational age to be 28 weeks.

3 Sion Hospital

shall also opine on whether a termination of the pregnancy can be carried out at this stage without any threat to the life of the minor.

6. In this view of the matter, we are of the view that the petitioner's daughter should be examined afresh by a Medical Board to be constituted at the Lokmanya Tilak Municipal General Hospital and Lokmanya Tilak Municipal Medical College, Sion, Mumbai tomorrow (20 April 2024). We request the Medical Superintendent of the hospital to constitute a Medical Board for that purpose."

5. A report has been submitted by the Sion Hospital. The minor was examined by a team of six doctors constituted by the Dean. The composition of the team was as follows:

(i) Dr Rajesh Dere, Prof. & Head Dept. of Forensic Medicine;

(ii) Dr Anagha Joshi, Prof. & Head Dept. of Radiology;

(iii) Dr Amarjitsingh Bawa, Additional Prof. Of Dept. of Gynecology & acting Head of Department;

(iv) Dr Nilesh Shah, Prof. & Head Dept. of Psychiatry; and

(v) Dr Swati Manerkar, Prof. & Head Dept. of Neonatology;

6. After examining 'X', the medical board of the Sion Hospital opined that the gestational age of the fetus was 29.6 weeks and continuation of pregnancy will negatively impact the physical and mental well-being of 'X'. Further, it opined that the pregnancy can be terminated with a degree of risk not higher than if the pregnancy was taken to term. The medical board reported as follows:

"1. Whether carrying of the pregnancy to the full term would impact upon the physical and mental well being of the minor who is barely 14 years?

Ans. Yes, continuation of pregnancy against her will may impact negatively on physical and mental well being of the minor who is barely 14 year old.

2. The medical board shall also opine whether termination of pregnancy can be carried out at this stage without any threat to the life of the minor?

> Ans. Yes, termination can be carried out at this stage. The threat of life to the patient if termination of pregnancy carried out at this stage is not higher than the risk of delivery at full term of pregnancy. Also in view of minor being barely 14 years, the chances of surgical intervention (Abdominal Surgery) at term or now may be there."

7. While forwarding the report of the Medical Board, the Dean of Sion Hospital has noted the opinion of the Board in the following terms:

> "The opinion of the committee is forwarded herewith for your perusal. The committee has opined that the medical termination of the pregnancy can be done with due risk and with appropriate counseling of the patient and the relatives. The Psychiatrist also contributed in evaluation of patient and assessing the psychological state of the patient. According to the committee report continuation of pregnancy could cause psychological trauma to the patient."

8. On 22 April 2024, this Court granted leave and pronounced its operative order to set aside the judgment of the High Court of Judicature at Bombay. In view of the urgency involved, while reserving judgment, this Court allowed 'X' to terminate her pregnancy forthwith. This Court noted as follows:

> "10 The following circumstances have been borne in mind, at this stage:
>
> (i) The medical termination of pregnancy is sought in respect of a minor who is 14 years old;
>
> (ii) The pregnancy is alleged to be an emanation from a sexual assault which has resulted in the registration of a First Information Report. The FIR was recorded on 20 March 2024 beyond the period of 24 weeks envisaged in the MTP Act;
>
> (iii) The minor was unaware of the fact that she was pregnant until a very late stage;
>
> (iv) The Medical Board at Sion Hospital has clearly opined that the continuation of the pregnancy against the will of the minor "may impact negatively on physical

and mental well being of the minor who is barely 14 years old"; and

(v) While a certain degree of risk is involved in every procedure for medical termination, the Medical Board has opined that the threat to life of the patient if termination of pregnancy is carried out at this stage is not higher than the risk of delivery at full term of pregnancy.

11. We will further elaborate on the guiding parameters in a reasoned order which will be delivered separately. However, bearing in mind the exigencies of the situation, the welfare of the minor, which is of paramount importance and her safety, we pass the following order:

(i) The judgment and order of the High Court of Judicature at Bombay dated 4 April 2024 shall stand set aside for reasons to follow;

(ii) The Dean at Sion Hospital is requested to immediately constitute a team for undertaking the medical termination of pregnancy of the minor in respect of whom the Medical Board has submitted its report dated 20 April 2024;

(iii) Arrangements shall be made by the State for transportation of the minor to the Hospital and for her return home after the completion of the procedure;

(iv) The State has agreed to bear all the expenses in connection with the procedure and all medical expenses required in the interest of the safety and welfare of the minor; and

(v) Post-termination if any further medical care is required, this may be ensured in the interest of the minor."

9. The above direction requesting the Dean at Sion hospital to constitute a team of doctors for undertaking the medical termination of pregnancy of 'X' was based on the specific request of the appellant who is her mother.

10. Subsequently, a communication dated 26 April 2024 was addressed by the Dean at Sion hospital to Ms Aishwarya Bhati, Additional Solicitor General. The communication reads thus:

"**Sub:-Guidance regarding Case No.9163/2024 order dated 22.04.2024.**

Ref:- Case No.9163/2024.

Respected Madam,

Order was given by Hon. Supreme Court of India to Dean at LTMMC & LTMGH, Sion to immediately constitute a team for undertaking the Medical termination of pregnancy of the minor in respect of whom the Medical Board has submitted its report dated 20.04.2024. On the basis of the order the patient has been admitted at LTMMC & LTMGH, Sion on 23.04.2024 under the expert care of Dr. Amarjitsingh Bawa, Associate Professor & Unit Chief Department of Gynecology.

The Team for undertaking the termination of pregnancy is formed as below:-

1. Dr. Arun Nayak, Prof & Head, Department of Obst & Gynecology.
2. Dr. Rahul Mayekar, Prof & Unit Chief, Department of Obst & Gynecology.
3. Dr. Amarjitsingh Bawa, Asso. Prof & Unit Chief, Department of Obst & Gynecology.
4. Dr. Swati Manerkar, Adhoc Prof & Head (I/C), Department of Neonatology.
5. Dr. Nilesh Shah, Prof & Head, Department of Psychiatry.

We request guidance of Hon. Supreme Court of India before proceeding for termination of pregnancy in the said case of minor girl in view of.

1. We would like to humbly bring to the attention of the Honorable Supreme Court of India that the minor girl's mother is changing her statements. On 24.04.2024 father and mother of the minor girl gave in writing that they gave permission to stop the baby's heart in utero by injecting medicine in the heart. They also gave permission for attempting

normal delivery of the minor girl by giving medicine. During this, if the pregnant minor girl suffers any problem, under such circumstances cesarean section operation may be needed, and they gave permission for the same. If even after giving injection baby is born alive, then they would like to give the baby for adoption.

2. On 25.04.2024 minor girl's mother said that she wanted alive baby & she wanted to give live baby to her relative for adoption. Thus we noticed that the mother of the said girl was changing her statements.

3. On 26.04.2024 the mother of the girl said in front of Medical team that she wants termination of pregnancy after the baby's heart is stopped by injecting medicine in the heart.

4. Hence, due to the changing statements made by the girl's parents and the fact that the sonography done at our hospital on 25.04.2024 reveled 30.2 weeks with baby weight of 1593grams, we humbly request Hon. Supreme Court of India to guide us whether

   (1) The baby should be delivered alive.

   OR

   (2) After injecting intracardiac injection KCL to end the life of the fetus in utero as per

a. The Government of India guidelines MOHFW D.O No. M. 12015/58/2017- MCH dated 14.08.2017, vide section Ve (Copy attached).

b. जा.क्र. राकुकका/पीसीपीएनडीटी/कक्ष ८ ड/नस्ती क्र. ५०७/२० आठवडयापलिकडील वैद्यकीय गर्भपात/मा. उच्च न्यायालय आदेश / स्थायी वैद्यकीय मंडळ व मान्यता प्राप्त वैद्यकीय गर्भपात केंद्रांनी अनुसरावयाची कार्यमार्गदर्शक तत्वे (SOPs) / दिनांक ०:- १८.०१.२०२०. vide section IVc (Copy attached)

5. We are ready to do the termination of pregnancy as per the directives of the Hon. Supreme Court of India. If the baby is born alive, we are ready to keep the

> baby in the Neonatal Intensive Care Unit if required under the care of neonatologist."

11. On the communication being drawn to the attention of the Registrar (Judicial – I), the proceedings were listed before the Court on 29 April 2024, which was the first available working day.

12. In view of the communication of the Dean at Sion hospital, we had the benefit of hearing submissions of counsel again. We considered it appropriate to thereafter interact with the parents of 'X' as well as with the medical team at Sion hospital. We have had an elaborate discussion with the medical team consisting of Dr Arun H Nayak, Professor and Head of the Department of Obstetrics and Gynecology and Dr Amarjeet Kaur Bava, Associate Professor and Unit Chief, Department of Obstetrics and Gynecology, over the video conferencing platform.

13. Dr Arun H Nayak has indicated that after the order of this Court dated 22 April 2024, the medical team followed requisite procedures by carrying out medical investigations and seeking the consent of the parents. According to the medical team, while initially the parents were agreeable to the stoppage of the fetal heart on 24 April 2024, on 25 April 2024 the appellant stated that she desires that the pregnancy be taken to term and that she would thereafter give the child in adoption. Subsequently, on 26 April 2024, the appellant stated that she desired a termination of pregnancy.

14. The doctors stated that in view of the changing views of the appellant and her spouse and the above background, they had moved the Additional Solicitor General with a communication dated 26 April 2024 of the Dean of the Sion hospital, as extracted above. Dr Nayak and Dr Bava have stated that in terms of the guidelines of the Union Government dated 14 August 2017, medical steps would have to be taken by giving an intracardiac injection, KCL, to end the life of the fetus in utero. An SOP has also been issued by the State Government on 18 January 2020. The doctors have stated that the pregnancy of the minor is at an advanced stage. In terms of the applicable guidelines, an intracardiac injection of KCL has to be administered and if the fetal heart is not detected to have stopped after sonography following the administration of the injection, the procedure would have to be repeated. Both the doctors have indicated that this may involve a certain degree of

risk to the minor which cannot be ruled out bearing in mind the late stage of the pregnancy.

15. The parents of 'X' have conversed with the doctors and with the Court on the video conferencing platform in Hindi. Their primary concern was that they should have been apprised a week ago by the medical team after the order of this Court was passed of the inherent dangers in carrying out the procedure in an advanced pregnancy. We appreciate the concerns of the parents and their anguish, particularly having regard to the backdrop in which the pregnancy is stated to have arisen. The issue is about the way forward at the present stage.

16. During the course of the conversation online, the doctors have deliberated on whether a delivery can be induced at this stage. However, both the doctors ruled out such a course of action bearing in mind that inducing a delivery at this stage may have real risks of a deformed child as a result of the premature birth. The situation has been duly explained to the parents of the minor.

17. It has emerged during the course of the discussion that both the parents of 'X' are averse to undertaking any risk to the life and well-being of their daughter at this stage and would prefer to take her home and to readmit her to the Sion hospital in time for her due date of delivery. During the course of the discussion, Dr Bava indicated to the parents that Sion hospital is ready and willing to let 'X' be in the care of the hospital from now until the date of the delivery. However, the father of the minor has specifically stated the he would prefer to take the minor home where she would be in more congenial surroundings with the members of her family. The doctors have indicated to the father and the mother that they should bring the minor back to the hospital for regular antenatal checkups.

18. This Court by its earlier order had authorized the medical team at the Sion hospital to carry out the termination of pregnancy. The reasons on the basis of which such a course was adopted have been elaborated upon in the earlier order, which is extracted above. Even when the Court passed the order on the previous occasion, the minor was in the thirtieth week of her pregnancy. She is now nearing the end of the thirty first week of pregnancy.

19. The sole and only consideration which must weigh with the Court at this stage is the safety and welfare of the minor. We are conscious of the trauma which the minor will face in having to continue the pregnancy for approximately five weeks, if the course of action which has been suggested by her parents is accepted. The Court has been informed that the minor is ready and willing to accept the decision of her parents which is in her best interest. Performing a procedure for termination of an advanced pregnancy at this stage is subject to risks involving the well-being and safety of the minor as explained by the medical team at Sion hospital. Bearing in mind the detailed discussion which took place, the parents of the minor have chosen not to press ahead with the termination of the advanced pregnancy at the present point of time. This decision, should, in our view, be accepted bearing in mind all that has been set out in the earlier part of this order. As a consequence, the earlier order of this Court dated 22 April 2024 shall stand recalled.

20. Before parting with this judgment we would like to shed light on two issues which have caught our attention in these proceedings. First, the opinion of the medical board constituted under the MTP Act must reflect the effect of the pregnancy on the pregnant person's physical and mental health. Second, the MTP Act and the reproductive right of a pregnant person gives primacy to their consent.

Role of the RMP and medical board under the MTP Act

21. In **X v. State (NCT of Delhi)**,[4] a three-judge bench of this Court had recognised that the fear of prosecution among registered medical practitioners[5] is a barrier for pregnant persons[6] to access safe and legal abortions. The opinion of the RMP is decisive in matters of termination of pregnancy under the MTP Act. The purpose of the opinion of the RMP borrows from the legislative intent of the MTP Act which is to protect the health of a pregnant person and facilitate safe, hygienic, and legal abortion. The right to abortion is a concomitant right of dignity, autonomy and reproductive choice. This right is guaranteed under Article 21 of the Constitution. The

4 [2022] 7 SCR 686 : (2023) 9 SCC 433

5 "RMP"

6 We use the term 'pregnant person' and recognize that in addition to cisgender women, pregnancy can also be experienced by some non-binary people and transgender men among other gender identities.

decision to terminate pregnancy is deeply personal for any person. The choice exercised by a pregnant person is not merely about their reproductive freedom but also about their agency as recognised by this court in **X v. State (NCT of Delhi)**.[7] It is therefore imperative that the fundamental right of a pregnant person is not compromised for reasons other than to protect the physical and mental health of the pregnant person.

22. Section 3(1) of the MTP Act protects the registered medical practitioner from penal provisions against abortion, under the Indian Penal Code,[8] if it is carried out as per the MTP Act. Moreover, no penalty may be attracted to a RMP merely for forming an opinion, in good faith, on whether a pregnancy may be terminated. This is because the MTP Act requires and empowers the RMP to form such an opinion. Its *bona fide* assured, no aspersions may be cast on the RMP. The same applies to medical boards constituted under Section 3(2-C) and Section 3(2-D) of the MTP Act.

23. The opinion of the RMP or the medical board, as the case may be, is indispensable under the scheme of the MTP Act. This inadvertently gives the power to the RMP or the medical board to stand in the way of a pregnant person exercising their choice to terminate the pregnancy. When there is fear or apprehension in the mind of the RMP or the medical board it directly jeopardises the fundamental freedoms of pregnant persons guaranteed under the Constitution. However, the scheme of the MTP Act and the steady line of application of the law by the courts has made it clear that the RMP or the medical board cannot be prosecuted for any act done under the MTP Act in good faith.

24. In the present case, the medical board of the Grant Government Medical College & Sir JJ Group of Hospitals, Mumbai had prepared a report dated 28 March 2024 stating that the pregnancy may be terminated in view of the physical and mental health of 'X'. The report however sought the permission of the High Court since the gestational age of the fetus was above twenty four weeks, which is the permissible age for termination of pregnancy under the MTP Act. What is inexplicable is the diametrically opposite view taken

7 [2022] 7 SCR 686 : (2023) 9 SCC 433

8 "IPC"

by the medical board in its 'clarificatory' opinion dated 3 April 2024. As we have noted above, the medical board issued a clarification without re-examining 'X'. Moreover, the opinion did not elaborate on the change in circumstances which prompted the board to issue a clarification on its earlier opinion.

25. From a perusal of the MTP Act, its statement of object and reasons as well as the recommendation of the Shah Committee which examined the issue of liberalising abortion laws in India,[9] two clear postulates emerge as to the legislative intent of the MTP Act. Firstly, the health of the woman is paramount. This includes the risk avoided from the woman not availing unsafe and illegal methods of abortion. Secondly, disallowing termination does not stop abortions, it only stops *safe* and *accessible* abortions. The opinion of the RMP and the medical board must balance the legislative mandate of the MTP Act and the fundamental right of the pregnant person seeking a termination of the pregnancy. However, as noticed above and by this Court in **X v. State (NCT of Delhi)**[10] the fear of prosecution among RMPs acts as a barrier for pregnant people in accessing safe abortion. Further, since the MTP Act only allows abortion beyond twenty four weeks if the fetus is diagnosed with substantial abnormalities, the medical board opines against termination of pregnancy merely by stating that the threshold under Section 3(2-B) of the MTP Act is not satisfied. The clarificatory report dated 3 April 2024 fell into this error by denying termination on the ground that the gestational age of the fetus is above twenty-four weeks and there are no congenital abnormalities in the fetus.

26. The report failed to form an opinion on the impact of the pregnancy on the physical and mental health of the pregnant person. If a pregnant person meets the condition under Section 3(2-B) of the MTP Act then there would be no need for any permission by the courts. Therefore, whenever a pregnant person approaches the High Court or this Court, it is imperative for the medical board to opine on the physical and mental health of the pregnant person. This court in **XYZ** v. **State of Gujarat**,[11] held that the medical board or the High Court cannot refuse abortion merely on the ground that the gestational

9 Report of the Committee to Study the Question of Legislation of Abortion, Ministry of Health and Family Planning, Government of India, dated December 1966.

10 [2022] 7 SCR 686 : (2023) 9 SCC 433

11 2023 SCC OnLine SC 1573

age of the pregnancy is above the statutory prescription. In light of the peculiar circumstances of that case where the pregnancy was detrimental to the physical and mental health of the pregnant person, this Court held that:

> "**10.** We find that in the absence of even noticing the aforesaid portion of the report, the High Court was not right in simply holding that "the age of the foetus is almost 27 weeks as on 17.08.2023 and considering the statements made by the learned advocate for the petitioner-victim and the averments made in the application the petition for medical termination of pregnancy stands rejected", which, in our view is *ex facie* contradictory...
>
> …
>
> **19.** The whole object of preferring a Writ Petition under Article 226 of the Constitution of India is to engage with the extraordinary discretionary jurisdiction of the High Court in exercise of its constitutional power. Such a power is vested with the constitutional courts and discretion has to be exercised judiciously and having regard to the facts of the case and by taking into consideration the relevant facts while leaving out irrelevant considerations and not vice versa."

27. The powers vested under the Constitution in the High Court and this Court allow them to enforce fundamental rights guaranteed under Part III of the Constitution. When a person approaches the court for permission to terminate a pregnancy, the courts apply their mind to the case and make a decision to protect the physical and mental health of the pregnant person. In doing so the court relies on the opinion of the medical board constituted under the MTP Act for their medical expertise. The court would thereafter apply their judicial mind to the opinion of the medical board. Therefore, the medical board cannot merely state that the grounds under Section 3(2-B) of the MTP Act are not met. The exercise of the jurisdiction of the courts would be affected if they did not have the advantage of the medical opinion of the board as to the risk involved to the physical and mental health of the pregnant person. Therefore, a medical board must examine the pregnant person and opine on the aspect of the risk to their physical and mental health.

28. The MTP Act has removed the restriction on the length of the pregnancy for termination in only two instances. Section 5 of the MTP Act prescribes that a pregnancy may be terminated, regardless of the gestational age, if the medical practitioner is of the opinion formed in good faith that the termination is immediately necessary to save the life of the pregnant person. Section 3(2-B) of the Act stipulates that no limit shall apply on the length of the pregnancy for terminating a fetus with substantial abnormalities. The legislation has made a value judgment in Section 3(2-B) of the Act, that a substantially abnormal fetus would be more injurious to the mental and physical health of a woman than any other circumstance. In this case, the circumstance against which the provision is comparable is rape of a minor. To deny the same enabling provision of the law would appear *prima facie* unreasonable and arbitrary. The value judgment of the legislation does not appear to be based on scientific parameters but rather on a notion that a substantially abnormal fetus will inflict the most aggravated form of injury to the pregnant person. This formed the basis for this Court to exercise its powers and allow the termination of pregnancy in its order dated 22 April 2024. The provision is arguably suspect on the ground that it unreasonably alters the autonomy of a person by classifying a substantially abnormal fetus differently than instances such as incest or rape. This issue may be examined in an appropriate proceeding should it become necessary.

29. Moreover, we are conscious of the fact that the decision to terminate pregnancy is one which a person takes seriously. The guidelines to terminate pregnancy as well as the scheme of the MTP Act show the seriousness attached to the well-being of the pregnant person throughout the process envisaged under the MTP Act. Change in the opinion of the medical board may cause undue trauma and exertion to a pregnant person whose mental health is understandably under distress. While we understand the need for a medical board to issue a clarificatory opinion based on the facts and circumstances of each case, the board must explain the reasons for the issuance of the clarification and, in particular, if their opinion has changed from the earlier report. Pregnant persons seeking termination of pregnancy seek predictability for their future. The uncertainty caused by changing opinions of the medical board must therefore balance the distress it would cause to the pregnant person by providing cogent and sound reasons.

30. The opinion of the pregnant person must be given primacy in evaluating the foreseeable environment of the person under Section 3(3) of the MTP Act.[12] In **Z v. State of Bihar**,[13] this Court found that the state authorities had failed in not terminating the pregnancy before the passage of twenty weeks which was permissible under the law. While a pregnancy beyond the statutory prescription would require the intervention of a constitutional court, the vitality of time sensitivity was recognised by this Court. 'X' was taken for termination of her pregnancy at the gestational age of twenty-five weeks in the present case. The passage of time in seeking the permission of this Court after being unsuccessful before the High Court matured the gestational age of the fetus to almost twenty-nine weeks. This increased the risk involved in ending the pregnancy of 'X' inducing the voluntary change of opinion by 'X' and her parents to take the pregnancy to term.

31. This highlights the need for giving primacy to the fundamental rights to reproductive autonomy, dignity and privacy of the pregnant person by the medical board and the courts. The delays caused by a change in the opinion of the medical board or the procedures of the court must not frustrate the fundamental rights of pregnant people. We therefore hold that the medical board evaluating a pregnant person with a gestational age above twenty-four weeks must opine on the physical and mental health of the person by furnishing full details to the court.

Primacy of the pregnant person's consent in abortion

32. As noted above, the order of this court allowing 'X' to terminate her pregnancy is recalled. This decision is made in light of the decisional and bodily autonomy of the pregnant person and her parents. The MTP Act does not allow any interference with the personal choice of a pregnant person in terms of proceeding with the termination. The Act or indeed the jurisprudence around abortion developed by the courts leave no scope for interference by the family or the partner of a pregnant person in matters of reproductive choice.

33. As stated above, the role of the RMPs and the medical board must be in a manner which allows the pregnant person to freely exercise

12 **X** v. **State (NCT of Delhi)** [2022] 7 SCR 686 : (2023) 9 SCC 433

13 [2017] 8 SCR 212 : (2018) 11 SCC 572

their choice. In the present case, the guardians of 'X', namely her parents, have also consented for taking the pregnancy to term. This is permissible as 'X' is a minor and the consent of the guardian is prescribed under Section 3(4)(a) of the MTP Act.

34. In **Suchita Srivastava v. Chandigarh Admn.**[14], a three-judge Bench of this Court has held that the right to make reproductive choices is a facet of Article 21 of the Constitution. Further, the consent of the pregnant person in matters of reproductive choices and abortion is paramount. The purport of this Court's decision in **Suchita Srivastava** (supra) was to protect the right to abortion on a firm footing as an intrinsic element of the fundamental rights to privacy, dignity and bodily integrity as well as to reaffirm that matters of sexual and reproductive choices belong to the individual alone. In rejecting the State's jurisdiction as the *parens patriae* of the pregnant person, this Court held that no entity, even if it is the State, can speak on behalf of a pregnant person and usurp her consent. The choice to continue pregnancy to term, regardless of the court having allowed termination of the pregnancy, belongs to the individual alone.

35. In the present case the view of 'X' and her parents to take the pregnancy to term are in tandem. The right to choose and reproductive freedom is a fundamental right under Article 21 of the Constitution. Therefore, where the opinion of a minor pregnant person differs from the guardian, the court must regard the view of the pregnant person as an important factor while deciding the termination of the pregnancy.

Conclusion

36. In the facts and circumstances of this case, we issue the following directions:

    (i) The Sion hospital shall bear all the expenses in regard to the hospitalization of the minor over the past week and in respect of her re-admission to the hospital for delivery as and when she is required to do so; and

    (ii) In the event that the minor and her parents desire to give the child in adoption after the delivery, the State Government shall take

14 [2009] 13 SCR 989 : (2009) 9 SCC 1

all necessary steps in accordance with the applicable provisions of law to facilitate this exercise. This shall not be construed as a direction of this Court binding either the parents or the minor and the State shall abide by the wishes as expressed at the appropriate stage.

37. In light of the issues which arose before this Court we record our conclusions as follows:

(i) The MTP Act protects the RMP and the medical boards when they form an opinion in good faith as to the termination of pregnancy;

(ii) The medical board, in forming its opinion on the termination of pregnancies must not restrict itself to the criteria under Section 3(2-B) of the MTP Act but must also evaluate the physical and emotional well being of the pregnant person in terms of the judgment;

(iii) When issuing a clarificatory opinion the medical board must provide sound and cogent reasons for any change in opinion and circumstances; and

(iv) The consent of a pregnant person in decisions of reproductive autonomy and termination of pregnancy is paramount. In case there is a divergence in the opinion of a pregnant person and her guardian, the opinion of the minor or mentally ill pregnant person must be taken into consideration as an important aspect in enabling the court to arrive at a just conclusion.

38. In view of the above, the appeal is disposed of. There shall be no order as to costs.

39. Pending application(s), if any, disposed of.

Headnotes prepared by: Nidhi Jain

Result of the case:
Appeal disposed of.

[2024] 5 S.C.R. 492 : 2024 INSC 380

Prashant Singh & Ors. Etc.
v.
Meena & Ors. Etc.

(Civil Appeal Nos. 8743-8744 of 2014)

25 April 2024

[Surya Kant* and Pamidighantam Sri Narasimha, JJ.]

Issue for Consideration

Whether the consolidation officer can grant ownership to any person in respect of a land/property inherited before commencement proceedings under U.P. Consolidation of Holdings Act, 1953.

Headnotes

U.P. Consolidation of Holdings Act, 1953 – s. 49 – Whether the consolidation officer can grant ownership to a person in respect of a land/property:

Held: Section 49 of the U.P. Consolidation of Holdings Act, 1953 ("1953 Act") is a provision of transitory suspension of jurisdiction of Civil or Revenue Court only during the period when consolidation proceedings are pending — Such suspension of jurisdiction of Civil or Revenue Court through the non obstante provision is only with respect to the declaration and adjudication of rights of tenure holders — The duty of a Consolidation Officer under Section 49 of the 1953 Act is to prevent fragmentation and consolidate the different parcels of land of a tenure holder — The power under Section 49 of the 1953 Act cannot be exercised to take away the vested title of a tenure holder — Kalyan Singh had acquired ancestral rights as a tenure holder – He was co-owner in the suit land much before the consolidation proceedings commenced — The only declaration and adjudication of rights of Ramji Lal or Kalyan Singh that a Consolidation Officer could undertake under Section 49 of the 1953 Act was to avoid the fragmentation of their respective land holdings and consolidate or redistribute the parcels of land among them — The provision does not enable the Consolidation Officer to grant ownership to Ramji Lal in respect of a property, which, before the consolidation proceedings, never vested in him, vice versa, the Consolidation Officer could not take away the ownership rights of Kalyan Singh which he had already inherited much before the commencement of the consolidation proceedings — The order

* Author

passed by Consolidation Officer has rightly been held to be null and void and without any jurisdiction by High Court. [Paras 12,13]

U.P. Consolidation of Holdings Act, 1953 – s. 49 — Whether High Court exceeded its jurisdiction by interfering with the order of remand passed by the Board of Revenue for determination of the legal issue of maintainability.

Held: High court was correct in interfering in the Board of Revenue's order — As once Kalyan Singh is held to be co-owner in the subject property, the exclusive possession of the land, if any, with Ramji Lal, was joint in nature — Kalyan Singh was already deemed to be in joint possession of the subject land in the eyes of law, hence he was not required to seek a decree of possession qua his share in the suit land. [Para 17]

Case Law Cited

Attar Singh v. State of U.P. [1959] Supp. 1 SCR 928; *Amar Nath v. Kewla Devi* [2014] 14 SCR 677 : **(2014) 11 SCC 273;** *Karbalai Begum v. Mohd. Sayeed* [1981] 1 SCR 863 : **(1980) 4 SCC 396 —relied on.**

List of Acts

U.P. Consolidation of Holdings Act, 1953; Specific Relief Act, 1963.

List of Keywords

Section 49 of U.P. Consolidation of Holdings Act, 1953; Exercise of power by Consolidation Officer under Section 49 of U.P. Consolidation of Holdings Act, 1953; Usurping of power by Consolidation Officer.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos.8743-8744 of 2014

From the Judgment and Order dated 16.01.2013 of the High Court of Uttarakhand at Nainital in WP No.752 of 2007 and WP No.305 of 2001 (Old No. WP No.22810 of 1989)

With

Civil Appeal No.8971 of 2014 and Contempt Petition (C) No.86 of 2024 in Civil Appeal Nos. 8743-8744 of 2014

Appearances for Parties

S.R. Singh, Kavin Gulati, Sr. Advs., Sushant Kumar Yadav, Ajay Yadav, Prateek Yadav, Gaurav Lomes, Prithvi Yadav, Anurag Singh, Dhroov Kumar Singh, Sanjiv Tandan, Ms. Swapnil Singh, Ms. Radha Rajput, Ankur Yadav, Yash Pal Dhingra, Ms. Asha Gopalan Nair, Rohit Amit Sthalekar, Purnendu Bajpai, Shashank Singh, Ms. Abha Jain, Dinesh Kumar Garg, Akshat Kumar, M.P. Parthiban, Tanmaya Agarwal, Wrick Chatterjee, Mrs. Aditi Agarwal, Vinayak Mohan, A. P. Mohanty, Mohith Sivakumar, Dushyant Sharma, Ankur Prakash, Mohd. Saquib Siddiqui, Amod Kumar Bidhuri, Ms. Srishti Kasana, Ms. Priyanka Singh, Yudhister Bharadwaj, Ms. Jyoti Sharma, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgement

Surya Kant, J.

1. Application (IA No.115495/2021) for bringing on record the legal representatives of deceased appellant no.2 is allowed after condoning the delay, if any. Cause title be amended accordingly.

2. In these civil appeals the controversy revolves around the ownership rights over Khasra Nos.115, 151 and 152, situated within the Revenue Estate of village Mustafabad, District Haridwar, Uttaranchal (now Uttarakhand). It is broadly not in dispute that the subject land is an ancestral property originally owned by Angat, who died leaving behind three sons, namely, Ramji Lal, Khushi Ram and Pyara. Pyara died issue-less and his share devolved equally upon his other two brothers. Khushi Ram also seems to have died before 1950 leaving behind his son Kalyan Singh, who succeeded his father's share in the subject property. The fact that Kalyan Singh was co-owner/co-sharer in the subject land is fortified from the entries in the revenue record, which the appellants have produced in these proceedings as well.

3. It seems that consolidation proceedings were initiated in village Mustafabad in late 50s or early 60s in accordance with the provisions of the U.P. Consolidation of Holdings Act, 1953 (in short, the "1953 Act"). Ramji Lal – one of the uncles of Kalyan Singh – approached the Consolidation Officer in the pending reference pertaining to their land under the erstwhile Section 9(3) of the 1953 Act (i.e., as

it stood before the U.P. (Amendment) Act 8 of 1963), claiming that whereabouts of Kalyan Singh were unknown and hence his name may be expunged from the ownership entry of the revenue record. The Consolidation Officer passed an order dated 08.05.1960 on the basis of a report dated 17.03.1960 of the Assistant Consolidation Officer, which *inter alia* claimed that Kalyan Singh – co-tenure holder had not been heard for last 8 of 10 years, he did not arrive in the village and an affidavit to this effect was filed by his uncle Ramji Lal. Since all efforts to secure service on Kalyan Singh failed, the Consolidation Officer, "in the interest of correction of record", expunged the name of Kalyan Singh from the record and declared his civil death. On this premise, Ramji Lal (later on his legal representatives) started claiming to be the sole owner(s) of the entire land holding of Angat.

4. Kalyan Singh then instituted Suit No.19/1985 on 12.03.1985 before the Assistant Collector, First Class, Haridwar for declaration of his half share in the suit property. The suit was decreed in his favor. Ramji Lal filed an appeal, which was dismissed on 06.08.1986. Ramji Lal then approached the Board of Revenue in a Second Appeal. That appeal was allowed in part on 31.07.1989 and the suit was remanded with a direction to adjudicate the dispute regarding Khasra No.115 afresh after forming an issue with respect to applicability of Section 34 of the Specific Relief Act, 1963. Kalyan Singh challenged the aforesaid order of the Board of Revenue before the High Court. His writ petition has been allowed by the High Court vide impugned judgment dated 16.01.2013.

5. We have heard learned senior counsel on behalf of the appellants as well as learned senior counsel who is representing the prospective vendees in whose favour Kalyan Singh had allegedly executed an agreement to sale and a mortgage deed. The other learned counsels representing the interested parties have also been heard and the material placed on record perused.

6. The sheet anchor of Mr. S.R. Singh, learned senior counsel for the appellants, is Section 49 of the 1953 Act. It is urged that the order dated 08.05.1960 passed by the Competent Authority in exercise of its powers under that provision, having attained finality, Kalyan Singh lost his right, title or interest in the subject land. It is contended that not only the subsequent suit filed by Kalyan Singh was expressly precluded under the said provision, such a suit was hopelessly time

barred. It is then argued that the High Court exceeded its jurisdiction in interfering with the order of remand passed by the Board of Revenue for determination of the legal issue as to maintainability of a simpliciter suit for declaration, without seeking consequential relief of possession filed by Kalyan Singh. The Board, it is asserted, rightly remanded the suit for determination of its maintainability keeping in mind Section 34 of the Specific Relief Act, 1963.

7. Contrarily, it is urged by learned senior counsel/other counsels for the respondents that neither Section 49 of the 1953 Act was attracted in the instant case nor the Consolidation Officer was competent to rob off Kalyan Singh of his ancestral right as a tenure holder on the subject land. Such a power, according to learned senior counsel for the respondents, is beyond the purview of Section 49 of the 1953 Act. As regard to Section 34 of the Specific Relief Act, 1963, it is urged that since Kalyan Singh was co-owner in the subject land along with his uncle Ramji Lal or his successors, the possession of the subject land continued in favour of all the co-owners. Consequently, even if one of them was in actual physical possession, such possession was of permissible nature, for and on behalf of all the co-owners. It is thus maintained that, no consequential relief like a decree for possession was required to be sought by Kalyan Singh in his declaratory suit.

8. Section 49 of the 1953 Act reads as follows:

> *"49. Bar to Civil Court jurisdiction — Notwithstanding anything contained in any other law Courts for the time being in force, the declaration and adjudication of rights of tenure-holder in respect of land, lying in an area, for which a notification has been issued under sub-section (2) of Section 4, or adjudication of any other right arising out of consolidation proceedings and in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act:*
>
> *Provided that nothing in this section shall preclude the Assistant Collector from initiating proceedings under Section 122-B of the U.P. Zamindari Abolition and Land*

Reforms Act, 1950 (U.P. Act 1 of 1951) in respect of any land, possession over which has been delivered or deemed to be delivered to a Gram Sabha under or in accordance with the provisions of this Act."

9. On a plain reading, we find that Section 49 of the 1953 Act contemplates bar to the jurisdiction of the Civil or Revenue Court for the grant of declaration or adjudication of rights of tenure holders in respect of land lying in an area for which consolidation proceedings have commenced. Section 49 of the 1953 Act is a provision of transitory suspension of jurisdiction of Civil or Revenue Court only during the period when consolidation proceedings are pending. Notably, such suspension of jurisdiction of these Courts through the *non obstante* provision is only with respect to the declaration and adjudication of rights of tenure holders. In other words, unless a person is a pre-existing tenure holder, Section 49 does not come into operation.

10. The expression "tenure holder" has been defined in Section 3(11) of the 1953 Act and it reads as follows:

> *"(11) "Tenure-holder" means a bhumidhar with transferable rights or bhumidhar with non-transferable rights and includes—*
>
> *(a) an asami,*
>
> *(b) a Government lessee or Government grantee, or*
>
> *(c) a co-operative farming society satisfying such conditions as may be prescribed;"*

11. It may be seen that a tenure holder means a bhumidhar with transferable or non-transferable rights. The question that arises further is as to what kind of rights of such tenure holders can be declared or adjudicated in exercise of powers under Section 49 of the 1953 Act? In this regard, the scheme of the statute becomes very material.

12. The object of the 1953 Act is to prevent fragmentation of the land holdings and consolidate them in such a fair and equitable manner that each tenure holder gets nearly equivalent land rights in the same revenue estate.[1] The duty of a Consolidation Officer under Section

1 *Attar Singh v. State of U.P.* [1959] Supp. 1 SCR 928, para 3

49 of the 1953 Act is to prevent fragmentation and consolidate the different parcels of land of a tenure holder. Such a power can be exercised only in respect of those persons who are already the tenure holders of the land. Conversely, the power under Section 49 of the 1953 Act cannot be exercised to take away the vested title of a tenure holder. No such jurisdiction is conferred upon a Consolidation Officer or any other Authority under the 1953 Act.[2] The power to declare the ownership in an immovable property can be exercised only by a Civil Court save and except when such jurisdiction is barred expressly or by implication under a law. Section 49 of the 1953 Act does not and cannot be construed as a bar on the jurisdiction of the Civil Court to determine the ownership rights.[3]

13. Having held so, it is not difficult to explain that Kalyan Singh had acquired ancestral rights as a tenure holder. He was co-owner in the suit land much before the consolidation proceedings commenced. Hence, the only declaration and adjudication of rights of Ramji Lal or Kalyan Singh that a Consolidation Officer could undertake under Section 49 of the 1953 Act was to avoid the fragmentation of their respective land holdings and consolidate or redistribute the parcels of land among them. As analyzed above, the provision does not enable the Consolidation Officer to grant ownership to Ramji Lal in respect of a property, which, before the consolidation proceedings, never vested in him. *Vice versa*, the Consolidation Officer could not take away the ownership rights of Kalyan Singh which he had already inherited much before the commencement of the consolidation proceedings.

14. That being so, the order dated 08.05.1960 passed by the Consolidation Officer has rightly been held to be null and void and without any jurisdiction. It was passed usurping a power fraudulently, which never ever vested in a Consolidation Officer. The said order is thus liable to be ignored for all intents and purposes. Having held that, it is not necessary for us to go into the question of fraud played upon Kalyan Singh in securing that order with or without collusion of the Consolidation Officer. All that is required to be held is that the order dated 08.05.1960 had no binding force or any adverse effect on the rights of Kalyan Singh.

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2 *Amar Nath v. Kewla Devi* [2014] 14 SCR 677 : (2014) 11 SCC 273, para 17

3 *Karbalai Begum v. Mohd. Sayeed* [1981] 1 SCR 863 : (1980) 4 SCC 396, para 12-13

15. In all fairness, learned senior counsel for the appellants has placed reliance on a decision of this Court in *Sita Ram vs. Chhota Bhondey & Ors.*,[4] for contending that during the pendency of consolidation proceedings, the Authority under the Act assumes the jurisdiction of the Civil Court to determine all types of rights including the dispute regarding title over the land. In our considered opinion that is not the *ratio decidendi* of the decision in *Sita Ram (supra)*. That was a case where the dispute related to *sirdari* holdings which were subject matter of the proceedings under the 1953 Act. These proceedings attained finality when the writ petition challenging the order of the Deputy Director of Consolidation was dismissed *in limine* and that order was further upheld by this Court under Article 133 of the Constitution of India. Thereafter, the unsuccessful party filed a Civil Suit seeking a declaration that the order passed by the Deputy Director of Consolidation (which had been upheld by the High Court and this Court) was without jurisdiction. The said suit was contested with an objection that it was barred by Section 49 of the 1953 Act. In this backdrop, this Court very aptly held that the subsequent civil suit was barred under Section 49 of the 1953 Act. The facts will speak for themselves as to how Section 49 of the 1953 Act was construed by this Court in the light of the events noticed above.

16. However, that is not the factual situation here. We may hasten to add that in the present case, Kalyan Singh filed the suit for declaration questioning the deletion of his name from the revenue record as a co-owner. As held earlier in paragraph 14 of this order, the order dated 08.05.1960 of the Consolidation Officer in the instant case was totally without jurisdiction and not being an order within the framework of the 1953 Act, and it could not bind the rights of Kalyan Singh.

17. As regard to the contention that the High Court ought not have interfered with the Board's Order remanding the case to the Trial Court to examine the legal issue of applicability of Section 34 of the Specific Relief Act, 1963, the same just deserves to be noticed and rejected. We say so for the reason that once Kalyan Singh is held to be co-owner in the subject property, the exclusive possession of the land, if any, with Ramji Lal, was joint in nature and it was for and on behalf of all the co-owners. Kalyan Singh was already deemed to

4 [1990] Supp. 2 SCR 184 : 1991 Supp (1) SCC 556

be in joint possession of the subject land in the eyes of law, hence he was not required to seek a decree of possession *qua* his share in the suit land.

18. For the reasons afore-stated, we do not find any merit in these appeals, which are accordingly dismissed.

Contempt Petition (C) No.86/2024

19. In view of the fact that the appeals have been decided on merits and Kalyan Singh's legal heir can now seek consequential rights in the suit land, we do not deem it necessary to entertain these contempt proceedings and leave the parties to work out their remedies.

20. The contempt petition is, accordingly, dismissed.

Headnotes prepared by:
Gaurav Upadhyay, Hony. Associate Editor
(*Verified by:* Shadan Farasat, Adv.)

Result of the case:
Appeals and
Contempt petition dismissed.

[2024] 5 S.C.R. 501 : 2024 INSC 359

Rahul Kumar Yadav
v.
The State of Bihar

(Criminal Appeal No. 177 of 2018)

25 April 2024

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

Issue for Consideration

The issue for consideration was challenge to the conviction of the Petitioner under Section 302 and 394 IPC on the ground that the courts below erred in not considering the Petitioner's plea of juvenility on the date of commission of the alleged offence.

Headnotes

Criminal Law – Plea of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case – Courts should be guided by object and purpose of the Juvenile Justice (JJ) Act and the matter should be considered prima facie on the touchstone of preponderance of probability – Juvenile Justice (Care and Protection) Act, 2015 – s.9(2).

Held: The Court held that the claim of juvenility can be raised for the first time even in appeal if not pressed before the trial court, including the Supreme Court – The focus of JJ Act is on the juvenile's reformation and rehabilitation, and hyper technical approach of the Court should not defeat the beneficent provisions contained in the Act – Reliance placed on Section 9(2) of JJ Act, 2015. [Para 10-13]

Juvenile Justice (Care and Protection) Act, 2015 – s.94 – Prima facie case/ initial burden to be discharged by the claimant to satisfy the Court that inquiry into the belated claim of juvenility is necessary – Materials

Held: The Court reiterated the guidelines laid down for evaluating the claim of juvenility raised after conviction by the Supreme Court in ***Abuzar Hossain vs State of West Bengal***, (2012) 10 SCC 489 – The Court observed that where the plea of juvenility is raised at a belated stage, medical tests could be resorted to for age determination in absence of the documents enumerated in Section 94 of the JJ Act, 2015. [Para 12-13]

* Author

Case Law Cited

Abuzar Hossain vs State of West Bengal [2012] 9 SCR 244 **: (2012) 10 SCC 489;** *Vinod Katara v. State of Uttar Pradesh* [2022] 9 SCR 836 **: 2022 SCCOnLine SC 1204 – relied on.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973; Arms Act, 1959.

List of Keywords

Plea of juvenility; Juvenile; Date of commission of offence; Stage of raising the plea; Irrelevant; Proper inquiry; *Prima facie* satisfaction; Documents / evidence; Ossification test.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 177 of 2018

From the Judgment and Order dated 29.06.2017 in CRLA No. 437 of 2013 and 30.04.2014 in CRLA No.518 of 2013 of the High Court of Judicature at Patna

With

Criminal Appeal No. 214 of 2018

Appearances for Parties

Rauf Rahim, Sr. Adv., Aviral Kashyap, Ashish Jha, Prabhsharan Singh Mohi, Abhijeet Chatterjee, Subodh Kr. Pathak, Ms. Barnali Basak, Shashi Ranjan, Pawan Kumar Sharma, Akash Swami, Dharmendra Kumar Sinha, Advs. for the Appellant.

Azmat Hayat Amanullah, Adv. for the Respondent.

Judgment / Order of the Supreme Court

Judgement

Mehta, J.

Criminal Appeal No. 177 of 2018

1. This appeal is preferred by the appellant-Rahul Kumar Yadav assailing the judgments dated 30th April, 2014 and 29th June, 2017 passed by

the learned Division Bench of Patna High Court in Criminal Appeal No. 518 of 2013.

2. The appellant and the co-accused were tried by the learned first Additional Sessions Judge, Darbhanga(hereinafter being referred to as the 'trial Court') in Sessions Trial No. 441 of 2011 for the offences punishable under Sections 302 and 394 of the Indian Penal Code, 1860(hereinafter being referred to as 'IPC') and Section 27(2) of the Arms Act, 1959. The trial Court, vide judgment dated 9th April, 2013, convicted the appellant and the co-accused for the offences stated above and qua the charge under Section 302 IPC, awarded death sentence to them.

3. The accused assailed the said judgment by filing an appeal before the Patna High Court. A reference under Section 366 of Code of Criminal Procedure, 1973 was also made by the trial Court for confirmation of the death sentence. The learned Judges of the Division Bench of the Patna High Court, gave a split opinion vide judgment dated 30th April, 2014 with one of the learned judges opining that the appeal was devoid of merit and other learned judge opining that the appeal deserves to be allowed and the accused were entitled to be acquitted by giving them the benefit of doubt. In view of the difference of opinion between the learned Judges of the Division Bench, the matter was referred to the third learned Single Judge of the Patna High Court who dismissed the appeal vide judgment dated 29th June, 2017 but commuted the death sentence awarded to the appellant and the co-accused to life imprisonment.

4. It may be stated here that even before the case was committed, the appellant herein had moved an application under Section 7-A of the Juvenile Justice(Care and Protection of Children) Act, 2000(hereinafter, being referred to as JJ Act, 2000) before the learned Chief Judicial Magistrate claiming that he was a juvenile as on the date of the incident, i.e., 27th July, 2011. In the said application, reliance was placed by the appellant on his own horoscope. However, the Chief Judicial Magistrate proceeded to reject the said application.

5. When the matter was committed by the Chief Judicial Magistrate to the trial Court, a fresh petition under Section 7-A of the JJ Act, 2000 was filed by the appellant claiming himself to be a juvenile in conflict with law which was rejected vide order dated 28th November, 2011

considering the fact that earlier the Chief Judicial Magistrate had rejected a similar application preferred by the appellant.

6. While addressing the Court in this appeal, Shri Rauf Rahim, learned senior counsel representing the appellant, at the outset, submitted that the plea made on behalf of the appellant in the trial Court claiming that he was a juvenile on the date of the incident was dismissed in an absolutely perfunctory manner without holding proper inquiry and simply on the ground that the same prayer had been turned down by the learned Chief Judicial Magistrate earlier.

7. Even in the appeal before the High Court, a pertinent plea was raised on behalf of the appellant that he was a juvenile on the date of the incident and thus, the proceedings undertaken against him in the trial Court were vitiated. However, the High Court also failed to advert to the said prayer. He thus urged that an inquiry should be directed to determine the age of the appellant so as to decide his plea of juvenility as per law.

8. *Per contra*, Shri Azmat Hayat Amanullah, learned counsel for the State opposed the submissions of Shri Rauf Rahim and urged that the highly belated plea of juvenility raised on behalf of the appellant should not be entertained by this Court.

9. We have given our thoughtful consideration to the submissions advanced on behalf of the appellant and have also gone through the material available on record.

10. Indisputably, during the pendency of the appeal before the Patna High Court, the Juvenile Justice (Care and Protection) Act, 2015(hereinafter being referred to as the 'JJ Act 2015') had come into force which provides a comprehensive mechanism to consider the prayer of juvenility raised on behalf of an accused claiming to be a child on the date of the commission of the offence. The proviso to Section 9(2) of the JJ Act, 2015 clearly enumerates that plea of juvenility may be raised before any Court and it shall be recognised at any stage, even after final disposal of the case. The High Court, however, did not consider and decide the prayer of juvenility raised on behalf of the appellant.

11. There are catena of decisions of this Court which hold that the plea of juvenility, even if not taken before the trial Court or the High Court, can be raised before this Court.

12. Guidelines laying down the standards for evaluating the claim of juvenility raised for the first time before this Court were laid down by this Court in the case of ***Abuzar Hossain vs State of West Bengal***[1] which are reproduced hereinbelow:-

> **"39.** Now, we summarise the position which is as under:
>
> **39.1.** A claim of juvenility may be raised at any stage even after the final disposal of the case. It may be raised for the first time before this Court as well after the final disposal of the case. The delay in raising the claim of juvenility cannot be a ground for rejection of such claim. The claim of juvenility can be raised in appeal even if not pressed before the trial court and can be raised for the first time before this Court though not pressed before the trial court and in the appeal court.
>
> **39.2.** For making a claim with regard to juvenility after conviction, the claimant must produce some material which may prima facie satisfy the court that an inquiry into the claim of juvenility is necessary. Initial burden has to be discharged by the person who claims juvenility.
>
> **39.3.** As to what materials would prima facie satisfy the court and/or are sufficient for discharging the initial burden cannot be catalogued nor can it be laid down as to what weight should be given to a specific piece of evidence which may be sufficient to raise presumption of juvenility but the documents referred to in Rules 12(3)(*a*)(*i*) to (*iii*) shall definitely be sufficient for prima facie satisfaction of the court about the age of the delinquent necessitating further enquiry under Rule 12. The statement recorded under Section 313 of the Code is too tentative and may not by itself be sufficient ordinarily to justify or reject the claim of juvenility. The credibility and/or acceptability of the documents like the school leaving certificate or the voters' list, etc. obtained after conviction would depend on the facts and circumstances of each case and no

1 [2012] 9 SCR 244 : (2012) 10 SCC 489

hard-and-fast rule can be prescribed that they must be prima facie accepted or rejected. In *Akbar Sheikh* [(2009) 7 SCC 415] and *Pawan* [(2009) 15 SCC 259] these documents were not found prima facie credible while in *Jitendra Singh* [(2010) 13 SCC 523] the documents viz. school leaving certificate, marksheet and the medical report were treated sufficient for directing an inquiry and verification of the appellant's age. If such documents prima facie inspire confidence of the court, the court may act upon such documents for the purposes of Section 7-A and order an enquiry for determination of the age of the delinquent.

39.4. An affidavit of the claimant or any of the parents or a sibling or a relative in support of the claim of juvenility raised for the first time in appeal or revision or before this Court during the pendency of the matter or after disposal of the case shall not be sufficient justifying an enquiry to determine the age of such person unless the circumstances of the case are so glaring that satisfy the judicial conscience of the court to order an enquiry into determination of the age of the delinquent.

39.5. The court where the plea of juvenility is raised for the first time should always be guided by the objectives of the 2000 Act and be alive to the position that the beneficent and salutary provisions contained in the 2000 Act are not defeated by the hypertechnical approach and the persons who are entitled to get benefits of the 2000 Act get such benefits. The courts should not be unnecessarily influenced by any general impression that in schools the parents/ guardians understate the age of their wards by one or two years for future benefits or that age determination by medical examination is not very precise. The matter should be considered prima facie on the touchstone of preponderance of probability.

40. The reference is answered in terms of the position highlighted in paras 39.1. to 39.6. The matters shall now be listed before the Bench(es) concerned for disposal."

13. In the case of ***Vinod Katara v. State of Uttar Pradesh***[2], this Court directed the concerned Sessions Court to inquire regarding the age of the accused as per law, even though, he had crossed the age of 50 years and his appeal against conviction was rejected by this Court taking into consideration the aspect regarding the determination of plea of juvenility at the belated stage. The relevant extracts from the said judgment are as follows: -

> "**51.** Ideally, there should not be any dispute as to the age of a person if the birth is registered in accordance with law and date of birth is entered in the school records on the basis of genuine record of birth. However, in India, the factors like poverty, illiteracy, ignorance, indifference and inadequacy of the system often lead to there being no documentary proof of a person's age. Therefore, in those cases where the plea of juvenility is raised at a belated stage, often certain medical tests are resorted to forage determination in absence of the documents enumerated in Section 94 of the Act 2015. The rule allowing plea of juvenility to be raised at a considerably belated stage has its rationale in the contemporary child rights jurisprudence which requires the stakeholders to act in the best interest of the child.
>
> **54.** Awareness about the rights of the child and correlated duties remain low among the functionaries of the juvenile justice system. Once a child is caught in the web of adult criminal justice system, it is difficult for the child to get out of it unscathed. The bitter truth is that even the legal aid programmes are mired in systemic bottlenecks and often it is only at a considerably belated stage of the proceeding that the person becomes aware of the rights, including the right to be differently treated on the ground of juvenility.
>
> **55.** What needs to be kept in mind is the main object and purpose of the Juvenile Justice Act. The focus of this legislation is on the juvenile's reformation and rehabilitation so that he also may have an opportunity to enjoy as other

2 [2022] 9 SCR 836 : 2022 SCCOnLine SC 1204

children. In *Pratap Singh* (supra), this Court, elaborating on the objects and purpose of the Juvenile Justice Act, made the following observations:—

"…The said Act is not only a beneficent legislation, but also a remedial one. The Act aims at grant of care, protection and rehabilitation of a juvenile vis-à-vis the adult criminals. Having regard to Rule 4 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, it must also be borne in mind that the moral and psychological components of criminal responsibility were also one of the factors in defining a juvenile. The first objective, therefore, is the promotion of the well-being of the juvenile and the second objective to bring about the principle of proportionality whereby and whereunder the proportionality of the reaction to the circumstances of both the offender and the offence including the victim should be safeguarded…"

14. In the present case, the appellant filed an application at the earliest point of time raising the claim of juvenility based on a horoscope before the learned Chief Judicial Magistrate. The said application was rejected. However, before the trial Court, the birth certificate was presented and a plea for determination of age was raised. Learned trial Court rejected the said prayer by observing that even though the birth certificate was issued in the year 1995, the same was not presented along with the application filed earlier before the learned Chief Judicial Magistrate.

15. On going through the record, we find that proper inquiry in accordance with the provisions of the JJ Act, 2000 or the JJ Act, 2015 was not carried out so to consider the prayer made by the appellant to be treated as juvenile on the date of the incident even though the plea was raised at the earliest opportunity. It can be said without a cavil of doubt that the plea of juvenility raised by the appellant could not have been thrown out without conducting proper inquiry.

16. In the wake of the above discussion, we hereby direct that the learned first Additional Sessions Judge, Darbhanga shall conduct a thorough inquiry to determine the age/date of birth of the appellant in accordance with the procedure provided under the JJ Act, 2015 and the rules framed thereunder.

17. The Station House Officer of the police station concerned shall provide full assistance to the learned first Additional Sessions Judge in the process of collection of documents/evidence so as to facilitate the inquiry. Proper opportunity to participate in the proceedings shall be provided to the accused as well as the prosecution.

18. In case the trial Court is unable to reach to a logical conclusion based on the documents/certificates placed on record during the course of the inquiry, it may, as a last resort, get conducted the ossification test of the appellant keeping in view the observations made by this Court in the case of ***Vinod Katara****(supra).*

19. The inquiry shall be completed within 12 weeks from today.

20. A copy of this order shall forthwith be transmitted to the learned first Additional Sessions Judge, Darbhanga for information and compliance.

21. Upon conclusion of procedure, the inquiry report shall be forwarded to this Court and a copy shall also be provided to the accused and the prosecution.

22. The matter shall be listed for hearing in the third week of August, 2024.

Criminal Appeal No. 214 of 2018

23. List along with Criminal Appeal No. 177 of 2018

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

Result of the case:
Interim direction issued.
Matter to be relisted.

[2024] 5 S.C.R. 510 : 2024 INSC 355

Dolly Rani
v.
Manish Kumar Chanchal

(Transfer Petition (C) No. 2043 of 2023)

19 April 2024

[B.V. Nagarathna and Augustine George Masih, JJ.]

Issue for Consideration

When the marriage ceremony had not been performed in accordance with section 7 of the Hindu Marriage Act, 1955, whether registration of such a marriage under section 8 of the 1955 Act would confer any legitimacy to it.

Headnotes

Hindu Marriage Act, 1955 – ss. 7 and 8 – During the pendency of the transfer petition, parties decided to resolve the dispute by filing a joint application u/Art.142 of the Constitution *inter-alia* seeking declaration that the marriage between the parties was not valid, consequently, the certificate issued by the Vadik Jankalyan Samiti and the marriage certificate issued under the Uttar Pradesh Registration Rule, 2017 were null and void:

Held: For a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the said ceremony when an issue/controversy arise – Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act and a mere issuance of a certificate by an entity in the absence of the requisite ceremonies having been performed, would neither confirm any marital status to the parties nor establish a marriage under Hindu law – The certificate issued by Vadik Jankalyan Samiti (Regd.) in the absence of any indication as to the rites and customs that were performed and as to whether the requirements under Section 7 of the Act was complied with would not be a certificate evidencing a Hindu marriage in accordance with Section 7 of the Act – It is on the basis of the said certificate that the Marriage Registration Officer has issued certificate under the Uttar Pradesh Marriage Registration Rule, 2017 – It is only when the marriage is solemnised in accordance with Section 7, there can be a marriage registered under Section 8 – But if there has been no marriage in accordance with Section 7, the registration would not confer legitimacy to the marriage – In

the absence of there being a valid Hindu marriage, the Marriage Registration Officer cannot register such a marriage under the provisions of Section 8 of the Act – Therefore, if a certificate is issued stating that the couple had undergone marriage and if the marriage ceremony had not been performed in accordance with Section 7 of the Act, then the registration of such marriage under Section 8 would not confer any legitimacy to such a marriage. [Paras 15, 16, 17]

Hindu Marriage Act, 1955 – Absence of a valid marriage ceremony – Practice Deprecated. [Para 21]

Hindu Marriage Act, 1955 – Registration of a marriage in order to apply for Visa for emigration to foreign countries where either of the parties may be working "in order to save time" and pending formalising a marriage ceremony – Practice deprecated. [Para 23]

Hindu Marriage Act, 1955 – Purpose of marriage:

Held: A marriage is not a commercial transaction – It is a solemn foundational event celebrated so as to establish a relationship between a man and a woman who acquire the status of a husband and wife for an evolving family in future which is a basic unit of Indian society – A Hindu marriage facilitates procreation, consolidates the unit of family and solidifies the spirit of fraternity within various communities. [Para 24]

Books and Periodicals Cited

Harman, William "The Hindu Marriage As Soteriological Event". International Journal of Sociology of the Family, vol. 17, no.2, 1987, pp.169-82.

List of Acts

Hindu Marriage Act, 1955; Code of Civil Procedure, 1908; Penal Code, 1860; Dowry Prohibition Act, 1961; Special Marriage Act, 1954; Uttar Pradesh Marriage Registration Rule, 2017.

List of Keywords

Section 7 of the Hindu Marriage Act, 1955; Section 8 of the Hindu Marriage Act, 1955; Marriage; Marriage ceremony; Valid marriage ceremony; Absence of valid marriage ceremony; Non-performance of marriage ceremony as per section 7 of the Hindu Marriage Act, 1955; Registration of marriage; Valid marriage.

Case Arising From

ORIGINAL JURISDICTION: Transfer Petition (C) No. 2043 of 2023

Petition Filed Under Section 25 of The Code of Civil Procedure, 1908

Appearances for Parties

Dhruv Gupta, Kumar Prashant, Ms. Aprajita Mishra, Ms. Vanya Gupta, Ms. Yagya Singh, Ms. Purva Mehta, Aditya Vaibhav Singh, Advs. for the Petitioner.

Ms. Rukhsana Choudhury, Adv. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. The present transfer petition is filed under Section 25 of the Code of Civil Procedure, 1908 (for short, "CPC") by the petitioner-wife seeking the following reliefs:

    a. "To transfer the divorce petition under Section 13(I)(ia) of the Hindu Marriage Act, 1955 bearing Matrimonial Case No. 82/2023 titled "Manish Kumar v/s Doly Singh" pending before the Court of Principal Judge, Family Court, Muzaffarpur, Bihar to the Court of Principal Judge, Family Court, Ranchi Jharkhand; and

    b. Pass such other and further orders and / or directions as 1s deemed just and proper by this Hon'ble Court in the facts and circumstances of the case."

2. During the pendency of this petition the parties have decided to resolve that dispute by filing a joint application under Article 142 of the Constitution of India seeking certain reliefs as referred to later.

3. Briefly stated, the facts of the case are that the petitioner and the respondent are trained commercial pilots. The parties were engaged to be married on 07.03.2021. The petitioner and respondent claimed to have 'solemnized' their marriage on 07.07.2021. They obtained a "marriage certificate" from Vadik Jankalyan Samiti (Regd.). Based on this certificate, they obtained a "Certificate of Registration of Marriage" under the Uttar Pradesh Marriage Registration Rules, 2017. The respective families of the parties fixed the date for performing the marriage ceremony as per Hindu rites and customs on 25.10.2022.

Meanwhile, the petitioner and respondent lived separately but nevertheless, differences ignited between them. According to the petitioner, there was demand for dowry made by respondent's family.

4. On 17.11.2022, the petitioner filed an FIR under Sections 498A, 420, 506, 509, 34 of the Indian Penal Code, 1860 (for short, "IPC") and Sections 3,4 of the Dowry Prohibition Act, 1961 (for short, "DP Act") against the respondent and his family members alleging harassment.

5. Thereafter on 13.03.2023, the respondent approached the Court of Principal Judge, Family Court, Muzaffarpur, Bihar by filing a petition for divorce under Section 13(1)(ia) of the Act in Matrimonial Case No.82/2023. Being aggrieved by this fact as the petitioner-wife is currently residing in Ranchi, Jharkhand with her parents, she filed the present transfer petition seeking to transfer the divorce petition under Section 13(I)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as "the Act") bearing Matrimonial Case No. 82/2023 titled "Manish Kumar v/s Doly Singh" pending before the Court of Principal Judge, Family Court, Muzaffarpur, Bihar to the Court of Principal Judge, Family Court, Ranchi Jharkhand.

6. Learned counsel for the petitioner submitted that the respondent has filed a Matrimonial Case No.82/2023 under Section 13(1)(ia) of the Act seeking a decree of divorce as against the petitioner herein whereas there being no marriage between the parties in the eyes of the law, the respondent could not have sought for by the said decree.

7. Learned counsel for the respondent also submitted that indeed there was no marriage in accordance with Section 7 of the Act inasmuch as the requisites of a valid Hindu marriage insofar as ceremonies are concerned, were not complied with but having no other recourse, the respondent was constrained to file M.C. No.82/2023 as the "marriage" between the parties was registered before the Registrar of Marriages.

8. Learned counsel for the respective parties further submitted that during the pendency of this transfer petition, the parties have discussed the matter and they have agreed to file a joint application under Article 142 of the Constitution of India seeking the following prayers:

> "(i) Grant a decree of declaration that the marriage dated 07.07.2021 between the parties is not valid in the

eye of law by exercising its jurisdiction under Article 142 of the Constitution of India.

(ii) Consequently, grant a decree of declaration that the certificate dated 07.07.2021 issued by under the Uttar Pradesh Registration Rule, 2017, and certificate dated 07.07.2021 issued by the Vadik Jankalyan Samiti (Regd.) are null and void.

(iii) Take on record the terms and conditions of settlement as stated in paragraph 5 of this application.

(iv) Pass any other order/direction that this Court may deem fit and necessary in the facts and circumstances of the case."

9. They submitted that since there was no valid marriage in the eye of the law, the parties seek a declaration to the effect that the so-called marriage dated 07.07.2021 was not valid in the law and therefore, a declaration may be granted to that effect. Consequently, the Certificate dated 07.07.2021 issued under the Uttar Pradesh Registration Rules, 2017 and another certificate dated 07.07.2021 issued by the Vadik Jankalyan Samiti (Regd.) are also null and void and would pale into insignificance in view of there being no valid Hindu marriage and, therefore, the same may also be declared null and void.

10. They submitted that the joint application filed by the parties herein may be taken on record and the prayers sought by them may be granted.

11. The parties are present before the Court. They have been identified by their respective counsel. When queried by this Court, they indeed stated that there was no "marriage" solemnized by them inasmuch as no customs, rites and rituals performed. However, due to certain exigencies and pressures, they were constrained to obtain the certificate dated 07.07.2021 from Vadik Jankalyan Samiti (Regd.) and on the basis of that certificate they sought registration under the Uttar Pradesh Registration Rule, 2017 and a "Certificate of Marriage" was issued by the Registrar of Marriages on 07.07.2021. That when there was no Hindu marriage which took place between them, the issuance of the said certificate is of no consequence. They further stated in unison that this court may allow the prayers sought for by

them and declare that no marriage took place between the parties and thereby permit them to lead their independent lives.

12. They further stated that the joint application has been filed under Article 142 of the Constitution of India on their own free volition without there being any coercion or undue influence from any side and that they would abide by the terms and conditions of the joint application and hence, this Court may grant the reliefs to them.

13. In the above backdrop, we have taken on record the joint application filed by the parties under Article 142 of the Constitution of India and we have perused the same. In the said joint application, the petitioner has sought for quashing of Maintenance Case No.326/2023 filed by her and the Criminal Case instituted vide FIR No.463/2022 before Police Station-Sukhdev Nagar, Ranchi and the proceedings thereunder against the respondent and his parents herein which may also be quashed.

14. We have perused the other terms and conditions mentioned in the joint application. We find the same to be lawful and we do not find any legal impediment in accepting the terms and conditions of the joint application. But before granting the reliefs sought for by the parties we wish to make certain observations.

> Section 7 of the Act reads as under:
>
> "7. Ceremonies for a Hindu marriage.—(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto. (2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken."

15. Section 7 of the Act speaks about ceremonies of a Hindu marriage. Sub-section (1) uses the word "solemnised". The word "solemnised" means to perform the marriage with ceremonies in proper form. Unless and until the marriage is performed with appropriate ceremonies and in due form, it cannot be said to be "solemnised". Further, sub-section (2) of Section 7 states that where such rites and ceremonies include the *saptapadi*, i.e., the taking of seven steps by the bridegroom and the bride jointly before the sacred fire, the marriage becomes complete and binding when the seventh step is

taken. Therefore, requisite ceremonies for the solemnisation of the Hindu marriage must be in accordance with the applicable customs or usage and where *saptapadi* has been adopted, the marriage becomes complete and binding when the seventh step is taken. Where a Hindu marriage is not performed in accordance with the applicable rites or ceremonies such as *saptapadi* when included, the marriage will not be construed as a Hindu marriage. In other words, for a valid marriage under the Act, the requisite ceremonies have to be performed and there must be proof of performance of the said ceremony when an issue/controversy arise. Unless the parties have undergone such ceremony, there would be no Hindu marriage according to Section 7 of the Act and a mere issuance of a certificate by an entity in the absence of the requisite ceremonies having been performed, would neither confirm any marital status to the parties nor establish a marriage under Hindu law.

16. A perusal of the marriage certificate produced in the instant case along with the application filed under Article 142 of the Constitution of India states that the 'marriage' between the parties has been solemnised according to Hindu Vedic rites and customs. The certificate issued by Vadik Jankalyan Samiti (Regd.) in the absence of any indication as to the rites and customs that were performed and as to whether the requirements under Section 7 of the Act was complied with would not be a certificate evidencing a Hindu marriage in accordance with Section 7 of the Act. In the absence of any ceremony being performed such a certificate could not have been issued. It is on the basis of the said certificate that the Marriage Registration Officer has issued under the Uttar Pradesh Marriage Registration Rule, 2017 a certificate stating that the parties had presented before the office on 07.07.2021 and had declared that their marriage was solemnised on the said date at Vadik Jankalyan Samiti (Regd.), Ghaziabad and on the basis of the said certificate issued by the said entity, the Marriage Registration Officer registered the marriage which is under Section 8 of the Act.

Section 8 of the Act reads as under:

"8. Registration of Hindu marriages.— (1) For the purpose of facilitating the proof of Hindu marriages, the State Government may make rules providing that the parties to any such marriage may have the particulars relating

> to their marriage entered in such manner and subject to such conditions as may be prescribed in a Hindu Marriage Register kept for the purpose.
>
> (2) Notwithstanding anything contained in sub-section (1), the State Government may, if it is of opinion that it is necessary or expedient so to do, provide that the entering of the particulars referred to in sub-section (1) shall be compulsory in the State or in any part thereof, whether in all cases or in such cases as may be specified, and where any such direction has been issued, any person contravening any rule made in this behalf shall be punishable with fine which may extend to twenty-five rupees.
>
> (3) All rules made under this section shall be laid before the State Legislature, as soon as may be, after they are made.
>
> (4) The Hindu Marriage Register shall at all reasonable times be open for inspection, and shall be admissible as evidence of the statements therein contained and certified extracts therefrom shall, on application, be given by the Registrar on payment to him of the prescribed fee.
>
> (5) Notwithstanding anything contained in this section, the validity of any Hindu marriage shall in no way be affected by the omission to make the entry."

17. Under Section 8 of the Act, it is open for two Hindus married under the provisions of the Act to have their marriage registered provided they fulfil the conditions laid down therein regarding performance of requisite ceremonies. It is only when the marriage is solemnised in accordance with Section 7, there can be a marriage registered under Section 8. The State Governments have the power to make rules relating to the registration of marriages between two Hindus solemnised by way of requisite ceremonies. The advantage of registration is that it facilitates proof of factum of marriage in a disputed case. But if there has been no marriage in accordance with Section 7, the registration would not confer legitimacy to the marriage. We find that the registration of Hindu marriages under the said provision is only to facilitate the proof of a Hindu marriage but for that, there has to be a Hindu marriage in accordance with Section

7 of the Act inasmuch as there must be a marriage ceremony which has taken place between the parties in accordance with the said provision. Although the parties may have complied with the requisite conditions for a valid Hindu marriage as per Section 5 of the Act in the absence of there being a "Hindu marriage" in accordance with Section 7 of the Act, i.e., solemnization of such a marriage, there would be no Hindu marriage in the eye of law. In the absence of there being a valid Hindu marriage, the Marriage Registration Officer cannot register such a marriage under the provisions of Section 8 of the Act. Therefore, if a certificate is issued stating that the couple had undergone marriage and if the marriage ceremony had not been performed in accordance with Section 7 of the Act, then the registration of such marriage under Section 8 would not confer any legitimacy to such a marriage. The registration of a marriage under Section 8 of the Act is only to confirm that the parties have undergone a valid marriage ceremony in accordance with Section 7 of the Act. In other words, a certificate of marriage is a proof of validity of Hindu marriage only when such a marriage has taken place and not in a case where there is no marriage ceremony performed at all.

18. We further observe that a Hindu marriage is a sacrament and has a sacred character. In the context of *saptapadi* in a Hindu marriage, according to *Rig Veda*, after completing the seventh step (*saptapadi*) the bridegroom says to his bride, *"With seven steps we have become friends (sakha). May I attain to friendship with thee; may I not be separated from thy friendship"*. A wife is considered to be half of oneself (*ardhangini*) but to be accepted with an identity of her own and to be a co-equal partner in the marriage. There is nothing like a "better-half" in a marriage but the spouses are equal halves in a marriage. In Hindu Law, as already noted, marriage is a sacrament or a *samskara*. It is the foundation for a new family.

19. With the passage of centuries and the enactment of the Act, monogamy is the only legally approved form of relationship between a husband and a wife. The Act has categorically discarded polyandry and polygamy and all other such types of relationships. The intent of the Parliament is also that there should be only one form of marriage having varied rites and customs and rituals. Thus, when the Act came into force on 18.05.1955, it has amended and codified the law relating to marriage among Hindus. The Act encompasses not only Hindus as such but *Lingayats, Brahmos, Aryasamajists, Buddhists, Jains*

and Sikhs also who can enter into a valid Hindu marriage coming within the expansive connotation of the word Hindu.

20. Section 4 of the Act is important and it gives an overriding effect to the Act and it repeals all existing laws whether in the shape of enactments, custom or usage inconsistent with the Act. Of course, the said Section also saves anything otherwise expressly provided under the Act. For immediate reference, Section 4 of the Act is extracted as under:

> "4. Overriding effect of the Act.- Save as otherwise expressly provided in this Act,-
>
> (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matte for which provision is made in this Act;
>
> (b) any other law in force immediately before the commencement of this Act shall cease to have effect insofar as it is inconsistent with any of the provisions contained in this Act."

21. In effect a union of two persons under the provisions of the Act, by way of a Hindu marriage gives them the status and character of being a husband and wife in society. The said status is of significance inasmuch as a man and a woman cannot be treated as a husband and a wife unless a marriage is performed or celebrated with proper and due ceremonies and in the prescribed form. In the absence of any solemnisation of a marriage as per the provisions of the Act, a man and a woman cannot acquire the status of being a husband and a wife to each other. In the above context, we deprecate the practice of young men and women seeking to acquire the status of being a husband and a wife to each other and therefore purportedly being married, in the absence of a valid marriage ceremony under the provisions of the Act such as in the instant case where the marriage between the parties was to take place later.

22. No doubt, under the Special Marriage Act, 1954, a man and a woman can acquire the status of being a husband and a wife as per the provisions of the said Act. The Special Marriage Act, 1954 is not restricted to Hindus. Any man and woman irrespective of their

race, caste or creed can acquire the status of being a husband and a wife under the provisions of the Special Marriage Act, 1954 but under the provisions of the Act (Hindu Marriage Act, 1955), there should not only be compliance of the conditions as prescribed under Section 5 of the said Act but also the couple must solemnise a marriage in accordance with Section 7 of the Act. In the absence of there being any such marriage in accordance with Section 7 of the Act, a certificate issued in that regard by any entity is of no legal consequence. Further, any registration of a marriage which has not at all taken place under Section 8 of the Act and as per the rules made by the State Government would not be evidence of a Hindu marriage and also does not confer the status of a husband and a wife to a couple.

23. In recent years, we have come across several instances where for "practical purposes", a man and a woman with the intention of solemnisation of their marriage at a future date seek to register their marriage under Section 8 of the Act on the basis of a document which may have been issued as proof of 'solemnisation of their marriage' such as in the instant case. As we have already noted, any such registration of a marriage before the Registrar of Marriages and a certificate being issued thereafter would not confirm that the parties have 'solemnised' a Hindu marriage. We note that parents of young couples agree for registration of a marriage in order to apply for Visa for emigration to foreign countries where either of the parties may be working "in order to save time" and pending formalising a marriage ceremony. Such practices have to be deprecated. What would be the consequence, if no such marriage is solemnised at all at a future date? What would be the status of the parties then? Are they husband and wife in law and do they acquire such status in society?

24. As already noted, a Hindu marriage is a *samskara* and a sacrament which has to be accorded its status as an institution of great value in Indian society. Children born out of a valid Hindu marriage are legitimate and therefore they have full rights in law. This is not an occasion for us to discuss about the vulnerability of illegitimate children born outside wedlock who yearn for status equal to legitimate children in society. Therefore, we urge young men and women to think deeply about the institution of marriage even before they enter upon it and as to how sacred the said institution is, in Indian society. A marriage

is not an event for 'song and dance' and 'wining and dining' or an occasion to demand and exchange dowry and gifts by undue pressure leading to possible initiation of criminal proceedings thereafter. A marriage is not a commercial transaction. It is a solemn foundational event celebrated so as to establish a relationship between a man and a woman who acquire the status of a husband and wife for an evolving family in future which is a basic unit of Indian society. A Hindu marriage facilitates procreation, consolidates the unit of family and solidifies the spirit of fraternity within various communities. After all, a marriage is sacred for it provides a lifelong, dignity-affirming, equal, consensual and healthy union of two individuals. It is considered to be an event that confers salvation upon the individual especially when the rites and ceremonies are conducted[1]. The customary ceremonies, with all its attendant geographical and cultural variations is said to purify and transform the spiritual being of an individual.

25. The Hindu Marriage Act, 1955 solemnly acknowledges both the material and spiritual aspects of this event in the married couple's lives. Besides providing a mechanism for registration of marriages in order to confer the status of a married couple and acknowledge rights in *personam* and rights in *rem*, a special place is given to rites and ceremonies in the Act. It follows that the critical conditions for the solemnizing of a Hindu marriage should be assiduously, strictly and religiously followed. This is for the reason that the genesis of a sacred process cannot be a trivial affair. The sincere conduct of and participation in the customary rites and ceremonies under Section 7 of the Hindu Marriage Act, 1955 ought to be ensured by all married couples and priests who preside over the ceremony.

26. The promises made to each by the parties to a Hindu marriage and the oath taken by them to remain friends forever lay the foundation for a life-long commitment between the spouses which should be realized by them. If such commitment to each other is adhered to by the couple, then there would be far fewer cases of breakdown of marriages leading to divorce or separation.

27. But in the instant case, the above parameters have not been followed by the parties herein. In the circumstances, we declare that the

1 HARMAN, WILLIAM. "THE HINDU MARRIAGE AS SOTERIOLOGICAL EVENT." International Journal of Sociology of the Family, vol. 17, no.2, 1987, *pp.169-82.*

'marriage' dated 07.07.2021 between the parties is not a 'Hindu marriage' having regard to the provisions of Section 7 of the Act. Consequently, the certificate issued by the Vadik Jankalyan Samiti (Regd.) dated 07.07.2021 is declared null and void. In view of the above the Certificate issued under the Uttar Pradesh Registration Rules, 2017 dated 07.07.2021 is also declared null and void.

28. In view of the aforesaid declaration, it is further declared that the petitioner and the respondent were not married in accordance with the provisions of the Act and therefore, they have never acquired the status of husband and wife.

29. Consequently, the three cases filed by the parties against each other stand quashed, namely,-

> "(a) The divorce petition Matrimonial Case No.82/2023 filed by the respondent/Manish Chanchal, which is pending before the Family Court at Muzaffarpur, Bihar;
>
> (b) The Maintenance Case No.326/2023 filed by petitioner/Doly Rani at Ranchi, Jharkhand;
>
> (c) The criminal case FIR No.463/2022 initiated at PS Sukhdev Nagar, Ranchi by the petitioner/Doly Rani and proceedings thereunder, against the respondent/ Manish Chanchal and his parents."

30. In view of the above, the application filed under Article 142 of the Constitution is allowed.

31. Consequently, the Transfer Petition stands disposed.

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

Headnotes prepared by: Ankit Gyan

Result of the case:
Transfer petition disposed of.

[2024] 5 S.C.R. 523 : 2024 INSC 405

Sant Bhagwan Baba Shikshan Mandal & Ors.
v.
Gunwant & Ors.

(Civil Appeal No. 2225 of 2011)

03 April 2024

[Hima Kohli and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

Whether the High Court was justified in allowing the writ petition filed by the respondent no.1 and appointing him to the post of Shikshan Sevak in the appellant no.3-school.

Headnotes

Service Law – Appointment – Shikshan Sevak – Respondent no.1 was appointed as a peon in the appellant no.3-school – According to respondent no.1, he acquired requisite qualifications for the post of Shikshan Sevak and he had submitted several representations for the said post, but the same were not considered favourably – Appellant no.1 issued advertisement inviting application for appointment to the post of Shikshan Sevak – Respondent no.1 did not apply, instead after the post was filled by the appellants, respondent no.1 filed writ petition before the High Court – The writ petition was decided in favour of respondent no.1 – Correctness:

Held: Once the respondent no.1 had acquired the requisite qualification in the course of his service with the respondent no. 3-School, and the relevant GR which was ultimately incorporated in the Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977, permitted appointment of a non-teaching employee in a school as a Shikshan Sevak subject to the employee acquiring the requisite educational qualifications and further, subject to such a post being available, the appellants cannot be heard to state that the respondent no.1 being a part of the non-teaching staff, was not entitled for being considered for appointment to the subject post – In fact, the language used in the regulation dated 10.06.2005, itself makes it clear that the employee was not required to take any steps by making a representation for being appointed to the post of a Shikshan Sevak and an obligation was cast on the appellants to ensure

that on a permanent vacancy being available to the post of Shikshan Sevak, a member of the non-teaching staff, who would have acquired the educational qualification required for such a post, ought to be appointed directly – Therefore, the impugned judgment is well reasoned and does not require any interference. [Paras 11 and 12]

List of Acts

Maharashtra Employees of Private Schools (Conditions of Service) Act, 1977.

List of Keywords

Service Law; Appointment; Shikshan Sevak; Requisite qualifications; Non-teaching employee; Entitlement to appointment; Balancing equities; Senority; Retiral benefits.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2225 of 2011

From the Judgment and Order dated 17.11.2009 of the High Court of Bombay, bench at Aurangabad in WP No. 1895 of 2007

Appearances for Parties

Adarsh Kumar Pandey, Shivaji M. Jadhav, Vignesh Singh, Ms. Apurva, Brij Kishor Sah, Prafulla, Alok Kumar, Advs. for the Appellants.

Vivek C. Solshe, Varun V. Solshe, Anjani Kumar Jha, Sachin Patil, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Geo Joseph, Durgesh Gupta, Risvi Muhammed, Aditya Krishna, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. The appellants are aggrieved by the judgment dated 17th November, 2009, passed by the High Court of Judicature at Bombay, Aurangabad Bench, whereunder a Writ Petition[1] filed by the respondent no.1 praying *inter alia* for being appointed to the post of Shikshan Sevak in the appellant no.3-School was allowed and the appellants were

1 Writ Petition No. 1895 of 2007

directed to ensure that he is appointed to the subject post on or before 31st December, 2009, in accordance with law.

2. We may briefly advert to the relevant sequence of events. The respondent no.1 was appointed as a Peon in the appellant no.3-School, being run by the appellant no.1-Society on 14th June, 1991. His appointment to the subject post was approved *vide* letter dated 29th January, 1998. While working on the subject post, in the year 2004, the respondent no.1 passed Bachelor of Arts examination from the Yashwant Rao Chavan Open University, Nasik. In the year 2005, he passed the Bachelor of Physical Education Examination. On 10th June, 2005, the respondent no.2-State of Maharashtra issued a Government Resolution[2] for implementation of the revised Shikshan Sevak Yojana in aided Secondary and Higher Secondary Schools/Colleges, D.Ed. Colleges and Sainik Schools in the State. The tenure of the Shikshan Sevak was fixed as three years and it was clarified in paragraph 8 as follows:

> "8. Where the non-teaching employee in the secondary school and Junior college acquires educational qualification required for teachers and such posts are available in the secondary and higher secondary/school/colleges, then such non-teaching member will have to be appointed as Shikshan Sevak and he will be entitled for honourarium as applicable to Shikshan Sevak and all other terms and conditions will be applicable to him. However, service rendered by non-teaching staff will be taken into consideration for pension".

3. On 15th February, 2007, the respondent no.2-State of Maharashtra issued a fresh GR in the background of the Central Government framing the Sarva Shiksha Abhiyan (Education for All Campaign), which left it to the States to develop a framework for appointment of teachers within the guidelines of the National Council of Teachers Education. Keeping in mind the said Scheme, the respondent no.2-State considered it imperative to implement an alternative Scheme for appointing Shikshan Sevaks on vacant posts of teachers in all Secondary/Higher Secondary Schools/Junior Colleges and College Education in the State. For the purposes of implementing the said

2 For short the 'GR'

Scheme, several Resolutions were passed from time to time, starting with the first GR dated 13th October, 2000, followed by GRs dated 26th July, 2001, 27th July, 2001, 18th December, 2003, 28th May, 2004, 07th January, 2005, 10th January, 2005 and 26th April, 2006.

4. All the aforesaid GRs were clubbed and included in the original GR dated 13th October, 2000, which was updated by virtue of GR dated 15th February, 2007. After updating the original GR, the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act[3], 1977 was amended and the post of Shikshan Sevak was included in the definition Clause, i.e., Section 2(24A) and the consequential amendments were included by virtue of the Maharashtra Act XIV of 2007. Section 5 of the Act, 1977 that mandates the management to fill up every permanent vacancy in a Private School by appointment of a person duly qualified to fill such a vacancy was also amended in the following manner:

> "5. (1) The Management shall, as soon as possible, fill in, in the manner prescribed, every permanent vacancy in a private school by the appointment of a person duly qualified to fill such vacancy:
>
> [Provided that, unless such vacancy is to be filled in by promotion, the Management shall, before proceeding to fill such vacancy, ascertain from the Educational Inspector, Greater Bombay, [the Education Officer, Zilla Parishad or, as the case may be, the Director or the officer designated by the Director in respect of schools imparting technical, vocational, art or special education, whether there is any suitable person available on the list of surplus persons maintained by him, for absorption in other schools; and in the event of such person being available, the Management shall appoint that person in such vacancy.]
>
> (2) Every person appointed to fill a permanent vacancy [except Shikshan sevak] shall be on probation for a period of two years. Subject to the provisions of sub-sections (3) and (4), he shall, on completion of this probation period of two years, be deemed to have been confirmed.

3 For short the 'Act of 1977'

> [Provided that, every person appointed as [Shikshan sevak)] shall be on probation for a period of three years.]
>
> [(2A) Subject to the provisions of sub-sections (3) and (4), shikshan sevak shall, on completion of the probation period of three years, be deemed to have been appointed and confirmed as a teacher.]
>
> (3) If in the opinion of the Management, the work or behaviour of any probationer, during the period of his probation, is not satisfactory, the Management may terminate his services at any time during the said period after giving him one month's notice [or salary [or honorarium] of one month in lieu of notice].
>
> (4) If the services of any probationer are terminated under sub-section (3) and he is reappointed by the Management in the same school or any other school belonging to it within a period of one year from the date on which his services were terminated, then the period of probation undergone by him previously shall be taken into consideration in calculating the required period of probation for the purposes of sub-section (2).
>
> [(4A) Nothing in sub-section (2), (3) or (4) shall apply to a person appointed to fill a permanent vacancy by promotion or by absorption as provided under the proviso to sub-section (1).]
>
> (5) The Management may fill in every temporary vacancy by appointing a person duly qualified to fill such vacancy. The order of appointment shall be drawn up in the form prescribed in that behalf, and shall state the period of appointment of such person."

5. It is the case of the respondent no.1 that on acquiring requisite qualifications for the post of Shikshan Sevak, he submitted several representations to the appellant no.1 for being appointed to the said post, but the same were not considered favourably. In the year 2006, one Mr. B.R. Dhakne, who was working as a Physical Education teacher in the school, was to retire on attaining the age of superannuation. The appellant no.1 claims to have issued an advertisement on 01st June, 2008, published in the daily newspaper,

'Lokmaan' inviting application for appointment to the post of Shikshan Sevak. The appellants claim that though the respondent no.1 was aware of the said vacancy and the advertisement issued for filling up the vacancy for appointment to the post of Shikshan Sevak, he did not submit his application. Instead, after the post was filled up by the appellants, he challenged the appointment of the respondent no.5 by filing a Writ Petition[4] before the High Court. The respondent no.1 separately filed an appeal[5] before the School Tribunal, Latur, which was dismissed for want of prosecution. On 31st January, 2007, the respondent no.1 approached the High Court by filing a Writ Petition, which has been decided in his favour by virtue of the impugned judgment.

6. Mr. Adarsh Kumar Pandey, learned counsel for the appellants submits that the High Court has erred in allowing the Writ Petition filed by the respondent no.1 for the reason that it failed to take into consideration the fact that the respondent no.1 was given promotion from the post of a Peon (non-teaching staff) to the post of Shikshan Sevak, which is a teaching post which is in contravention of the provisions of the Act and the Rules. In support of the said submission, he seeks to place reliance on Clause 3 of the Schedule 'F' of the Maharashtra Employees of Private School Rules, 1981, that lays down the guidelines for fixation of seniority of non-teaching staff and casts an obligation on the concerned school to maintain a common seniority list of the lower grade staff on the basis of the date of their appointment and further mandates that if any of the lower grade staff improves his qualification as prescribed for the post of Laboratory Assistant or Clerk, then the said employee ought to be given preference by filling up the said post as per his placement in the common list of seniority. It is submitted by learned counsel for the appellants that respondent no.1 was working on the post of a Peon and at best, he could have been promoted in accordance with the placement of his name in the seniority list, to the position of a Laboratory Assistant or Clerk, but to no other post, including the post of Shikshan Sevak, which was under the category of teaching staff. It is thus submitted that the respondent no.1 was not entitled for promotion to the post of Shikshan Sevak, a post that is a part of the teaching cadre and a non-promotional post.

4 Writ Petition No. 1895 of 2007

5 Appeal No. 131 of 2006

7. *Per contra*, Mr. Vivek C. Solshe, learned counsel for the respondent no.1 supports the impugned judgment and submits that the entire controversy has been set at rest on amendment of the Maharashtra Employees of Private Schools (Conditions of Service) Regulation Act, 1977, by including the post of Shikshan Sevak under the Act and casting an obligation on the management of Private Schools to fill up the said post by appointing a person suitable in the list of surplus persons maintained by the office of Education Inspector, Greater Bombay or the Education Officer, Zilla Parishad, as the case may be, for absorption to the post.

8. We have heard learned counsel for the parties, perused the records as also the impugned judgment. In our opinion, the arguments advanced by learned counsel for the appellants regarding non-entitlement of the respondent no.1 for appointment from a non-teaching cadre to a teaching cadre has been duly considered and turned down by the High Court for valid reasons.

9. It is not in dispute that the respondent no.1 who was working on the post of Peon, had taken permission from the appellants-Management for undergoing further education and improving his qualifications. It is also not in dispute that in terms of the qualifications acquired by him in the course of his service, the respondent no.1 qualified for being appointed to the post of Shikshan Sevak. Thirdly, on completion of the requisite qualification, the respondent no.1 had submitted a representation to the appellants-management for being appointed to the subject post as and when a vacancy would arise.

10. Despite the aforesaid position, when a vacancy to the subject post arose on Mr. Dhakne superannuating in the year 2006, instead of approaching the Education Inspector/Education Officer/Zilla Parishad, as the case may be, being the office designated by the Director of Education for vacancies to be filled up by a suitable person available on the list of surplus persons maintained in that office, the appellants proceeded to issue an advertisement inviting applications from the public at large for filling up the subject post, thereby completely ignoring the claim of the respondent no.1 for being appointed to the subject post. The High Court has noticed in paragraph 14 of the impugned judgement that even the aspect of issuing a public notice in the daily newspaper is doubtful, since the appellants did not file the relevant page of the daily newspaper along with their counter

affidavit and what was filed, could not be treated as an authentic newspaper. Further, the application submitted by the respondent No.1 for being appointed to the subject post has not been disputed by the appellants. Their only plea is that the respondent no.1 did not qualify for being appointed as a Shikshan Sevak and that the appellants were well entitled to fill up the post in terms of the advertisement issued.

11. Once the respondent no.1 had acquired the requisite qualification in the course of his service with the respondent no. 3-School, and the relevant GR which was ultimately incorporated in the Act of 1977, permitted appointment of a non-teaching employee in a school as a Shikshan Sevak subject to the employee acquiring the requisite educational qualifications and further, subject to such a post being available, the appellants cannot be heard to state that the respondent no.1 being a part of the non-teaching staff, was not entitled for being considered for appointment to the subject post. In fact, the language used in the regulation dated 10th June, 2005, itself makes it clear that the employee was not required to take any steps by making a representation for being appointed to the post of a Shikshan Sevak and an obligation was cast on the appellants to ensure that on a permanent vacancy being available to the post of Shikshan Sevak, a member of the non-teaching staff, who would have acquired the educational qualification required for such a post, ought to be appointed directly.

12. In view of the aforesaid discussion, we are of the opinion that the impugned judgment is well reasoned and does not deserve any interference.

13. Now coming to the aspect of molding the relief. Though the appellants have duly impleaded the private respondents no. 4 and 5 in this appeal, being necessary and proper parties, they have not entered appearance. Respondent No.5 was issued an appointment letter to the post of a Shikshan Sevak, in terms of the letter dated 24th August, 2009, issued by the appellants. He had executed a consent/ guarantee letter stating *inter alia* that in the event the respondent no.1 succeeds in his Writ Petition, he shall not claim any right to the subject post. Additionally, a consent letter was also executed by the Secretary of the appellant no.1 on behalf of the appellant no.1 and the appellant no.3-School stating *inter alia* that in the event the judgement in the Writ Petition filed by the respondent

no.1 goes against the Society, then the entire responsibility shall be that of the Society. The respondent no.3-Education Officer had also approved the appointment of the respondent no.5 to the post of Shikshan Sevak subject to the outcome of the Writ Petition filed by the respondent no.1.

14. The records reveal that while issuing notice in the present appeal on 18th December, 2009, operation of the impugned judgment was stayed. As a result, the respondent no.5 has been continuing to discharge his duties in the respondent no.3-School as a Physical Education teacher, on the post of an Assistant Teacher. As noticed above, the respondent no.5 was duly served in the present appeal but he has elected not to appear or participate in the proceedings. Now that the impugned judgement has been upheld by this Court and the respondent no.1 has been held entitled to appointment to the post of Shikshan Sevak w.e.f. 01st January, 2010 and on expiry of a period of three years reckoned therefrom, to the post of Assistant Teacher, this Court is required to consider balancing the equities. We are informed that in all these years, respondent no.1 has been serving on the post of Peon in the appellant no.3-School. Though learned counsel for the respondent no.1 states that the financial impact of depriving him for appointment to the post of Shikshan Sevak in terms of the impugned judgment comes to ₹.21,00,000/- (Rupees Twenty One Lakhs) approximately, we are of the opinion that ends of justice would be met if the appellants are directed to pay a consolidated sum of ₹.10,00,000/- (Rupees Ten Lakhs) to the respondent no.1 on account of the financial loss incurred by him and for his non-appointment to the subject post. Needful shall be done within eight weeks. For purposes of claiming seniority and retiral benefits, the notional date of his appointment to the post of Shikshan Sevak shall be reckoned as 01st January, 2010. Respondent no.3 shall issue a letter indicating the pay scale of the respondent no.1 by notionally computing it on the post of Shikshan Sevak w.e.f. 01st January, 2010 and to the post of Assistant Teacher w.e.f. 01st January, 2013 and furnish a copy thereof to the appellants within three months.

15. As for the respondent no.5, it is directed that in the event the post of a Physical Education Teacher is vacant and available in any of the schools/colleges being run by the appellant no.1-Society, he shall be duly accommodated on the post of an Assistant Teacher there. In the alternative, the respondent no.5 shall be considered

by the State authorities for appointment in terms of Regulation 5 of the Act of 1977, as amended from time to time, on being declared as a surplus teacher. However, there shall not be any recovery of salary or emoluments from the respondent no.5 for the period during which he has rendered services with the appellant no.3 – School.

16. The appeal is disposed of on the above terms, while leaving the parties to bear their own expenses.

Headnotes prepared by: Ankit Gyan

Result of the case:
Appeal disposed of.

[2024] 5 S.C.R. 533 : 2024 INSC 459

Varad Balwant Vasant & Ors.
v.
Union of India & Ors.

(Writ Petition (Civil) No 255 of 2024)

29 April 2024

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

Issue for Consideration

Re-scheduling of two papers of Chartered Accountant Examination sought in the wake of General Elections of 2024. In view of the obligation cast upon every citizen to exercise their franchise, whether the examination schedule will cause a dislocation for students eligible to exercise their franchise and enrolled for the examination.

Headnotes

Education/Educational Institutions – Chartered Accountancy – Examination – Re-scheduling of two papers sought – Phase-wise polling during the 2024 General Elections was scheduled to take place on 07.05.2024 and 13.05.2024 – Chartered Accountant Examination for the Intermediate and final course were to be held between 02.05.2024 and 17.05.2024 – Re-scheduling of two papers scheduled to be held on 08.05.2024 and 14.05.2024 sought contending that convening of the examination one day after the polling will cause severe hardship to candidates – Whether the examination schedule will cause a dislocation for students eligible to exercise their franchise and enrolled for the examination:

Held: Scheduling of examinations essentially pertains to the policy domain – Number of centres is 591, spread across not only cities but other parts of the country as well – No examination scheduled on polling days or on a day prior – Over 4,36,000 candidates enrolled for the examination – The grant of any relief at this stage would cause substantial prejudice. [Para 6]

List of Keywords

Chartered Accountancy; Chartered Accountant Examination; Re-scheduling of papers/examination; Re-scheduling of Chartered Accountant Examination; General Elections of 2024; Examination after the polling; Hardship to candidates.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Writ Petition (Civil) No. 255 of 2024

(Under Article 32 of The Constitution of India)

Appearances for Parties

Ms. Madhavi Divan, Sr. Adv., Divyansh Tiwari, Ms. Aishani Narain, Sameer Choudhary, Nirnimesh Dube, Advs. for the Petitioners.

Ramji Srinivasan, Sr. Adv., Pramod Dayal, Nikunj Dayal, Ms. Namrata Saraogi, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Order

1. The Chartered Accountant Examination for the Intermediate and final course is due to commence on 2 May 2024 and end on 17 May 2024.

2. The bone of contention in these proceedings under Article 32 of the Constitution pertains to two examinations which are scheduled to be held on 8 May 2024 and 14 May 2024. The grievance is that phase-wise polling during the General Elections is scheduled to take place on 7 May and 13 May 2024 and hence, the convening of the examination on the above two days (one day after the phase-wise polling) will cause severe hardship to candidates.

3. Ms Madhavi Divan, senior counsel appearing on behalf of the petitioners submitted that though there are 816 districts, there are only 290 centres where the examination is being held, as a consequence of which serious hardship may be caused to students coming from remote areas.

4. A petition which was instituted before the High Court of Delhi was dismissed on 8 April 2024. However, independent of that, we have considered the grievance to assess whether a cause of action warranting the grant of relief has been established.

5. On behalf of the Institute of Chartered Accounts, it has been submitted by Mr Ramji Srinivasan, senior counsel that :

(i) As many as 4,36,246 candidates have been enrolled for the ensuing examination;

(ii) Though 291 cities have examination centres, there are 591 centres across India to facilitate the convenience of students; and

(iii) The Institute of Chartered Accountants has not scheduled the examination either on the day of polling or a day prior to polling days.

6. The scheduling of examinations essentially pertains to the policy domain. At the same time, bearing in mind the importance of the obligation which is cast upon every citizen to exercise their franchise, we have independently assessed whether the examination schedule will cause a dislocation for students who would are eligible to exercise their franchise and are enrolled for the examination. The number of centres is 591, spread across not only cities but other parts of the country as well. No examination has been scheduled on polling days or on a day prior. Over 4,36,000 candidates have enrolled for the examination. The grant of any relief at this stage would cause substantial prejudice.

7. Ms Madhavi Divan, senior counsel appearing on behalf of the petitioners submitted in the alternative that an option may be given to students who are unable to appear for the examinations which are scheduled on 8 and 14 May 2024 to take the examinations in a subsequent batch.

8. We find considerable force in the submission which has been urged on behalf of Institute of Chartered Accountants that such a course of action would not be fair because it will allow some students to opt out of certain papers and take them in the ensuing examination. This will cause prejudice to those students who have to be assessed on the basis that they have taken all the papers at one and the same time. The arrangements that were made during the course of the COVID 19 pandemic stand on a completely different footing since the country was then faced with a public health crisis of unprecedented proportion. The relief as sought is contrary to the regulations and cannot be granted.

9. Bearing in mind all the above circumstances, we are not in a position to accede to the request of the petitioners for the grant of relief.

10. The Writ Petition is accordingly dismissed.

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

Headnotes prepared by: Divya Pandey

Result of the case:
Writ Petition dismissed.

[2024] 5 S.C.R. 537 : 2024 INSC 342

Aniruddha Khanwalkar
v.
Sharmila Das & Others

(Criminal Appeal No. 2272 of 2024)

26 April 2024

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

Issue for Consideration

Whether it is sufficient to make out prima facie case on the basis of allegations for summoning of the accused.

Headnotes

A. Magistrate vide order dated 12.03.2019 directed issuance of process against the respondents after recording preliminary evidence and being satisfied that a prima facie case was made out – Sessions Court partly allowed the revision against the order of magistrate setting aside the order to the extent of taking cognizance of the offence punishable under section 420 of IPC against the respondent no.1 and for the offence punishable under section 420 read with section 120-B of IPC against the respondent nos.2 and 3 – Appellant challenged the order of Sessions Court before High Court – High Court upheld the same – Appellant filed the appeal against the order dated 25.04.2023 passed by the High Court upholding the order of the Sessions Court – Appeal allowed. [Paras 2, 4, 5, 6, and 16]

B. Prima facie case is to be made out on the basis of allegations and pre-summoning evidence for summoning of an accused.

Held: The Sessions Court held that no offence punishable under Section 420 read with Section 120-B, IPC was made out as the factum of earlier marriage of the respondent no.1 was clearly disclosed to the appellant. The Sessions Judge failed to appreciate the fact that certain events had taken place thereafter, namely, apprising the appellant about the decree of divorce having been passed and showing the forged copy thereof to him on mobile. The Learned Sessions Court

* Author

has considered the revision against the summoning order as if after trial the findings of conviction or acquittal was to be recorded. It was a preliminary stage of summoning. For summoning of an accused, prima facie case is to be made out on the basis of allegations in the complaint and the pre-summoning evidence led by the complainant. [Para 12.1]

List of Acts

Code of Criminal Procedure, 1973; Indian Penal Code, 1860, Hindu Marriage Act, 1955.

List of Keywords

Issuance of process, Prima facie, Pre-summoning evidence, Summoning order.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2272 of 2024

From the Judgment and Order dated 25.04.2023 of the High Court of M.P at Gwalior in MCRC No. 11184 of 2021

Appearances for Parties

Gopal Shankarnarayanan, Sr. Adv., Ms. Astha Sharma, Nipun Saxena, Ms. Anju Thomas, Ms. Mantika Haryani, Ms. Aditi Gupta, Ms. Ripul Swati Kumari, Archit Adlakha, Ms. Soumya Saxena, Aditya Raj Pandey, Advs. for the Appellant.

Mukesh Kumar, Yashaswi S.K. Chocksey, Ankit Singh, Sushant Sagar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

Leave granted.

2. The complainant is before this Court challenging the order dated 25.04.2023[1] passed by the High Court of Madhya Pradesh at Gwalior

1 Passed in Misc. Criminal Case No.11184 of 2021

vide which the order dated 11.01.2021 passed by the 4th Additional Sessions Judge, Shivpuri[2] quashing the summoning order dated 12.03.2019[3] passed by the Trial Court was set aside as far as Section 420, IPC is concerned against the respondent no.1/Sharmila Das and Section 420 read with Section 120-B, IPC against the respondent no.2/Usharani Das and respondent no.3/Sangita.

3. Briefly the facts as available on record are that the marriage of the appellant was solemnized with the respondent no.1 on 28.04.2018 in the presence of the respondent nos. 2 and 3. Having come to know that on the date, the respondent no.1 had solemnized marriage with the appellant, she was already married and had not obtained divorce from her first husband, the appellant filed a petition[4] under Section 11 of the 1955 Act[5] before Principal Judge, Family Court, Shivpuri (M.P.) seeking annulment of marriage between the appellant and the respondent no.1.

4. Subsequently, the appellant preferred a complaint[6] against the respondent nos.1, 2, and 3 in which the Magistrate *vide* order dated 12.03.2019, after recording preliminary evidence and being satisfied that a *prima facie* case was made out, directed issuance of process against the respondent no.1 for the offences punishable under Sections 494 and 420 read with Section 120-B, IPC, and against the respondent nos. 2 & 3 for the offence punishable under Section 420 read with Section 120-B, IPC.

5. The aforesaid order was impugned by the accused persons/ respondent nos. 1 to 3 by filing Revision Petition[7] before the 4th Additional Sessions Judge, Shivpuri which was partly allowed by the Sessions Court. The impugned order dated 12.03.2019 passed by the Magistrate was set aside to the extent of taking cognizance of the offence punishable under section 420 of IPC against the respondent no.1 and for the offence punishable under section 420 read with section 120-B of IPC against the respondent nos.2 and 3.

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2 In Criminal Revision No. 155 of 2019

3 Complaint Case bearing Case No. 7798 of 2019

4 Case No. RCSHM/34/2019

5 Hindu Marriage Act, 1955

6 The Court of Judicial Magistrate First Class, Shivpuri (M.P.) under Sections 495, 420, 468, 471 and 506 read with Section 34, IPC

7 Criminal Revision No. 155 of 2019

6. The appellant challenged the order of Sessions Court before the High Court. The same was upheld. It is against the aforesaid two orders, the appellant is before this Court.

7. Learned counsel for the appellant submitted that both the parties namely the appellant and the respondent no.1 came in contact through a matrimonial site (name withheld) and thereafter meetings were held at Visakhapatnam on 09.03.2018 and 10.03.2018 in the presence of the respondent nos.2 and 3. The respondent no.1 was earlier married as was even disclosed by her on the matrimonial site. At the time of meeting the appellant was shown a smudged copy of the divorce order passed in favour of the respondent no.1 on mobile phone. On the document, the date could not be clearly seen as the copy of the order was not clear. It was stated that the order is pending signatures of the Judge. Thereafter, the marriage of the parties was solemnized on 28.04.2018. The respondents dishonestly misrepresented that they are not financially well, and thereby induced the appellant to part with ₹ 2 lakhs and bear the entire expenses of the marriage.

   7.1 On 16.06.2018, when respondent no.1 visited the doctor for a checkup, she was found to be pregnant. She wanted to undergo an abortion, but when confronted by the appellant, the reason therefore she told that she had not yet obtained divorce from her previous marriage. The document which was shown to him on mobile phone was forged. This shows that the consent for marriage was obtained dishonestly. The appellant was taken aback. When confronted, the respondent no.1 threatened him of filing false cases, which may lead to his dismissal from Government service besides tarnishing his image.

   7.2 As the appellant was in shock, he was left with no option but to file complaint with the police on 08.07.2018. However, no action was taken on the complaint. Thereafter, the appellant preferred criminal complaint before the Magistrate on 20.07.2018.

   7.3 Immediately after coming to know about the filing of the criminal complaint by the appellant, the respondent no.1 approached the Family Court, Panvel on 25.07.2018 where the Divorce Petition filed by her first husband under Sections 13(1)(i) and 13(1) (i-a) of the 1955 Act was pending for more than 6 months. The respondent no.1 filed an application seeking conversion

thereof to a divorce by mutual consent under Section 13-B of the 1955 Act. After accepting the application the divorce was granted on the same day.

7.4 In the complaint filed by the appellant he led both documentary and oral evidence. Based on the evidence produced by the appellant, a prima facie case was established. Consequently, the Magistrate issued process against the respondents to face trial under Sections 494, 420, read with Section 120-B, IPC.

7.5 Aggrieved by the same, the respondents preferred Revision Petition before the Sessions Judge. However, without there being any valid reason, the Sessions Judge set aside the summoning order with reference to respondent no.1 under Section 420 of IPC and with reference to respondent nos.1 and 2 under Section 420 read with Section 120-B of IPC; and confirmed the order of Trial Court with reference to summons issued against respondent no.1 under section 494 of IPC.

7.6 Challenge was made by the appellant to the aforesaid order before the High Court raising the contention that the Court without appreciating the facts of the case, which are self-speaking, dismissed the Revision Petition. The impugned order deserves to be set aside, as a prima facie case is made out showing that the appellant had been dishonestly induced by the respondent nos.1, 2 and 3 to believe that the respondent no.1 had obtained divorce by showing him a forged order of divorce from earlier marriage knowing well that it had not yet been dissolved as on the date of marriage with the appellant, and thereby dishonestly induced him to marry respondent no.1. The respondents are liable to face trial under Section 420 read with Section 120-B, IPC for the reason that all of them had conspired with each other to dishonestly induce the appellant into marrying respondent no.1 and parting away with huge amount.

8. On the other hand, learned counsel for the respondents submitted that even on the basis of the pleaded facts and the material produced by the appellant before the Magistrate, no offence under Section 420, IPC can be made out. It cannot be said to be a case of criminal conspiracy and no offence of cheating is made out against the respondents. There is no error in the orders passed by the Sessions Court or the High Court. There was no concealment or cheating at

the behest of the respondents as they had clearly disclosed all the facts to the appellant from the very beginning. The appeal deserves to be dismissed.

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

10. The appellant and the respondent no.1 came in contact through a matrimonial site. The appellant was already divorced whereas the respondent no.1 had uploaded her status as "process of divorce is under consideration." After initial conversation, the appellant along with his family members were invited to visit Visakhapatnam, where they had interaction with the respondents. At the time of the meeting the appellant was told that the respondent no.1 was earlier married at Mumbai and the divorce had already taken place. On being asked about the copy of the decree of divorce it was stated that the same is pending for signature of the Judge concerned and will be provided in due course. The respondents had shown to the appellants an unclear photocopy of the decree of divorce which was believed to be true. On 11.03.2018, the appellant gave his consent for the marriage. Date was fixed as 28.04.2018. The respondents pointed out that their financial condition was not good to come to Gwalior for the marriage along with their other relatives. As a result, the appellant booked tickets for the respondents and their relatives from Visakhapatnam to Gwalior and vice-versa, and also gave ₹ 2 lakhs cash to the respondents as expenditure for marriage.

11. On 16.06.2018, on account of some medical complication the appellant as well as the respondent no.1 rushed to the clinic of a lady doctor in Shivpuri (Madhya Pradesh), where couple resided after their marriage. The doctor disclosed that the respondent no.1 was pregnant. The joy of the appellant knew no bounds whereas the respondent no.1 was very sad. The message was even conveyed to the family members of the appellant as well as the respondent no.1. The respondent nos.2 and 3 were not happy. The appellant was surprised with the reaction. Later, when the reason was asked by the appellant from respondent no.1, he was told that she is yet to get divorce from her previous husband. It was a shock of life for the appellant. It was nothing else but cheating by showing a fake decree of divorce. It was for this reason only that the respondent no.1 wanted to get the pregnancy aborted. The appellant felt cheated.

When he told that he would take action against the respondents, he was threatened with criminal cases of various matrimonial offences, which he claimed to have been filed.

12. Written complaint was filed by the appellant to the Superintendent of Police of Shivpuri, Madhya Pradesh on 07.07.2018 and to the Station in-Charge, Physical Shivpuri on 08.07.2018. However, no action was taken. It was thereafter, that the complaint was filed in the court before the Magistrate on 20.07.2018. The Trial Court after recording the preliminary evidence summoned the respondent no.1 to face trial under Sections 494 and 420 read with Section 120-B, IPC and the respondent nos.2 and 3 to face trial under Section 420 read with Section 120-B, IPC.

    12.1 The aforesaid order was challenged by the respondents before the Additional Sessions Judge. The Sessions Court held that no offence punishable under Section 420 read with Section 120-B, IPC was made out as the factum of earlier marriage of the respondent no.1 was clearly disclosed to the appellant. The Sessions Judge failed to appreciate the fact that certain events had taken place thereafter, namely, apprising the appellant about the decree of divorce having been passed and showing the forged copy thereof to him on mobile. The Learned Sessions Court has considered the revision against the summoning order as if after trial the findings of conviction or acquittal was to be recorded. It was a preliminary stage of summoning. For summoning of an accused, prima facie case is to be made out on the basis of allegations in the complaint and the pre-summoning evidence led by the complainant.

13. In a challenge by the appellant to the aforesaid order in the quashing petition, the High Court dismissed the petition without recording any reasons.

14. Considering the material on record, in our opinion the approach of the Learned Sessions Court and the High Court in setting aside the summoning order against the accused persons i.e. respondent nos.1, 2 and 3 under Section 420 read with Section 120-B IPC is not legally sustainable.

15. For the reasons mentioned above from the facts as pleaded in complaint and the evidence led by the appellant, *prima facie* case

was made out for issuing process against the respondents to face trial for the offence punishable under Section 420 read with Section 120-B, IPC, for which they were summoned.

16. The appeal is accordingly allowed. The impugned orders passed by the High Court and the Sessions Court are set-aside and that of the Magistrate is restored. It is made clear that nothing said above shall be taken as final opinion on merits of the controversy. The Trial Court shall decide the case on its own merits on the basis of the evidence led by the parties.

Headnotes prepared by:
Himanshu Rai, Hony. Associate Editor
(*Verified by:* Shadan Farasat, Adv.)

Result of the case:
Appeal allowed

[2024] 5 S.C.R. 545 : 2024 INSC 306

Association of Engineers and Others Etc.
v.
The State of Tamil Nadu and Others Etc.

Civil Appeal No. 4886-4888 of 2023
(Arising out of SLP (C) No. 17269-17271 of 2022)

16 April 2024

[B. R. Gavai* and Sandeep Mehta]

Issue for Consideration

Validity of appointing Technical Assistants (forming part of state subordinate services) as Assistant Engineers on transfer - challenged.

Headnotes

Tamil Nadu State and Subordinate Service Rules – Civil Appeal Nos. 4886 to 4889, 4892 and 5748 to 5750 of 2023 ('Batch 1') – A Government Order ('GO') was issued allowing appointment of Junior Draughting Officers, Draughting Officers, Overseers and Technical Assistants with 5 years of service and B.E./A.M.I.E degree, to the post of Assistant Engineers, on transfer basis – Challenge before High Court upheld – Several posts of Assistant Engineers, earmarked for filling on transfer basis remained vacant between 1991 to 2002 – Therefore State Government appointed Technical Assistants to the said post, on temporary basis – This executive decision challenged in High Court – Ground – For being violative of an earlier order of State Administrative Tribunal ('SAT') (affirmed by High Court and Supreme Court on appeal), which upheld inclusion of Junior Draughting Officers and Draughting Officers (but not of Technical Assistants) in the direct recruitment process to the post of Assistant Engineers pursuant to a government advertisement – Single Judge upheld the challenge to the above executive decision and directed State Government to bring necessary amendments to the Rules – On appeal, the Division Bench set aside the decision of Single Judge by order dated 03.08.2022, hence the present appeal.

* Author

Held: Even if Technical Assistants did not challenge SAT's order, the High Court upheld the validity of GO in totality and appeal against the said order of High Court stood dismissed by this Court. Judgment in *B. Thirumal* *((2014)* 16 SCC 593) relied on by Appellants is distinguishable as Technical Assistants herein do not claim right over 75% quota reserved for direct recruitment of Assistant Engineer but only seek consideration within 25% quota reserved for subordinate services, as long as they possess the requisite qualification. Appellants contention to disregard Technical Assistants' candidature for want of their regularisation stood negated in light of the GO dated 13.08.2015 which regularised them. State Government's decision of temporarily appointing Technical Assistants as Assistant Engineers was a need-based decision as large number of posts reserved for recruitment by transfer remained unfilled – Appellants cannot be allowed to have a right over posts earmarked for recruitment by transfer of those belonging to subordinate services – Appeal dismissed. [Para 17-23, 25, 27].

Practice and Procedure – Remand – Civil Appeal Nos. 4372, 4890, 4891 and 5747 of 2023 ('Batch 2') – Individual appeals allowed and respective cases remanded to High Court for fresh consideration on specific facts of each case.

Held: On the request of parties – Matter remanded for fresh consideration as High Court passed Impugned Orders without appreciating parties' submissions – Impugned Orders set aside; Appeals allowed. [Para 30, 31]

Case Law Cited

Narpat Singh and Others v. Jaipur Development Authority and Another **[2002] 3 SCR 365 : (2002) 4 SCC 666 – relied upon.**

Association of Engineers v. Government of Tamil Nadu and Others **[2017] 11 SCR 713 : 2017 INSC 906;** *B. Thirumal v. Ananda Sivakumar and Others* **[2013] 14 SCR 1076 : (2014) 16 SCC 593 – referred to.**

List of Acts

Constitution of India; Tamil Nadu State and Subordinate Service Rule.

Association of Engineers and Others Etc. v.
The State of Tamil Nadu and Others Etc.

List of Keywords

Technical Assistants; Feeder category; Subordinate service; Draughting Engineers; Direct recruitment; Appointment by transfer; Vacancy filled on temporary basis; Regularization; Executive instructions; Filling legislative gaps.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 4886-4888 of 2023

From the Judgment and Order dated 03.08.2022 of the High Court of Judicature at Madras in WA No. 82 and 95 of 2015 and WP No. 5251 of 2022

With

Civil Appeal No. 4372, 4891-4892, 4889-4890 and 5747-5750 of 2023

Appearances for Parties

Mrs. Madhavi Divan, V. Prakash, Senthil Jagadeesan, Sanjay R. Hegde, Sr. Advs., Ms. Preetika Dwivedi, Abhisek Mohanty, Naveen Kumar Murthy, N. Subramaniyan, Pranav Sachdeva, Jatin Bhardwaj, Ms. Aakriti, Ms. Neha Rathi, Kamal Kishore, Ms. Kajal Giri, K.K. Mani, G. Veerapathiran, Ms. T. Archana, Rajeev Gupta, D. Kumanan, Sheikh F Kalia, Mrs. Deepa. S, Ms. Beno Deswal, Ms. Sonakshi Malhan, Sabarish Subramanian, P. Rajendran, S. Beno Bencigar, Parijat Kishore, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

B.R. Gavai, J.

Civil Appeal Nos. 4886 to 4889, 4892 and 5748 to 5750 of 2023

1. The present set of appeals challenge the judgment dated 3rd August 2022, passed by the Division Bench of the High Court of Judicature at Madras ('Madras High Court' for short), whereby the writ appeals being W.A. Nos. 82 and 95 of 2015 and 5251 of 2022 filed by the respondents herein were allowed and the order dated 23rd December 2014 passed by the learned Single Judge of the Madras High Court in Writ Petition No. 11148 of 2017 was quashed and set aside.

2. The facts giving rise to present appeals are as under:

2.1 The employees are governed by Tamil Nadu State and Subordinate Service Rules and also Special Rules to govern different services in the State. The engineering staff comes under the Tamil Nadu Engineering Service and Tamil Nadu Engineering Subordinate Service.

2.2 On 2nd January 1990, Public Works Department, Government of Tamil Nadu (hereinafter referred to as 'PWD') issued an order being G.O. Ms. No. 1 (hereinafter referred to as 'G.O. No. 1) accepting the recommendations of Chief Engineer, PWD (General) and the Tamil Nadu Public Service Commission (hereinafter referred to as 'TNPSC') and directed that from the date of this order, Junior Draughting Officers, Draughting Officers, Overseers and Technical Assistants, who have completed 5 years of service and acquired B.E./A.M.I.E. qualification, will be entitled to be appointed as Assistant Engineers on transfer of service.

2.3 On 22nd January 1991, Government Order being G.O. Ms. No. 88 of 1991 (hereinafter referred to as "G.O. No. 88") came to be issued wherein it was clarified that TNPSC need not be consulted for appointment of Junior Draughting Officers, Draughting Officers, Overseers and Technical Assistants, who have completed 5 years of service and acquired B.E./A.M.I.E. qualification, as Assistant Engineers.

2.4 Writ Petition No. 3309 of 1991 came to be filed before the Madras High Court by Engineering Graduates challenging G.O. No.1 on the ground that part-time B.E. Degrees were inferior to regular B.E. Degrees. The same were dismissed vide order dated 8th March 1991.

2.5 On 31st May 1994, an advertisement being No. 9/94 was issued by the TNPSC for direct recruitment of Assistant Engineers. This advertisement was challenged by several Junior Draughting Officers, Draughting Officers and Technical Assistants before the Tamil Nadu Administrative Tribunal, Chennai (hereinafter referred to as the 'Tribunal) on the ground that their appointment should also be considered in the advertised posts in terms of abovementioned G.O. Nos. 1 and 88.

2.6 The Tribunal, vide order dated 17th April 1997, allowed the applications filed by Junior Draughting Officers and Draughting Officers, however, dismissed the applications filed by Technical Assistants. The Tribunal observed that the Technical Assistants are not part of feeder category from which recruitment by transfer can be made for the post of Assistant Engineers.

2.7 Thereafter, Association of Engineers, one of the appellants herein filed Writ Petition No. 7523 of 1997 before the Madras High Court challenging the above finding of the Tribunal qua the Junior Draughting Officers and Draughting Officers. The Technical Assistants never challenged the dismissal of their applications by the Tribunal. The High Court, vide order dated 6th November 2006, dismissed the said writ petition. In the year 2009, the said order of the High Court was challenged before this Court in Civil Appeal No. 995 of 2009. This Court, vide order dated 14th September 2017, dismissed the said appeal.

2.8 From 1999 till 2002, a total number of 491 vacancies in the post of Assistant Engineers were notified to be filled up. Out of the same, 369 vacancies were to be filled up by direct recruitment and the remaining 122 vacancies were to be filled up by recruitment by transfer. Out of the said 122 vacancies referable to the feeder categories for appointment by recruitment by transfer, 29 vacancies alone had been filled up so far.

2.9 The State Government, due to dearth of eligible candidates to fill the remaining 93 vacancies by transfer, issued directions dated 24th February 2006 directing appointment of persons in the category of Technical Assistant, who possessed B.E./A.M.I.E. qualification in Civil Engineering and have rendered 5 years of service on temporary basis.

2.10 Vide Proceedings No. S2(2)/29148/2004-24 dated 27th February 2006, 21 Technical Assistants were appointed as Assistant Engineers on temporary basis.

2.11 The Association of Engineers, one of the appellants herein, filed writ petition being WP No. 11148 of 2007 before the Madras High Court challenging the abovementioned appointment order dated 27th February 2006 on the ground that the same was violative of the order dated 17th April 1997 passed by the

Tribunal in O.A. No. 3348 of 1994 and also the order dated 6th November 2006 passed by the Madras High Court in WP No. 7523 of 1997. Further, the appointments are against the statutory rules prescribed.

2.12 Vide order dated 23rd December 2014, the learned Single Judge of the High Court allowed the said writ petition being WP No. 11148 of 2007 and restrained the official respondents from appointing Technical Assistants as Assistant Engineers by recruitment by transfer unless and until the statutory rules were amended making Technical Assistants as feeder category. The services of respondents herein were to be continued for a period of 3 months and in case the rules are amended by inclusion of Technical Assistants as feeder category within three months, they would not suffer reversion. However, if the rules are not amended, then they will be reverted to their original post.

2.13 In 2016, the unemployed engineering graduates had filed a writ petition being WP No. 36614 of 2016 before the Madras High Court challenging the validity of G.O. No. 1. The matter is still pending adjudication.

2.14 Being aggrieved by the order of the learned Single Judge dated 23rd December 2014, writ appeals being W.A. Nos. 82 and 95 of 2015 were filed before the learned Division Bench of the Madras High Court by the respondents herein. The learned Division Bench of the Madras High Court, vide impugned judgment dated 3rd August 2022, quashed and set aside the order of the learned Single Judge and allowed the writ appeals filed by the respondents herein.

2.15 Aggrieved thereby, the present set of appeals came to be filed.

3. We have heard Smt. Madhavi Divan, learned Senior Counsel, Shri N. Subramaniyan and Shri Pranav Sachdeva, learned counsel appearing on behalf of the appellants. We have also heard Shri V. Prakash and Shri Senthil Jagadeesan, learned Senior Counsel, and Shri P. Rajendran, learned counsel appearing on behalf of the respondents. We have also heard Shri Sanjay Hegde, learned Senior Counsel appearing on behalf of the State of Tamil Nadu.

4. Smt. Madhavi Divan, learned Senior Counsel appearing on behalf of the appellants submitted that in the absence of amendment to

the Rules, Technical Assistants cannot be permitted to be in the feeder cadre for promotion to the post of Assistant Engineers. She submitted that, in spite of several chances, the State has failed to carry out amendment to the Rules and in the absence of Rules, they are not entitled to be promoted to the post of Assistant Engineers. Smt. Divan, relying on Section 10 of the Tamil Nadu Engineering Services submitted that the entry into the Assistant Engineers' Cadre, is either by direct recruitment or recruitment by transfer from Junior Engineers, Overseers, Special Grade Draughting Officers or Civil Draughtsmen of Tamil Nadu Engineering Subordinate Service. It is submitted that the appointment to the post of Technical Assistants has been provided under G.O. MS. No. 1972 dated 18th November 1985. The said G.O. provided that the general and special rules applicable to the holders of the permanent posts in the Tamil Nadu Engineering Subordinate Service shall apply to the holders of the temporary posts of Technical Assistants Civil, Electrical and Mechanical. However, that was subject to the modifications specified therein. The appointing authority to the said posts was the Superintending Engineer of PWD.

5. Smt. Divan submitted that by G.O. MS. No. 1356 dated 2nd August 1980, the State provided for appointment to the post of Junior Engineers (now Assistant Engineers) from the cadre of Draughtsman Grade III, Overseers and Technical Assistants, who, on acquiring degree qualification in Engineering have rendered 5 years of service as Draughtsmen, Overseers, Technical Assistants.

6. Smt. Divan submitted that the appointment of Technical Assistants as Assistant Engineers is totally illegal, violative of Right to Equality under Article 14 of the Constitution of India and also violative of Article 335 of the Constitution of India which mandates efficiency in public administration. It is further submitted that the entry of Assistant Engineers is through competitive examination on the basis of merit whereas the entry of Technical Assistants is through a backdoor entry i.e. appointment by the Superintending Engineer. It is therefore submitted that, permitting the Technical Assistants to march ahead of the Assistant Engineers would, apart from being anti-meritian, would also promote the persons who have entered through backdoor.

7. Smt. Divan further submitted that the temporary appointments of Technical Assistants have neither been regularized nor has

their probation commenced. It is therefore submitted that without regularization and declaration of probation in the category of Assistant Engineers as mandated by Rule 7 of Special Rules to Tamil Nadu Engineering Service, they cannot be made as Assistant Engineers.

8. Reliance is placed on the judgment of this Court in the case of ***Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Others***[1] in support of the proposition that unless the appointment is in accordance with the rules, the same is not valid. Reliance is also placed on the judgment of this Court in the case of ***A.K. Bhatnagar and Others v. Union of India and Others***[2] contending that this Court has categorically rejected the argument to consider the appointment of ad-hoc appointees without regularization.

9. Shri N. Subramaniyan, learned counsel appearing on behalf of the appellants supplemented the arguments advanced by Smt. Divan. He submitted that sub-rule (1) of Rule 2 of Tamil Nadu State and Subordinate Services Rules postulates that a person is said to be 'appointed to a service' when in accordance with the said Rules or in accordance with the Rules applicable at the time, he discharges, for the first time the duties of a post borne on the cadre of such service or commences the probation, instruction or training prescribed for members thereof. It is submitted that the Technical Assistants neither commenced their duties on the posts borne on the cadre of such service nor commenced their probation. He further submitted that, in accordance with Rule 4 of the said Rules, all appointments to a service whether by direct recruitment or by recruitment by transfer or by promotion, can be made by the appointing authority from a list of approved candidates. It is submitted that, since the Technical Assistants are not approved candidates, they cannot be appointed to the post of Assistant Engineers. He further submitted that the temporary appointments in accordance with Rule 10 of the said Rules could be made only for a temporary period only when there is likelihood of delay in making the appointments in accordance with the said Rules. He further submitted that, in accordance with Rule 36A of the said Rules, the appointments by recruitment by transfer can be made only on the ground of merit and ability, seniority being

1 [1990] 2 SCR 900 :(1990) 2 SCC 715 : 1990 INSC 169

2 [1990] Supp. 2 SCR 638 : (1991) 1 SCC 544 : 1990 INSC 344

considered only where merit and ability are approximately equal. He submitted that, amendment to Rule 4A specifically prohibits promotion or appointment on the basis of executive orders seeking to modify the Rules. He therefore submitted that, on several grounds, the appointments of Technical Assistants are liable to be set aside.

10. It is further submitted that the appointments so made are contrary to the judgment of this Court in the case of ***B. Thirumal v. Ananda Sivakumar and Others***[3].

11. Per contra, Shri V. Prakash, learned Senior Counsel appearing on behalf of the respondents submitted that a perusal of G.O. Ms. No. 3037 dated 22nd December 1986 issued by the PWD would reveal that the pay-scales of Overseers and Technical Assistants are the same. It is submitted that the said G.O. Ms. No. 3037 specifically provides that 75% of the vacancies in the post of Junior Engineer (formerly Supervisor) shall be filled up by Engineering degree holders while remaining 25% vacancies shall be filled up by the candidates possessing Engineering Diploma or equivalent certificates. It further provides for promotion from Overseers, Head Draughtsman and Civil Draughtsman (Grad I, II and III). It is submitted that, though the pay-scales of the Overseers are same as that of Technical Assistants and that of Draughtsman Grade III, inadvertently, the cadre of Technical Assistants was not mentioned therein. It is submitted that, in order to rectify this omission, the G.O. No. 1 came to be issued. It provided that, Junior Draughting Officers, Draughting Officers, Overseers and Technical Assistants in PWD, who have put in five years service would be eligible to be appointed as Assistant Engineers on transfer of service on acquiring B.E./A.M.I.E. qualification. Shri Prakash submitted that challenge to the said G.O. No. 1 was negatived by the Madras High Court vide order dated 8th March 1991 in Writ Petition No. 3309 of 1991 in the case of ***R. Murali and Others v. The State of Tamil Nadu and Another***[4]. The High Court held that the executive instructions can be issued to fill up the gap till rules are framed under Article 309 of the Constitution of India.

12. Shri Prakash further submitted that, out of 36 Technical Assistants promoted as Assistant Engineers in the years 2006 and 2008, only a

3 [2013] 14 SCR 1076 : (2014) 16 SCC 593 : 2013 INSC 787

4 Order dated 8th March 1991 in Writ Petition No. 3309 of 1991

few would be remaining in service as most of them have been retired or would be retiring in near future. He therefore submitted that this is a fit case wherein this Court should not exercise its jurisdiction under Article 136 of the Constitution of India.

13. Shri Senthil Jagadeesan, learned Senior Counsel appearing on behalf of the respondents, relying on the judgment of this Court in the case of ***Sant Ram Sharma v. State of Rajasthan and Others***[5], submitted that where the rules are silent, the said gap can be filled up by the executive instructions. He further relies on the order of the Division Bench of the Madras High Court dated 6th November 2006 in Writ Petition No. 7523 of 1997 in the case of ***Association of Engineers' v. The Tamil Nadu Administrative Tribunal and Others***[6].

14. We find that, on account of various facts as emerging from the record, it will not be necessary for us to go into the wider issues as canvassed by the parties.

15. G.O. No. 1 which includes Technical Assistants for being appointed as the Assistant Engineers on transfer of service on acquiring B.E./A.M.I.E. qualification, came to be challenged by Engineering Graduates who had obtained the degree by joining regular courses, before the High Court of Judicature at Madras. The same was negatived by the Madras High Court by order dated 8th March 1991. It is further pertinent to note that the Association of Engineers, who is one of the lead appellants herein, had filed a petition challenging the order dated 17th April 1997 passed by the Tribunal in O.A. No. 3348 of 1994.

16. The said O.A No. 3348 of 1994 was filed challenging the Advertisement No.9/94 issued by the TNPSC for the post of Assistant Engineer and for consequentially considering the claim of Junior Draughting Officers, Draughting Officers and Technical Assistants for appointment as Assistant Engineers on the basis of G.O. Ms. Nos. 1 of 1990 and 88 of 1991. The Tribunal, vide order dated 17th April 1997, allowed the applications filed by the Junior Draughting Officers and Draughting Officers, however, dismissed the applications filed by Technical Assistants. The Tribunal observed that the Technical Assistants

5 [1968] 1 SCR 111 : 1967 SCC OnLine SC 16 : 1967 INSC 167

6 Order dated 6th November 2006 in Writ Petition No. 7523 of 1997

are not part of feeder category from which recruitment by transfer can be made for the post of Assistant Engineers. The order of the learned Tribunal was challenged by the appellants herein by filing a writ petition being Writ Petition No. 7523 of 1997 titled ***Association of Engineers' v. The Tamil Nadu Administrative Tribunal and Others*** (supra) before the Madras High Court. The Division Bench of the said High Court rejected the claim of the appellants herein and upheld the order of the Tribunal. It will be relevant to refer to para (13) of the said order, which reads thus:

> "**13.** It is also brought to our notice that the Special Rules were amended by G.O.Ms.No.1745 dated 10.10.1972, which were subsequently modified by G.O.Ms.No.1356 dated 02.08.1980 and on the basis of representation, the Government reconsidered those executive orders and issued G.O.Ms.No.1 PWD dated 02.01.1990, **stating that with effect from the date of the said order, Junior Drafting Officer, Drafting Officer, Overseers and Technical Assistants, who have put in five years of service will be eligible to be appointed as Assistant Engineers by transfer of service on acquiring B.E./ A.M.E.E. degree qualification. We are satisfied that Rule 5 of the Special Rules in no way affects the implementation of the decision of the Tribunal in view of Rule 2(a)(5) of the Special Rules. As observed earlier, it is our duty to mention that in order to implement the orders passed in G.O.Ms.No.1 PWD dated 02.01.1990, the Government have conducted meeting with various Engineering Associations, including the petitioner Association on 10.12.1996 and 03.06.1997 and took a decision to maintain 3:1 ratio between the direct recruitment and recruitment by transfer.** As rightly pointed out, members of the petitioner Association are being considered for the number of vacancies apportioned as per the ratio out of total estimated vacancies. **We have already referred to the order of this Court dated 08.03.1991 in W.P.No.3309 of 1991, upholding the G.O.Ms.No.1 PWD dated 02.01.1990.** It is also not in dispute that executive instructions can be issued to fill up the gap till necessary Rules are framed under Article

309 of the Constitution. All these and other materials have been correctly considered by the Tribunal; and we are in agreement with the conclusion arrived at by it."

17. It can thus clearly be seen that the Division Bench of the Madras High Court held that G.O. No. 1 provided that from the date of the said order, Junior Drafting Officer, Drafting Officer, Overseers and Technical Assistants, who have put in five years of service will be eligible to be appointed as Assistant Engineers by transfer of service on acquiring B.E./A.M.I.E. degree qualification.

18. It is sought to be urged that, before the Tribunal, the Technical Assistants had failed and that they had not challenged the said order of the Tribunal.

19. However, we find that the Division Bench of the Madras High Court clearly referred to G.O. No. 1 and approved it. It is further to be noted that the appeal challenging the aforesaid order of the Madras High Court dated 6th November 2006 has also been dismissed by this Court vide order dated 14th September 2017 in the case of ***Association of Engineers v. Government of Tamil Nadu and Others***[7].

20. Insofar as the issue in the case of ***B. Thirumal*** (supra) is concerned, the same would not be applicable to the facts of the present case. In the said case, the appellant was working as a Junior Engineer (Electrical). He was appointed to the said post by direct recruitment. Aggrieved by the prevalent practice of Assistant Engineers (Electrical) being empanelled for promotion to the post of Assistant Executive Engineer (Electrical) only against 25% quota apportioned for members of the Subordinate Engineering Service, he had filed a representation. The said representation came to be rejected. It was sought to be contended in the said case that an Assistant Engineer promoted from Junior Engineer cadre and having obtained a degree in engineering was also entitled to compete with the Assistant Engineers directly recruited for 75% of the quota earmarked for the direct recruits. The Court found that the degree holder Junior Engineers continue to be members of the Subordinate Engineering Service even after they are redesignated as Assistant Engineers upon getting a degree qualification. Upon their getting degree qualification, they could

7 [2017] 11 SCR 713 : 2017 INSC 906

be considered only against the 25% quota apportioned for the Subordinate Service and not against 75% apportioned for the State Service members directly recruited to that service or appointed by transfer in terms of the Rules.

21. Such is not the situation here. The Technical Assistants are not claiming against the 75% posts available for direct recruits. Their claim is only towards 25% posts which are required to be filled in from Junior Draughting Officers, Overseers and Technical Assistants who have put five years service and have acquired B.E./A.M.I.E. qualification. It is thus clear that the Technical Assistants are, in no way, encroaching upon the quota apportioned for directly recruited Assistant Engineers. Even if their contention is accepted that once they are brought in the cadre of Assistant Engineers, they would lose their birthmark, in view of the judgment of this Court in the case of ***B. Thirumal*** (supra), for the higher post, and there will be no competition amongst direct recruits and promotees. Whereas the direct recruits would be entitled to get promotional posts from 75% quota apportioned for them, the Technical Assistants along with other placed amongst them would be entitled to promotional posts only from 25% posts apportioned for them.

22. It is further to be noted that the contention of the appellants that, the services of the Technical Assistants are not regularized, is also contrary to record. It will be relevant to refer to Clause 4 of G.O. Ms. No. 155 dated 13th August 2015, issued by the Government of Tamil Nadu, which reads thus:

> "**4.** In accordance with the powers delegated under the general rule 48 of the Tamil Nadu State and Subordinate Services Rules Volume II, the Governor of Tamil Nadu orders relaxing the rule 2(a) and rule (5) of the Tamil Nadu Engineering Service (Category-1, Public Works) the so as to regularize the 72 Assistant Engineers (Civil) as per the Annexure of this order who were appointed retrospectively from the category of Junior Engineers and promoted from the category of Technical Assistants who acquired B.E., Civil Degree before promotion as Junior Engineers so as to enable them for regularization of the services in the category of Assistant Engineers (Civil). Further, the Government also order exempting them from the purview

> of the G.O.(Ms).No. 1, Public Works Department dated 02.01.1990 for regularization of the personnel stated in the Annexure to this order."

23. It is thus clear that the contention of the appellants that the services of the Technical Assistants have not been regularized is contrary to record. In any case, the State Government, in its affidavit dated 10th March 2023, has categorically reaffirmed this position.

24. It is further relevant to note the relevant extract from the Proceedings No. S2(2)/2918/2004-24 dated 27th February 2006 conducted before the Engineer-in-Chief, W.R.D and Chief Engineer (General), PWD, which reads thus:

> "During the year from 1999-2000 to 2001-2002 the number of 369 vacancies have been apportioned to the post of Assistant Engineer to be filled up by direct recruitment and the number of 122 vacancies have been apportioned to the post Asst. Engineer to be filled up by recruitment by transfer.
>
> Out of 122 vacancies apportioned to the post of Assistant Engineer to be filled up by recruitment by transfer, only 29 vacancies have been filled up so far, from the Junior Draughting Officers, Draughting Officers and Overseers. The remaining number of 93 vacancies are still vacant due to dearth of eligible candidates.
>
> Under these circumstances and also pursuant to the directions of the Government, PWD issued in the letter fourth cited the personnels in the category of Technical Assistant, who possessed B.E/A.M.I.E qualification in civil Engineering and rendered 5 years of service, furnished to this proceedings are appointed as Asst. Engineer(civil) in the time scale of pay of Rs.65-00-200-11, 100 on temporary basis under rule 10(a)(i) of the General Rules for the Tamil Nadu State and Subordinate Service, subject to the outcome of W.P.No.7523/97 pending in the High Court of Madras in this matter."

25. It can thus clearly be seen that the State Government was required to take a decision to appoint Technical Assistants as Assistant

Engineers on temporary basis as it was found that out of 122 vacancies apportioned to the post of Assistant Engineer to be filled up by recruitment by transfer, only 29 vacancies had been filled so far. It appears that the attempt of the appellant association is to grab all the posts available even those apportioned for the candidates promoted from subordinate services. In our view, the said attitude is totally unequitable.

26. In any case, any interference at this stage is likely to undo the settled position which has been prevalent almost for a period of last 18 years. As already held hereinabove, the continuation of the appellants as Assistant Engineers would not amount to encroaching upon the 75% posts apportioned for the members of the appellants' association. We may gainfully refer to the following observations of this Court in the case of ***Narpat Singh and Others v. Jaipur Development Authority and Another***[8]:

> "**10.** ….The exercise of jurisdiction conferred by Article 136 of the Constitution on this Court is discretionary. It does not confer a right to appeal on a party to litigation; it only confers a discretionary power of widest amplitude on this Court to be exercised for satisfying the demands of justice. On one hand, it is an exceptional power to be exercised sparingly, with caution and care and to remedy extraordinary situations or situations occasioning gross failure of justice; on the other hand, it is an overriding power whereunder the Court may generously step in to impart justice and remedy injustice. The facts and circumstances of this case as have already been set out do not inspire the conscience of this Court to act in the aid of the appellants. ….."

27. Following the aforesaid, we find that equity demands no interference to be warranted in the impugned judgment in the facts and circumstances of the case.

28. In the result, the appeals are dismissed.

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

8 [2002] 3 SCR 365 : (2002) 4 SCC 666 : 2002 INSC 222

Civil Appeal Nos. 4372, 4890, 4891 and 5747 of 2023

30. Learned counsel for the parties agree that the writ petitions being WP No. 3617 of 2017 and 35161 of 2019 filed before the Madras High Court were decided by it without even adverting to the facts and the rival submissions and they therefore made a request for remanding the matter to the High Court for consideration afresh.

31. In the result, the appeals are allowed. The impugned orders dated 3rd August 2022 in WP No. 3617 of 2017 and dated 17th March 2022 in WP No. 35161 of 2019 are quashed and set aside and the matters are remanded back to the Madras High Court for consideration afresh in accordance with law.

32. Pending application(s), if any, shall stand disposed of. No costs.

Headnotes prepared by:
Niti Richhariya,
Hony. Associate Editor
(*Verified by:* Balbir Singh, Sr. Adv.)

Result of the case:
Civil Appeal Nos. 4886 to 4889, 4892 and 5748 to 5750 of 2023 dismissed.
Civil Appeal Nos. 4372, 4890, 4891 and 5747 of 2023 allowed.

[2024] 5 S.C.R. 561 : 2024 INSC 325

Jadunath Singh
v.
Arvind Kumar & Ors. Etc.

Criminal Appeals No. 2170 - 2172 of 2024
(Arising Out of SLP(Crl.) Nos. 7961-7963 of 2023)

19 April 2024

[Vikram Nath* and Sanjay Kumar, JJ.]

Issue for Consideration

Criminal appeal filed by appellant Jadunath Singh against the Allahabad High Court's decision to grant bail to Arvind Kumar, Chandra Kumar @ Chandu, and Rishi Kumar, who were convicted for life imprisonment under the Indian Penal Code for offenses including murder. The incident occurred on February 11, 2011, in Village Bhogaon, where Arvind Kumar and his associates, armed with firearms, opened fire on Jadunath Singh and others, resulting in the deaths of Rajvir and Pawan Kumar, and injuries to Ravita. The accused were convicted under Sections 147, 148, 302/149, and 120B of the Indian Penal Code (IPC) and sentenced to life imprisonment. During the trial, two of the accused, Chandra Kumar and Rishi Kumar, murdered a police constable, Ajay Kumar, while in judicial custody and attempted to escape, leading to additional charges and a separate trial; Whether the High Court's decision to grant bail was made with all relevant facts, including the accused's subsequent criminal conduct, being presented before it; and Whether the principle of parity with other co-accused who have been granted bail is applicable in this case, given the distinct roles and additional crimes committed by Chandra Kumar and Rishi Kumar.

Headnotes

Bail – Appeals arising from a Common Order passed by Allahabad High Court – Appellants challenge the High Court's order granting bail to the applicants – Applicants are "dreaded criminals" who have committed multiple murders, including the murder of Police Constable – Appellant fears if applicants are released on bail, they may conspire to harm the complainant and his family members – High Court's decision to grant bail was made without considering all relevant facts, particularly the applicants' subsequent criminal conduct and the ongoing

* Author

trial for the murder of the police constable – The other co-accused is not part of the murder of the police constable – No interference with the bail granted to such co-accused by the High Court. [Para 12-13]

Held: The High Court did not consider the fact of the murder of the constable- Bail granted to the accused in the murder of the constable is cancelled – Insofar as the other co-accused is concerned, he is not a party to the murder of the constable – Hence, no interference with the bail granted to the co-accused.

List of Acts

Indian Penal Code, 1860.

List of Keywords

Bail; Co-accused; Parity; Seriousness; Relevant facts.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 2170-2172 of 2024

From the Judgment and Order dated 08.02.2023 of the High Court of Judicature at Allahabad in CRLA Nos. 5033, 5100 and 5102 of 2019

Appearances for Parties

Ravindra Singh, Sr. Adv., Raman Yadav, Syed Mehdi Imam, Ms. Akriti Chaturvedi, Priyam Kaushik, Advs. for the Appellant.

Shashank Shekhar Singh, Ms. Pooja Singh, Abhinav Singh, Varun Thakur, Deepak Goel, Mrs. Tanuj Bagga Sharma, Dr. M.K Ravi, Denson Joseph, M/S. Varun Thakur & Associates, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Vikram Nath

Leave granted.

2. These appeals arise from a Common Order passed by Allahabad High Court on 08.02.2023 while adjudicating three Criminal Appeals- Criminal Appeal No. 5033 of 2019 (Arvind Kumar vs State of U.P.),

Criminal Appeal No. 5100 of 2019 (Chandra Kumar @ Chandu vs State of U.P.) and Criminal Appeal No. 5102 of 2019 (Rishi Kumar vs State of U.P.). The Applicants had sought for suspension of sentence and grant of bail through these Appeals on the primary ground that they are in jail for more than ten years. Also, two co-accused Pramod Kashyap and Adesh Kumar had been granted bail by co-ordinate bench of same High Court. By the Impugned order, the three Applicants- Arvind Kumar, Chandra Kumar @ Chandu and Rishi Kumar were granted bail during the pendency of their Criminal appeals, with condition of furnishing a personal bond in the sum of Rs.50,000/- each (Fifty Thousand) along with two sureties. Appellant is the Complainant and has challenged the order of granting bail through these appeals.

3. The three Applicants have filed separate Criminal Appeals before High Court against order of Sessions Court dated 06.06.2019 whereby total five Accused namely, Arvind Kumar, Chandra Kumar @ Chandu, Rishi Kumar, Pramod Kashyap and Adesh Kumar were convicted under Sections 147, 148, 302/149 and 120B of Indian Penal Code, 1860[1]. They were sentenced for life imprisonment under Section 302/149 of IPC along with fine of Rs. 20,000/-. By the same order two other accused- Monu and Amit Kumar were acquitted of all the Charges.

4. The brief facts leading to these appeals are as follows:

   4.1 On 11.02.2011, the appellant/Complainant- Jadunath Singh submitted a Written Report narrating the incident leading to present Criminal case. He stated that in Village Bhogaon there is a plot illegally taken by Arvind Kumar (accused- respondent). He was removed from its illegal possession by Rajvir, son of the Complainant, in accordance with the order of District Magistrate.

   4.2 On the same day around 11.45 AM, Complainant Jadunath Singh along with his son Rajvir, Pawan Kumar, Rawan Kumar, Upendra, Chedalal were sitting together, discussing the disputed plot. At this time, Arvind Kumar, armed with country made pistol (katta of 315 bore), his two sons-Chandra Kumar @ Chandu armed with katta and Rishi Kumar armed with katta along with Amit Kumar, armed with a rifle and two unknown

1 In short, "IPC"

persons with rifles, arrived there in white coloured Maruti 800 Car and immediately opened fire at the complainant and all other persons sitting with him.

4.3 The Complainant and others ran into a nearby building owned by one Harvilas. They were chased by accused persons along with continuous firing. They managed to intrude in the room in which Rajvir and Pawan entered while hiding and escaping from the shots. There the accused aimed at Rajvir and Pawan, shot them dead and thus caused the death of both these victims and also injured Ravita- daughter in law of Harvilas, causing injuries upon her. Thereafter the accused persons fled away. The injured persons were taken to Hospital.

4.4 The Medical Officer on duty declared Rajvir and Pawan Kumar as brought dead. Ravita's treatment is under process. As per testimony of Dr. Ankit Nikant, Pawan's death was caused by fire arm injury on his chest and excessive bleeding from the same. Rajvir's death is caused from excessive bleeding from the 9 firearm wounds found on his body. Two injuries were found on Rajvir's shoulder and one injury was on his chest.

5. On the basis of the complaint given by Jadunath Singh (Appellant), FIR No. 1411 of 2011 was registered at Police Station Kotwali Dist. Mainpuri under Sections 147, 148, 149, 302, 307, 120B of IPC against five named accused and two unknown. After investigation Chargesheet was submitted against all the seven accused. However, three separate trials were registered being Session Trial No. 48 of 2013- State of U.P. vs Chandra Kumar and three others, namely Pramod Kashyap, Aadesh Kumar and Monu, Session Trial No. 321 of 2013- State of U.P. vs Arvind Kumar and Rishi Kumar and Session Trial No. 531 of 2013- State of U.P. vs Amit Kumar. The trials were clubbed and the leading case was ascertained as Sessions Trial No. 48 of 2013- State vs Chandra Kumar and three others.

6. Trial Court after appreciating the evidence led during the trial, convicted five accused namely Arvind Kumar, Chandra Kumar, Pramod Kashyap, Rishi Kumar and Aadesh Kumar under Section 302/149, 147, 148 and 120-B of IPC and awarded life sentence. It, however, acquitted two other accused namely Monu and Amit Kumar of all the charges.

7. At this juncture it is relevant to note another criminal case involving some of the present convicted accused. On 31.01.2013, two accused viz Rishi Kumar and Chandra Kumar were produced before Sessions Court at Mainpuri, while in judicial custody by Constable Ajay Kumar. The two accused persons requested the police constable Ajay Kumar to take them out for attending nature's call. The police constable Ajay Kumar went along with two accused persons along with family members in a Maruti Car. As soon as they moved out from the Court campus, the two accused Chandra Kumar and Rishi Kumar opened fire on said police constable Ajay Kumar due to which said constable died on the spot and thereafter his dead body was thrown by the accused persons in front of the house of one Munshi Lal. Consequently, an FIR being Case Crime No.60 of 2013 was registered under Section 302 IPC. Charge sheet No. 29 of 2013 dated 27.07.2013 was also filed against eight accused persons- Rishi Kumar, Chandra Kumar, Sudha- wife of Rishi Kumar, Babli- wife of Chandra Kumar, Dharmveer, Monu, Jayshree and Ravindra Singh under Sections 302, 201, 120B, 34, 224 of IPC, with allegation that all eight accused hatched conspiracy for committing murder of Police Constable Ajay Kumar. The accused Chandra Kumar and Rishi Kumar absconded and were later on arrested by STF from Maharashtra where also they had opened fire on the police party for which a separate FIR Case Crime No. 54 of 2013.

8. Thus, Complainant has challenged the impugned order of granting bail on primary ground that the accused persons are dreaded criminals as initially they have committed two murders and later co-accused Chandra Kumar and Rishi Kumar, the sons of co-accused Arvind Kumar killed a Police Constable Ajay Kumar while he was on duty during the course of trial. Therefore, Complainant fears that after being released from jail, they will hatch another conspiracy for eliminating the complainant and his family members.

9. We have heard learned counsel for the parties and perused the material on record.

10. The High Court has granted bail taking into consideration the following two factors:

    i) Period of incarceration;

    ii) Two other co-accused have been granted bail.

11. It appears that before the High Court, the fact relating to the murder of Ajay Kumar Police Constable in whose custody the accused Chandra Kumar and Rishi Kumar were produced before the Trial Court at Mainpuri and further, the fact that they had absconded after throwing the dead body of deceased Constable Ajay Kumar and later on arrested by Special Task Force (STF) from Maharashtra and during their arrest also they had resisted and opened fire on the police party for which a separate case was registered. Such facts have not been placed before the High Court. These were relevant facts which ought to have been placed before the High Court. The parity mentioned by the High Court in the impugned order relating to Adesh Kumar and Pramod Kashyap was clearly distinguishable not only with respect to their role in the case in hand but also, they were not involved in the murder of Ajay Kumar Police Constable.

12. In our considered opinion, two accused respondents namely Chandra Kumar and Rishi Kumar despite their period of incarceration of more than 10 years would not be entitled to grant of bail for their subsequent conduct for which they are facing separate trial.

13. Insofar as Arvind Kumar is concerned, he is not charge sheeted in the murder case of Ajay Kumar as such we are not inclined to interfere with the order of the High Court granting bail to him i.e. Arvind Kumar. However, insofar as the other two accused Rishi Kumar and Chandra Kumar are concerned, their bail deserves to be cancelled.

14. **Accordingly, the appeal against Arvind Kumar is dismissed, and other two appeals i.e. against Chandra Kumar and Rishi Kumar are allowed.** The impugned order of the High Court granting bail to Rishi Kumar and Chandra Kumar is set aside. They may surrender within two weeks failing which the High court will take appropriate steps for taking them into custody using coercive measures as are permissible under law.

Headnotes prepared by:
Harshit Anand, Hony. Associate Editor
(Verified by: Shadan Farasat, Adv.*)*

Result of the case:
Appeals disposed of.