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v.
Anurag Kumar

(Transfer Petition (Civil) No. 1008 of 2023)

15 May 2024

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

Issue for Consideration

Parties arrived at an amicable settlement for dissolution of marriage by mutual consent. However, the wife resiled from the settlement agreement. Exercise of powers under Article 142 of the Constitution of India to grant decree of divorce.

Headnotes†

Constitution of India – Article 142 – Exercise of powers under – Grant of decree of divorce – Present transfer petition was filed by wife seeking transfer of the petition filed by husband u/s.9 of the Hindu Marriage Act, 1955 – Parties arrived at settlement before the Mediator for dissolution of marriage by mutual consent – Husband abided by the terms of settlement however, the wife resiled from the settlement agreement:

Held: The petitioner-wife having taken advantage of the settlement executed before the Mediator managed to get the matrimonial case instituted by the respondent-husband withdrawn – She also accepted Rs.50 lakhs from the husband towards part payment of the permanent alimony and thereafter, tried to resile from the settlement without any justification – The conduct of the wife is clearly, recalcitrant inasmuch as she disregarded the terms and conditions agreed before the Mediator in the settlement proceedings undertaken pursuant to the directions of this Court – Because of her conduct, the husband was put to grave disadvantage inasmuch as he withdrew the matrimonial case and also paid a significant proportion of the permanent alimony to the wife in terms of the settlement agreement – The matrimonial relations between the spouses have broken down irrevocably and there is no possibility of reconciliation and revival of the spousal relationship – Hence, looking at the conduct of the wife and the other attending facts and circumstances, decree of divorce granted in exercise the powers under Article 142 of the Constitution of India – The marriage between the petitioner and the respondent is dissolved. [Paras 7, 10]

Case Law Cited

Ruchi Agarwal v. Amit Kumar Agrawal and Others **(2005) 3 SCC 299 – relied on.**

List of Acts

Constitution of India; Hindu Marriage Act, 1955.

List of Keywords

Exercise of powers under Article 142 of the Constitution of India to grant decree of divorce; Transfer petition; Dissolution of marriage by mutual consent; Amicable settlement; Settlement before Mediator; Resiled from settlement; Matrimonial case withdrawn; Permanent alimony; Matrimonial relations; Spousal relationship; Irrevocable/ irretrievable break down; Marriage dissolved.

Case Arising From

CIVIL ORIGINAL JURISDICTION: Transfer Petition (Civil) No. 1008 of 2023

Petition Filed Under Section 9 of The Hindu Marriage Act, 1955

Appearances for Parties

Dr. Arvind S. Avhad, Adv. for the Petitioner.

Paban K Sharma, Himanshu Shekhar, Pranab Kumar Nayak, Anchit Sripat, Arvind Kumar, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Order

1. The instant transfer petition came to be preferred by the petitioner-wife seeking transfer of the petition filed by the respondent-husband under Section 9 of the Hindu Marriage Act, 1955 being Matrimonial Case No. 2172/2022 titled as 'Anurag Kumar S/o Ravindra Nath Sharma Vs. Trisha Singh', pending before the Court of 7-Principal Judge, Family Court, Varanasi, U.P. to the Family Court at Pune, Maharashtra.

2. The transfer petition was dismissed for want of prosecution on 26th July, 2023. Subsequently, vide order dated 21st August, 2023, the transfer petition was restored to its original number and on the request of learned counsel for the parties, the matter was forwarded to the

Supreme Court Mediation Centre for exploring the possibility of an amicable settlement between the parties. Pursuant to the efforts made by the Mediator, the parties had arrived at a settlement which was signed by the petitioner-wife and the respondent-husband before Shrabani Chakrabarty, Advocate/Mediator, Supreme Court Mediation Centre on 26th February, 2024. The relevant terms and conditions of the settlement agreement which in entirety shall form a part of this order are reproduced below: -

> "5. Both the parties hereto have arrived at an amicable settlement on the following terms and conditions for dissolution of marriage by mutual consent: -
>
> A. That the respondent husband continued to pay certain expenses voluntary to the tune of Rs.20 lakhs (Rupees twenty lakh only) from March 2020 upto October 2023 for his child to the bank account of the petitioner-wife including the period the parties were not together. Mediation took place at great length between the parties and parties want to part away taking divorce. The respondent- husband has agreed to pay full and final alimony of Rs.1 Crore 15 lakh (one crore and Fifteen lakhs only) to the petitioner-wife. The respondent husband has paid an amount of Rs.50 lakh to the petitioner wife on 22.02.2024. The remaining alimony will be paid will be as under:
>
> (i) Rs.50 Lakh (rupees fifty lakh) only shall be paid to the petitioner-wife on or before 31.08.2024;
>
> (ii) The remaining alimony of Rs. 15 lakh (rupees fifteen lakh) only will be paid on or before 31.12.2024.
>
> (iii) The gold and jewelries belonging to the petitioner-wife kept in a locker at Bank of India of Varanasi shall be taken by the petitioner within 14th to 20th March 2024. Petitioner will also collect silver items given on marriage from the respondent-husband."

3. It is thus manifest that there was a clear undertaking by the parties before the Mediator that they shall part ways peacefully.

4. It is also clear that the respondent-husband had voluntarily paid a sum of Rs. 20 lakhs for the support of his child during the period from March, 2020 to October, 2023. The respondent-husband also paid a sum of Rs. 50 lakhs to the petitioner-wife in the terms of the settlement. The remaining amount of permanent alimony has been agreed to be paid as per the schedule indicated in the settlement deed. Out of this agreed amount, the respondent-husband has paid a sum of Rs. 50,00,000/- (fifty lacs) only to the petitioner-wife.

5. However, today when the matter was taken up, this Court was apprised that the petitioner-wife seems to have resiled from the settlement agreement.

6. Learned counsel for the petitioner-wife has affirmed that his client has stopped instructing him in the matter. Acting on the terms of the settlement, the respondent-husband has already withdrawn the matrimonial case on 23rd April, 2024 which fact is recorded in the order sheet of the Family Court placed on record with I.A. No. 112620 of 2024 and thus he is abiding by the terms of settlement in letter and spirit.

7. It seems, the petitioner-wife having taken advantage of the settlement executed before the Mediator has managed to get the matrimonial case instituted by the respondent-husband withdrawn. She has also accepted a sum of Rs.50 lakhs from the respondent-husband towards part payment of the permanent alimony and thereafter, she is trying to resile from the settlement without any justification. The conduct of the petitioner-wife is clearly, recalcitrant inasmuch as she has disregarded the terms and conditions agreed before the Mediator in the settlement proceedings which were undertaken pursuant to the directions of this Court. Not only this, because of her conduct, the respondent-husband has been put to grave disadvantage inasmuch as he has withdrawn the matrimonial case and has also paid a significant proportion of the permanent alimony to the petitioner-wife in terms of the settlement agreement.

8. Learned counsel for the respondent-husband on instructions states that his client undertakes to abide by the remaining terms and conditions of the settlement agreement in letter and spirit and shall make due payments on the schedule dates if the marriage is dissolved.

9. A similar situation was examined by this Court in the case of ***Ruchi Agarwal v. Amit Kumar Agrawal and Others***[1], the relevant excerpts whereof read as follows: -

> "**4**. It is the above order of the High Court that is under challenge before us in this appeal. During the pendency of the proceedings before the courts below and in this Court, certain developments have taken place which have a material bearing on the merits of this appeal. The complaint which the appellant herein filed is dated 10-4-2002. Thereafter, a divorce petition was filed by the appellant wife before the Family Court at Nainital. In the said divorce petition a compromise was arrived at between the parties in which it was stated that the first respondent husband was willing for a consent divorce and that the appellant wife had received all her stridhan and maintenance in lump sum. She also declared in the said compromise deed that she is not entitled to any maintenance in future. It is also stated in the said compromise deed that the parties to the proceedings would withdraw all criminal and civil complaints filed against each other which includes the criminal complaint filed by the appellant which is the subject-matter of this appeal. The said compromise deed contains annexures with the particulars of the items given to the appellant at the time of marriage and which were returned. The said compromise deed is signed by the appellant. But before any order could be passed on the basis of the said compromise petition, the appellant herein wrote a letter to the Family Court at Nainital which was received by the Family Court on 3-10-2003 wherein it was stated that she was withdrawing the compromise petition because she had not received the agreed amount. But subsequently when her statement was recorded by the Family Court, she withdrew the said letter of 3-10-2003 and stated before the court in her statement that she wanted a divorce and that there is no dispute in relation to any amount pending. The court, after recording the said statement, granted a

1 (2005) 3 SCC 299

divorce under Section 13-B of the Hindu Marriage Act, dissolving the marriage by mutual consent by its order dated 3-3-2004.

5. In the compromise petition, referred to hereinabove, both the parties had agreed to withdraw all the civil and criminal cases filed by each against the other. It is pursuant to this compromise, the above divorce as sought for by the appellant was granted by the husband and pursuant to the said compromise deed the appellant also withdrew Criminal Case No. 63 of 2002 on the file of the Family Court, Nainital which was a complaint filed under Section 125 of the Criminal Procedure Code for maintenance. It is on the basis of the submission made on behalf of the appellant and on the basis of the terms of the compromise, the said case came to be dismissed. However, so far as the complaint under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act is concerned, which is the subject-matter of this appeal, the appellant did not take any steps to withdraw the same. It is in those circumstances, a quashing petition was filed before the High Court which came to be partially allowed on the ground of the territorial jurisdiction, against the said order the appellant has preferred this appeal.

6. From the above-narrated facts, it is clear that in the compromise petition filed before the Family Court, the appellant admitted that she has received *stridhan* and maintenance in lump sum and that she will not be entitled to maintenance of any kind in future. She also undertook to withdraw all proceedings, civil and criminal, filed and initiated by her against the respondents within one month of the compromise deed, which included the complaint under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act from which complaint this appeal arises. In the said compromise, the respondent husband agreed to withdraw his petition filed under Section 9 of the Hindu Marriage Act pending before the Senior Judge, Civil Division, Rampur and also agreed to give a consent divorce as sought for by the appellant.

7. It is based on the said compromise the appellant obtained a divorce as desired by her under Section 13-B of the Hindu Marriage Act and in partial compliance with the terms of the compromise she withdrew the criminal case filed under Section 125 of the Criminal Procedure Code but for reasons better known to her she did not withdraw that complaint from which this appeal arises. That apart after the order of the High Court quashing the said complaint on the ground of territorial jurisdiction, she has chosen to file this appeal. It is in this background, we will have to appreciate the merits of this appeal.

8. Learned counsel appearing for the appellant, however, contended that though the appellant had signed the compromise deed with the abovementioned terms in it, the same was obtained by the respondent husband and his family under threat and coercion and in fact she did not receive lump sum maintenance and her *stridhan* properties. We find it extremely difficult to accept this argument in the background of the fact that pursuant to the compromise deed the respondent husband has given her a consent divorce which she wanted, thus had performed his part of the obligation under the compromise deed. Even the appellant partially performed her part of the obligations by withdrawing her criminal complaint filed under Section 125. It is true that she had made a complaint in writing to the Family Court where Section 125 CrPC proceedings were pending that the compromise deed was filed under coercion but she withdrew the same and gave a statement before the said court affirming the terms of the compromise which statement was recorded by the Family Court and the proceedings were dropped and a divorce was obtained. **Therefore, we are of the opinion that the appellant having received the relief she wanted without contest on the basis of the terms of the compromise, we cannot now accept the argument of the learned counsel for the appellant. In our opinion, the conduct of the appellant indicates that the criminal complaint from which this appeal arises was filed by the wife only to harass the respondents.**

> **9. In view of the abovesaid subsequent events and the conduct of the appellant, it would be an abuse of the process of the court if the criminal proceedings from which this appeal arises is allowed to continue. Therefore, we are of the considered opinion to do complete justice, we should while dismissing this appeal also quash the proceedings arising from criminal case Cr. No. 224 of 2003 registered in Police Station Bilaspur (District Rampur) filed under Sections 498-A, 323 and 506 IPC and under Sections 3 and 4 of the Dowry Prohibition Act against the respondents herein. It is ordered accordingly. The appeal is disposed of**."
>
> (emphasis supplied)

10. On going through the material available on record, we find that the matrimonial relations between the spouses have broken down irrevocably and there is no possibility of reconciliation and revival of the spousal relationship. Hence, looking at the conduct of the petitioner-wife as indicated *supra* and the other attending facts and circumstances, we are inclined to exercise the powers under Article 142 of the Constitution of India so as to grant decree of divorce and hence, the marriage between the petitioner and the respondent is dissolved.

11. However, it is made clear that the respondent in terms of the settlement shall make the remaining payment to the petitioner.

12. The petition is allowed in these terms.

13. Decree be prepared accordingly.

14. No order as to costs.

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

Result of the case: Petition allowed.

[†]*Headnotes prepared by:* Divya Pandey

[2024] 5 S.C.R. 575 : 2024 INSC 438

Ajwar
v.
Waseem and Another

(Criminal Appeal No. 2639 of 2024)

17 May 2024

[Hima Kohli* and Ahsanuddin Amanullah, JJ.]

Issue for Consideration

High Court, if justified in exercising jurisdiction u/s. 439(1) Cr.P.C for granting regular bail in favour of the accused persons.

Headnotes†

Code of Criminal Procedure, 1973 – s. 439(1) – Special powers of High Court or Court of Session regarding bail – Complainant's case that on account of previous enmity, the accused persons indiscriminately fired at the complainant and his two sons, resulting in death of his sons and serious injuries to his nephew – Grant of regular bail to the accused by the High Court – Justification:

Held: Orders granting bail not justified and suffers from grave infirmity – High Court completely lost sight of the principles that conventionally govern a Court's discretion at the time of deciding whether bail ought to be granted or not – High Court ignored that the complainant stuck to his version as recorded in the FIR and even after entering the witness-box, the complainant and three eyewitnesses specified the roles of the accused in the entire incident – High Court also overlooked the fact that the accused had previous criminal history – One of the accused while on bail, is alleged to have committed the double murder of the complainant's son – Allegations that three of the accused threatened one of the key eye-witnesses in open Court, and an FIR was registered – High Court also overlooked the period of custody of the accused for such a grave offence alleged to have been committed by them – Furthermore, in the cross-FIR filed by accused persons, closure was filed by the police – Protest petition filed by complainant is pending arguments – Thus, the accused do not deserve the concession of bail – Impugned orders quashed and set aside. [Paras 30-35]

* Author

Bail – Grant of, in cases involving serious offences – Relevant parameters to be considered:

Held: Courts to consider the nature of the accusations made against the accused; the manner in which the crime is alleged to have been committed; the gravity of the offence; the role attributed to the accused; the criminal antecedents of the accused; the probability of tampering of the witnesses and repeating the offence, if the accused released on bail; and the possibility of obstructing the proceedings and evading the courts of justice. [Para 26]

Bail – Grant of – Cancellation, when – Considerations for setting aside the bail:

Held: Bail once granted, ought not to be cancelled in a mechanical manner – However, an unreasoned or perverse order of bail always open to interference by the superior Court – If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that has granted the bail – Bail can also be revoked by a superior Court if it transpires that the courts below have ignored the relevant material available on record or not looked into the gravity of the offence or the impact on the society resulting in such an order – Bail can be set aside when any supervening circumstances may have occurred after granting relief to the accused, the conduct of the accused while on bail, attempt on the part of the accused to delay the trial, attempt to tamper with the evidence, threats being extended to the witnesses while on bail – However, the court to examine only a prima facie case, and detailed reasons relating to the merits of the case to be avoided – Bail order should reveal the factors that have been considered by the court for granting relief to the accused. [Paras 27, 28]

Case Law Cited

Mahipal v. Rajesh Kumar @ Polia and Another [2019] 14 SCR 529 **: (2020) 2 SCC 118;** *Ajwar v. Niyaj Ahmad and Another* [2022] 7 SCR 356 **: (2022) SCC OnLine SC 1403;** *Jagjeet Singh and Others v. Ashish Mishra* [2022] 4 SCR 536 **: (2022) 9 SCC 321;** *Deepak Yadav v. State of Uttar Pradesh and Another*

[2022] 4 SCR 1 **: (2022) 8 SCC 559;** *P v. State of Madhya Pradesh and Another* [2022] 3 SCR 823 **: (2022) 15 SCR 211;** *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Another* **(2004) 7 SCC 528;** *Kumer Singh v. State of Rajasthan and Another* [2021] 6 SCR 539 **: (2021) SCC OnLine SC 511;** *Yashpal Singh v. State of Uttar Pradesh and Another* [2022] 4 SCR 835 **: (2023) SCC Online SC 347;** *Manno Lal Jaiswal v. State of Uttar Pradesh and Another* [2022] 1 SCR 990 **: (2022) 15 SCC 248;** *Chaman Lal v. State of U.P. and Another* [2004] Supp. 3 SCR 584 **: (2004) 7 SCC 525;** *Masroor v. State of Uttar Pradesh and Another* [2009] 6 SCR 1030 **: (2009) 14 SCC 286;** *Prasanta Kumar Sarkar v. Ashis Chatterjee and Another* [2010] 12 SCR 1165 **: (2010) 14 SCC 496;** *Neeru Yadav v. State of Uttar Pradesh and Another* [2014] 12 SCR 453 **: (2014) 16 SCC 508;** *Anil Kumar Yadav v. State (NCT of Delhi) and Another* [2017] 11 SCR 195 **: (2018 12 SCC 129);** *Puran v. Ram Bilas and Another* [2001] 3 SCR 432 **: (2001) 6 SCC 338;** *Narendra K. Amin (Dr.) v. State of Gujarat and Another* [2008] 6 SCR 1149 **: (2008) 13 SCC 584 – referred to.**

List of Acts

Code of Criminal Procedure, 1973.

List of Keywords

Bail; Regular bail; Double murder; Eye-witnesses; Period of custody of the accused; Protest petition; Nature of the accusations; Gravity of the offence; Role attributed to the accused; Criminal antecedents of the accused; Probability of tampering of the witnesses; Unreasoned or perverse order of bail; Misused the bail granted; Supervening circumstances.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2639 of 2024

From the Judgment and Order dated 07.12.2022 of the High Court of Judicature at Allahabad in CRMBA No. 26740 of 2022

With

Criminal Appeal Nos. 2640, 2641 and 2642 of 2024

Appearances for Parties

Shreeyash U. Lalit, Ansar Ahmad Chaudhary, Md. Anas Chaudhary, Ms. Shehla Chaudhary, Pulkit Agarwal, Vikas Kumar, Mohammad Asim Khan, Shoaib Ahmad Khan, Faiyaz Khalid, Kavindra Yadav, Altamash Ahmad, Sandeep Garausa, Krishnagopal Abhay, Ms. Runjhun Garg, Abhinav Aggarwal, Himanshu Vats, Iduddin, Jazib Siddiqui, Ms. Bushra Ali, Advs. for the Appellant.

Ardhendumauli Kumar Prasad, A.A.G., Sidharth Luthra, Sr. Adv., Ms. Preeti Gupta, Sitab Ali Chaudhary, Kartikeye Dang, MZ Chaudhary, Hamid Ali, Gufran Ali, Ms. Rubina, Sadik, Sheryab Ali, Rajat Singh, Ms. Shweta Yadav, Ms. Vartika Singh, Ms. Ananya Sahu, Sarthak Chandra, Deepesh Singh, Arun Pratap Singh Rajawat, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Hima Kohli, J.

1. Leave granted.

2. The present appeals are directed against four different orders passed by the learned Single Judges of the High Court of Judicature at Allahabad on applications moved by Waseem (accused No. 7)[1], Nazim (accused No. 8)[2], Aslam (accused No. 2)[3] and Abubakar (accused No.1)[4] under Section 439 Code of Criminal Procedure, 1973[5] for seeking regular bail in respect of Case Crime No.126 of 2020 registered at Police Station Mundali, District Meerut, Uttar Pradesh for offences punishable under Sections 147, 148, 149, 302, 307, 352 and 504 read with Section 34 of Indian Penal Code, 1860[6]. Vide orders dated 07th December, 2022, 13th February, 2023 and 02nd March, 2023 and 21st March, 2023 respectively, the applications filed by Waseem, Nazim, Aslam and Abubakar were allowed by

1 Respondent No. 1 in Criminal Appeal arising out of SLP(Crl.) 513 of 2023

2 Respondent No. 1 in Criminal Appeal arising out of SLP (Crl.) 2437 of 2023

3 Respondent No. 1 in Criminal Appeal arising out of SLP (Crl.) No. 13404 of 2023

4 Respondent No. 1 in Criminal Appeal arising out of SLP(Crl.) No. 16310 of 2023

5 Cr.P.C.

6 IPC

different Benches of the High Court. Aggrieved by the said orders, the appellant-Complainant has approached this Court.

BRIEF FACTS

3. The relevant facts of the case, as recorded in a First Information Report[7] registered on the complaint received from the appellant - complainant herein on 19th May, 2020, are that the incident in question had taken place on 19th May, 2020 at 7.30 in the evening when the appellant-complainant, his two sons, Abdul Khaliq and Abdul Majid with some other persons were sitting in the baithak of his house for breaking the fast (Roza Iftar) and preparing to offer prayers. The accused persons (10 in number, namely, Nazim, Abubakar, Waseem, Aslam, Gayyur, Nadeem, Hamid, Akram, Qadir and Danish) arrived at the spot and indiscriminately fired at the appellant and his two sons. Both the sons of the appellant died on the spot and his nephew, Asjad was seriously injured. The appellant-complainant has alleged that there was previous enmity between the parties due to which the accused persons had attacked him and his sons.

4. Pertinently, Niyaz Ahmed, father of Waseem (accused No. 7) was not named in the FIR. His role in the incident came up during the course of the investigation conducted by the police and based thereon, his name was added as a co-accused. On completion of the investigation, a chargesheet was submitted under Section 173 Cr.P.C. on 23rd June, 2020 against eight accused including Abubakar (accused No. 1), Niyaz Ahmad, Aslam (accused No.2) and Nazim (accused No. 8). Aslam is the nephew of Nazir and Nazim is the cousin of Waseem, whose father, Niyaz Ahmad was enlarged on bail by the High Court, vide order dated 4th August 2022, which order was set aside by this Court on 30th September, 2022 in a Criminal Appeal[8] filed by the appellant-complainant. Three other accused were not found to be involved in the offence and on conclusion of the investigation, no chargesheet was filed against them.

PROCEEDINGS AFTER FILING OF CHARGESHEET

5. After the chargesheet was filed, the case was committed to the Sessions Court and was registered as Sessions Trial No.574 of

7 FIR

8 Criminal Appeal No.1722 of 2022

2020. The same is pending trial before the Court of the Additional Sessions Judge, Court 15, Meerut. Charges were framed and twenty witnesses have been cited by the prosecution. Out of the said list of witnesses, seven are eyewitnesses. The trial has commenced. Four eyewitnesses have been examined so far. Three eyewitnesses are yet to be examined. The statement of the appellant-complainant (PW-1) and three other eyewitnesses (PW-2, PW-3 and PW-4) have been recorded. The prime witnesses have elaborated the role of the respondents herein, i.e., Waseem (A-7), Nazim (A-8), Aslam (A-2) and Abubakar (A-1). Two more witnesses were summoned for examination on 7th May, 2024.

REASONS FOR SETTING ASIDE THE EARLIER BAIL ORDER GRANTED BY THE HIGH COURT IN FAVOUR OF WASEEM

6. Earlier hereto, Waseem(A-7) was granted bail by the High Court vide order dated 22nd August 2022[9]. The said order was challenged by the appellant-complainant before this Court[10]. Vide order dated 14th October, 2022, this Court cancelled the bail granted to Waseem observing that it was apparent from a perusal of the order dated 22nd August, 2022 passed by the High Court that Waseem was granted bail on the basis of a co-ordinate Bench granting bail to his father, Niyaz Ahmad, vide order dated 4th August, 2022. Since the order passed in favour of Niyaz Ahmad was set aside by this Court vide order dated 30th September, 2022, the bail application filed by Waseem before the High Court was restored for fresh consideration and expeditious disposal, preferably within a period of one month from the date of receipt of the copy of the said order. It is expedient to extract below the relevant part of the order dated 30th September, 2022[11], passed by a Division Bench of this Court [of which one of us (Hima Kohli, J) was a member], overturning the order passed by the High Court granting bail in favour of Niyaz Ahmad:

> "9. At the outset, it needs to be noted that this Court has had occasion to peruse a succession of orders by the same Judge of the High Court of Judicature at Allahabad (which were challenged in Special Leave

9 Criminal Misc. Bail Application No.26740 of 2022

10 Criminal Appeal No. 1784 of 2022

11 Criminal Appeal No.1722 of 2022 (Ajwar Vs. Niyaz Ahmad and Anr.).

Petitions before this Court) containing identical reasons as recorded above for the grant of bail. As a matter of fact, in the counter affidavit, which has been filed by the first respondent, the fact that similar orders have been passed by the Single Judge has been relied upon though with the submission that the first respondent should not be penalized for the High Court's failure to record adequate reasons. The first respondent in the course of his counter affidavit states as follows:

> "…In fact, the present case is not the only case, in which so called reasons are not assigned by the Hon'ble High Court while grating bail. There are many other cases also in which the same or similar orders were passed by the Hon'ble High Court and perhaps will be passed in future, as well. Therefore, the Respondent No.1 may not be penalized for something on which he has no control at all and it is the judicial discretion of the Hon'ble High Court to give reasons or not to give reasons while granting bail…"

10. The manner in which the Single Judge of the High Court has disposed of the application for bail is unsatisfactory. In determining as to whether bail should be granted in a matter involving a serious criminal offence, the Court is duty bound to consider:

    (i) The seriousness and gravity of the crime;

    (ii) The role attributed to the accused;

    (iii) The likelihood of the witnesses being tampered with if bail is granted;

    (iv) The likelihood of the accused not being available for trial if bail is granted; and

    (v) The criminal antecedents of the accused.

11. In successive orders, the Single Judge of the High Court granted bail containing the same sentence,

> purportedly of reasons. Merely recording that the Court has had regard to the nature of the accusation, the severity of the punishment in the case of conviction, the nature of supporting evidence, prima facie satisfaction of the Court in support of the charge, reformative theory of punishment and the larger mandate of Article 21 is not a satisfactory method for the simple reason that the facts of the case have to be considered. Moreover, not all the circumstances referred to above will weigh in the same direction. The duty to consider the circumstances of the case cannot be obviated by setting down legal formulations."

7. This Court noted that as the order grating bail in favour of Niyaz Ahmad had been set aside, the subsequent order passed by the High Court on 22nd August, 2022, granting regular bail in favour of the accused Waseem could not be sustained. As a result, the appeal preferred by the appellant-complainant was allowed and the order granting bail in favour of Waseem(A-7) was set aside with a direction issued to the High Court to consider the matter afresh. It is on the basis of the said directions that the impugned order has been passed. The factors that have persuaded the learned Single Judge of the High Court to allow the application filed by the accused, Waseem are encapsulated in the following para :

> "Considering the overall facts and circumstances, the nature of allegation, the gravity of offence, the severity of the punishment, the evidence appearing against the accused, submission of learned counsel for the parties, considering the law laid down in the case of **Lakshmi Singh and others vs. State of Bihar** and Others, **Babu Ram and Others vs. State of Punjab** and **Amarjeet Singh vs. State of Haryana**, this Court thinks that eleven accused persons are said to have assaulted the complainant side after indiscriminate firing in which only three persons had sustained injuries on their persons, who later on, died in the hospital from the side of the complainant and the accused side had also received serious injuries, accused Niyaj Ahmad has also suffered gun shot injury in the incident and the injuries sustained by the accused side has not been explained by the prosecution. They ought to have

been explained by the prosecution and since it seems that there is a cross version of the incident and it is very difficult to ascertain at this stage who was the aggressor and it will be decided at the stage of trial after taking evidence from both the sides; but without expressing any opinion on merits, this Court finds it to be a fit case for bail."

ARGUMENTS ON BEHALF OF THE APPELLANT-COMPLAINANT

8. Appearing for the appellant-complainant, Mr. Shreeyash U. Lalit and Mr. Ansar Ahmad Chaudhary, learned counsel submitted that this is a case of double murder of two young sons of the appellant-complainant at the hands of the accused persons who harboured previous enmity against him and his family members. Waseem (A-7) was arrested on 27th May, 2020. The other accused persons were arrested on different dates. After their arrest, the police conducted a search of the respondents and recovered five illegal country-made pistols, seven live cartridges and five used cartridges from the possession of Aslam (A-2). A specific role has been attributed to each of the four respondents herein that resulted in the death of the appellant's two sons and serious injuries to his nephew. All the four respondents herein were named in the FIR, besides the other co-accused. During the course of investigation, the statements of eleven independent witnesses were recorded under Section 161 Cr.P.C. wherein an active role has been attributed to all the four respondents. Later on, the appellant-complainant entered the witness box and appeared as PW-1. He has reiterated the role played by the respondents herein in committing the offence. Two other independent eye witnesses, namely, Abdullah (PW-2), Asjad (PW-3) and Fahimuddin (PW-4) have supported the testimony of the appellant (PW-1).

9. Learned counsel for the appellant-complainant further states that the High Court has completely overlooked the fact that the respondents-accused parties were the aggressors who had forcibly entered the house of the appellant-complainant and indiscriminately fired at him, his sons and other persons who had gathered at his house to break the fast. They have criminal antecedents and several cases are registered against them. Even before completion of a period of six months granted by the High Court, by an earlier order dated 7th April, 2022 passed on an application moved by the appellant-complainant under Section 482 Cr.P.C for issuing directions to the

trial Court to complete the trial in a definite period, the High Court has proceeded to grant bail in favour of Waseem on the grounds of parity with his father; similar orders have been passed in favour of Nazim[12], Aslam[13] and Abubakar[14]. It has also been pointed out that from the side of the accused persons, a cross case was registered[15] on the basis of an application moved under Section 156(3) of the Cr.P.C. The matter was investigated and the police filed its final report. The Magistrate directed fresh investigation, which was followed by a second final report. Yet again, the Magistrate passed an order on 18th November, 2022 directing further investigation and the said case was reopened. A closure report was subsequently submitted which was placed before the Magistrate on 5th August, 2023 and is pending final orders.

10. It was next argued by learned counsel for the appellant-complainant that the respondents have been deliberately delaying conclusion of the trial on one pretext or the other. He submitted that this conduct of the respondents was adversely commented upon by the Additional Sessions Judge, Court No.15, Meerut in his order dated 23rd August, 2022[16], wherein it was observed that five dates were taken by the accused but they failed to cross-examine the appellant – complainant and the accused were cautioned that if the cross-examination would not be completed, then their right to cross-examine him would be closed. To delay the trial, the co-accused, Niyaz Ahmad filed a transfer petition before the Sessions Court, requesting that the trial be conducted by some other Additional Sessions Judge, on the plea of bias. This application was rejected vide order dated 7th December, 2022. The order dated 07th December, 2022 was unsuccessfully challenged before the High Court and vide order dated 08th February, 2023, the Transfer Application[17] of Niyaz Ahmed was dismissed. It was observed that the trial was at the initial stage and several applications were being moved before the trial Court for lingering the trial. Yet again, as a strategy, the counsel engaged by

12 *vide* order dated 13th February, 2023

13 *vide* order dated 2nd March, 2023

14 Vide order dated 21st March, 2023

15 Case Crime No.361/2020

16 Session Case No. 1126 of 2020

17 Transfer Application (Crl.) No. 688 of 2022

four accused persons withdrew his power of attorney, stating that his clients weren't co-operating with him. When the Sessions Court closed their right to cross-examine PW-2 vide order dated 14th March, 2023, Nazim Ali approached the High Court[18]. Vide order dated 16th May, 2023, the High Court allowed the said application subject to costs of ₹ 10,000/- (Rupees Ten Thousand only) payable to PW-2 and permitted his cross examination.

11. As for the subsequent conduct of the respondents, it was pointed out that after being released on bail, one of the prime eyewitnesses, Abdullah (PW-2) was sought to be intimidated by them and their supporters. Abdullah (PW-2) filed a complaint on 21st March, 2023 which was registered as an FIR[19], wherein it was alleged that five accused persons i.e. three respondents herein (Waseem, Nazim and Aslam) and the co-accused, Hamid and Ayyub had threatened him in open Court. After he left the Court premises, he was thrashed by them. On an application moved by PW-2, he was extended protection by the Court. Subsequently, the police filed a closure report in respect of the captioned FIR, but the learned Magistrate passed an order on 7th July, 2023, directing further investigation in the matter.

12. Lastly, it has been contended that none of the respondents have clean antecedents, which is apparent from the counter affidavit filed by the respondent No.2 – State of Uttar Pradesh, which aspect has been lost sight of by the High Court while granting bail in their favour.

13. In support of their submission that individual facts of the case are relevant factors that must be considered by the court while considering a bail application under Section 439 Cr.P.C., learned counsel for the appellants cited the decisions of this Court in **Mahipal vs. Rajesh Kumar @ Polia and Another**[20], **Ajvar vs. Niyaj Ahmad and Another**[21], **Jagjeet Singh and Others vs. Ashish Mishra**[22], **Deepak Yadav vs. State of Uttar Pradesh and Another**[23] and **P vs.**

18 Application No. 18195 of 2023

19 FIR No.0095 dated 22nd March, 2023

20 [2019] 14 SCR 529 : (2020) 2 SCC 118

21 [2022] 7 SCR 356 : 2022 SCC OnLine SC 1403

22 [2022] 4 SCR 536 : (2022) 9 SCC 321

23 [2022] 4 SCR 1 : (2022) 8 SCC 559

State of Madhya Pradesh and Another[24] urging that the accused herein have been in custody for less than three years and were not entitled to any relief by way of bail. Reliance has been placed on **Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav and Another**[25]. Kumer Singh vs. State of Rajasthan and Another[26], Yashpal Singh vs. State of Uttar Pradesh and Another[27] and Manno Lal Jaiswal vs. State of Uttar Pradesh and Another[28] have been cited to urge that at the stage of considering an application for being released on regular bail, the individual role of each accused is not required to be considered when they were allegedly a part of an unlawful assembly and charged with offences punishable under Section 149 IPC.

ARGUMENTS ADVANCED ON BEHALF OF THE ACCUSED-RESPONDENTS

14. The present petitions have been strongly opposed by Mr. Siddharth Luthra, Senior Advocate appearing for the accused-respondents Waseem, Nazim and Aslam and Mr. Sitab Ali Chaudhary, learned counsel for the accused-respondent Abubakar. Learned counsel submitted that any delay in completing the trial cannot be attributed to the respondents and the adjournments referred to by the learned trial judge in the order dated 23rd August 2022 were not on account of the respondents. In fact, the prosecution witness was available only on two dates for his cross-examination and only one date was taken by the accused, Niyaz Ahmed on medical grounds. He submitted that accused Waseem did not misuse the liberty granted to him by the High Court vide order dated 22nd August, 2022 and when his bail order was set aside by this Court on 14th October, 2022 and remanded back to the High Court for passing a reasoned order, he had surrendered on time. The allegation that the respondents are involved in several other cases is also refuted by learned counsel stating that the accused Waseem is involved in only one other

24 [2022] 3 SCR 823 : (2022) 15 SCR 211

25 (2004) 7 SCC 528

26 [2021] 6 SCR 539 : 2021 SCC OnLine SC 511

27 [2022] 4 SCR 835 : (2023) SCC Online SC 347

28 [2022] 1 SCR 990 : (2022) 15 SCC 248

case[29] besides the present one, where he is on bail. The co-accused Nazim is also similarly stated to be involved in one other case, i.e. the captioned case along with Waseem, besides the present case (namely Criminal Case no. 214 of 2016) where he has been released on bail. As for the accused Aslam, it is stated that besides the present case, he is involved in CC No. 214/16[30], CC No. 129/20[31] and CC No. 95/23[32]. The accused Abubakar is involved in one other case[28] besides the present one.

15. Learned counsel submitted that the appellant-complainant himself is a well-known criminal of the area, having several cases registered against him as also his two sons. The criminal history of the appellant-complaint and his two deceased sons, Abdul Majid and Abdul Khaliq have been detailed in paras 19 to 21 of the counter affidavit. As per the respondents, the appellant-complainant is involved in 10 criminal cases and his two deceased sons, Abdul Majid was involved in 21 criminal cases and Abdul Khaliq was involved in 2 cases.

16. Next, contending that bail once granted cannot be cancelled until there are supervening circumstances and in the present case there are no such circumstances that require setting aside of the impugned orders, learned counsel for the respondents supported the impugned orders and requested that the present appeals be dismissed. It was additionally submitted that even when the accused Waseem was released on bail, he had abided by the conditions of bail imposed on him and did not misuse the liberty in any manner.

17. On merits, learned counsel for the respondents submitted that there was previous enmity between the parties; that three persons had been falsely introduced in the FIR against whom no case was made out and after investigation, their names were dropped from the chargesheet; that the prime eye-witnesses (PW-1, 2, 3 and 4) are related to the deceased being their father/uncle/cousin, etc. Several loopholes in the prosecution version were sought to be highlighted by the learned counsel for the respondents relating to conducting the inquest of the deceased Abdul Majid, the difference in the time between reporting

29 Crime Case No. 214 of 2016 under Section 147, 148, 149, 307, 342, 323, 308 IPC, P.S. Mundali, Meerut.

30 Under Sections 147/148/149/342/323/308 IPC, P.S. Mundali District Meerut.

31 Under Sections 3/25 Arms Act IPC, P.S. Mundali District Meerut.

32 Under Section 504/506 IPC, P.S. Civil Lines District Meerut.

the crime that took place on 19th May, 2020, at 2030 hours as against the time when the investigation had allegedly started (1818 hours); the alleged manipulation in the Medico Legal Reports of the injured, Asjad; the role of Asjad (nephew of the appellant-complainant) who had allegedly called twice on the mobile phone of Abubakar (brother of the accused, Waseem) which fact could be verified from the CDR details of the mobile phone and showed that the injured Asjad was the aggressor who had threatened to kill Waseem's brother. It was also contended that the appellant-complainant and 15 other persons with him were present at the mosque and not at his residence, as recorded in the chargesheet and they were the ones who had badly assaulted Waseem's brother, entered his residence and thrashed his family members. Aggrieved by the same, when Waseem's mother (Ms. Saeeda Begum) had filed a Complaint Case on 07th July, 2020 before the Court of the Additional Magistrate-I, Meerut, an order was passed directing the police to register an FIR[33] against 15 persons. A closure report was filed by the local police but the Judicial Magistrate did not accept the same and has directed further investigation in the matter.

18. Learned counsel for the respondents submitted that the real reason behind the dispute between the appellant-complainant and his family members and the accused and his family members related to political rivalry as the appellant-complainant had lost the election for the post of Village Pradhan and then proceeded to falsely implicate the accused persons.

19. Learned counsel argued that where there are two bullet injuries, one each to the two deceased by three assailants, there is a possibility of over-implication of the accused persons. Finally, an assurance has sought to be extended to this Court that the respondents will not abscond as they are permanent residents of the village and they shall continue cooperating for timely completion of the trial.

20. Mr. Sarvesh Singh Baghel, learned counsel appearing for the respondent No. 2 – State of Uttar Pradesh has filed a counter affidavit[34] supporting the case of the appellant-complainant and stating inter alia that the High Court did not consider the fact that

33 Case Crime No. 361 of 2020 under Section 147, 148, 149, 452, 323, 307, 34, 504 and 506 of IPC

34 In Special Leave Petition (Crl.) No. 513 of 2023

the present case involves a serious offence. There are accounts of eye-witnesses that have categorically specified the role of the accused-respondents and that there was a definite motive to commit the offence and injuries were caused intentionally that had resulted in the death of the two deceased persons. It was further submitted that there is a likelihood of the accused persons influencing the trial and threatening the eye-witnesses.

QUESTION INVOLVED

21. We have heard learned counsels for the parties, carefully examined the records and the impugned orders. The short question that falls for our consideration is whether the High Court was justified in exercising jurisdiction under Section 439(1) of the Cr.P.C for granting regular bail in favour of the respondents in the facts and circumstances of the present case.

FIRST ROUND OF LITIGATION

22. As noted above, this is the third time that the appellant-complainant has approached this Court for relief. Earlier hereto, aggrieved by the order dated 4th of August, 2022, passed by the learned Single Judge of High Court of judicature at Allahabad, directing release of Niyaz Ahmad (father of the accused, Waseem) in connection with the very same case, the appellant-complainant had filed an appeal[35]. Noting that successive orders were being passed by the same judge of the High Court mentioning identical reasons as stated in the order dated 4th August, 2022, this Court had expressed its dissatisfaction and opined that merely setting down legal formulations cannot be a ground for granting bail and that due application of mind was not apparent in the facts of the case that reveals the seriousness and gravity of the offence. As a result, the order dated 14th August, 2022, enlarging Niyaz Ahmad on bail was set aside and the appeal preferred by the appellant-complainant was allowed.

SECOND ROUND OF LITIGATION

23. The second round of litigation took place when the appellant-complainant approached this Court being aggrieved by an order dated 22nd August, 2022, passed by learned Single Judge of the High Court

35 Criminal Appeal No. 1722 of 2022 arising out of SLP(Crl.) No. 8139 of 2022)

admitting the accused Waseem to bail in the same case[36]. Since bail was granted in favour of the accused Waseem on parity with his father, Niyaz Ahmad and the said order[37] was subsequently set aside by this Court on 30th September, 2022, the appeal preferred by the appellant-complainant[38] was allowed and the application for bail filed by the accused Waseem was restored to be decided afresh by the High Court.

PRESENT ROUND OF LITIGATION

24. The third and present round of litigation has commenced on four orders passed by learned Single Judges of the High Court, impugned herein in respect of the four accused respondents. The first order dated 07th December, 2022 enlarging the accused Waseem on bail, was passed on merits. The subsequent three orders dated 13th February, 2023, 02nd March, 2023 and 21st March, 2023, granting bail in favour of Nazim, Aslam and Abubakar respectively, are on grounds of parity.

POST MORTEM REPORT OF THE TWO DECEASED PERSONS, SONS OF THE APPELLANT-COMPLAINANT

25. We may note that the post mortem report of the deceased, Abdul Khaliq shows that he had received one firearm injury in his head and the cause of his death was cranio-cerebral damage as a result of ante-mortem firearm injury which was sufficient to cause death in ordinary course of nature. The post mortem report of the deceased, Abdul Majid showed that he had sustained one firearm entry wound in the abdomen and one exit wound corresponding to each other and the cause of his death was shock and hemorrhage as a result of ante-mortem firearm injury. The injury report of the injured, Asjad (nephew of the appellant-complaint) showed that he had sustained a lacerated wound on the skull and bruises and abrasion on other parts of his body. All the three respondents herein have been named in the FIR alongwith five other accused. The appellant-complainant being the informant, had reiterated the events narrated in the FIR in his statement recorded on 20th of May, 2020 under Section 161

36 Criminal Misc. Bail Application No. 26740 of 2022

37 Order dated 4th August, 2022 by the High Court.

38 Criminal Appeal no. 1784 of 2022 arising out of SLP(Crl.) 9342 of 2022

Cr.P.C. After the chargesheet was submitted in Court on 23rd June, 2020, cognizance of the offence was taken and the case was committed to the Sessions Court for trial. So far, deposition of four eye-witnesses have been recorded **(PW 1, 2, 3 and 4)** and all of them have attributed a role to the accused respondents.

RELEVANT PARAMETERS FOR GRANTING BAIL

26. While considering as to whether bail ought to be granted in a matter involving a serious criminal offence, the Court must consider relevant factors like the nature of the accusations made against the accused, the manner in which the crime is alleged to have been committed, the gravity of the offence, the role attributed to the accused, the criminal antecedents of the accused, the probability of tampering of the witnesses and repeating the offence, if the accused are released on bail, the likelihood of the accused being unavailable in the event bail is granted, the possibility of obstructing the proceedings and evading the courts of justice and the overall desirability of releasing the accused on bail. ***(Refer: Chaman Lal v. State of U.P. and Another[39]; Kalyan Chandra Sarkar vs. Rajesh Ranjan alias Pappu Yadav and Another*** (supra); ***Masroor v. State of Uttar Pradesh and Another[40]; Prasanta Kumar Sarkar v. Ashis Chatterjee and Another[41]; Neeru Yadav v. State of Uttar Pradesh and Another[42] ; Anil Kumar Yadav v. State (NCT of Delhi) and Another[43]; Mahipal v. Rajesh Kumar @ Polia and Another*** (supra).

27. It is equally well settled that bail once granted, ought not to be cancelled in a mechanical manner. However, an unreasoned or perverse order of bail is always open to interference by the superior Court. If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that has granted the bail. Bail can also be revoked by a superior Court if it transpires that the courts below have ignored the relevant material available on record or not looked into the gravity of the offence or the impact on the society resulting

39 [2004] Supp. 3 SCR 584 : (2004) 7 SCC 525

40 [2009] 6 SCR 1030 : (2009) 14 SCC 286

41 [2010] 12 SCR 1165 : (2010) 14 SCC 496

42 [2014] 12 SCR 453 : (2014) 16 SCC 508

43 [2017] 11 SCR 195 : (2018 12 SCC 129)

in such an order. In ***P v. State of Madhya Pradesh and Another*** (supra) decided by a three judges bench of this Court [authored by one of us (Hima Kohli, J)] has spelt out the considerations that must weigh with the Court for interfering in an order granting bail to an accused under Section 439(1) of the CrPC in the following words:

> "24. As can be discerned from the above decisions, for cancelling bail once granted, the court must consider whether any supervening circumstances have arisen or the conduct of the accused post grant of bail demonstrates that it is no longer conducive to a fair trial to permit him to retain his freedom by enjoying the concession of bail during trial [Dolat Ram v. State of Haryana, (1995) 1 SCC 349 : 1995 SCC (Cri) 237] . To put it differently, in ordinary circumstances, this Court would be loathe to interfere with an order passed by the court below granting bail but if such an order is found to be illegal or perverse or premised on material that is irrelevant, then such an order is susceptible to scrutiny and interference by the appellate court."

CONSIDERATIONS FOR SETTING ASIDE BAIL ORDERS

28. The considerations that weigh with the appellate Court for setting aside the bail order on an application being moved by the aggrieved party include any supervening circumstances that may have occurred after granting relief to the accused, the conduct of the accused while on bail, any attempt on the part of the accused to procrastinate, resulting in delaying the trial, any instance of threats being extended to the witnesses while on bail, any attempt on the part of the accused to tamper with the evidence in any manner. We may add that this list is only illustrative and not exhaustive. However, the court must be cautious that at the stage of granting bail, only a prima facie case needs to be examined and detailed reasons relating to the merits of the case that may cause prejudice to the accused, ought to be avoided. Suffice it is to state that the bail order should reveal the factors that have been considered by the Court for granting relief to the accused.

29. In ***Jagjeet Singh*** (supra), a three-Judges bench of this Court, has observed that the power to grant bail under Section 439 Cr.P.C is of wide amplitude and the High Court or a Sessions Court, as the case may be, is bestowed with considerable discretion while deciding an

application for bail. But this discretion is not unfettered. The order passed must reflect due application of judicial mind following well established principles of law. In ordinary course, courts would be slow to interfere with the order where bail has been granted by the courts below. But if it is found that such an order is illegal or perverse or based upon utterly irrelevant material, the appellate Court would be well within its power to set aside and cancel the bail. (***Also refer:*** ***Puran v. Ram Bilas and Another***[44]***;*** ***Narendra K. Amin (Dr.) v. State of Gujarat and Another***[45])

DISCUSSION

30. Keeping in mind the aforesaid parameters, we may now proceed to examine the pleas taken by the parties so as to decide as to whether the impugned orders can be sustained or not. On a careful consideration of the entire records, we are inclined to agree with submission made by learned counsel for the appellant-complainant that the impugned orders are unjustified and suffer from grave infirmity. The primary factor that has swayed the learned Single Judge of the High Court in granting bail to the accused Waseem is that even though the prosecution version is that 11 accused persons had assaulted the appellant-complainant and members of his family on indiscriminate firing taking place, only three persons had sustained injuries and two had expired on the side of the appellant-complainant. At the same time, serious injuries were also received on the side of the accused which could not be explained by the prosecution. In the case of the accused Nazim, the High Court observed that there was no distinction between the role attributed to him and the co-accused Waseem and that the injuries suffered on the side of the respondent had not been explained by the prosecution. The High Court has also gone on to observe that the investigation conducted by the police was one-sided and the case set up by the accused side was ignored. In the case of Aslam, his bail application was allowed and learned Single Judge observed that there is a cross-version of the incident inasmuch as the accused side had also received serious injuries which were not satisfactorily explained by the prosecution. In the case of Abubakar, noting that the co-accused Aslam was granted bail by a coordinate

44 [2001] 3 SCR 432 : (2001) 6 SCC 338

45 [2008] 6 SCR 1149 : (2008) 13 SCC 584

Bench and the case of Abubakar was similar to that of Aslam, he was granted the benefit of bail on grounds of parity.

31. In our opinion, the High Court has completely lost sight of the principles that conventionally govern a Court's discretion at the time of deciding whether bail ought to be granted or not. The High Court has ignored the fact that the appellant-complainant has stuck to his version as recorded in the FIR and that even after entering the witness-box, the appellant-complainant and three eyewitnesses have specified the roles of the accused-respondents in the entire incident. The High Court has also overlooked the fact that the respondents have previous criminal history details whereof have been furnished by the Counsel for the State of UP. It is worthwhile to note that the accused Nazim was granted bail in FIR No. 214 of 2016 on 10th January, 2017 and while on bail, he is alleged to have committed a double murder of the two sons of the appellant-complainant.

32. To top it all, while on bail, there have been allegations that three of the accused-respondents herein have threatened one of the key eye-witnesses, Abdullah (PW-2) in open Court, thrashed him and threatened to kill him in the Court premises. On his approaching the trial Court for police protection, appropriate orders were passed in his favour and an FIR got registered[46]. Though the police had filed a closure report, dissatisfied with the same, the Magistrate has directed further investigation. The attempt to delay the trial on the part of the respondents has also surfaced from the records.

33. Furthermore and most importantly, the High Court has overlooked the period of custody of the respondents-accused for such a grave offence alleged to have been committed by them. As per the submission made by learned counsel for the State of UP, before being released on bail, the accused-Waseem had undergone custody for a period of about two years four months, the accused-Nazim for a period of two years eight months, the accused-Aslam for a period of about two years nine months and the accused Abubakar, for a period of two years ten months. In other words, all the accused-respondents have remained in custody for less than three years for such a serious offence of a double murder for which they have been charged.

46 FIR No. 95 of 2023

34. Learned Counsel for the appellants and the State of UP have also informed this Court that in the cross-FIR filed by Smt. Saeeda Begum (w/o Niyaz Ahmad mother of Waseem) at the instance of the accused persons, a closure was filed by the police. Vide order dated 04th September, 2023, the Magistrate issued notice to the complainant in the cross-FIR. A protest petition has been filed by the complainant herein which is pending arguments. In the meantime, the appellant herein moved an application in the captioned case stating that though three affidavits (of Usman Ali, Alenbi and Farhana) were annexed with the protest petition to support the cross-complaint, on being examined, all three persons have denied having sworn the said affidavits. Accordingly, the appellant has filed an application under Section 340 Cr.P.C against the complainant in the cross-FIR which has been registered vide order dated 15th January, 2024 and is due to come up for arguments.

35. All the aforesaid factors when examined collectively, leave no manner of doubt that the respondents do not deserve the concession of bail. As a result, all the four impugned orders are quashed and set aside. The respondents are directed to surrender within two weeks from the date of passing of this order. It is, however, clarified that the observations made above are limited to examining the infirmities in the impugned orders and shall not be treated as an opinion on the merits of the matter which is still pending trial. It is also clarified that in the event of any new circumstances emerging, the respondents shall be entitled to apply for bail at a later stage.

36. The appeals arising out of the petitions for special leave to appeal are disposed of on the above terms.

Result of the case: Appeals disposed of.

†*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 596 : 2024 INSC 446

Tamil Nadu Medical Services Corporation Limited
v.
Tamil Nadu Medical Services Corporation Employees Welfare Union & Anr.

(Civil Appeal No. 6511 of 2024)

17 May 2024

[Sanjay Karol* and Prasanna Bhalachandra Varale, JJ.]

Issue for Consideration

Whether the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 would apply to the parties; whether the Corporation can be termed as an industrial establishment as per the provisions of the Tamil Nadu Shops and Establishments Act, 1947; and whether the members of the Union would qualify as workmen and thus, would be eligible for permanent status u/s. 3 of the Act; and whether the suggestion to institute an 'Industrial Disputes Claim' questioning non-employment was sustainable, given that the Inspector of Labour had already passed orders in that regard.

Headnotes†

Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 – s. 2(3), 7 – Tamil Nadu Shops and Establishments Act, 1947 – ss. 2(3), 2(6) – Employees of Government Corporation sought regularisation – Inspector of labour conferred permanent status to the workmen – High Court upheld the same and directed to provide employment to the employees – Cross appeals – Issue as regards, applicability of the 1981 Act to the parties – Corporation, if could be termed as an industrial establishment as per the 1947 Act – Members of the Union, if would qualify as workmen and thus, would be eligible for permanent status u/s. 3 of the Act – High Court on remand, if could have ignored the order of the Inspector of Labour and suggested to institute an 'Industrial Disputes Claim' questioning non-employment:

Held: Activities conducted by the Corporation fall under those mentioned u/s. 2(3) of the 1947 Act – Construction work, which

* Author

the Corporation, by its own admission, carries out, is also for non-governmental bodies such as firms, companies, and individuals – Language of s. 7 of the 1981 Act implies that this Act shall not apply to those workmen who are engaged in the construction of buildings and the like or other construction work be it structural, mechanical, or electrical and thus, the establishments and its workmen engaged exclusively in the work of construction, shall be exempted – However, this would not allow the Corporation to wash its hands off the responsibilities or obligations under the Act, since the construction to be undertaken by the Corporation, is only one of the many activities to be undertaken by it – To take all the workers out of the purview of the Act, especially, when the said workers were not the ones undertaking construction, unwarranted – Employee having uninterruptedly continued in service for 480 days or more for 24 months, having been met, the Act would apply to the parties – Furthermore, the scope of remand was limited – Since the High Court concluded that the Act would apply, no reason for it to disturb the finding of the Inspector of Labour – It ought to have simply ordered that the order of Labour Inspector which concluded that members of Union be given permanent employment, be complied with. [Paras 21-25, 27, 28]

Case Law Cited

State of Karnataka v. Uma Devi [2006] 3 SCR 953 **: (2006) 4 SCC 1;** *Maharashtra State Road Transport Corporation v. Casteribe Rajya Parivahan Karmachari Sanghathana* [2009] 13 SCR 937 **: (2009) 8 SCC 556;** *U.P. Power Corporation Limited & Anr. v. Bijli Mazdoor Sangh & Ors.* [2007] 5 SCR 256 **: (2007) 5 SCC 755;** *ONGC Limited v. Petroleum Coal Labour Union & Ors.* [2015] 5 SCR 474 **: (2015) 6 SCC 494;** *Ajay Pal Singh v. Haryana Warehousing Corporation* **(2015) 6 SCC 321;** *Ranbir Singh v. S.K. Roy, Chairman, Life Insurance Corporation of India & Anr.* [2022] 10 SCR 986 **: (2022) SCC OnLine SC 521 – referred to.**

List of Acts

Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981; Companies Act, 1956; Tamil Nadu Shops and Establishments Act, 1947; Industrial Disputes Act, 1947.

List of Keywords

Industrial Disputes Claim; Inspector of Labour; Industrial establishment; Members of the Union; Workmen; Permanent status to workmen; Regularisation; Commercial element; Construction work; Non-governmental bodies; Scope of remand.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6511 of 2024

From the Judgment and Order dated 09.08.2019 of the High Court of Judicature at Madras in WP No.17133 of 2001

With

Civil Appeal No. 6512 of 2024

Appearances for Parties

S. Nandakumar, Basant R, Sr. Advs., Ms. Deepika Nandakumar, Naresh Kumar, K. K. Mani, V.M. Shivakumar, Ms. T. Archana, Raunak Arora, Rajeev Gupta, S. Janardanan, D. Kumanan, Ms. G. Indira, Ashwini Kumar, P. Gandepan, Ms. D. Poornima, Advs. for the appearing parties.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

1. Leave to appeal by special leave granted.

THE APPEALS

2. The cross appeals, one by the Tamil Nadu Medical Services Corporation Limited[1] and the other by the Tamil Nadu Medical Services Corporation Employees Welfare Union[2], question the judgment and order dated 9th August, 2019, passed by the High Court of Judicature at Madras in W.P.Nos.17133 of 2001 and 15241 of 2009 respectively. The position of the parties is in accordance with SLP(C)No.30005 of 2019.

1 Hereinafter 'the Corporation'.

2 Hereinafter 'the Union'.

3. The impugned judgment came to be passed in Writ Petition No.17133/2001 which was directed against order dated 31st March, 2001 of the Inspector of Labour, Circle-III, Chennai[3], by which the claim of 53 workmen to be conferred permanent status in the Corporation was accepted, while the claim of 42 others was rejected.

4. W.P. No.15241 of 2009 was filed by 22 out of the said 53 workmen seeking a writ of mandamus to be granted employment in the Corporation as per the order of the Inspector of Labour.

QUESTIONS BEFORE THIS COURT

5. The questions that this Court is to consider are –

   (i) Whether the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 would apply to the parties?

   (ii) Whether by way of the impugned judgment, the suggestion to institute an 'Industrial Disputes Claim' questioning non-employment was sustainable, given that the Inspector of Labour had already passed orders in that regard?

FACTS IN BRIEF

6. The Corporation was incorporated under the Indian Companies Act, 1956 on 1st July, 1994. Its management is under the State of Tamil Nadu. It has employed various workmen in different capacities, including the appellants in the appeal arising out of SLP(C)No.2649 of 2020. Such employees had sought regularization under the provisions of Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981[4]. Such representations being unsuccessful, two Writ Petitions bearing Nos.17263 and 17147 of 1998 were preferred before the learned Single Judge of the High Court.

7. The learned Single Judge[5], *vide* judgment and order dated 21st July, 2000 passed the following directions:

---

3 Hereinafter 'Inspector of Labour'.

4 Hereinafter 'the Act'.

5 Annexure P1, pg 61.

"19....

1. The Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act, 1981 (Tamil Nadu Act 46 of 1981) is applicable to the second respondent corporation.

2. The 'Inspector' having jurisdiction over the second respondent is directed to inspect and verify the records of the second respondent corporation and pass appropriated orders under Sec.3 of the said Act with regard to the claim made by the members of the petitioner Union;

3. The 'Inspector' is also directed to consider the claim made by the petitioner Union regarding employment on Saturdays to the members of the petitioner Union;

4. The 'Inspector' is further directed to determine the above referred questions within three months from the date of a copy of this order after affording an opportunity of being heard to both parties; and

5. Till an order is passed by the 'Inspector' as stated above, status quo as on date shall be maintained by both parties. Writ petitions are allowed to the extent mentioned above. No costs. All the miscellaneous petitions are closed."

8. Pursuant to the above order, the Inspector of Labour passed order dated 31st March, 2001[6], wherein the following issues were framed :

"**ISSUES**

(a) Whether the act pertaining to conferment of permanent status of Workmen could be made applicable to the respondent Establishment?

(b) Whether the authorized office under the aforesaid act being Labour Inspector has got the authority to try this case?

6 Annexure P3, pg.98.

(c) If, the respondent's Management is covered by the Jurisdiction of the aforesaid Act what is the nature of relief that could be awarded to the petitioners?"

9. The Inspector of Labour concluded that G. Sumathi and 52 other workmen were in the service of the Corporation continuously for 480 days over a period of 24 months and accordingly they could be granted permanent status.

10. It is against this order that the judgment and order impugned before us, eventually came to be passed. An appeal assailing the order dated 21st July, 2000 and, an independent writ petition was filed against the order dated 31st March, 2001 of the Inspector of Labour, and Division Bench *vide* order dated 10th December 2009[7] in such proceedings, confirmed both these orders and the Corporation was directed to provide employment to the Respondents, such as those who were before the Court as petitioners (original writ petitioners) in those proceedings. Against such confirmation of the order of the Inspector of Labour, Civil Appeal Nos. 6567 and 6568 of 2012 were preferred.

11. Hence, this Court on 29th March 2010 while issuing notice, stayed the operation of the impugned judgment. Subsequently, on 10th March, 2016, while allowing the appeal, this Court remanded the matter to the High Court, thus-

> "3. It has been submitted that while deciding the writ petitions and the connected matters, the High Court did not consider the fact whether the aforesaid Act is applicable to the members of the respondent-Union and the said submission appears to be correct.
>
> 4. In the afore-stated circumstances, the impugned judgment is set aside and the matters are remanded to the High Court for considering the same afresh in accordance with law. We are sure that the High Court will hear the matters afresh and decide the same in accordance with law.
>
> 5. Interim order dated 29th March, 2010 granted by this Court shall continue till the High Court modifies the same after hearing the concerned parties…"

7 page 205 of paper book.

THE IMPUGNED JUDGMENT

At this juncture, it is worth clarifying that the dismissal of the Writ Appeal Nos.1430 & 1431 of 2000 was not challenged before this Court and what was challenged was the dismissal of W.P.No.17133/2001 and the directions in W.P.No.15241/2009, which took on Civil Appeal Nos.6567 and 6568 of 2012, wherein the Court remanded the matter.

12. Pursuant to the above order of remand, The High Court in its judgment, recorded its agreement with the judgment of the learned Single Judge, reproduced supra. It was observed that the learned Single Judge had extensively examined the constitution of the management of the Corporation, the nature of activities conducted by it, *et cetera* and then concluded that the Act would apply on the ground that it was an industrial establishment under Section 2(3)(e) of the Act, and that they (the learned Division Bench) concur with the same.

13. It was further observed that since no appeal stood preferred after the writ appeals against the order of the learned Single Judge, were dismissed, the order of the Inspector of Labour had become final. On independent analysis with respect to the application of the act on the Corporation, it was observed as under:

> "50. However on independent analysis of the facts, we categorically hold that the provisions of Tamil Nadu Act, 46 of 1981 are applicable to TNMSC Management, in view of the fact that, TNMSC Management is an industrial establishment as defined under section 2(3)(e) of the Act and that it is an establishment as defined under section 2 (6) of Tamil Nadu Act, 36 of 1947. By the above reasoning be conclusively hold that TNMSC Management is an industrial establishment and is covered under the provisions of Tamil Nadu Act, 46 of 1981."

SUBMISSIONS OF THE PARTIES

14. We have heard the learned counsel for the parties and perused the written submission. On behalf of the appellant, it has been submitted :-

a) That the order dated 10th March, 2016 of this Court was not complied with. The specific plea of the appellant that the Act

as also the Tamil Nadu Shops and Establishments Act, 1947[8] would not be applicable to the appellant. However, the same was not considered by the High Court. The only manner in which the said Act could be applicable was that the Corporation would fall under the definition of 'commercial establishment' under Section 2(3) of the 1947 Act.

b) That the impugned judgment did not analyze whether any of the activities of the Corporation fell under Section 2(3) of the 1947 Act. Section 7 of the Act exempts such of those industrial establishments, that are engaged in construction activities and since some of the activities of the Corporation, include construction, the Corporation would be exempt.

c) That most of the 53 employees who are appellants in Appeal arising out of SLP(C)No.2649 of 2020, who were directed to be given permanent status by the Inspector of Labour, have obtained other profitable employment and the Corporation cannot be forced to grant permanent status.

15. The respondent-Union has submitted –

(a) That the Corporation is attempting to distinguish the status of the respondents by applying the ratio of **State of Karnataka v. Uma Devi**[9] after having exploited them for years together as temporary employees. Reliance has been placed on **Maharashtra State Road Transport Corporation v. Casteribe Rajya Parivahan Karmachari Sanghathana**[10] and particularly, paragraphs 32 to 36 thereof.

(b) Relying on **U.P. Power Corporation Limited & Anr. v. Bijli Mazdoor Sangh & Ors.**[11], it is submitted that the industrial adjudicator, although can vary terms of employment, but cannot do anything violative of Article 14 and if the case at hand is covered by the concept of regularization, the same Rule applies.

8 Hereinafter 1947 Act.

9 [2006] 3 SCR 953 : (2006) 4 SCC 1

10 [2009] 13 SCR 937 : (2009) 8 SCC 556

11 [2007] 5 SCR 256 : (2007) 5 SCC 755

(c) Relying on **ONGC Limited v. Petroleum Coal Labour Union & Ors.**[12] and **Ajay Pal Singh v. Haryana Warehousing Corporation**[13], it is urged that the powers of Industrial and Labour Courts were not in consideration in **Uma Devi** (supra).

(d) A tabular chart has been provided in respect of the 12 appellants in the Appeal arising out of SLP(C)No.2649 of 2020 and it is submitted that since the Inspector of Labour vide its order has declared the eligibility of the said workmen for grant of permanent status, there falls no requirement to raise an industrial dispute questioning the non-employment. Such of those respondents who have reached the age of superannuation would be entitled to compensation in lieu of regularization as recognized in **Ranbir Singh v. S.K. Roy, Chairman, Life Insurance Corporation of India & Anr.**[14].

ANALYSIS AND CONSIDERATION

16. The relevant provisions for the adjudication of the present dispute are reproduced below for ease of reference :-

> 2. Definitions. - In this Act, unless the context otherwise requires,-
>
> x x x x x
>
> (3) *"industrial establishment"* means-
>
> (a) .....; or
>
> (b) .....; or
>
> (c) .....; or
>
> (d) .....; or
>
> (e) an establishment as defined in clause (6) of section of the Tamil Nadu Shops and Establishments Act, 1947 (Tamil Nadu Act XXXVI of 1947); or
>
> (f) .....; or

12 [2015] 5 SCR 474 : (2015) 6 SCC 494

13 (2015) 6 SCC 321

14 [2022] 10 SCR 986 : 2022 SCC OnLine SC 521

(g) any other establishment which the Government may, by notification, declare to be an industrial establishment for the purpose of this Act.

(4) *"workman'*, means any person employed in any industrial establishment to do any skilled or unskilled, manual supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied [and includes a badli workman, but does not include any such person,-

(a) who is employed in the police service or as an officer or, other employee of a prison; or

(b) who is employed mainly in a managerial or administrative capacity; or

(c) who, being employed in a supervisory capacity, [draws wages exceeding three thousand and five hundred rupees per mensem] or exercises either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

x x x x x

3. Conferment of permanent status to workmen. - (1) Notwithstanding anything contained in any law for the time being in force every workman who is in continuous service for a period of four hundred and eighty days in a period of twenty-four calendar months in an industrial establishment shall be made permanent.

(2) A workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted on account of sickness or authorised leave or an accident or a strike, which is not illegal, or a lock-out [xxx], or a cessation of work which is not due to any fault on the part of the workman.

[*Explanation [I]*. - [For the purposes of computing the continuous service referred to in sub-sections (1) and (2),

a workman shall be deemed to be in continuous service during the days on which] -

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (Central Act XX of 1946) or under any other law applicable to the industrial establishment;

(ii) he has been on leave with full wages, earned in the course of this employment; and

(iv) in the case of a female, she has been on maternity leave; so however, that the total period of such maternity leave does not exceed twelve weeks.

[*Explanation II.* - For the purpose of this section, Law' includes any award, agreement, settlement, instrument or contract of service whether made before or after the commencement of this Act.]"

(Emphasis supplied)

17. The core issue here is the application of the Act to the Corporation *qua* the employees and their Union. In order to examine the same, what is to be considered is as to whether the Corporation can be termed as an industrial establishment as per the provisions reproduced supra and whether the members of the Union would qualify as workmen and therefore would be eligible for permanent status under Section 3 of the Act.

18. The High Court considered this question in line with Section 2(3)(e), as above, i.e., the definition of 'establishment' provided under section 2(6) of the 1947 Act. It reads thus –

"2. Definitions- In this Act, unless there is anything repugnant in the subject or context-

x x x x

(6) 'establishment' means a shop. commercial establishment, restaurant, eating-house, residential hotel, theatre or any place of public amusement or entertainment and includes such establishment as the 1 [State] Government may by

> notification declare to be an establishment for the purposes of this Act;"

19. For an establishment to be covered under the definition thereof under the 1947 Act, unless it is one of those specifically mentioned, it must satisfy being a commercial establishment which is defined under Section 2(3) which is as under -

> "(3) 'commercial establishment´ means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company, bank, broker's office or exchange and includes such other establishments as the State Government may by notification declare to be a commercial establishment for the purposes of this Act."

20. The affidavit dated 16th September, 2009 filed by the Corporation before the High Court records that the actual turnover for the year 2007-2008 is Rs.27.5 crores, vis-à-vis, the value of drugs distributed being at Rs.186.60 crores. The order of the Inspector of Labour records as under -

> "Further the respondent advanced the arguments that the Tamil Nadu Medical Services Corporation is not functioning with any profit motive, that quality argues are being obtained from quality manufacturing and supplied the same to the consumers without obtaining any service charges and therefore, the respondent's establishment is not attending to any commercial duty and while perusing all the aforesaid factors and also the audited balance sheets of the respondents filed on behalf of the petitioner i.e. for the years 1994-95, 1995-96 and 1996-97 it is seen that for the year 1994-95 the profit to the tune of Rs.6.96 lakhs and for 1995-96 Rs.8.44 lakhs and for 1996-97 Rs.1.84 lakhs had been obtained. Therefore it is clearly seen that the respondent's establishment has no profit intention as mentioned by the respondent is not at all true."

21. For any establishment to be commercial, it has to be established that the activities undertaken by it are for making some monetary

gain. Commercial in the most rudimentary sense means buying or selling of goods in exchange of money. As the above reproduced, uncontroverted paragraph (also recorded by the High Court) establishes, the commercial element was not absent.

22. Further, it was submitted that the activities conducted by the Corporation did not fall under those mentioned under Section 2(3) of the 1947 Act. This submission too, is difficult to accept. The construction work, which the Corporation, by its own admission, carries out, is also for non-governmental bodies such as firms, companies, and individuals. It would be apposite to refer to the observations of the High Court in this regard, in particular, paragraphs 37 and 38 of the impugned decision, which, for ease of reference are reproduced below :

> "37. TNMSC Management is a company registered under the Indian Companies Act, 1956 which is wholly owned by the Government of Tamil Nadu. The objects of the company as seen from the memorandum of articles of association are as follows :
>
> > "(1) To buy or otherwise acquire all kinds and varieties of generic and patent medicines, drugs, mixtures, formulations, tablets, pills, powders, pharmaceutical and medical products, needles, syringes, injectables, vaccinesr sera, immunogens, phylacogens, chemicals and surgical dressings, kits and instruments and to sell or supply to various hospitals and other health centres.
> >
> > (ii) To purchase, distribute, assemble, install, maintain or otherwise deal in all types of capital equipments and instruments required in hospitals.
> >
> > (iii)To undertake designing and construction of Hospitals and or other buildings for Government, or for any other person including local authorities, corporations, societies, trusts, companies, firms and individuals.
> >
> > (iv)To establish modern warehouses and Engineering workshops to manufacture, assemble, repair or otherwise maintain various medical equipments,

> surgical instruments, diagnostic equipments, fire-fighting equipments, furniture and – fittings including, hospital furniture and also to undertake civil and other general maintenance of hospitals.
>
> (v)To establish research and development centres and institutes for medical and para-medical personnel for imparting training in various Techno-Managerial fields."
>
> (Emphasis supplied)

38. It is also seen that TNMSC Management has warehouses in channel and in all the District Headquarters. These warehouses are used for storing of medicines and drugs. It has been specifically held as a fact by the Inspector of Labour in the order dated 31.03.2001, that TNMSC Management had earned profit of Rs.6.95 lakhs in the year 1994-95, Rs.8.44 lakhs in the year 1995-96 and Rs.1.84 lakhs in the year 1996-97. Consequently, any contention raised that it is run on a "no profit basis" has to be rejected."

23. It was argued that the Corporation's activities included construction and therefore it would be exempt from the application of the Act. Section 7 reads thus-

> "7. Act not to apply to workmen employed in certain industrial establishment. – Nothing contained in this Act shall apply to workmen employed in an industrial establishment engaged in the construction of buildings, bridges, roads, canals, dams or other construction work whether structural, mechanical or electrical."

The language of the provision is clear. It implies that this act shall not apply to those workmen who are engaged in the construction of buildings and the like or other construction work be it structural, mechanical, or electrical. Therefore, those establishments and their workmen shall be exempt, who are engaged exclusively, in the work of construction. The objectives of the Corporation, which have been reproduced[15] in the affidavit of the Union before the High Court, state:-

15 Page 137 of the paperbook in SLP (c) 2649 of 2020

"

x x

x

iii) To undertake the designing and construction of hospitals and other buildings for the Government, or any other person including local authorities, corporations, societies, trusts, companies firms and individuals.

…"

24. This, however, in our view would not allow the Corporation to wash its hands off the responsibilities or obligations under the Act, since the construction to be undertaken by the Corporation, is only one of the many activities to be undertaken by it. To take all the workers out of the purview of the Act, especially, when the said workers, like the members of the respondent union, were not the ones undertaking construction is unwarranted.

25. It was further argued that many of the persons directed to be granted permanent employment by the order of the Inspector of Labour have found profitable employment elsewhere, and as such the SLP on their behalf should be dismissed. We cannot accept this submission. Simply because some of the persons involved in the employment dispute have allegedly found other employment, that does not justify a dismissal of others' claims. Per the written submissions of the appellants in the appeal arising out of SLP(C)No.2649 of 2020, twelve appellants have approached this court. And therefore, it must be seen to its logical conclusion.

26. It was argued before the Courts below that the respondents had not continued in service after a certain point in time, however, the said argument was not accepted and we find no reason to take a different view on fact which since the year 1997 remains proven and recognized by the Courts.

27. As such, both requirements, of the establishment being covered under the definition of industrial establishment as provided and that of the employee having uninterruptedly continued in service for 480 days or more for 24 months, having been met we have no hesitation in holding that the Act would apply to the parties to the present dispute.

28. The next question to be considered is whether the High Court on remand, could have ignored the order of the Inspector of Labour and suggested that the employees raise an industrial dispute questioning their non-employment. The reason for remand, as is seen from the judgment dated 10th March, 2016, was that the High Court had not considered that the Act would be applicable to the parties, which were the very same as the parties before us. In other words, the scope of remand was limited. The order of the Inspector of Labour was passed under the Act. Since the High Court concluded that the Act would apply, there was no reason for it to disturb the finding of the Inspector of Labour and, therefore, it ought to have simply ordered that the order of Inspector of Labour which concluded that the members of the respondent-Union be given permanent employment, be complied with. When an issue stands already decided and such decision does not suffer from any vice of authority or jurisdiction then, putting those who enjoy an order in their favour through the wringer once more of having to re-establish their claim, this time before the authority under the Industrial Disputes Act, 1947, would be unjustified.

29. The appeal filed by the Corporation (Appeal arising out of SLP(C) No.30005 of 2019) is, in terms of the above, dismissed and the appeal filed by the respondent-Union through its President, G. Sumathi (Appeal arising out of SLP(C)No.2649 of 2020) is accordingly allowed with all consequences in favour of the respondent-employees, under the law, to follow.

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

Result of the case: Appeal filed by the Corporation dismissed.
Appeal filed by the Union allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 612 : 2024 INSC 444

Rajesh Kumar
v.
Anand Kumar & Ors.

(Civil Appeal No. 7840 of 2023)

17 May 2024

[Pankaj Mithal and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

Matter pertains to deposition of power of attorney holder in a suit for specific performance, in place and instead of the plaintiff-principal wherein the plaintiff is required to aver and prove his readiness and willingness to perform the terms of the contract; and the effect of filing a suit for specific performance after a long delay, on the last date of limitation.

Headnotes†

Specific Relief Act, 1963 – s. 12 – Specific performance of part of contract – Deposition of a power of attorney holder, when can be read in evidence – On facts, the appellant entered into an agreement to sell with power of attorney holder for purchase of land for a sale consideration – Appellant paid earnest money on the date of agreement to sell and the balance amount was to be paid on the date of registration of the sale deed – Time for execution of the sale deed extended – However, the power of attorney holder executed the sale deed of the suit land in favour of respondents even though they were aware of the earlier sale agreement and its extensions – Sale deed executed behind the back of the appellant – Subsequently, on coming to know of the same, the appellant sent notice – Thereafter, suit filed and the trial court decreed in favour of the appellant – However, set aside by the High Court – Correctness:

Held: In view of s. 12, in a suit for specific performance wherein the plaintiff is required to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, a power of attorney holder is not entitled to depose in place and instead of the plaintiff (principal) – If the power of attorney holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect

* Author

of such acts, but he cannot depose for the principal for the act done by the principal and not by him – Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined – It is necessary for the plaintiff to step into the witness box and depose that he was always ready and willing to perform his part of the contract and subject himself to cross-examination on that issue – Plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness – On facts, the plaintiff failed to appear in the witness box and subject himself to cross-examination, he has not been able to prove the pre-requisites of s. 12 and more so, when the original agreement contained a definite time for registration of sale deed which was later on extended but the suit was filed on the last date of limitation calculated on the basis of the last extended time – Instead, the power of attorney holder got himself examined – It is not a case where the suit itself was filed by power of attorney holder – He appeared subsequently only for recording his evidence as the special power of attorney holder of the plaintiff – Plaintiff entered into an agreement with only one of the co-owners and thereafter sought extensions for execution of the sale deed but did not prefer any suit though he was aware of the sale deed executed in favour of respondents – Suit was preferred, on the last date of limitation, after a long delay – Thus, the appellant not entitled for specific performance – Judgment and decree passed by the High Court upheld. [Paras 6, 8, 12, 13, 18, 19]

Case Law Cited

Shanmughasundaram & Ors. v. Diravia Nadar (dead) by Lrs. & Anr. [2005] 2 SCR 649 **: AIR (2005) SC 1836;** *Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors.* [2004] Supp. 6 SCR 681 **: (2005) 2 SCC 217;** *Man Kaur v. Hartar Singh Sangha* [2010] 12 SCR 515 **: 2010 (10) SCC 512;** *A.C. Narayanan v. State of Maharashtra & Anr.* [2013] 11 SCR 80 **: (2014) 11 SCC 790;** *K.S. Vidyanadam v. Vairavan* [1997] 1 SCR 993 **: (1997) 3 SCC 1;** *Azhar Sultana v. B. Rajamani & Ors.* [2009] 2 SCR 537 **: (2009) 17 SCC 27;** *Saradamani Kandappan v. S. Rajalakshmi & Ors.* [2011] 8 SCR 874 **: (2011) 12 SCC 18;** *Atma Ram v. Charanjit Singh* [2020] 3 SCR 697 **: (2020) 3 SCC 311 – referred to.**

List of Acts

Specific Relief Act, 1963.

List of Keywords

Specific Relief; Specific performance; Deposition of power of attorney holder; Agreement to sell; Sale consideration; Earnest money; Ready and willing to perform the contract; Term 'readiness and willingness'; Tendering in evidence; Limitation.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7840 of 2023

From the Judgment and Order dated 01.09.2016 of the High Court of M.P at Jabalpur in FA No. 340 of 2003

Appearances for Parties

Dhruv Agrawal, Sr. Adv., M/s. Aura & Co., Yashish Chandra, Nishit Agrawal, Harsh Bansal, Kushagra Pandey, Ms. Vanya Agrawal, Ms. Kanishka Mittal, Advs. for the Appellant.

Gagan Gupta, Sr. Adv., Vineet Chaudhary, Santosh Chaudhary, Hemang Chaudhary, Saurabh Gupta, Rahul Gupta, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

The appellant/plaintiff has called in question the judgment rendered by the High Court of Madhya Pradesh dated 01.09.2016 in First Appeal No. 340 of 2003 allowing the appeal preferred by the respondent nos. 1 to 3/defendant nos. 12 to 14 thereby setting aside the judgment and decree dated 25.04.2003 passed by the Trial Court in Civil Suit No. 38-A of 2000.

2. The facts of the case briefly stated, are that the appellant/plaintiff entered into an agreement to sell with respondent no. 4 (acting as Power of Attorney holder of respondents/defendant nos. 2 to 11) for purchase of land admeasuring 145.60 acres bearing Khasra No. 214 to 233 (except Khasra No. 225) and Khasra Nos. 67/1 to 212 situated at village Khirsau, Tehsil Sihora, District Jabalpur, M.P for

sale consideration at the rate of Rs. 3,000/- per acre, totalling Rs. 4,41,000/-. The appellant/plaintiff paid earnest money of Rs. 41,000/- on the date of agreement to sell and the balance amount was to be paid on the date of registration of the sale deed which was to be done within six months from the date of agreement.

2.1 On 22.05.1996, the appellant/plaintiff paid an additional amount of Rs. 20,000/- for which an endorsement was made on the backside of the agreement. Further amount of Rs. 40,000/- was paid on 30.06.1996 which too was endorsed on the backside of the agreement. On 26.12.1996, another agreement was executed between the appellant/plaintiff and the Power of Attorney Holder extending the execution of the sale deed till 31.03.1997, remaining terms being the same. The date was further extended to 31.05.1997 vide entry made in the subsequent agreement dated 26.12.1996. Another entry was made on 23.04.1997 mentioning that the agreement to sell shall come to an end on 31.05.1997.

2.2 However, the respondent/defendant no. 1 being the Power of Attorney Holder of respondents/defendant nos. 2 to 11 executed the sale deed of the suit land on 14.05.1997 in favour of respondent nos. 1 to 3/defendant nos. 12 to 14 even though the said respondents were aware of the earlier sale agreement and its extensions. The sale deed dated 14.05.1997 was executed behind the back of the appellant/plaintiff which came to his notice subsequently on which a legal notice was sent on 30.05.1997 calling upon the respondents/defendant nos. 1 to 11 to be present in the Registrar's office at Sihora on 31.05.1997 to carry out the formalities for execution of the sale deed. Despite receipt of this notice, the respondents/defendant nos. 1 to 11 did not attend the Registrar Office. On 31.05.1997, the appellant/plaintiff was informed by the sub-Registrar that the suit land has been sold in favour of respondent nos. 1 to 3/defendant nos. 12 to 14.

2.3 According to the appellant/plaintiff, he is in possession of the suit land, therefore, he objected to the application dated 20.08.1997 moved by the respondents/defendant nos. 12 to 14 for mutation of their names. The Gram Panchayat assured the appellant/plaintiff in its meeting dated 06.12.1997 that defendant nos.

12 to 14 will execute a sale deed in favour of the appellant/ plaintiff, therefore, legal action was not initiated. The present suit was filed on 19.06.2000.

2.4 The respondents/defendants in joint written statement averred that the suit land is in possession of the respondent nos. 1 to 3/defendant nos. 12 to 14 being the *bona fide* purchasers for value paid vide registered sale deed dated 14.05.1997. It was pleaded that the respondents/defendants were not aware of any agreement to sell between the appellant/plaintiff and respondent nos. 1 to 11 and that the suit is barred by limitation. It was also pleaded that time was the essence of the contract and the sale deed was to be executed within six months from the date of the agreement and that the appellant/plaintiff did not have sufficient funds with him for payment of the sale consideration and the advance amount of Rs. 40,000/- was also returned to the appellant/plaintiff through one Subhash Chandra Bansal. The respondents/defendant nos. 2A to 2F filed their separate joint written statement stating that their late father Raghvendra Kumar Bakshi has never executed or agreed to execute the sale agreement. Similar was the plea in the written statement filed by the respondent/defendant no. 5.

2.5 The Trial Court decreed the suit upon finding that the agreement to sell has been executed between the appellant/plaintiff and defendant no. 1 as a Power of Attorney Holder of defendant nos. 2 to 11. Non-examination of the appellant/plaintiff as a witness was held not having any adverse impact on plaintiff's case. The Trial Court also found that the time allowed for execution of sale deed was extended twice and he had also paid earnest money, therefore, the appellant/plaintiff was ready and willing to perform his part of the contract and the suit is not barred by limitation. Since the extended time for registration of sale deed was till 31.05.1997 and the suit was to be filed on or before 30.05.2000. However, on the said date, the Court was closed for summer vacation which ended on 18.06.2000 and the suit was filed on 19.06.2000. Therefore, the suit was within limitation, having been filed on the last date of limitation.

2.6 In appeal preferred by the respondent nos. 1 to 3/defendant nos. 12 to 14, the High Court has passed the impugned judgment

allowing the appeal to set aside the judgment and decree of the Trial Court consequently dismissing the appellant/plaintiff's suit. Hence this appeal.

3. Mr. Dhruv Agrawal, learned senior counsel appearing for the appellant would submit that the High Court has committed serious error of law and fact by setting aside the well reasoned judgment and decree passed by the Trial Court. According to him, the execution of sale agreement by defendant no. 1 as a Power of Attorney Holder of Defendant Nos. 2 to 11 having been duly proved and the appellant/plaintiff having paid the earnest money and filing the suit within time, the First Appellate Court ought not to have set aside the judgment of the Trial Court. It is further submitted that the High Court is not correct in holding that the defendant nos. 2 to 11 had not signed the agreement because defendant no. 1 was their Power of Attorney Holder. The High Court has also erred in holding that Power of Attorney Holder cannot depose in a civil suit on behalf of the plaintiff. According to him, non-appearance of the appellant/plaintiff as a witness would not have any adverse impact in a suit of this nature and that the readiness and willingness can be proved by the Attorney Holder.

4. *Per contra*, Mr. Gagan Gupta, learned senior counsel for the respondents/defendants would submit that the agreement dated 26.09.1995 is *void ab initio* because it was not executed by all the owners of the suit land. It was then argued that in a suit for specific performance non-appearance of plaintiff as a witness is fatal to his case because it is he who has to plead and prove the readiness and willingness. He would submit that the High Court has rightly set aside the judgment and decree of the Trial Court which is based on perverse finding and incorrect application of settled legal principles.

5. The High Court has non-suited the appellant/plaintiff on two counts. *Firstly*, that defendant no. 1 is not the sole owner of the property which was the coparcenary property and the other coparceners did not sign the initial agreement and *secondly*, that the appellant/plaintiff having failed to appear in the witness box, the testimony of his Power of Attorney Holder cannot be read as statement of the plaintiff in a civil suit of this nature.

6. Admittedly, the initial agreement dated 26.09.1995 was executed by Defendant no. 1-Gajay Bahadur Bakshi. It is the case of the appellant/

plaintiff that Gajay Bahadur Bakshi was the Power of Attorney Holder of Defendant nos. 2 to 11, the other co-owners/coparceners of the suit property. However, the agreement itself no where states that Gajay Bahadur Bakshi has executed the agreement as Attorney Holder of Defendant nos. 2 to 11. On the contrary, it is mentioned in the agreement that Gajay Bahadur Bakshi would be responsible for getting the sale deed executed and registered by all the co-owners or co-khatedars at the time of registration. Neither the names of all the co-owners/ coparceners/co-khatedars are mentioned in the agreement, thus, the High Court is right in finding that all the co-owners have not signed the agreement. The subsequent endorsement of receipt of additional amount of Rs. 40,000/- is also not signed by all the co-parceners. The same is the condition with the 3rd agreement dated 26.12.1996 and the extension endorsement dated 27.03.1997 and 23.04.1997. Significantly, the so-called power of attorney pleaded in the plaint through which the defendant nos. 2 to 11 authorised defendant no. 1 to execute the agreement, have not been produced and proved in the Trial Court. Thus, neither in the agreement nor in course of trial the power of attorney is proved by tendering the same in evidence. Hence, in the absence of evidence, the High Court rightly held that the agreement is not signed by all the co-owners.

7. In the matter of ***Shanmughasundaram & Ors. Vs. Diravia Nadar (dead) by Lrs. & Anr.***[1], this Court has held that in the event all the co-sharers of the property have not executed the sale agreement, a suit for specific performance cannot be decreed. The following is held in paras 29,30 & 31:

> "29. The facts in present case are distinguishable. Admittedly, the property has been jointly inherited by two brothers and three sisters. As heirs under the Hindu Succession Act, they inherited the property as co-owners. In the absence of partition between them, the two brothers together had undivided share in the property, and they could not have agreed for sale of the entire property. They were competent to execute agreement to the extent only of their undivided share in the property. In the event of sale of such undivided share, the vendee would be required to file a suit for partition

1 [2005] 2 SCR 649 : AIR 2005 SC 1836

> to work out his right in the property. The left out three sisters as co-owners having undivided share in the whole property, the two brothers are incompetent to abide by the award.
>
> 30. Learned counsel makes a reference to Section 12 of the Specific Relief Act, 1963 and submits that the arbitration agreement and consequent award should be allowed to be enforced to the extent of share of two brothers leaving the vendee to work out his right, if necessary, in case the sisters object to the sale, by a suit in accordance with Section 12 of the Specific Relief Act.
>
> 31. Section 12 of the Specific Relief Act, in our considered opinion, would be of no assistance in the situation obtaining here. In the absence of sisters being parties to the agreement, the vendee can at best obtain undivided interest of two brothers in the property. Section 12 of the Specific Relief Act cannot be invoked by the vendee to obtain sale of undivided share of the two brothers with a right to force partition on the sisters who were not parties to the agreement of sale. Such a relief under Section 12 cannot be obtained by a vendee, on purchase of an undivided share of the property of some of the co-owners, against other co-owners who were not parties to the sale agreement."

8. Undisputedly, in the present case, the plaintiff failed to appear in the witness box. Instead, his Power of Attorney Holder – Parmod Khare has got himself examined as PW-1. This witness was examined on 05.09.2002 and the power of attorney was executed on 26.08.2002. It is not a case where the suit itself was filed by a Power of Attorney Holder. He appeared subsequently only for recording his evidence as the Special Power of Attorney Holder of the plaintiff. The legal position as to when the deposition of a Power of Attorney Holder can be read in evidence has been dealt with by this Court in several decisions.

9. In ***Janki Vashdeo Bhojwani & Anr. vs. Indusind Bank Ltd. & Ors.***[2]**,** it is held that a Power of Attorney Holder cannot depose

2 [2004] Supp. 6 SCR 681 : (2005) 2 SCC 217

for principal in respect of matters of which only principal can have personal knowledge and in respect of which the principal is liable to be cross-examined. It is also held that if the principal to the suit does not appear in the witness box, a presumption would arise that the case set up by him is not correct. This Court has discussed the legal position in the following words in paras 13 to 22:

> "13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.
>
> 14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr Bhojwani to represent them and the Tribunal erred in allowing the power-of-attorney holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.
>
> 15. Apart from what has been stated, this Court in the case of Vidhyadhar v. Manikrao [(1999) 3 SCC 573] observed at SCC pp. 583-84, para 17 that:

> "17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct…."

16. In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of decree.

17. On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri v. State of Rajasthan [(1986) 2 WLN 713 (Raj)] it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with approval in the case of Ram Prasad v. Hari Narain [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] . It was held that the word "acts" used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

19. In the case of Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias [(2000) 1 Bom LR 908] the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

> 20. However, in the case of Humberto Luis v. Floriano Armando Luis [(2002) 2 Bom CR 754] on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word "act" appearing in Order 3 Rule 2 CPC takes within its sweep "depose". We are unable to agree with this view taken by the Bombay High Court in Floriano Armando [(2002) 2 Bom CR 754] .
>
> 21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri [(1986) 2 WLN 713 (Raj)] followed and reiterated in the case of Ram Prasad [AIR 1998 Raj 185 : (1998) 3 Cur CC 183] is the correct view. The view taken in the case of Floriano Armando Luis [(2002) 2 Bom CR 754] cannot be said to have laid down a correct law and is accordingly overruled.
>
> 22. In the view that we have taken, we hold that the appellants have failed to discharge the burden that they have contributed towards the purchase of property at 38, Koregaon Park, Pune from any independent source of income and failed to prove that they were co-owners of the property at 38, Koregaon Park, Pune. This being the core question, on this score alone, the appeal is liable to be dismissed."

10. Thereafter, in ***Man Kaur vs. Hartar Singh Sangha***[3], this Court referred to its earlier decisions including ***Janki Vashdeo Bhojwani*** (supra) and concluded thus in paras 17 & 18:

> "17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the

3 [2010] 12 SCR 515 : 2010 (10) SCC 512

contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney-holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney-holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney-holder alone has personal knowledge of such acts and transactions and not the principal, the attorney-holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney-holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney-holder, necessarily the attorney-holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorised managers/attorney-holders or persons residing abroad managing their affairs through their attorney-holders.

(e) Where the entire transaction has been conducted through a particular attorney-holder, the principal has to examine that attorney-holder to prove the transaction, and not a different or subsequent attorney-holder.

(f) Where different attorney-holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney-holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney-holder. A landlord who seeks eviction of his tenant, on the ground of his "bona fide" need and a purchaser seeking specific performance who has to show his "readiness and willingness" fall under this category. There is however a recognised exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or "readiness and willingness". Examples of such attorney-holders are a husband/wife exclusively managing the affairs of

his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

11. In a more recent judgment of this Court in the matter of ***A.C. Narayanan vs. State of Maharashtra & Anr.***[4]**,** this Court again considered the earlier judgments, particularly, ***Janki Vashdeo Bhojwani*** (supra) and having noticed that **Janki Vashdeo Bhojwani** relates to Power of Attorney Holder under CPC whereas in the matter of (**A.C. Narayanan**) the Court was concerned with a criminal case. It was observed that since criminal law can be set in motion by anyone, even by a stranger or legal heir, a complaint under Section 138 of the Negotiable Instruments Act, 1881 preferred by the Power of Attorney Holder is held maintainable and also that such Power of Attorney Holder can depose as complainant.

12. Having noticed the three judgments of this Court in ***Janki Vashdeo Bhojwani*** *(supra)***,** ***Man Kaur*** *(supra)* **&** ***A.C. Narayanan*** *(supra),* we are of the view that in view of Section 12 of the Specific Relief Act, 1963, in a suit for specific performance wherein the plaintiff is required to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract, a Power of Attorney Holder is not entitled to depose in place and instead of the plaintiff (principal). In other words, if the Power of Attorney Holder has rendered some 'acts' in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the act done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined. If a plaintiff, in a suit for specific performance is required to prove that he was always ready and willing to perform his part of the contract, it is necessary for him to step into the witness box and depose the said fact and subject himself to cross-examination on that issue. A plaintiff cannot examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. The term 'readiness and willingness' refers to the

4 [2013] 11 SCR 80 : (2014) 11 SCC 790

state of mind and conduct of the purchaser, as also his capacity and preparedness, one without the other being not sufficient. Therefore, a third party having no personal knowledge about the transaction cannot give evidence about the readiness and willingness.

13. In the light of above settled legal position, we are of the view that in the instant case, the plaintiff/appellant has failed to enter into the witness box and subject himself to cross-examination, he has not been able to prove the pre-requisites of Section 12 of the Specific Relief Act,1963 and more so, when the original agreement contained a definite time for registration of sale deed which was later on extended but the suit was filed on the last date of limitation calculated on the basis of the last extended time.

14. The effect of filing a suit for specific performance after long delay, may be at the fag end of period of limitation fell for consideration before this Court in ***K.S. Vidyanadam vs. Vairavan***[5] wherein this Court held thus in para 10:

> "10. It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit(s) specified in the agreement have no relevance and can be ignored with impunity? It would also mean denying the discretion vested in the court by both Sections 10

5 [1997] 1 SCR 993 : (1997) 3 SCC 1

> and 20. As held by a Constitution Bench of this Court in Chand Rani v. Kamal Rani [(1993) 1 SCC 519]: (SCC p. 528, para 25)……"

15. In ***Azhar Sultana vs. B. Rajamani & Ors.***[6], this Court held thus in para 28:

> "28. …….The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard-and-fast law can be laid down therefor. The conduct of the parties in this behalf would also assume significance."

16. In ***Saradamani Kandappan vs. S. Rajalakshmi & Ors.***[7], this Court held that every suit for specific performance need not be decreed merely because it is filed within the period of limitation by ignoring time limits stipulated in the agreement. The courts will also frown upon suits which are not filed immediately after the breach/ refusal. The fact that limitation is three years does not mean that a purchaser can wait for one or two years to file a suit and obtain specific performance.

17. In ***Atma Ram vs. Charanjit Singh***[8], this Court has observed in para 9 thus:

> "9. ……..No explanation was forthcoming from the petitioner for the long delay of three years, in filing the suit (on 13-10-1999) after issuing a legal notice on 12-11-1996. The conduct of a plaintiff is very crucial in a suit for specific performance. A person who issues a legal notice on 12-11-1996 claiming readiness and willingness, but who institutes a suit only on 13-10-1999 and that too only with a prayer for a mandatory injunction carrying a fixed court fee relatable only to the said relief, will not be entitled to the discretionary relief of specific performance."

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6 [2009] 2 SCR 537 : (2009) 17 SCC 27

7 [2011] 8 SCR 874 : (2011) 12 SCC 18

8 [2020] 3 SCR 697 : (2020) 3 SCC 311

18. In the case in hand, the plaintiff entered into an agreement with only one of the co-owners and thereafter sought extensions for execution of the sale deed but did not prefer any suit though he was aware of the sale deed dated 14.05.1997 executed in favour of defendant nos. 12 to 14 and sent a legal notice on 30.05.1997 and even objected to the subsequent purchasers' application for mutation of their names in the revenue records on 20.08.1997 and refers to a meeting of the Gram Panchayat dated 06.12.1997, yet the suit was preferred, on 09.05.2000 on the last date of limitation. Thus, on the strength of observations made by this Court in ***K.S. Vidyanadam*** *(supra),* ***Azhar Sultana*** *(supra),* ***Saradamani Kandappan*** *(supra)* & ***Atma Ram*** *(supra),* the suit having been preferred after a long delay, the plaintiff is not entitled for specific performance on this ground also.

19. For the foregoing, we uphold the judgment and decree dated 01.09.2016 passed in FA No. 340 of 2003 by the High Court. The appeal lacks substance and is hereby dismissed. The parties shall bear their own costs.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 629 : 2024 INSC 448

Sunita Devi
v.
The State of Bihar & Anr.

(Criminal Appeal No. 3924 of 2023)

17 May 2024

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

Issue for Consideration

Need for a comprehensive sentencing policy. Trial against the accused under Protection of Children from Sexual Offences Act, 2012 was conducted by the judicial officer in utmost haste and the accused was denied due opportunity to defend himself. Conviction and death sentence awarded was set aside by the High Court and a *de novo* trial was ordered, making certain observations against the Special Judge. Criminal Appeal Nos.3925-3927 of 2023 filed by the judicial officer. Criminal Appeal No.3924 of 2023 filed by the informant against the order of remittal for *de novo* trial. On facts, in Criminal Appeal No.3925 of 2023, the trial had commenced and concluded in a single day wherein the aforesaid judicial officer rendered a similar conviction however, the accused was sentenced to life imprisonment.

Headnotes†

Sentencing – Lack of policy/legislation – Disparities in awarding sentence – Need for sentencing policy – Constitution of India – Articles 14, 21:

Held: Hearing the accused on sentence is a valuable right conferred on the accused – The real importance lies only with the sentence, as against the conviction – Unfortunately, there is no clear policy or legislation when it comes to sentencing – Over the years, it has become judge-centric and there are admitted disparities in awarding a sentence – When it comes to sentencing, there are various factors such as age, sex, education, home life, social background, emotional and mental conditions, caste, religion and community that constitute aggravating and mitigating circumstances – A decision of a Judge in sentencing, would vary from person to person and also from stage to stage – It is controlled by the mind – The environment and the upbringing of a Judge would become the ultimate arbiter in deciding the sentence – A Judge from an affluent background

* Author

might have a different mindset as against a Judge from a humble one – A female Judge might look at it differently, when compared to her male counterpart – An Appellate Court might tinker with the sentence due to its experience, and the external factors like institutional constraints might come into play – There is a crying need for a clear sentencing policy, which should never be judge-centric as the society has to know the basis of a sentence – Sentencing shall not be a mere lottery – It shall also not be an outcome of a knee-jerk reaction – This is a very important part of the Fundamental Rights conferred under Articles 14 and 21 – Various elements such as deterrence, incapacitation and reformation should form part of sentencing – The need for adequate guidelines for exercising sentencing discretion, avoiding unwanted disparity, is of utmost importance – Courts do take into consideration the mitigating and aggravating circumstances – However, no research has been undertaken for constituting what are aggravating and mitigating circumstances – Suggestions made – Department of Justice, Ministry of Law and Justice, Government of India to consider introducing a comprehensive policy, possibly by way of getting an appropriate report from a duly constituted Sentencing Commission consisting of experts in different fields for the purpose of having a distinct sentencing policy – Government of India to file an affidavit on the feasibility of introducing a comprehensive sentencing policy and a report thereon, within six months. [Paras 29, 30, 32-36, 37, 40, 58]

Administration of Criminal Justice – Denial of due opportunity to defend and hearing – Trial against the accused under POCSO Act was conducted by appellant-judicial officer in utmost haste – At every stage, the accused was denied due opportunity to defend himself – High Court set aside the conviction and the death sentence and a *de novo* trial was ordered – In Criminal Appeal No.3925 of 2023 filed by the very same judicial officer, a similar conviction was rendered in the trial which was concluded in a single day and the accused was sentenced to life imprisonment:

Held: High Court while passing both the impugned judgments not only called for the records and rendered findings of fact, but also considered them in detail – At every stage, the accused was denied due opportunity to defend himself – The appellant was acting in utmost haste – It would be humanly impossible to deliver the judgment within half an hour's time running into 27 pages consisting of 59 paragraphs in the first case and similarly in the other – At every

stage, including framing of charges, there was a constant denial of due opportunity and hearing – Accused was not able to consult his lawyer – He was not even served with the copies, though his lawyer received the same before framing of the charges – Receiving of documents by his lawyer would not be sufficient compliance, unless there was sufficient time given for him to peruse them and thereafter have a consultation – Admittedly, neither the provisions of the Witness Protection Scheme, 2018 were invoked nor the Rules for Video Conferencing for Courts, 2020 were followed – Further, the appellant was fortunate that no action was taken against him thus, in the absence of any proposed action, there is no question of hearing him – Trial court to keep in mind the mandate of POCSO Act, 2012 while recording the evidence of the victim and to conduct and complete the trial expeditiously. [Paras 32, 55, 56, 58]

Code of Criminal Procedure, 1973 – s.360 – Probation of Offenders Act, 1958 – ss.3, 4, 6:

Held: Section 360 speaks of releasing a convict on probation of good conduct or after admonition – Before passing the sentence on a convict, after rendering conviction, the Judge shall consider the feasibility of proceeding in accordance with this provision – Being a beneficial provision dealing with a reformative aspect, it is the bounden duty of the Judge to consider the application of this provision before proceeding to hear the accused on sentence – While doing so, the Judge has to hear the accused and the prosecution – Similarly, the Court has to apply the salient provisions contained under Sections 3, 4 and 6 of the Probation of Offenders Act, 1958 – A trial court is duty bound to comply with the mandate of Section 360 of the CrPC, 1973 read with Sections 3, 4 and 6 of the Act, 1958 before embarking into the question of sentence. [Para 28]

Administration of Justice – Administration of Criminal Justice – Conduct of a fair trial – Constitution of India – Articles 14, 21 – Absence of a fair trial violates fundamental rights:

Held: A fair trial would include due compliance of the procedure with adequate opportunities for all the stakeholders – Such procedural safeguards and compliance are to be kept in mind by the Court, as any deviation might either impact the prosecution or the defence in a given case – A fair trial is the heart and soul of criminal jurisprudence – It is not only a statutory right, but also a human right, which would be violated when the safeguards

provided under the Statute are not followed – The absence of a fair trial would seriously impair and violate the fundamental rights guaranteed under Articles 14 and 21 – The right to fair hearing is a part of Article 21 – A trial should be a real one and, therefore, not a mere pretence – There shall never be an impression over the decision of a Court that it has predetermined and pre-judged a case even before starting a trial, or else, such a trial would become an empty formality – Principle of presumption of innocence and concept of speedy trial, discussed. [Paras 7, 9, 10]

Code of Criminal Procedure, 1973 – ss.238, 207:

Held: Section 238 mandates that while dealing with a warrant case instituted on a police report, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207 – In all these cases, due compliance is to be done when the accused is produced or appears before the Magistrate – Therefore, Section 238 reiterates the bounden duty of a Magistrate and, if not done, to be complied with at the time of commencement of the trial – Such a reiteration would only reinforce a renewed emphasis on due compliance being a facet of fair play – An accused shall be put to notice on the incriminating materials leading to the charges framed against him – The obligation so imposed is not only on the supply of the relevant documents, but such compliance should be at the appropriate stage so that it does not brook any delay – The idea is to enable an accused to face the trial by thoroughly understanding the case stated against him – However, a mere non-supply of a part of the documents would not lead to the trial being vitiated, unless an accused substantiates before the Court that it has caused prejudice to him – It is ultimately for the Court to come to an appropriate conclusion by an adequate assessment of facts placed before it. [Para 16]

Code of Criminal Procedure, 1973 – s.465 – Rigour of, when not applicable:

Held: If the Appellate Court is of the view that there is a continued non-compliance of the substantial provisions of the CrPC, 1973 then the rigour of Section 465 of the CrPC, 1973 would not apply and, in that case, an order of remand would be justified – This provision is meant to uphold the decision of the trial court, even in a case where there is an apparent irregularity in procedure – If the evidence available has been duly taken note of by the Court, then such a decision cannot be reversed on account of a mere technical error – This is based on the principle that a procedural

law is the handmaid of justice – However, the ultimate issue is as to whether such an error or omission has constituted a failure of justice, which is one of fact, to be decided on the touchstone of prejudice. [Para 25]

Code of Criminal Procedure, 1973 – ss.227, 228 – Discharge – Framing of charge – Constitution of India – Article 22:

Held: Before the stage of framing of charges, the Judge is expected to discharge an accused, if he is of the considered view that there is no sufficient ground to proceed against the accused – This being a judicial exercise, his discretion must be supported by adequate reasons – In discharge of his powers, he has to consider the records and documents submitted by the prosecution *vis-à -vis* the arguments adduced by both sides – The words "after hearing the submissions of the accused" would imply an effective and meaningful hearing – It is not a mere procedural compliance – The duty of the Court is to see as to whether the materials produced by the prosecution are reasonably related to the offence attributed against the accused – What is to be seen is the existence of a *prima facie* case – The case is at a pre-framing stage and therefore, it cannot be a full-fledged pre-trial – Adequacy and sufficiency are the relevant factors to be seen – The test is one of the degree of probability – Section 227 gives effect to Article 22 of the Constitution – The right of an accused to be heard is inalienable – For exercising this right, there has to be due consultation – It is the duty of the court to ensure that the accused is given sufficient opportunities to consult his lawyer – Under sub-section (2) of Section 228 of the CrPC, 1973, the Judge, while framing any charge, is ordained to read and explain it to the accused – Thereafter, the accused shall be asked as to whether he pleads guilty of the offence charged or claims to be tried – This is an occasion where the Judge avoids the lawyer and keeps in touch with the accused directly – Unless a situation so warrants otherwise, the presence of the accused shall be ensured. [Paras 18-21]

Code of Criminal Procedure, 1973 – ss.230, 231, 233, 309:

Held: Sections 230, 231 are to be read in consonance with each other – At this stage, the Court is concerned only with the prosecution's evidence – To ensure fair play, as a normal practice, the Court has to fix a date for the examination of the witnesses – The idea is to complete the examination-in-chief and cross examination, both at the same time – While fixing the

date, the Court is expected to take into consideration the relative convenience of the parties, though the discretion lies with it – A balance has to be struck between the competing interests – Further, when an application is moved invoking Section 233, the Judge is duty bound to issue process, unless he is satisfied on the existence of the three elements, as stated – Any denial would be an affront to the concept of a fair trial – Section 309 places emphasis on the continuation of the trial as any obstruction and delay would hamper the process of justice – Despite a bar under the second and fourth proviso to Section 309, an adjournment can be granted, provided the party who seeks so, satisfies the court. [Paras 22-24]

Code of Criminal Procedure, 1973 – s.386 – Powers of the Appellate Court – Re-trial:

Held: An Appellate Court has got ample power to direct re-trial – However, such a power is to be exercised in exceptional cases – The irregularities found must be so material that a re-trial is the only option. [Para 27]

Sentencing – Sentencing policy – Sentencing policy adopted in countries like Israel, Canada, New Zealand and UK – Discussed. [Paras 38-40]

Case Law Cited

Mohd. Hussain v. State (Govt. of NCT of Delhi) [2012] 10 SCR 480 **: (2012) 9 SCC 408;** *State of Haryana v. Ram Mehar* [2016] 5 SCR 172 **: (2016) 8 SCC 762;** *Talab Haji Hussain v. Madhukar Purshottam Mondkar* [1958] 1 SCR 1226**;** *Naresh Kumar Yadav v. Ravindra Kumar* [2007] 11 SCR 615 **: (2008) 1 SCC 632***; P. Gopalkrishnan v. State of Kerala* [2019] 17 SCR 422 **: (2020) 9 SCC 161;** *Anokhilal v. State of M.P.* [2019] 18 SCR 1196 **: (2019) 20 SCC 196;** *Kewal Krishan v. Suraj Bhan* **1980 (Supp.) SCC 499;** *Hardeep Singh v. State of Punjab* [2014] 2 SCR 1 **: (2014) 3 SCC 92;** *Sajjan Kumar v. CBI* [2010] 11 SCR 669 **: (2010) 9 SCC 368;** *Mohd. Ajmal Amir Kasab v. State of Maharashtra* [2012] 8 SCR 295 **: (2012) 9 SCC 1;** *State of Kerala v. Rasheed* [2018] 13 SCR 587 **: (2019) 13 SCC 297;** *State of UP v. Shambu Nath Singh* [2001] 2 SCR 854 **: (2001) 4 SCC 667;** *State of M.P. v. Bhooraji* [2001] Supp. 2 SCR 128 **: (2001) 7 SCC 679;** *Darbara Singh v. State of Punjab* [2012] 7 SCR 541 **: (2012) 10 SCC 476;**

Kottayya v. Emperor, **AIR (34) 1947 Privy Council 67;** *Nasib Singh v. State of Punjab* [2021] 13 SCR 566 **: (2022) 2 SCC 89;** *Manoj v. State of M.P.* [2023] 11 SCR 246 **: (2023) 2 SCC 353;** *Dhananjoy Chatterjee v. State of W.B.* [1994] 1 SCR 37 **: (1994) 2 SCC 220;** *Swamy Shraddananda (2) v. State of Karnataka* [2008] 11 SCR 93 **: (2008) 13 SCC 767;** *Soman v. State of Kerala* [2012] 11 SCR 1155 **: (2013) 11 SCC 382 – referred to.**

Munna Pandey v. State of Bihar [2023] 11 SCR 1005 **: AIR 2023 SUPREME COURT 5709;** *Akil v. State (NCT of Delhi)* [2012] 13 SCR 659 **: (2013) 7 SCC 125;** *Sakshi v. Union of India* [2004] 2 Suppl. SCR 723 **: (2004) 5 SCC 518;** *State of Maharashtra v. Mahesh Kariman Tirki* **(2022) 10 SCC 207;** *Pradeep S. Wodeyar v. State of Karnataka* [2021] 11 SCR 985 **: (2021) 19 SCC 62 – held inapplicable.**

Books and Periodicals Cited

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List of Acts

Code of Criminal Procedure, 1973; Probation of Offenders Act, 1958; Code of Criminal Procedure, 1898; Rules for Video Conferencing for Courts, 2020; Witness Protection Scheme, 2018; Criminal Code (Canada); Sentencing Act 2002, New Zealand; Coroners and Justice Act, 2009 (UK); Sentencing Act 2020 (UK).

List of Keywords

Sentencing; Sentencing policy; Need for sentencing policy; Comprehensive sentencing policy; Disparities in awarding sentence; Denial of due opportunity to defend; Death sentence; *de novo* trial; Principle of presumption of innocence; Fair trial; Absence of a fair trial; Right to fair hearing; Article 21; Speedy trial; Sentencing discretion; Aggravating and mitigating circumstances; Lack of policy/ legislation on sentencing; Judge-centric sentencing; Deterrence; Incapacitation; Reformation; Sentencing Commission; Examination

of the witnesses; Witness Protection Scheme; Examination-in-chief; Cross examination; *prima facie* case; Video Conferencing; Pre-framing stage; Full-fledged pre-trial; Supply of relevant documents; Non-compliance of mandatory provisions; Discharge; Framing of charge; Effective and meaningful hearing; Right of an accused to be heard; Re-trial; Sentencing policy in Israel, Canada, New Zealand, UK.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 3924 of 2023

From the Judgment and Order dated 16.08.2022 of the High Court of Judicature at Patna in CRADB No. 203 of 2022

With

Criminal Appeal Nos. 3926-3927 and 3925 of 2023

Appearances for Parties

Vikas Singh, Sr. Adv., Ms. Deepeika Kalia, Satwik Misra, Ms. Gunjan Dogra, Ms. Devashree, Keshav Khandelwal, Ms. Vasudha Singh, Ms. Udita Singh, Mrityunjai Singh, Advs. for the Appellant.

Chander Uday Singh, Sr. Adv., Gautam Narayan, Ms. Asmita Singh, Harshit Goel, Samir Ali Khan, Pranjal Sharma, Abhimanyu Jhamba, Nishesh Sharma, Ms. Prerna Singh , Anil Kumar, Sidharth Sarthi, Shantanu Sagar, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

M. M. Sundresh, J.

1. Criminal Appeal No.3924 of 2023 has been filed by the informant, against the order of remittal passed by the Division Bench of the Patna High Court directing the Trial Court to conduct a *de novo* trial, while making certain observations against the Special Judge, disapproving his approach in the conduct of the trial. Criminal Appeal Nos.3926-3927 of 2023 have been filed by the learned Special Judge who conducted the trial and thereafter delivered the judgment. Criminal Appeal No.3925 of 2023 has been filed by the very same learned Judge, aggrieved over the remarks once again made by the High Court in an order of

remittal, requesting the Hon'ble Chief Justice of the Patna High Court to consider whether the Judicial Officer should be assigned the function of holding sessions trial which have far reaching consequences, while sending him for fresh training to the State Judicial Academy.

2. Heard Learned Senior Counsel Mr. Vikas Singh for the appellant and Learned Senior Counsel Mr. C. U. Singh for the respondents. We have perused the documents filed along with the written submissions made by the parties.

3. Before going into the submissions on merit, we shall first deal with the provisions governing the legal position in conducting a trial.

VIDEO CONFERENCING

Rule 6 of the Rule for Video Conferencing for Courts, 2020

> **"6. *Application for Appearance, Evidence and Submission by Video Conferencing:***
>
> 6.1 Any party to the proceeding or witness, save and except where proceedings are initiated at the instance of the Court, may move a request for video conferencing. A party or witness seeking a video conferencing proceeding shall do so by making a request in the form prescribed in Schedule II.
>
> 6.2 Any proposal to move a request to for video conferencing should first be discussed with the other party or parties to the proceeding, except where it is not possible or inappropriate, for example in cases such as urgent applications.
>
> 6.3 On receipt of such a request and upon hearing all concerned persons, the Court will pass an appropriate order after ascertaining that the application is not filed with an intention to impede a fair trial or to delay the proceedings.
>
> 6.4 While allowing a request for video conferencing, the Court may also fix the schedule for convening the video conferencing.
>
> 6.5 In case the video conferencing event is convened for making oral submissions, the order may require the

Advocate or party in person to submit written arguments and precedents, if any, in advance on the official email ID of the concerned Court.

6.6 Costs, if directed to be paid, shall be deposited within the prescribed time, commencing from the date on which the order convening proceedings through video conferencing is received."

Rule 8 of the Rule for Video Conferencing for Courts, 2020

"8. *Examination of persons.—*

8.3 Where the person being examined, or the accused to be tried, is in custody, the statement or, as the case may be, the testimony may be recorded through video conferencing. The Court shall provide adequate opportunity to the under-trial prisoner to consult in privacy with their counsel before, during and after the video conferencing."

Rule 11 of the Rule for Video Conferencing for Courts, 2020

"11. *Judicial remand, framing of charge, examination of accused and Proceedings under Section 164 of the CrPC.—*

11.1 The Court may, at its discretion, authorize detention of an accused, frame charges in a criminal trial under the CrPC by video conferencing. However, ordinarily judicial remand in the first instance or police remand shall not be granted through video conferencing save and except in exceptional circumstances for reasons to be recorded in writing.

11.2 The Court may, in exceptional circumstances, for reasons to be recorded in writing, examine a witness or an accused under Section 164 of the CrPC or record the statement of the accused under Section 313 CrPC through video conferencing, while observing all due precautions to ensure that the witness or the accused as the case maybe is free of any form of coercion, threat or undue influence. The Court shall ensure compliance with Section 26 of the Evidence Act."

4. The High Court of Patna, in exercise of the powers conferred under Articles 225 and 227 of the Constitution of India, 1950, framed rules and procedures relating to the use of video conferencing for Courts. This was done with the concurrence of the State Government. "*Rules for Video Conferencing for Courts, 2020*" delineate the general principles governing video conferencing. Rule 6 provides for an application seeking video conferencing. When such an application is made, it has to be put to the other party followed by an appropriate order by the court indicating its satisfaction for granting approval. As per Rule 8, when the testimony of a person being examined is to be recorded through video conferencing, the court shall provide an adequate opportunity to the undertrial prisoner to consult in privacy with his counsel at different stages – before, during and after. Under Rule 11, an act of securing the presence of an accused through video conferencing at the time of judicial remand for the first time or police remand, is not a matter of course and, therefore, it is to be exercised only in exceptional circumstances for the reasons to be recorded in writing. Similar is the case *qua* recording of the statement of an accused under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the "**CrPC, 1973**"), in which case, it is obligatory on the part of the Court to make sure that the accused is free from any form of coercion, threat or undue influence.

5. On a conjoint reading of the aforesaid rules, it is only appropriate that the accused has to be produced before the Court, rather than marking his appearance through video conferencing, the latter being an exception. While applying its mind, the Court has to rule out the possibility of any misuse.

WITNESS PROTECTION SCHEME, 2018

6. Witness Protection Scheme, 2018 has been introduced in the interest of the administration of justice, while enforcing a criminal law. It is meant to take care of a situation where the witnesses are made to depose before the Court by completely abandoning the case of the prosecution, either by fear or favour. The scheme provides for a competent authority which is the Standing Committee headed by a District and Sessions Judge with the head of the Police in the District as a Member and the head of the Prosecution as its Member Secretary. A witness is at liberty to seek protection before

the competent authority. The head of the police is expected to place before the competent authority a "*Threat Analysis Report*". The Scheme lays down in detail, the action proposed to be taken, once such an application is filed.

FAIR TRIAL

7. A fair trial would include due compliance of the procedure with adequate opportunities for all the stakeholders. Such procedural safeguards and compliance are to be kept in mind by the Court, as any deviation might either impact the prosecution or the defence in a given case. In an adversarial system of criminal law, which is being followed in India, when an accused is prosecuted on behalf of the State, the interest of a victim cannot be ignored. An offence is presumed to be against societal values and, therefore, any crime would constitute a deviant act by the accused.

8. Every trial is a march towards the truth. It is the primary duty of the Court to search for the truth using the procedural law as its tool. Such a procedural law may have a substantive part extending certain inalienable rights to both, the accused and the victim. By non-compliance of the procedural law, justice cannot be allowed to derail. Anyone, who complains of an unfair trial, is duty bound to satisfy the Court that he stands prejudiced by it. This does not mean that a Court can be lackadaisical in following the rules and procedures meant to ensure justice.

9. A fair trial is the heart and soul of criminal jurisprudence. The principle of democracy lies in a fair trial. It is not only a statutory right, but also a human right, which would be violated when the safeguards provided under the Statute are not followed. The absence of a fair trial would seriously impair and violate the fundamental rights guaranteed under Articles 14 and 21 of the Constitution of India, 1950. What is important to be seen is the existence of a failure of justice, which is obviously one of fact. A mere violation *per se* would not vitiate the trial, especially when the degree of substantivity exhibited in a statute is minimal.

10. The right to fair hearing is a part of Article 21 of the Constitution of India, 1950. A trial should be a real one and, therefore, not a mere pretence. There shall never be an impression over the decision

of a Court that it has pre-determined and pre-judged a case even before starting a trial, or else, such a trial would become an empty formality.

Precedents

J. Jayalalithaa v. State of Karnataka, (2014) 2 SCC 401

> "28. **Fair trial is the main object of criminal procedure and such fairness should not be hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society. Thus, fair trial must be accorded to every accused in the spirit of the right to life and personal liberty and the accused must get a free and fair, just and reasonable trial on the charge imputed in a criminal case.** Any breach or violation of public rights and duties adversely affects the community as a whole and it becomes harmful to the society in general. In all circumstances, the courts have a duty to maintain public confidence in the administration of justice and such duty is to vindicate and uphold the "majesty of the law" and the courts cannot turn a blind eye to vexatious or oppressive conduct that occurs in relation to criminal proceedings.
>
> 29. **Denial of a fair trial is as much injustice to the accused as is to the victim and the society. It necessarily requires a trial before an impartial Judge, a fair prosecutor and an atmosphere of judicial calm. Since the object of the trial is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities and must be conducted under such rules as will protect the innocent and punish the guilty. Justice should not only be done but should be seem to have been done. Therefore, free and fair trial is a sine qua non of Article 21 of the Constitution. Right to get a fair trial is not only a basic fundamental right but a human right also. Therefore, any hindrance in a fair trial could be violative of Article 14 of the Constitution.** "No trial can be allowed to prolong indefinitely due to the

lethargy of the prosecuting agency or the State machinery and that is the raison d'être in prescribing the time frame" for conclusion of the trial."

(emphasis supplied)

Rattiram v. State of M.P., (2012) 4 SCC 516

"39. The question posed by us fundamentally relates to the non-compliance with such interdict. **The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.**

40. In *Kalyani Baskar* v. *M.S. Sampoornam* [(2007) 2 SCC 258 : (2007) 1 SCC (Cri) 577] it has been laid down that "fair trial" includes fair and proper opportunities allowed by law to the accused to prove innocence and, therefore, adducing evidence in support of the defence is a valuable right and denial of that right means denial of fair trial. It is essential that the rules of procedure designed to ensure justice should be scrupulously followed and the courts should be zealous in seeing that there is no breach of them.

41. In this regard, we may fruitfully reproduce the observations from *Manu Sharma* v. *State (NCT of Delhi)* [(2010) 6 SCC 1 : (2010) 2 SCC (Cri) 1385] wherein it has been so stated : (SCC pp. 79-80, para 197)

> "*197*. In the Indian criminal jurisprudence, the accused is placed in a somewhat advantageous position than under different jurisprudence of some of the countries in the world. *The criminal justice administration system in India places human rights and dignity for human life at a much*

higher pedestal. In our jurisprudence an accused is presumed to be innocent till proved guilty, the alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance with the basic rule of law. These are the fundamental canons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 and 21 of the Constitution of India."

(emphasis supplied)

42. It would not be an exaggeration if it is stated that a "fair trial" is the heart of criminal jurisprudence and, in a way, an important facet of a democratic polity that is governed by rule of law. Denial of "fair trial" is crucifixion of human rights. It is ingrained in the concept of due process of law. **While emphasising the principle of "fair trial" and the practice of the same in the course of trial, it is obligatory on the part of the courts to see whether in an individual case or category of cases, because of non-compliance with a certain provision, reversion of judgment of conviction is inevitable or it is dependent on arriving at an indubitable conclusion that substantial injustice has in fact occurred."**

(emphasis supplied)

Zahira Habibulla H. Sheikh v. State of Gujarat, (2004) 4 SCC 158

"35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. **The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and**

prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice — often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

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39. Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial.

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54. Though justice is depicted to be blindfolded, as popularly said, it is only a veil not to see who the party before it is while pronouncing judgment on the cause

> **brought before it by enforcing law and administer justice and not to ignore or turn the mind/attention of the court away from the truth of the cause or lis before it, in disregard of its duty to prevent miscarriage of justice.** When an ordinary citizen makes a grievance against the mighty administration, any indifference, inaction or lethargy shown in protecting his right guaranteed in law will tend to paralyse by such inaction or lethargic action of courts and erode in stages the faith inbuilt in the judicial system ultimately destroying the very justice-delivery system of the country itself. **Doing justice is the paramount consideration and that duty cannot be abdicated or diluted and diverted by manipulative red herrings."**
>
> (emphasis supplied)

PRESUMPTION OF INNOCENCE AND SPEEDY TRIAL

11. Unless a statute indicates otherwise, a criminal trial would commence with the presumption of innocence. This principle is of utmost importance as the Court embarks upon a trial in its quest for the truth. Though an accused is charged with an offence, it is the Court which has to satisfy its conscience, upon the prosecution proving the charges levelled beyond reasonable doubt. For the aforesaid purpose, an accused will have to be given a decent setting to prove his innocence. Compliance with the procedural safeguard is meant for the aforesaid purpose. However, such procedural safeguards would not only ensure a fair trial, but also help the prosecution in confirming that it did its part fairly.

12. The concept of fair trial is not a vague idea, but a decisive one. While a speedy trial is in the best interest of everyone, including the society, the pace can only be set through the procedural mechanism, and it cannot be done at the mere dictate of the Court in ignorance of the procedural law. At the same time, care has to be taken with the aid of the law, to prevent the miscarriage of justice, when the delay is caused on purpose. Thus, a speedy trial, being a facet of fair trial, cannot be permitted to destroy the latter by its recklessness. Any anxiety on the part of the Court, either to expedite the trial in contravention of law, or delay it unnecessarily, would seriously impede fair trial. In such a case, either the prosecution or the defence would bear the consequences.

Precedents

Mohd. Hussain v. State (Govt. of NCT of Delhi), (2012) 9 SCC 408

> **"40. "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances.** Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. **The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered."**
>
> (emphasis supplied)

State of Haryana v. Ram Mehar, (2016) 8 SCC 762

> "24. The decisions of this Court when analysed appositely clearly convey that the concept of the fair trial is not in the realm of abstraction. It is not a vague idea. It is a concrete

phenomenon. It is not rigid and there cannot be any straitjacket formula for applying the same. On occasions it has the necessary flexibility. Therefore, it cannot be attributed or clothed with any kind of rigidity or flexibility in its application. It is because fair trial in its ambit requires fairness to the accused, the victim and the collective at large. Neither the accused nor the prosecution nor the victim which is a part of the society can claim absolute predominance over the other. Once absolute predominance is recognised, it will have the effect potentiality to bring in an anarchical disorder in the conducting of trial defying established legal norm. There should be passion for doing justice but it must be commanded by reasons and not propelled by any kind of vague instigation. It would be dependent on the fact situation; established norms and recognised principles and eventual appreciation of the factual scenario in entirety. There may be cases which may command compartmentalisation but it cannot be stated to be an inflexible rule. Each and every irregularity cannot be imported to the arena of fair trial. There may be situations where injustice to the victim may play a pivotal role. The centripodal purpose is to see that injustice is avoided when the trial is conducted. Simultaneously the concept of fair trial cannot be allowed to such an extent so that the systemic order of conducting a trial in accordance with CrPC or other enactments get mortgaged to the whims and fancies of the defence or the prosecution. The command of the Code cannot be thrown to winds. In such situation, as has been laid down in many an authority, the courts have significantly an eminent role. A plea of fairness cannot be utilised to build castles in Spain or permitted to perceive a bright moon in a sunny afternoon. It cannot be acquiesced to create an organic disorder in the system. It cannot be acceded to manure a fertile mind to usher in the nemesis of the concept of trial as such."

Talab Haji Hussain v. Madhukar Purshottam Mondkar, 1958 SCR 1226 (at page 1232)

"Now it is obvious that the primary object of criminal procedure is to ensure a fair trial of accused persons. Every criminal trial begins with the presumption of innocence in favour of

the accused; and provisions of the Code are so framed that a criminal trial should begin with and be throughout governed by this essential presumption; but a fair trial has naturally two objects in view; it must be fair to the accused and must also be fair to the prosecution. The test of fairness in a criminal trial must be judged from this dual point of view. It is therefore of the utmost importance that, in a criminal trial, witnesses should be able to give evidence without any inducement or threat either from the prosecution or the defence. A criminal trial must never be so conducted by the prosecution as would lead to the conviction of an innocent person; similarly the progress of a criminal trial must not be obstructed by the accused so as to lead to the acquittal of a really guilty offender. The acquittal of the innocent and the conviction of the guilty are the objects of a criminal trial and so there can be no possible doubt that, if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice. …"

THE CODE OF CRIMINAL PROCEDURE, 1973 (CrPC, 1973)

13. The CrPC, 1973, though a Code dealing with procedural law, is embellished with numerous substantive elements in it. The substantive elements give effect to Articles 14, 20, 21 and 22 of the Constitution of India, 1950. Any Court that deals with a criminal case, starting at the magisterial level, is duty-bound to give effect to the CrPC, 1973 which would only mean the protection of rights conferred under the Constitution of India, 1950. To put it differently, the CrPC, 1973 is a handbook introduced to maintain and uphold fair play in a criminal case, starting with the investigation and ending with the acquittal or a conviction leading to a sentence.

SUPPLY OF DOCUMENTS

Section 173 of the Code of Criminal Procedure, 1898

"173. Report of police officer.—

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(4) After forwarding a report under this section, the officer-in-charge of the police station shall, before the commencement of, the inquiry or trial, furnish or cause

to be furnished to the accused, free of cost, a copy of the report forwarded under sub-section (1) and of the first information report recorded under Section 154 and of all other documents or relevant extracts thereof, on which the prosecution proposes to rely, including the statements and confessions, if any recorded under Section 164 and the statements recorded under sub-section (3) of Section 161 of all the persons whom the prosecution proposes to examine as its witnesses."

Section 207A of the Code of Criminal Procedure, 1898

"207A. Procedure to be adopted in proceedings instituted on police report.

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(3) At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them, he shall cause the same to be so furnished."

Section 251A of the Code of Criminal Procedure, 1898

"251A. Procedure to be adopted in cases instituted on police report.

(1) When, in any case instituted on a police report, the accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused, and if he finds that the accused has not been furnished with such documents or any of them, he shall cause them to be so furnished."

Section 207 of the CrPC, 1973

"207. Supply to the accused of copy of police report and other documents.-

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay

furnish to the accused, free of cost, a copy of each of the following:-

(i) the police report;

(ii) the first information report recorded under section 154;

(iii) the statements recorded under sub-section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 173;

(iv) the confessions and statements, if any, recorded under section 164;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 173 :

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused :Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

Section 208 of the CrPC, 1973

"208. Supply of copies of statements and documents to accused in other cases triable by Court of Session.-

Where, in a case instituted otherwise than on a police report, it appears to the Magistrate issuing process under section 204 that the offence is triable exclusively by the Court of Session, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:

(i) the statements recorded under section 200 or section 202, of all persons examined by the Magistrate;

(ii) the statements and confessions, if any, recorded under section 161 or section 164;

(iii) any documents produced before the Magistrate on which the prosecution proposes to rely:

Provided that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

Section 209 of the CrPC, 1973

"209. Commitment of case to Court of Session when offence is triable exclusively by it.-

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

Section 238 of the CrPC, 1973

"238. Compliance with Section 207.

When, in any warrant-case instituted on a police report, the accused appears or is brought before a Magistrate

at the commencement of the trial, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207."

14. To understand these provisions, one has to go back to the Code of Criminal Procedure, 1898 (hereinafter referred to as the "**CrPC, 1898**"). Section 173 of the CrPC, 1898 fixes the responsibility on the officer in charge of police station to serve a copy of the report of the Police Officer and of the First Information Report, along with the requisite documents, on the accused. As per Section 207A of the CrPC, 1898 a Magistrate shall, after the commencement of the inquiry, satisfy himself that there was due compliance of Section 173 of the CrPC 1898 by furnishing all the requisite documents on the accused. Thus, the Magistrate was expected to find out due compliance on the part of the investigating agency and, if not done, must direct it to do so. A similar procedure was adopted under Section 251A of the CrPC, 1898.

15. Section 207 of the CrPC, 1973 has dispensed with the role of the investigating agency in serving the requisite copies on the accused, replacing it with that of the Magistrate. Additionally, the Magistratre is directed to make sure that due compliance is made at the earliest. Section 208 of the CrPC, 1973 reiterates the aforesaid position in cases instituted otherwise than on a police report and triable by the Court of Sessions. It is only thereafter, that the commitment of the case to a Court of Sessions, regarding an offence exclusively triable by it, shall take place.

16. Section 238 of the CrPC, 1973 mandates that while dealing with a warrant case instituted on a police report, the Magistrate shall satisfy himself that he has complied with the provisions of Section 207 of the CrPC, 1973. In all these cases, due compliance is to be done when the accused is produced or appears before the Magistrate. Therefore, Section 238 of the CrPC, 1973 reiterates the bounden duty of a Magistrate and, if not done, to be complied with at the time of commencement of the trial. Such a reiteration would only reinforce a renewed emphasis on due compliance being a facet of fair play. An accused shall be put to notice on the incriminating materials leading to the charges framed against him. As stated, the obligation so imposed is not only on the supply of the relevant documents, but such compliance should be at the appropriate stage

so that it does not brook any delay. The idea is to enable an accused to face the trial by thoroughly understanding the case stated against him. However, a mere non-supply of a part of the documents would not lead to the trial being vitiated, unless an accused substantiates before the Court that it has caused prejudice to him. Obviously, it is ultimately for the Court to come to an appropriate conclusion by an adequate assessment of facts placed before it.

Precedents

Naresh Kumar Yadav v. Ravindra Kumar, (2008) 1 SCC 632

> **"13. The documents in terms of Sections 207 and 208 are supplied to make the accused aware of the materials which are sought to be utilised against him. The object is to enable the accused to defend himself properly. The idea behind the supply of copies is to put him on notice of what he has to meet at the trial. The effect of non-supply of copies has been considered by this Court in *Noor Khan* v. *State of Rajasthan* [AIR 1964 SC 286] and *Shakila Abdul Gafar Khan* v. *Vasant Raghunath Dhoble* [(2003) 7 SCC 749 : 2003 SCC (Cri) 1918]. It was held that non-supply is not necessarily prejudicial to the accused.** The court has to give a definite finding about the prejudice or otherwise. Even the supervision notes cannot be utilised by the prosecution as a piece of material or evidence against the accused. If any reference is made before any court to the supervision notes, as has been noted above they are not to be taken note of by the court concerned. As many instances have come to light when the parties, as in the present case, make reference to the supervision notes, the inevitable conclusion is that they have unauthorised access to the official records."
>
> **(emphasis supplied)**

P. Gopalkrishnan v. State of Kerala, (2020) 9 SCC 161

> **"21. Be that as it may, furnishing of documents to the accused under Section 207 of the 1973 Code is a facet of right of the accused to a fair trial enshrined in Article 21 of the Constitution…**

22. Similarly, in *V.K. Sasikala* v. *State* [(2012) 9 SCC 771 : (2013) 1 SCC (Cri) 1010] , this Court held as under : (SCC p. 788, para 21)

> "*21.* The issue that has emerged before us is, therefore, somewhat larger than what has been projected by the State and what has been dealt with by the High Court [*V.K. Sasikala* v. *State*, 2012 SCC OnLine Kar 9209]. *The question arising would no longer be one of compliance or non-compliance with the provisions of Section 207 CrPC and would travel beyond the confines of the strict language of the provisions of CrPC and touch upon the larger doctrine of a free and fair trial that has been painstakingly built up by the courts on a purposive interpretation of Article 21 of the Constitution.* It is not the stage of making of the request; the efflux of time that has occurred or the prior conduct of the accused that is material. What is of significance is if in a given situation the accused comes to the court contending that some papers forwarded to the court by the investigating agency have not been exhibited by the prosecution as the same favours the accused the court must concede a right to the accused to have an access to the said documents, if so claimed. This, according to us, is the core issue in the case which must be answered affirmatively. In this regard, we would like to be specific in saying that we find it difficult to agree with the view [*V.K. Sasikala* v. *State*, 2012 SCC OnLine Kar 9209] taken by the High Court that the accused must be made to await the conclusion of the trial to test the plea of prejudice that he may have raised. Such a plea must be answered at the earliest and certainly before the conclusion of the trial, even though it may be raised by the accused belatedly. This is how the scales of justice in our criminal jurisprudence have to be balanced."
>
> (emphasis supplied)

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38. It is crystal clear that all documents including "electronic record" produced for the inspection of the court along with the police report and which prosecution proposes to use against the accused must be furnished to the accused as per the mandate of Section 207 of the 1973 Code. The concomitant is that the contents of the memory card/pen-drive must be furnished to the accused, which can be done in the form of cloned copy of the memory card/pen-drive. **It is cardinal that a person tried for such a serious offence should be furnished with all the material and evidence in advance, on which the prosecution proposes to rely against him during the trial. Any other view would not only impinge upon the statutory mandate contained in the 1973 Code, but also the right of an accused to a fair trial enshrined in Article 21 of the Constitution of India."**

(emphasis supplied)

17. We make it clear that the right of an accused would arise, in getting the documents relied upon by the prosecution, after taking cognizance and before framing of the charges. Therefore, between taking cognizance and framing of charges, an accused should have sufficient window to go through the documents supplied to him as he is entitled to be heard at a later stage.

DISCHARGE

Section 227 of the CrPC, 1973

"227. Discharge.-

If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

18. Before the stage of framing of charges, the Judge is expected to discharge an accused, if he is of the considered view that there is no sufficient ground to proceed against the accused. This being a judicial

exercise, his discretion must be supported by adequate reasons. In discharge of his powers, he has to consider the records and documents submitted by the prosecution vis-à-vis the arguments adduced by both sides. The words "*after hearing the submissions of the accused*" would imply an effective and meaningful hearing. It is not a mere procedural compliance. A Judge has to satisfy himself that the accused had reasonable time to ponder over and prepare his arguments before seeking a discharge. At this stage, an accused gets a substantive right as there is a window of opportunity for him to get discharged, instead of facing a prolonged trial. Such an opportunity can only be exercised by not only supplying the documents needed, but also giving adequate and sufficient time to the defence to place its case. Granting time for the aforesaid purpose is the sole discretion of the Court.

19. The duty of the Court is to see as to whether the materials produced by the prosecution are reasonably related to the offence attributed against the accused. What is to be seen is the existence of a prima facie case. The case is at a pre-framing stage and therefore, it cannot be a full-fledged pre-trial. Adequacy and sufficiency are the relevant factors to be seen. The test is one of the degree of probability.

20. Section 227 of the CrPC, 1973, in fact, is a provision which gives effect to Article 22 of the Constitution of India, 1950. The right of an accused to be heard is inalienable. For exercising this right, there has to be due consultation. Such a right can never be termed as a procedural one. It would be a ground to challenge the proceeding at that stage, but the same would not vitiate the trial. Suffice it is to reiterate that it is the duty of the court to ensure that the accused is given sufficient opportunities to consult his lawyer.

Precedents

Anokhilal v. State of M.P., (2019) 20 SCC 196

> **"22. The provisions concerned viz. Sections 227 and 228 of the Code contemplate framing of charge upon consideration of the record of the case and the documents submitted therewith, and after "hearing the submissions of the accused and the prosecution in that behalf". If the hearing for the purposes of these provisions is to be meaningful, and not just a routine**

affair, the right under the said provisions stood denied to the appellant.

23. In our considered view, the trial court on its own, ought to have adjourned the matter for some time so that the Amicus Curiae could have had the advantage of sufficient time to prepare the matter. The approach adopted by the trial court, in our view, may have expedited the conduct of trial, but did not further the cause of justice. Not only were the charges framed the same day as stated above, but the trial itself was concluded within a fortnight thereafter. In the process, the assistance that the appellant was entitled to in the form of legal aid, could not be real and meaningful.

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26. Expeditious disposal is undoubtedly required in criminal matters and that would naturally be part of guarantee of fair trial. However, the attempts to expedite the process should not be at the expense of the basic elements of fairness and the opportunity to the accused, on which postulates, the entire criminal administration of justice is founded. In the pursuit for expeditious disposal, the cause of justice must never be allowed to suffer or be sacrificed. What is paramount is the cause of justice and keeping the basic ingredients which secure that as a core idea and ideal, the process may be expedited, but fast tracking of process must never ever result in burying the cause of justice.

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31. Before we part, we must lay down certain norms so that the infirmities that we have noticed in the present matter are not repeated:

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31.3. Whenever any learned counsel is appointed as Amicus Curiae, some reasonable time may be provided to enable the counsel to prepare the matter. There cannot be any

hard-and-fast rule in that behalf. However, a minimum of seven days' time may normally be considered to be appropriate and adequate.

31.4. Any learned counsel, who is appointed as Amicus Curiae on behalf of the accused must normally be granted to have meetings and discussion with the accused concerned. Such interactions may prove to be helpful as was noticed in *Imtiyaz Ramzan Khan* [*Imtiyaz Ramzan Khan v. State of Maharashtra*, (2018) 9 SCC 160 : (2018) 3 SCC (Cri) 721] ."

(emphasis supplied)

Kewal Krishan v. Suraj Bhan, 1980 (Supp) SCC 499

"11. The proposition that in cases instituted on complaint in regard to an offence exclusively triable by the Court of Session, the standard for ascertaining whether or not the evidence collected in the preliminary inquiry discloses sufficient grounds for proceeding against the accused is lower than the one to be adopted at the stage of framing charges in a warrant case triable by the Magistrate, is now evident from the scheme of the new Code of 1973. Section 209 of the Code of 1973 dispenses with the inquiry preliminary to commitment in cases triable exclusively by a Court of Session, irrespective of whether such a case is instituted on a criminal complaint or a police report. Section 209 says: "When in a case instituted on a police report or otherwise the accused appears or is brought before the magistrate and it appears to the magistrate that the offence is triable exclusively by the Court of Session, he shall commit the case to the Court of Session." If the Committing Magistrate thinks that it is not necessary to commit the accused who may be on bail to custody, he may not cancel the bail. This has been made clear by the words "subject to the provisions of this Code relating to bail" occurring in clause (*b*) of Section 209. Therefore, if the accused is already on bail, his bail should not be arbitrarily cancelled. **Section 227 of the Code of 1973 has made another beneficent provision to save the accused**

from prolonged harassment which is a necessary concomitant of a protracted trial. This section provides that if upon considering the record of the case, the documents submitted with it and the submissions of the accused and the prosecution, the judge is not convinced that there is sufficient ground for proceeding against the accused, he has to discharge the accused under this section and record his reasons for so doing."

(emphasis supplied)

Hardeep Singh v. State Of Punjab, (2014) 3 SCC 92

"100. However, there is a series of cases wherein this Court **while dealing with the provisions of Sections 227, 228, 239, 240, 241, 242 and 245 CrPC, has consistently held that the court at the stage of framing of the charge has to apply its mind to the question whether or not there is any ground for presuming the commission of an offence by the accused. The court has to see as to whether the material brought on record reasonably connect the accused with the offence. Nothing more is required to be enquired into. While dealing with the aforesaid provisions, the test of prima facie case is to be applied. The court has to find out whether the materials offered by the prosecution to be adduced as evidence are sufficient for the court to proceed against the accused further.** (Vide *State of Karnataka* v. *L. Muniswamy* [(1977) 2 SCC 699 : 1977 SCC (Cri) 404 : AIR 1977 SC 1489] , *All India Bank Officers' Confederation* v. *Union of India* [(1989) 4 SCC 90 : 1989 SCC (L&S) 627 : AIR 1989 SC 2045] , *Stree Atyachar Virodhi Parishad* v. *Dilip Nathumal Chordia* [(1989) 1 SCC 715 : 1989 SCC (Cri) 285] , *State of M.P.* v. *Krishna Chandra Saksena* [(1996) 11 SCC 439 : 1997 SCC (Cri) 35] and *State of M.P.* v. *Mohanlal Soni* [(2000) 6 SCC 338 : 2000 SCC (Cri) 1110 : AIR 2000 SC 2583] .)

101. In *Dilawar Balu Kurane* v. *State of Maharashtra* [(2002) 2 SCC 135 : 2002 SCC (Cri) 310] , this Court while dealing with the provisions of Sections 227 and 228 CrPC, placed a very heavy reliance on the earlier

judgment of this Court in *Union of India* v. *Prafulla Kumar Samal* [(1979) 3 SCC 4 : 1979 SCC (Cri) 609 : AIR 1979 SC 366] and held that while considering the question of framing the charges, the court may weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out and whether the materials placed before the court disclose *grave suspicion* against the accused which has not been properly explained. In such an eventuality, the court is justified in framing the charges and proceeding with the trial. The court has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but the court should not make a roving enquiry into the pros and cons of the matter and weigh evidence as if it is conducting a trial."

(emphasis supplied)

Sajjan Kumar v. CBI, (2010) 9 SCC 368

"***Exercise of jurisdiction under Sections 227 and 228 CrPC***

21. On consideration of the authorities about the scope of Sections 227 and 228 of the Code, the following principles emerge:

(i) The Judge while considering the question of framing the charges under Section 227 CrPC has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out. The test to determine prima facie case would depend upon the facts of each case.

(ii) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained, the court will be fully justified in framing a charge and proceeding with the trial.

(iii) The court cannot act merely as a post office or a mouthpiece of the prosecution but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities, etc. However, at this stage, there cannot be a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

(iv) If on the basis of the material on record, the court could form an opinion that the accused might have committed offence, it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence.

(v) At the time of framing of the charges, the probative value of the material on record cannot be gone into but before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commission of offence by the accused was possible.

(vi) At the stage of Sections 227 and 228, the court is required to evaluate the material and documents on record with a view to find out if the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. For this limited purpose, sift the evidence as it cannot be expected even at that initial stage to accept all that the prosecution states as gospel truth even if it is opposed to common sense or the broad probabilities of the case.

(vii) If two views are possible and one of them gives rise to suspicion only, as

distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage, he is not to see whether the trial will end in conviction or acquittal.

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24. At the stage of framing of charge under Section 228 CrPC or while considering the discharge petition filed under Section 227, it is not for the Magistrate or the Judge concerned to analyse all the materials including pros and cons, reliability or acceptability, etc. It is at the trial, the Judge concerned has to appreciate their evidentiary value, credibility or otherwise of the statement, veracity of various documents and is free to take a decision one way or the other."

Mohd. Ajmal Amir Kasab v. State of Maharashtra, (2012) 9 SCC 1

"465. All this development clearly indicates the direction in which the law relating to access to lawyers/legal aid has developed and continues to develop. It is now rather late in the day to contend that Article 22(1) is merely an enabling provision and that the right to be defended by a legal practitioner comes into force only on the commencement of trial as provided under Section 304 CrPC.

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471. The resounding words of the Court in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] are equally, if not more, relevant today than when they were first pronounced. In *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] the Court also alluded to the reasons for the urgent need of the accused to access a lawyer, these being the indigence and illiteracy of the vast majority of Indians accused of crimes.

472. As noted in *Khatri (2)* [(1981) 1 SCC 627 : 1981 SCC (Cri) 228] as far back as in 1981, a person arrested needs a lawyer at the stage of his first production before the Magistrate, to resist remand to police or jail custody and to apply for bail. He would need a lawyer when the

charge-sheet is submitted and the Magistrate applies his mind to the charge-sheet with a view to determine the future course of proceedings. He would need a lawyer at the stage of framing of charges against him and he would, of course, need a lawyer to defend him in trial.

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474. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a Magistrate. We, accordingly, hold that it is the duty and obligation of the Magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the Magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the Magistrate concerned liable to departmental proceedings.

475. It needs to be clarified here that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. **According to our system of law, the role of a lawyer is mainly focused on court proceedings. The accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides**

upon the future course of proceedings and at the stage of the framing of charges; and beyond that, of course, for the trial. It is thus to be seen that the right to access to a lawyer in this country is not based on the *Miranda* [(1966) 16 L Ed 2d 694 : 384 US 436] principles, as protection against self-incrimination, for which there are more than adequate safeguards in Indian laws. The right to access to a lawyer is for very Indian reasons; it flows from the provisions of the Constitution and the statutes, and is only intended to ensure that those provisions are faithfully adhered to in practice.

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477. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see *Suk Das* v. *UT of Arunachal Pradesh* [(1986) 2 SCC 401 : 1986 SCC (Cri) 166]).

478. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent Magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had

resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case."

(emphasis supplied)

Section 228 of the CrPC, 1973

"228. Framing of charge.-

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which--

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, [or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or, as the case may be, the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate] shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried."

21. Under sub-section (2) of Section 228 of the CrPC, 1973, the Judge, while framing any charge, is ordained to read and explain it to the accused. Thereafter, the accused shall be asked as to whether he pleads guilty of the offence charged or claims to be tried. As a matter of routine, video conferencing must be avoided, unless there are compelling reasons to do so. This is an occasion where the Judge avoids the lawyer and keeps in touch with the accused directly. He records the response

of the accused. Under those circumstances, unless a situation so warrants otherwise, the presence of the accused shall be ensured.

EXAMINATION OF WITNESSES

Section 230 of the CrPC, 1973

> **"230. Date for prosecution evidence .-**
>
> If the accused refuses to plead, or does not plead, or claims to be tried or is not convicted under section 229, the Judge shall fix a date for the examination of witnesses, and may, on the application of the prosecution, issue any process for compelling the attendance of any witness or the production of any document or other thing."

Section 231 of the CrPC, 1973

> **"231. Evidence for prosecution.-**
>
> (1) On the date so fixed, the Judge shall proceed to take all such evidence as may be produced in support of the prosecution.
>
> (2) The Judge may, in his discretion, permit the cross-examination of any witness to be deferred until any other witness or witnesses have been examined or recall any witness for further cross-examination."

22. These two provisions are to be read in consonance with each other. At this stage, the Court is concerned only with the prosecution's evidence. To ensure fair play, as a normal practice, the Court has to fix a date for the examination of the witnesses. The idea is to complete the examination-in-chief and cross examination, both at the same time. While fixing the date, the Court is expected to take into consideration the relative convenience of the parties, though the discretion lies with it. Sub-section (1) of Section 231 of the CrPC, 1973 fixes a responsibility on the Court, the prosecution and the defence to go ahead with the examination of witnesses on the date so fixed. Therefore, even for this reason, the Court shall ascertain and then decide a convenient date for both sides, while being conscious about any attempt to drag the trial. Completion of such examination is a matter of rule as any deferment can at best be an exception, to the discretion of the Court. Obviously, the use of such a discretion, being judicial in nature, has to be on a case-to-case

basis. Suffice it is to state that a balance has to be struck between the competing interests.

State of Kerala v. Rasheed, (2019) 13 SCC 297

> **"22. There cannot be a straitjacket formula providing for the grounds on which judicial discretion under Section 231(2) CrPC can be exercised. The exercise of discretion has to take place on a case-to-case basis. The guiding principle for a Judge under Section 231(2) CrPC is to ascertain whether prejudice would be caused to the party seeking deferral, if the application is dismissed.**
>
> **23. While deciding an application under Section 231(2) CrPC, a balance must be struck between the rights of the accused, and the prerogative of the prosecution to lead evidence. The following factors must be kept in consideration:**
>
> *(i)* possibility of undue influence on witness(es);
>
> *(ii)* possibility of threats to witness(es);
>
> *(iii)* possibility that non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;
>
> *(iv)* possibility of loss of memory of the witness(es) whose examination-in-chief has been completed;
>
> *(v)* occurrence of delay in the trial, and the non-availability of witnesses, if deferral is allowed, in view of Section 309(1) CrPC ["**309. *Power to postpone or adjourn proceedings*.**—(1) In every inquiry or trial the proceedings shall be continued from day to day until all the witnesses in attendance have been examined, unless the court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded: See also *Vinod Kumar v. State of Punjab*, (2015) 3 SCC 220 : (2015) 2 SCC

(Cri) 226 : (2015) 1 SCC (L&S) 712; and *S.J. Chaudhary* v. *State (UT of Delhi)*, (1984) 1 SCC 722 : 1984 SCC (Cri) 163.] .

These factors are illustrative for guiding the exercise of discretion by a Judge under Section 231(2) CrPC.

24. The following practice guidelines should be followed by trial courts in the conduct of a criminal trial, as far as possible:

24.1. A detailed case-calendar must be prepared at the commencement of the trial after framing of charges.

24.2. The case-calendar must specify the dates on which the examination-in-chief and cross-examination (if required) of witnesses is to be conducted.

24.3. The case-calendar must keep in view the proposed order of production of witnesses by parties, expected time required for examination of witnesses, availability of witnesses at the relevant time, and convenience of both the prosecution as well as the defence, as far as possible.

24.4. Testimony of witnesses deposing on the same subject-matter must be proximately scheduled.

24.5. The request for deferral under Section 231(2) CrPC must be preferably made before the preparation of the case-calendar.

24.6. The grant for request of deferral must be premised on sufficient reasons justifying the deferral of cross-examination of each witness, or set of witnesses.

24.7. While granting a request for deferral of cross-examination of any witness, the trial courts must specify a proximate date for the cross-examination of that witness, after the examination-in-chief of such witness(es) as has been prayed for.

24.8. The case-calendar, prepared in accordance with the above guidelines, must be followed strictly, unless departure from the same becomes absolutely necessary.

> **24.9.** In cases where trial courts have granted a request for deferral, necessary steps must be taken to safeguard witnesses from being subjected to undue influence, harassment or intimidation."
>
> (emphasis supplied)

Section 233 of the CrPC, 1973

> **"233. Entering upon defence.-**
>
> (1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.
>
> (2) If the accused puts in any written statement, the Judge shall file it with the record.
>
> (3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice."

23. At this stage, the accused will be called upon to enter on his defence and adduce any evidence. If the accused applies for the issue of process to compel the attendance of any witnesses or production of document, the Judge shall issue such process. It is only when he comes to the conclusion, that an application filed for the aforesaid purpose on behalf of the defence is vexatious or filed to delay the proceedings or for defeating the ends of justice, it has to be refused. We have no hesitation in holding that when an application is moved invoking Section 233 of the CrPC, 1973 the Judge is duty bound to issue process, unless he is satisfied on the existence of the three elements as aforesaid. Any denial would be an affront to the concept of a fair trial.

Section 309 of the CrPC, 1973

> **"309. Power to postpone or adjourn proceedings**.— (1) In every inquiry or trial the proceedings shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment

of the same beyond the following day to be necessary for reasons to be recorded:

Provided that when the inquiry or trial relates to an offence under Section 376, Section 376A, Section 376AB, Section 376B, Section 376C, Section 376D, Section 376DA or Section 376DB of the Indian Penal Code (45 of 1860), the inquiry or trial shall be completed within a period of two months from the date of filing of the charge sheet.

(2) If the Court after taking cognizance of an offence, or commencement of trial, finds it necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, it may, from time to time, for reasons to be recorded, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing:

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him:

Provided also that—

(a) no adjournment shall be granted at the request of a party, except where the circumstances are beyond the control of that party;

(b) the fact that the pleader of a party is engaged in another Court, shall not be a ground for adjournment;

(c) where a witness is present in Court but a party or his pleader is not present or the party or his pleader though present in Court, is not ready to examine or cross-examine the witness, the Court may, if thinks

fit, record the statement of the witness and pass such orders as it thinks fit dispensing with the examination-in-chief or cross-examination of the witness, as the case may be.

Explanation 1.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Explanation 2.—The terms on which an adjournment or postponement may be granted include, in appropriate cases, the payment of costs by the prosecution or the accused."

24. This section places emphasis on the continuation of the trial as any obstruction and delay would hamper the process of justice. In a criminal trial, continuity is of utmost importance, as it not only helps the court to concentrate, but ensures quality justice. However, the courts are not powerless in granting adjournments if the circumstances so warrant. Therefore, despite a bar under the second and fourth proviso to Section 309, an adjournment can be granted, provided the party who seeks so, satisfies the court. After all, a speedy trial enures to the benefit of the accused.

State of UP v. Shambu Nath Singh (2001) 4 SCC 667

"11. The first sub-section mandates on the trial courts that the proceedings shall be held expeditiously but the words "as expeditiously as possible" have provided some play at the joints and it is through such play that delay often creeps in the trials. Even so, the next limb of the sub-section sounded for a more vigorous stance to be adopted by the court at a further advanced stage of the trial. That stage is when examination of the witnesses begins. The legislature which diluted the vigour of the mandate contained in the initial limb of the sub-section by using the words "as expeditiously as possible" has chosen to make the requirement for the next stage (when examination of the witnesses has started) to be quite stern. Once

the case reaches that stage the statutory command is that such examination "shall be continued from day to day until all the witnesses in attendance have been examined". The solitary exception to the said stringent rule is, if the court finds that adjournment "beyond the following day to be necessary" the same can be granted for which a condition is imposed on the court that reasons for the same should be recorded. Even this dilution has been taken away when witnesses are in attendance before the court. In such situation the court is not given any power to adjourn the case except in the extreme contingency for which the second proviso to sub-section (2) has imposed another condition,

> "provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, *except for special reasons to be recorded in writing*".

(emphasis supplied)

12. Thus, the legal position is that once examination of witnesses started, the court has to continue the trial from day to day until all witnesses in attendance have been examined (except those whom the party has given up). **The court has to record reasons for deviating from the said course. Even that is forbidden when witnesses are present in court, as the requirement then is that the court has to examine them. Only if there are "special reasons", which reasons should find a place in the order for adjournment, that alone can confer jurisdiction on the court to adjourn the case without examination of witnesses who are present in court."**

(emphasis supplied)

Section 465 of the CrPC, 1973

"465. Finding or sentence when reversible by reason of error, omission or irregularity.—

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of

> competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation of revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.
>
> (2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

25. This provision is meant to uphold the decision of the trial court, even in a case where there is an apparent irregularity in procedure. If the evidence available has been duly taken note of by the Court, then such a decision cannot be reversed on account of a mere technical error. This is based on the principle that a procedural law is the handmaid of justice. However, the ultimate issue is as to whether such an error or omission has constituted a failure of justice, which is one of fact, to be decided on the touchstone of prejudice.

26. If the Appellate Court is of the view that there is a continued non-compliance of the substantial provisions of the CrPC, 1973 then the rigour of Section 465 of the CrPC, 1973 would not apply and, in that case, an order of remand would be justified.

State of M.P. v. Bhooraji, (2001) 7 SCC 679

> **"15.** A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that **unless such error, omission or irregularity has occasioned "a failure of justice" the superior court shall not quash**

the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by "a failure of justice" occasioned on account of such error, omission or irregularity? This Court has observed in *Shamnsaheb M. Multtani v. State of Karnataka* [(2001) 2 SCC 577: 2001 SCC (Cri) 358] thus: (SCC p. 585, para 23)

> **"*23.* We often hear about 'failure of justice' and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression 'failure of justice' would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd.* v. *Deptt. of the Environment* [(1977) 1 All ER 813: 1978 AC 359: (1977) 2 WLR 450 (HL)]). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage."**

(emphasis supplied)

Darbara Singh v. State of Punjab, (2012) 10 SCC 476

> **21. "*Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable**

of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then the accused can seek benefit under the orders of the court. (Vide *Rafiq Ahmed* v. *State of U.P.* [(2011) 8 SCC 300 : (2011) 3 SCC (Cri) 498: AIR 2011 SC 3114] , SCC p. 320, para 36; *Rattiram* v. *State of M.P.* [(2012) 4 SCC 516 : (2012) 2 SCC (Cri) 481] and *Bhimanna* v. *State of Karnataka* [(2012) 9 SCC 650] .)"

(emphasis supplied)

Kottayya v. Emperor, AIR (34) 1947 Privy Council 67

"[7] Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the note-book in question amounted merely to an irregularity in the proceedings which can be cured under the provisions of S. 537 Criminal P.C. if the court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to 49 ALL. 475 [('27) 49 All. 475 : 14 A.I.R. 1927 All. 350 : 100 I.C. 371, Tirkha v Nanak], in which the court expressed the view that S. 537, Criminal P.C., applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to 45 Mad. 820 [('22) 45 Mad. 820 : 9 A.I.R. 1922 Mad. 512 : 71 I.C. 252, In re Madura Muthu Vannian.], in which the view was expressed that any failure to examine the accused under S. 342, Criminal P.C., was fatal to the validity of the trial and could not be cured under S. 537. In their Lordships' opinion this argument is

based on too narrow a view of the operation of S. 537. **When a trial is conducted in a manner different from that prescribed by the Code as in 28 I.A. 257 [('01) 28 I.A. 257 : 25 Mad. 61 : 8 Sar. 160 (P.C.), Subrahmania Aiyar v. Emperor], the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under S. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind.** This view finds support in the decision of their Lordships' Board in 5 Rang. 53 [('26) 5 Rang. 53 : 14 A.I.R. 1927 P.C. 44 :54 I.A. 96 : 100 I.C. 227 (P.C.), Abdul Rahman v. Emperor], where failure to comply with Ss. 360, Criminal P.C., was held to be cured by Ss. 535 and 537. The present case falls under S. 537, and their Lordships hold the trial valid notwithstanding the breach of S. 162."

(emphasis supplied)

RE-TRIAL

Section 386 of the CrPC, 1973

"**386. Powers of the Appellate Court**.—After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction—

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same—

(c) in an appeal for enhancement of sentence—

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or, the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper:

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement:

Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

27. An Appellate Court has got ample power to direct re-trial. However, such a power is to be exercised in exceptional cases. The irregularities found must be so material that a re-trial is the only option. In other words, the failure to follow the mandate of law must cause a serious prejudice vitiating the entire trial, which cannot be cured otherwise, except by way of a re-trial. Once such a re-trial is ordered, the effect is that all the proceedings recorded by the court would get obliterated leading to a fresh trial, which is inclusive of the examination of witnesses.

Nasib Singh v. State of Punjab, (2022) 2 SCC 89

> "33. The principles that emerge from the decisions of this Court on retrial can be formulated as under:
>
> 33.1. The appellate court may direct a retrial only in "exceptional" circumstances to avert a miscarriage of justice.
>
> 33.2. Mere lapses in the investigation are not sufficient to warrant a direction for retrial. Only if the lapses are so grave so as to prejudice the rights of the parties, can a retrial be directed.
>
> 33.3. A determination of whether a "shoddy" investigation/trial has prejudiced the party, must be based on the facts of each case pursuant to a thorough reading of the evidence.
>
> 33.4. It is not sufficient if the accused/prosecution makes a facial argument that there has been a miscarriage of justice warranting a retrial. It is incumbent on the appellate court directing a retrial to provide a reasoned order on the nature of the miscarriage of justice caused with reference to the evidence and investigatory process.
>
> 33.5. If a matter is directed for retrial, the evidence and record of the previous trial is completely wiped out.
>
> 33.6. The following are some instances, not intended to be exhaustive, of when the Court could order a retrial on the ground of miscarriage of justice:

(*a*) The trial court has proceeded with the trial in the absence of jurisdiction;

(*b*) The trial has been vitiated by an illegality or irregularity based on a misconception of the nature of the proceedings; and

(*c*) The prosecutor has been disabled or prevented from adducing evidence as regards the nature of the charge, resulting in the trial being rendered a farce, sham or charade."

SENTENCING

"If the criminal law as a whole is the Cinderella of jurisprudence, then the law of sentencing is Cinderella's illegitimate baby"

Nigel Walker.
British criminologist
Sentencing in a Rational Society 1 (1969)

Section 235 of the CrPC, 1973

"235. Judgment of acquittal or conviction.—

(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the questions of sentence, and then pass sentence on him according to law."

Section 360 of the CrPC, 1973

"360. Order to release on probation of good conduct or after admonition.-

(1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with

death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour:

Provided that where any first offender is convicted by a Magistrate of the second class not specially empowered by the High Court, and the Magistrate is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class forwarding the accused to or taking bail for his appearance before, such Magistrate, who shall dispose of the case in the manner provided by sub-section (2).

(2) Where proceedings are submitted to a Magistrate of the first class as provided by sub-section (1), such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

(3) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code (45 of 1860) punishable with not more than two years' imprisonment or any offence punishable with fine only and no previous conviction is proved against him, the Court before which

he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(4) An order under this section may be made by any Appellate Court or by the High Court or Court of Session when exercising its powers of revision.

(5) When an order has been made under this section in respect of any offender, the High Court or Court of Session may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law:

Provided that the High Court or Court of Session shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(6) The provisions of Sections 121, 124 and 373 shall, so far as may be apply in the case of sureties offered in pursuance of the provisions of this section.

(7) The Court, before directing the release of an offender under sub-section (1) shall be satisfied that an offender or his surety (if any) has a fixed place of abode or regular occupation in the place for which the Court acts or in which the offender is likely to live during the period named for the observance of the conditions.

(8) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

(9) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody

until the case is heard or admit him to bail with a sufficient surety conditioned on his appearing for sentence and such Court may after hearing the case, pass sentence.

(10) Nothing in this section shall affect the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders."

Section 3 of the Probation of Offenders Act, 1958

"3. Power of court to release certain offenders after admonition.—

When any person is found guilty of having committed an offence punishable under section 379 or section 380 or section 381 or section 404 or section 420 of the Indian Penal Code, (45 of 1860) or any offence punishable with imprisonment for not more than two years, or with fine, or with both, under the Indian Penal Code or any other law, and no previous conviction is proved against him and the court by which the person is found guilty is of opinion that, having regard to the circumstances of the case including the nature of the offence, and the character of the offender, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition.

Explanation.—For the purposes of this section, previous conviction against a person shall include any previous order made against him under this section or section 4."

Section 4 of the Probation of Offenders Act, 1958

"4. Power of court to release certain offenders on probation of good conduct.—

(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the court by which the person is found guilty is of opinion that, having regard to the circumstances

of the case including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the court may, instead of sentencing him at once to any punishment direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and in the meantime to keep the peace and be of good behaviour:

Provided that the court shall not direct such release of an offender unless it is satisfied that the offender or his surety, if any, has a fixed place of abode or regular occupation in the place over which the court exercises jurisdiction or in which the offender is likely to live during the period for which he enters into the bond.

(2) Before making any order under sub-section (1), the court shall take into consideration the report, if any, of the probation officer concerned in relation to the case.

(3) When an order under sub-section (1) is made, the court may, if it is of opinion that in the interests of the offender and of the public it is expedient so to do, in addition pass a supervision order directing that the offender shall remain under the supervision of a probation officer named in the order during such period, not being less than one year, as may be specified therein, and may in such supervision order, impose such conditions as it deems necessary for the due supervision of the offender.

(4) The court making a supervision order under sub-section (3) shall require the offender, before he is released, to enter into a bond, with or without sureties, to observe the conditions specified in such order and such additional conditions with respect to residence, abstention from intoxicants or any other matter as the court may, having regard to the particular

circumstances, consider fit to impose for preventing a repetition of the same offence or a commission of other offences by the offender.

(5) The court making a supervision order under sub-section (3) shall explain to the offender the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to each of the offenders, the sureties, if any, and the probation officer concerned."

Section 6 of the Probation of Offenders Act 1958

"6. Restrictions on imprisonment of offenders under twenty-one years of age.—

(1) When any person under twenty-one years of age is found guilty of having committed an offence punishable with imprisonment (but not with imprisonment for life), the court by which the person is found guilty shall not sentence him to imprisonment unless it is satisfied that, having regard to the circumstances of the case including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

(2) For the purpose of satisfying itself whether it would not be desirable to deal under section 3 or section 4 with an offender referred to in sub-section (1), the court shall call for a report from the probation officer and consider the report, if any, and any other information available to it relating to the character and physical and mental condition of the offender."

28. Before passing the sentence on a convict, after rendering conviction, the Judge shall consider the feasibility of proceeding in accordance with the provisions of Section 360 of the CrPC, 1973 which speaks of releasing a convict on probation of good conduct or after admonition. Being a beneficial provision dealing with a reformative aspect, it is the bounden duty of the Judge to consider the application of this provision before proceeding to hear the accused on sentence. While

doing so, the Judge has to hear the accused and the prosecution. Similarly, the Court has to apply the salient provisions contained under Sections 3, 4 and 6 of the Probation of Offenders Act, 1958 (hereinafter referred to as "**Act, 1958**"). If an offence is considered as an act against the society, the resultant action cannot be retributive alone, as equal importance is required, if not more, to be given to the reformative part. The ultimate goal is to bring the accused back on the rails, to once again be a part of society. Any attempt to ignore either Section 360 of the CrPC, 1973 or the provisions as mandated in the Act, 1958 would make their purpose redundant. It looks as if these laudable provisions have been lost sight of while rendering a sentence. The ultimate objective is to prevent the commission of such offences in future. It can never be done by a retributive measure alone, as a change of heart at the behest of the accused is the best way to prevent an act of crime. Therefore, we have absolute clarity in our mind, that a trial court is duty bound to comply with the mandate of Section 360 of the CrPC, 1973 read with Sections 3, 4 and 6 of the Act, 1958 before embarking into the question of sentence. In this connection, we may note that sub-section (10) of Section 360 of the CrPC, 1973 makes a conscious effort to remind the Judge of the rigour of the beneficial provisions contained in the Act, 1958.

29. Hearing the accused on sentence is a valuable right conferred on the accused. The real importance lies only with the sentence, as against the conviction. Unfortunately, we do not have a clear policy or legislation when it comes to sentencing. Over the years, it has become judge-centric and there are admitted disparities in awarding a sentence.

30. In a country like ours, sentencing accused persons pursuant to a conviction, on a uniform pattern, would also be prejudicial. When it comes to sentencing, there are various factors such as age, sex, education, home life, social background, emotional and mental conditions, caste, religion and community that constitute aggravating and mitigating circumstances.

31. There is a distinction between knowledge and character. Knowledge is acquired, while character is formed. The formation of a person's character depends upon various factors. More often than not, a convict does not have control over the formation of his character. This

leads to certain groups of people inheriting crime. In this connection, we can draw an analogy from nature itself. Before falling on the ground, rainwater remains the same. It is the soil which changes the character of the water. Rainwater partakes in the character of the soil, over which it does not have any control. The issues are extremely complex.

32. A decision of a Judge in sentencing, would vary from person to person. This will also vary from stage to stage. It is controlled by the mind. The environment and the upbringing of a Judge would become the ultimate arbiter in deciding the sentence. A Judge from an affluent background might have a different mindset as against a Judge from a humble one. A female Judge might look at it differently, when compared to her male counterpart. An Appellate Court might tinker with the sentence due to its experience, and the external factors like institutional constraints might come into play. Certainly, there is a crying need for a clear sentencing policy, which should never be judge-centric as the society has to know the basis of a sentence.

33. Sentencing shall not be a mere lottery. It shall also not be an outcome of a knee-jerk reaction. This is a very important part of the Fundamental Rights conferred under Articles 14 and 21 of the Constitution of India, 1950. Any unwarranted disparity would be against the very concept of a fair trial and, therefore, against justice.

34. Various elements such as deterrence, incapacitation and reformation should form part of sentencing. There is a compelling need for a studied scrutiny of sentencing, to address in particular the reformative aspect, while maintaining equality between different groups. Perhaps, much study is also required on the occurence of repeat offences, which could be attributable to certain groups. The nexus between particular types of offences and the offenders forming their own groups has to be taken note of and addressed.

35. The concept of intuitive sentencing is against the rule of law. A Judge can never have unrestrictive and unbridled discretion, based upon his conscience formed through his understanding of the society, without there being any guidelines in awarding a sentence. The need for adequate guidelines for exercising sentencing discretion, avoiding unwanted disparity, is of utmost importance.

36. Courts do take into consideration the mitigating and aggravating circumstances. As we have dealt with illustratively, no research has been undertaken for constituting what are aggravating and mitigating circumstances. While it would be appropriate to follow '*beyond reasonable doubt*' standard in adjudicating aggravating circumstances, the '*balance of probability*' standard is required while construing mitigating circumstances. Courts may also be guided by the conduct of the convict during pre-trial stage, either under incarceration or otherwise. A report may well be called for from the designated authority. The ultimate idea is to eliminate discretion on the part of the Court, which obviously leads to disparity.

37. As we discuss the issue we have flagged, we understand that the issue is an extremely complex one and it is the duty of the States and the Union of India to deal with the situation by duly considering the three different modes discussed above. There has to be a conscious discussion and debate over this issue which might require constituting an appropriate Commission on Sentencing consisting of various experts and stakeholders. We illustratively suggest "the members from the legal fraternity, psychologists, sociologists, criminologists, executives and legislators". Societal experience would come handy in coming to a correct conclusion. What we have at present is an imposition of a sentence by way of a legislation. There are obvious errors and lacunae, which have been pointed out in the preceding discussion. It may also be imperative for a court to have an assessment to be made by an independent authority on the conduct and behaviour of the accused for the purpose of deciding the sentence. The guidelines which have been proposed by this Court may also be considered. This would include the creation of a competent authority tasked to give a report and its composition.

Manoj v. State of M.P., (2023) 2 SCC 353

> "230. The strength of "precedent" and "consistency" is perhaps, therefore, *lowest* when it comes to matters of sentencing, as long as it is within the confines of legality and resulting in "principled sentencing". In other words, the judicial incongruence when it relates to sentencing, would in fact be a positive indicator, rather than a negative one, *provided it is still within the well-defined contours of*

"principled" sentencing. For sentencing in capital offences, discretion to arrive at individualised sentences is encouraged, but must be constrained by the "rarest of rare" principle, wherein the court considers aggravating circumstances of the crime, and mitigating circumstances of the criminal (a "liberal and expansive" construction of the latter), which in turn must inform their consideration of whether the option of life imprisonment is unquestionably foreclosed owing to an impossibility [Held to be "probability" and not "impossibility" in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420] to reform.

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233. Therefore, "individualised, principled sentencing" — based on *both* the crime and criminal, with consideration of whether reform or rehabilitation is achievable (held to be "*probable*" in *Rajendra Pralhadrao Wasnik* [*Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, (2019) 12 SCC 460 : (2019) 4 SCC (Cri) 420]), and consequently whether the option of life imprisonment is unquestionably foreclosed — should be the only factor of "commonality" that must be discernible from decisions relating to capital offences. With the creation of a new sentencing threshold in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2) v. State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , and later affirmed by a Constitution Bench in *Union of India* v. *V. Sriharan* [*Union of India* v. *V. Sriharan*, (2016) 7 SCC 1 : (2016) 2 SCC (Cri) 695] , of life imprisonment without *statutory* remission (i.e. Articles 72 and 161 of the Constitution are still applicable), yet another option exists, before imposition of death sentence. However, serious concern has been raised against this concept, as it was upheld by a narrow majority, and is left to be considered at an appropriate time.

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Practical guidelines to collect mitigating circumstances

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid

slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh* [*Bachan Singh* v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] . Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a *time-bound manner*, collect *additional* information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

(a) Age

(b) Early family background (siblings, protection of parents, any history of violence or neglect)

(c) Present family background (surviving family members, whether married, has children, etc.)

(d) Type and level of education

(e) Socio-economic background (including conditions of poverty or deprivation, if any)

(f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(g) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — *a fresh report* (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will *further* evidence the reformative progress, and reveal post-conviction mental illness, if any.

252. It is pertinent to point out that this Court in *Anil* v. *State of Maharashtra* [*Anil* v. *State of Maharashtra*, (2014) 4 SCC 69 : (2014) 2 SCC (Cri) 266] has in fact directed criminal courts to call for additional material : (SCC p. 86, para 33)

"*33*. … Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated,

calls for additional materials. *We, therefore, direct that the criminal courts, while dealing with the offences like Section 302IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case*."

(emphasis supplied)

We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence."

38. Our thought process has been ignited from a book titled "*Discretion, Discrimination and the Rule of Law, Reforming Sentencing in India*", authored by Mr. Mrinal Satish, published by the Cambridge University Press, (2017). The learned author has drawn extensively from the sentencing policy in Israel. Upon a thorough reading of the book, it presents an excellent insight into sentencing policy. The Israeli model takes into consideration numerous factors compiled in the form of guidelines to the Judge, in sentencing an accused.

39. We have also benefitted by looking into the policy adopted in other countries, such as in Canada, New Zealand and UK.

CANADA

Criminal Code (Canada)

Purpose and Principles of Sentencing

Section 718 of the Criminal Code (Canada)

"Purpose

718 The **fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:**

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community."

(emphasis supplied)

Section 718.1 of the Criminal Code (Canada)

"Fundamental principle

718.1 A sentence **must be proportionate to the gravity of the offence** and the **degree of responsibility of the offender."**

(emphasis supplied)

Section 718.2 of the Criminal Code (Canada)

"Other sentencing principles

718.2 A court that imposes a sentence **shall also take into consideration the following principles:**

(a) a sentence should be increased or reduced to account **for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,**

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner

or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

(v) evidence that the offence was a terrorism offence,

(vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*, and

(vii) evidence that the commission of the offence had the effect of impeding another person from obtaining health services, including personal care services,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders."

(emphasis supplied)

Procedure and Evidence

Section 720 of the Criminal Code (Canada)

"Sentencing proceedings

720 (1) A court shall, as soon as practicable after an offender has been found guilty, conduct proceedings to determine the appropriate sentence to be imposed.

Court-supervised programs

(2) The court may, with the consent of the Attorney General and the offender and after considering the interests of justice and of any victim of the offence, delay sentencing to enable the offender to attend a treatment program approved by the province under the supervision of the court, such as an addiction treatment program or a domestic violence counselling program."

(emphasis supplied)

Section 721 of the Criminal Code (Canada)

"Report by probation officer

721 (1) Subject to regulations made under subsection (2), where an accused, other than an organization, pleads guilty to or is found guilty of an offence, a probation officer shall, if required to do so by a court, prepare and file with the court a report in writing relating

to the accused for the purpose of assisting the court in imposing a sentence or in determining whether the accused should be discharged under section 730."

(emphasis supplied)

NEW ZEALAND

Sentencing Act 2002, New Zealand

Section 3 of the Sentencing Act, 2002

"Part 1 **Sentencing purposes and principles, and provisions of general application**

Preliminary provisions

3 Purposes

The purposes of this Act are—

(a) to set out the purposes for which offenders may be sentenced or otherwise dealt with; and

(b) to promote those purposes, and aid in the public's understanding of sentencing practices, by providing principles and guidelines to be applied by courts in sentencing or otherwise dealing with offenders; and

(c) to provide a sufficient range of sentences and other means of dealing with offenders; and

(d) to provide for the interests of victims of crime."

(emphasis supplied)

Section 7 of the Sentencing Act, 2002

"Purposes and principles of sentencing

7 Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are—

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or

(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or

(c) to provide for the interests of the victim of the offence; or

(d) to provide reparation for harm done by the offending; or

(e) to denounce the conduct in which the offender was involved; or

(f) to deter the offender or other persons from committing the same or a similar offence; or

(g) to protect the community from the offender; or

(h) to assist in the offender's rehabilitation and reintegration; or

(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to."

(emphasis supplied)

Section 8 of the Sentencing Act, 2002

"8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10)."

(emphasis supplied)

Section 9 of the Sentencing Act, 2002

"9 Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

xxx xxx xxx

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

xxx xxx xxx

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

xxx xxx xxx

(4) Nothing in subsection (1) or subsection (2)—

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account."

Section 9A of the Sentencing Act, 2002

"9A Cases involving violence against, or neglect of, child under 14 years

(1) **This section applies if the court is sentencing or otherwise dealing with an offender in a case involving violence against, or neglect of, a child under the age of 14 years.**

(2) **The court must take into account the following aggravating factors to the extent that they are applicable in the case:**

(a) the defencelessness of the victim:

(b) in relation to any harm resulting from the offence, any serious or long-term physical or psychological effect on the victim:

(c) the magnitude of the breach of any relationship of trust between the victim and the offender:

(d) threats by the offender to prevent the victim reporting the offending:

(e) deliberate concealment of the offending from authorities.

(3) The factors in subsection (2) are in addition to any factors the court might take into account under section 9.

(4) Nothing in this section implies that a factor referred to in subsection (2) must be given greater weight than any other factor that the court might take into account."

(emphasis supplied)

Section 24 of the Sentencing Act, 2002

"24 Proof of facts

(1) **In determining a sentence or other disposition of the case, a court—**

(a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and

(b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.

(2) **If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other,—**

(a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist,

and its significance to the sentence or other disposition of the case:

(b) **if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial:**

(c) **the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false**:

(d) **the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence:**

(e) either party may cross-examine any witness called by the other party.

(3) **For the purposes of this section,—**

aggravating fact means any fact that—

(a) **the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and**

(b) **the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case**

mitigating fact means any fact that—

(a) **the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and**

(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case."

(emphasis supplied)

Section 25 of the Sentencing Act, 2002

"25 Power of adjournment for inquiries as to suitable punishment

(1) **A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:**

(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:

(b) to enable a restorative justice process to occur, or to be completed:

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or **course of action to be undertaken**:

(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) **If proceedings are adjourned under this section** or under section 10(4) or 24A, a Judge or Justice or Community Magistrate having jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) **may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates."**

(emphasis supplied)

Section 26 of the Sentencing Act, 2002

"26 Pre-sentence reports

(1) Except as provided in section 26A**, if an offender who is charged with an offence punishable by imprisonment is found guilty or pleads guilty, the court may direct a probation officer to prepare a report for the court in accordance with subsection (2).**

(2) A pre-sentence report may include—

(a) information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender:

(b) information regarding the factors contributing to the offence, and the rehabilitative needs of the offender:

(c) information regarding any offer, agreement, response, or measure of a kind referred to in section 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case:

(d) recommendations on the appropriate sentence or other disposition of the case, taking into account the risk of further offending by the offender:

(e) in the case of a proposed sentence of supervision, intensive supervision, or home detention, recommendations on the appropriate conditions of that sentence:

(f) in the case of a proposed sentence of supervision, intensive supervision, or home detention involving 1 or more programmes,—

(i) a report on the programme or programmes, including a general description of the conditions that the offender will have to abide by; and

(ii) confirmation that the report has been made available to the offender:

(g) in the case of a proposed sentence of supervision, intensive supervision, or home detention involving a special condition requiring the offender to take prescription medication, confirmation that the offender—

(i) has been fully advised by a person who is qualified to prescribe that medication about the nature and likely or intended effect of the medication and any known risks; and

(ii) consents to taking the prescription medication:

(h) in the case of a proposed sentence of community work,—

(i) information regarding the availability of community work of a kind referred to in section 63 in the area in which the offender will reside; and

(ii) recommendations on whether the court should authorise, under section 66A, hours of work to be spent undertaking training in basic work and living skills:

(i) in the case of a proposed sentence of intensive supervision or possible release conditions for a proposed sentence of imprisonment for 24 months or less, the opinion of the chief executive of the Department of Corrections as to whether—

(i) a condition that prohibits the offender from entering or remaining in specified places or areas at specified times or at all times (a **whereabouts condition** in this paragraph) would facilitate or promote the objective of reducing the

risk of the offender reoffending while subject to the sentence or release conditions; and

(ii) a whereabouts condition would facilitate or promote the objective of rehabilitating and reintegrating the offender; and

(iii) a further condition requiring the offender to submit to electronic monitoring of his or her compliance with a whereabouts condition is warranted, having regard to the likelihood of non-compliance with the whereabouts condition.

(3) The court must not direct the preparation of a report under subsection (1) on any aspects of the personal characteristics or personal history of an offender if a report covering those aspects is readily available to the court and there is no reason to believe that there has been any change of significance to the court since the report was prepared.

(4) **On directing the preparation of a report under subsection (1), the court may indicate to the probation officer the type of sentence or other mode of disposition that the court is considering, and may also give any other guidance to the probation officer that will assist the officer to prepare the report.**

(5) If a court has directed the preparation of a report under subsection (1), the probation officer charged with the preparation of the report may seek the further directions of the court on—

(a) any particular item of information sought by the court; or

(b) **any alternative sentence or other mode of disposition that may be considered by the court if it appears that the sentence or other mode of disposition under consideration is inappropriate.**"

(emphasis supplied)

Section 31 of the Sentencing Act, 2002

"31 General requirement to give reasons

(1) **A court must give reasons in open court—**

(a) for the imposition of a sentence or for any other means of dealing with the offender; and

(b) for the making of an order under Part 2**.**

(2) The reasons may be given under this section with whatever level of particularity is appropriate to the particular case.

(3) Nothing in this section limits any other provision of this or any other enactment that requires a court to give reasons.

(4) **The fact that a court, in giving reasons in a particular case, does not mention a particular principle in** section 8 **or a particular factor in** section 9 **or a consideration under** section 10 **or** section 11 **is not in itself grounds for an appeal against a sentence imposed or an order made in that case."**

(emphais supplied)

UNITED KINGDOM

Coroners and Justice Act, 2009 (UK)

PART 4

SENTENCING

CHAPTER 1

Sentencing Council For England and Wales

Section 118 of the Coroner and Justice Act, 2009

"118 Sentencing Council for England and Wales

(1) There is to be a Sentencing Council for England and Wales.

(2) Schedule 15 makes provision about the Council."

Schedule 15

The Sentencing Council for England and Wales

Constitution of the Council

Schedule 15, Para 1 of the Coroner and Justice Act, 2009

"1 The Council is to consist of—

(a) 8 members appointed by the Lord Chief Justice with the agreement of the Lord Chancellor ("judicial members");

(b) 6 members appointed by the Lord Chancellor with the agreement of the Lord Chief Justice ("non-judicial members")."

Appointment of a person to chair the Council etc

Schedule 15, Para 2 of the Coroner and Justice Act, 2009

"2 The Lord Chief Justice must, with the agreement of the Lord Chancellor, appoint—

(a) a judicial member to chair the Council ("the chairing member"), and

(b) another judicial member to chair the Council in the absence of the chairing member."

Appointment of judicial members

Schedule 15, Para 3 of the Coroner and Justice Act, 2009

"3(1) A person is eligible for appointment as a judicial member if the person is—

(a) a judge of the Court of Appeal,

(b) a puisne judge of the High Court,

(c) a Circuit judge,

(d) a District Judge (Magistrates' Courts), or

(e) a lay justice.

(2) The judicial members must include at least one Circuit judge, one District Judge (Magistrates' Courts) and one lay justice.

(3) When appointing judicial members, the Lord Chief Justice must have regard to the desirability of the judicial members including at least one person who appears to the Lord Chief Justice to have responsibilities relating to

the training of judicial office-holders who exercise criminal jurisdiction in England and Wales.

(4) "Judicial office-holder" has the meaning given by section 109(4) of the Constitutional Reform Act 2005 (c. 4)."

Appointment of non-judicial members

Schedule 15, Para 4 of the Coroner and Justice Act, 2009

"4(1) A person is eligible for appointment as a non-judicial member if the person appears to the Lord Chancellor to have experience in one or more of the following areas—

(a) criminal defence;

(b) criminal prosecution;

(c) policing;

(d) sentencing policy and the administration of justice;

(e) the promotion of the welfare of victims of crime;

(f) academic study or research relating to criminal law or criminology;

(g) the use of statistics;

(h) the rehabilitation of offenders.

(2) The persons eligible for appointment as a non-judicial member by virtue of experience of criminal prosecution include the Director of Public Prosecutions."

Section 120 of the Coroner and Justice Act, 2009

Guidelines

"**120 Sentencing guidelines**

(1) In this Chapter "sentencing guidelines" means guidelines relating to the sentencing of offenders.

(2) A sentencing guideline may be general in nature or limited to a particular offence, particular category of offence or particular category of offender.

(3) The Council must prepare—

(a) sentencing guidelines about the discharge of a court's duty under section 73 of the Sentencing Code (reduction in sentences for guilty pleas), and

(b) sentencing guidelines about the application of any rule of law as to the totality of sentences.

(4) The Council may prepare sentencing guidelines about any other matter.

(5) Where the Council has prepared guidelines under subsection (3) or (4), it must publish them as draft guidelines.

(6) The Council must consult the following persons about the draft guidelines—

(a) the Lord Chancellor;

(b) such persons as the Lord Chancellor may direct;

(c) the Justice Select Committee of the House of Commons (or, if there ceases to be a committee of that name, such committee of the House of Commons as the Lord Chancellor directs);

(d) such other persons as the Council considers appropriate.

(7) In the case of guidelines within subsection (3), the Council must, after making any amendments of the guidelines which it considers appropriate, issue them as definitive guidelines.

(8) In any other case, the Council may, after making such amendments, issue them as definitive guidelines.

(9) The Council may, from time to time, review the sentencing guidelines issued under this section, and may revise them.

(10) Subsections (5), (6) and (8) apply to a revision of the guidelines as they apply to their preparation (and subsection (8) applies even if the guidelines being revised are within subsection (3)).

(11) When exercising functions under this section, the Council must have regard to the following matters—

(a) the sentences imposed by courts in England and Wales for offences;

(b) the need to promote consistency in sentencing;

(c) the impact of sentencing decisions on victims of offences;

(d) the need to promote public confidence in the criminal justice system;

(e) the cost of different sentences and their relative effectiveness in preventing re-offending;

(f) the results of the monitoring carried out under section 128."

Section 121 of the Coroner and Justice Act, 2009

"**121 Sentencing ranges**

(1) When exercising functions under section 120, the Council is to have regard to the desirability of sentencing guidelines which relate to a particular offence being structured in the way described in subsections (2) to (9).

(2) The guidelines should, if reasonably practicable given the nature of the offence, describe, by reference to one or more of the factors mentioned in subsection (3), different categories of case involving the commission of the offence which illustrate in general terms the varying degrees of seriousness with which the offence may be committed.

(3) Those factors are—

(a) the offender's culpability in committing the offence;

(b) the harm caused, or intended to be caused or which might foreseeably have been caused, by the offence;

(c) such other factors as the Council considers to be particularly relevant to the seriousness of the offence in question.

(4) The guidelines should—

(a) specify the range of sentences ("the offence range") which, in the opinion of the Council, it may be appropriate for a court to impose on an offender convicted of that offence, and

(b) if the guidelines describe different categories of case in accordance with subsection (2), specify for each category the range of sentences ("the category range") within the offence range which, in the opinion of the Council, it may be appropriate for a court to impose on an offender in a case which falls within the category.

(5) The guidelines should also—

(a) specify the sentencing starting point in the offence range, or

(b) if the guidelines describe different categories of case in accordance with subsection (2), specify the sentencing starting point in the offence range for each of those categories.

(6) The guidelines should—

(a) (to the extent not already taken into account by categories of case described in accordance with subsection (2)) list any aggravating or mitigating factors which, by virtue of any enactment or other rule of law, the court is required to take into account when considering the seriousness of the offence and any other aggravating or mitigating factors which the Council considers are relevant to such a consideration,

(b) list any other mitigating factors which the Council considers are relevant in mitigation of sentence for the offence, and

(c) include criteria, and provide guidance, for determining the weight to be given to previous convictions of the offender and such of the other factors within paragraph (a) or (b) as the Council considers to be of particular significance in relation to the offence or the offender.

(7) For the purposes of subsection (6)(b) the following are to be disregarded—

(a) the requirements of section 73 of the Sentencing Code (reduction in sentences for guilty pleas);

(b) sections 74, 387 and 388 of the Sentencing Code (assistance by defendants: reduction or review of sentence) and any other rule of law by virtue of which an offender may receive a discounted sentence in consequence of assistance given (or offered to be given) by the offender to the prosecutor or investigator of an offence;

(c) any rule of law as to the totality of sentences.

(8) The provision made in accordance with subsection (6)(c) should be framed in such manner as the Council considers most appropriate for the purpose of assisting the court, when sentencing an offender for the offence, to determine the appropriate sentence within the offence range.

(9) The provision made in accordance with subsections (2) to (8) may be different for different circumstances or cases involving the offence.

(10) The sentencing starting point in the offence range—

(a) for a category of case described in the guidelines in accordance with subsection (2), is the sentence within that range which the Council considers to be the appropriate starting point for cases within that category—

(i) before taking account of the factors mentioned in subsection (6), and

(ii) assuming the offender has pleaded not guilty, and

(b) where the guidelines do not describe categories of case in accordance with subsection (2), is the sentence within that range which the Council considers to be the appropriate starting point for the offence—

(i) before taking account of the factors mentioned in subsection (6), and

(ii) assuming the offender has pleaded not guilty."

Section 128 of the Coroner and Justice Act, 2009

"128 Monitoring

(1) The Council must—

(a) monitor the operation and effect of its sentencing guidelines, and

(b) consider what conclusions can be drawn from the information obtained by virtue of paragraph (a).

(2) The Council must, in particular, discharge its duty under subsection (1)(a) with a view to drawing conclusions about—

(a) the frequency with which, and extent to which, courts depart from sentencing guidelines;

(b) the factors which influence the sentences imposed by courts;

(c) the effect of the guidelines on the promotion of consistency in sentencing;

(d) the effect of the guidelines on the promotion of public confidence in the criminal justice system.

(3) When reporting on the exercise of its functions under this section in its annual report for a financial year, the Council must include—

(a) a summary of the information obtained under subsection (1)(a), and

(b) a report of any conclusions drawn by the Council under subsection (1)(b)."

Sentencing Act 2020 (UK)

Section 3 of the Sentencing Act, 2020

"DEFERMENT OF SENTENCE

3 Deferment order

(1) In this Code **"deferment order" means an order deferring passing sentence on an offender in respect of one or more offences until the date specified in the order, to enable a court, in dealing with the offender, to have regard to—**

(a) the offender's conduct after conviction (including, where appropriate, the offender's making reparation for the offence), or

(b) any change in the offender's circumstances.

(2) A deferment order may impose requirements ("deferment requirements") as to the offender's conduct during the period of deferment.

(3) Deferment requirements may include—

(a) requirements as to the residence of the offender during all or part of the period of deferment;

(b) restorative justice requirements."

(emphais supplied)

Section 5 of the Sentencing Act, 2020

"5 Making a deferment order

(1) A court may make a deferment order in respect of an offence only if—

(a) the offender consents,

(b) the offender undertakes to comply with any deferment requirements the court proposes to impose,

(c) if those requirements include a restorative justice requirement, section 7(2) (consent of participants in restorative justice activity) is satisfied, and

(d) the court is satisfied, having regard to the nature of the offence and the character and circumstances of the offender, that it would be in the interests of justice to make the order.

(2) The date specified under section 3(1) in the order may not be more than 6 months after the date on which the order is made.

(3) A court which makes a deferment order must forthwith give a copy of the order—

(a) to the offender,

(b) if it imposes deferment requirements that include a restorative justice requirement, to every person who would be a participant in the activity concerned (see section 7(1)),

(c) where an officer of a provider of probation services has been appointed to act as a supervisor, to that provider, and

(d) where a person has been appointed under section 8(1)(b) to act as a supervisor, to that person.

(4) A court which makes a deferment order may not on the same occasion remand the offender, notwithstanding any enactment."

(emphais supplied)

Section 6 of the Sentencing Act, 2020

"6 Effect of deferment order

(1) Where a deferment order has been made in respect of an offence, the court which deals with the offender for the offence may have regard to—

(a) the offender's conduct after conviction, or

(b) any change in the offender's circumstances."

(emphais supplied)

Section 30 of the Sentencing Act, 2020

"Pre-sentence reports

30 Pre-sentence report requirements

(1) This section applies where, by virtue of any provision of this Code, the pre-sentence report requirements apply to a court in relation to forming an opinion.

(2) If the offender is aged 18 or over, the court must obtain and consider a pre-sentence report before forming the opinion unless, in the circumstances of the case, it considers that it is unnecessary to obtain a pre-sentence report.

(3) If the offender is aged under 18, the court must obtain and consider a pre-sentence report before forming the opinion unless—

(a) there exists a previous pre-sentence report obtained in respect of the offender, and

(b) the court considers—

(i) in the circumstances of the case, and

(ii) having had regard to the information contained in that report or, if there is more than one, the most recent report, that it is unnecessary to obtain a pre-sentence report.

(4) Where a court does not obtain and consider a pre-sentence report before forming an opinion in relation to which the pre-sentence report requirements apply, no custodial sentence or community sentence is invalidated by the fact that it did not do so."

(emphais supplied)

Section 31 of the Sentencing Act, 2020

"31 Meaning of "pre-sentence report" etc

"Pre-sentence report"

(1) In this Code "pre-sentence report" means a report which—

(a) is made or submitted by an appropriate officer with a view to assisting the court in determining the most suitable method of dealing with an offender, and

(b) contains information as to such matters, presented in such manner, as may be prescribed by rules made by the Secretary of State."

40. We find that an exhaustive and detailed exercise has been done by New Zealand. What we have discussed has already been substantially taken into consideration by the aforementioned countries. As it is an important aspect which has escaped the attention of the Government of India, we recommend the Department of Justice, Ministry of Law and Justice, Government of India, to consider introducing a comprehensive policy, possibly by way of getting an appropriate report from a duly constituted Sentencing Commission consisting of experts in different fields for the purpose of having a distinct sentencing policy. We request the Union of India to respond to our suggestion by way of an affidavit within a period of six months from today.

41. In this connection, we would like to place on record the 47th Report of the Law Commission of India, Report by the Committee on Reforms of Criminal Justice, Chaired by Dr. Justice V.S. Malimath, (2003), Report by the Committee on Draft National Policy on Criminal Justice, Chaired by Dr. N.R. Madhava Menon and decisions rendered by this Court to indicate an emerging need for a distinct sentencing policy

47th Report of the Law Commission of India

CHAPTER 7

DESIRABILITY OF AMENDMENTS – SUBSTANTIVE POINTS COMMON TO ALL THE ACTS CONSIDERED

"7.44. A proper sentence is a composite of many factors, including the nature of the offence, the circumstances-

extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the professional and social record of the offender, the background of the offender with reference to education. home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or of training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, for such a deterrent in respect to the particular type of offence involved."

Report by the Committee on Reforms of Criminal Justice System, Chaired by Dr. Justice V.S. Malimath, Vol. I March (2003)

"14.4 NEED FOR SENTENCING GUIDELINES

14.4.1 The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. **The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity. Some Judges are lenient and some Judges are harsh. Exercise of unguided discretion is not good even if it is the Judge who exercises the discretion. In some countries guidance regarding sentencing option and sentencing guideline laws are given in the penal code. There is need for such law in our country to minimise uncertainty to the matter of awarding sentence.** There are several factors which are relevant in prescribing the alternative sentences. This requires a thorough examination by an expert statutory body.

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14.4.5 **Sometimes the courts are unduly harsh while at other times they are liberal. We have already adverted to aspects which Supreme Court said are relevant in deciding as to what are the rarest of the rare cases for imposing death sentence. However, even in such matters uniformity is lacking. In certain rape cases acquittals gave rise to public protests. Therefore in order to bring about certain regulation and predictability in the matter of sentencing, the Committee recommends a statutory committee to lay guidelines on sentencing under the Chairmanship of a former Judge of Supreme Court or a former Chief Justice of a High Court experienced in criminal law with other members representing the Prosecution, legal profession, Police, social scientist and women representative."**

(emphasis supplied)

Report of the Committee on Draft National Policy on Criminal Justice, Chaired by Prof. (Dr.) N.R. Madhava Menon, July, 2007

"5.5 PUNISHMENTS AND SENTENCING

5.5.1 Given the limited options in the choice of punishments now available in the statutes and the inadequate deterrence in the sentence often imposed, there has to be some serious rethinking on the philosophy, justification and impact of sentencing in criminal justice administration. The quantums of fines were prescribed more than a century ago. Imprisonment in practice is reduced to a much shorter period through a variety of practices even when it is for life. **Equality in sentencing is not pursued vigorously and there is no serious attempt yet to standardize the sentencing norms and procedures. The objects of punishment are not served in many cases as a result of such incoherent sentencing practices.**

5.5.2 What are the policy choices in the matter of punishments and determination of its quantum to achieve the goals of criminal justice? Can community service be made an effective punishment and how is it to be organized? How to make probation a dominant part of

disposition in criminal cases? How to achieve equality and fairness in sentencing? These and many related questions are not even raised in India seriously with the result the system seems to be functioning as an end in itself.

There has to be a radical change in the law and practice of sentencing if punishment should serve the cause of criminal justice. A set of sentencing guidelines may be statutorily evolved to make the system consistent and purposeful. Fixing mandatory minimum sentences may not be a worthwhile solution. More importantly, the policy should be to increase the choices in punishment and make the other functionaries of the system (like probation service and correctional administration) to have a voice in the sentencing process and administration.

In short, sentences and sentencing require urgent attention of policy planners if criminal justice is to retain its credibility in the public mind.

5.5.3 A national policy on sentencing shall seek to address the following issues:

(i) The need for criminal law to offer more alternatives in the matter of punishments instead of limiting the option merely to fines and imprisonment.

(ii) In respect of the quantum of punishments, the need for constant review to ensure that it meets the ends of justice and disparity is reduced in similar situations.

(iii) A policy to avoid short-term imprisonments and to prevent overcrowding of jails and other custodial institutions, to be rigorously pursued at all levels.

(iv) The need for specific sentencing guidelines to be evolved in respect of each punishment.

(v) Also the need for an institutional machinery involving correctional experts for fixing proper punishment."

(emphasis supplied)

Precedents

Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220

> **"14.** In recent years, the rising crime rate — particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. **Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.**
>
> **15.** In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."
>
> (emphasis supplied)

Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767

"48. That is not the end of the matter. **Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] laid down the principle of the rarest of rare cases. *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] categories were followed uniformly and consistently.**

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50. The same point is made in far greater detail in a report called "*Lethal Lottery, The Death Penalty in India*" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry. The report is based on the study of the Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see Chapters 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench.

52. The inability of the criminal justice system to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of

cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the criminal justice system. Thus the overall larger picture gets asymmetric and lopsided and presents a poor reflection of the system of criminal administration of justice. This situation is a matter of concern for this Court and needs to be remedied."

(emphasis supplied)

Soman v. State of Kerala, (2013) 11 SCC 382

"15. Giving punishment to the wrongdoer is at the heart of the criminal justice delivery, but in our country, it is the weakest part of the administration of criminal justice. There are no legislative or judicially laid down guidelines to assist the trial court in meting out the just punishment to the accused facing trial before it after he is held guilty of the charges. In *State of Punjab* v. *Prem Sagar* [(2008) 7 SCC 550 : (2008) 3 SCC (Cri) 183] this Court acknowledged as much and observed as under: (SCC p. 552, para 2)

> "*2*. In our judicial system, we have not been able to develop legal principles as regards sentencing. The superior courts except making observations with regard to the purport and object for which punishment is imposed upon an offender, have not issued any guidelines. Other developed countries have done so. At some quarters, serious concerns have been expressed in this behalf. Some committees as for example Madhava Menon Committee and Malimath Committee have advocated introduction of sentencing guidelines."

Section 354 of the CrPC, 1973

"354. Language and contents of judgment.—

(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—

(a) shall be written in the language of the Court;

(b) shall contain the point or points for determination, the decision thereon and the reasons for the decision;

(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;

(d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.

(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

(4) When the conviction is for an offence punishable with imprisonment for a term of one year or more, but the Court imposes a sentence of imprisonment for a term of less than three months, it shall record its reasons for awarding such sentence, unless the sentence is one of imprisonment till the rising of the Court or unless the case was tried summarily under the provisions of this Code.

(5) When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead.

(6) Every order under section 117 or sub-section (2) of section 138 and every final order made under section

125, section 145 or section 147 shall contain the point or points for determination, the decision thereon and the reasons for the decision."

42. Section 354 of the CrPC, 1973 though merely deals with the language and contents of judgment, also sheds light on the fact that a judgment contains two distinct parts, wherein the first part deals with the conviction and the second deals with the sentence. Sub-section (1)(c) of the aforesaid provision has to be understood to mean that a Judge is expected to consider the aggravating and mitigating circumstances. In such view of the matter, sub-section (3) of the aforesaid provision is more clarificatory, keeping in mind the nature of the offence committed. As a convict is heard on sentence, it follows that any decision on sentence has to indicate the reasons for exercise of judicial discretion by the Judge.

ON FACTS

Criminal Appeal No. 3924 of 2023 and Criminal Appeal Nos. 3926-3927 of 2023.

43. An FIR was registered in Crime No. 137 of 2021 for the occurrence that took place on 01.12.2021. The said complaint was filed by the mother of the victim on 02.12.2021. Accordingly, the case was registered under Section 376AB of the Indian Penal Code, 1860 (hereinafter referred to as the "**IPC, 1860**") and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the "**POCSO Act, 2012**") read with Section 3(2)(v) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "**SC/ST Act, 1989**"). The case of the prosecution in nutshell is that the accused took advantage of a minor girl child and committed the offence of rape.

44. The accused was arrested on 12.12.2021. He was produced before the concerned Judicial Magistrate on 13.12.2021 and remanded to judicial custody till 24.12.2021. The remand was further extended by the orders dated 24.12.2021 and 05.01.2022 through video conferencing. On 12.01.2022, the charge-sheet was filed for the offences aforestated. The accused was once again produced through video conferencing on 15.01.2022. There was no advocate representing the accused, and the case was put up on 24.01.2022 for his production.

45. On 20.01.2022, without the FSL report, the charge-sheet filed was taken on record. Accordingly, the cognizance was taken. The prosecutor was directed to ensure the presence of the accused through video conferencing. The accused feigned his inability to engage a lawyer as he was behind the bars. The case was adjourned to 22.01.2022 for framing of charges and for the supply of documents.

46. On that day i.e. 22.01.2022, the counsel appearing for the accused was provided with the documents, without being given any time and without ensuring that these documents were in fact shown to the accused, followed by due consultation with his lawyer, directly arguments were heard on framing of charges. Thereafter, the charges were framed and explained to the accused through the virtual mode. On the very same date, an order was passed for summoning the prosecution witnesses. Strangely enough, an application was filed by the Investigating Officer to record the evidence of four witnesses in a single day, as a confidential information obtained, indicated that there was pressure from the family members of the accused. No notice was served either on the accused or his counsel, and the order was apparently passed, without taking into consideration the Witness Protection Scheme, 2018. In disregard of the provisions of the Rules for Video Conferencing for Courts, 2020, the statements of the witnesses were recorded.

47. After two days i.e. 24.01.2022, the remaining witnesses, including the Investigating Officer, were examined. There was no material to show that the accused was present at that point of time. The plea made by the counsel for the defence for deferment by one week was rejected, *sans* any substantial reason. For the purpose of questioning under Section 313 of the CrPC, 1973 alone, the accused was brought through video conferencing. In a hurried manner, the questioning was done. The repeated plea of adjournment by one week made by the counsel for the defence was once again rejected, while ultimately facilitating a day's adjournment.

48. On the next day i.e. 25.01.2022, an application was filed by the defence praying for time for production of witnesses. The matter was passed over, with a direction to produce the witnesses on that day itself. Arguments were heard, during which time, the prosecution made submissions for 10 minutes, whereas the defence argued for 3

hours. It was accordingly concluded at 6.30 p.m. The judgment was delivered at about 7.00 pm, running into about 27 pages consisting of 59 paragraphs. It is not known as to how the copies of the witnesses statements were made ready and kept for perusal. Admittedly, even the counsel for the defence did not have those copies.

49. Two days thereafter i.e. 27.01.2022, the case was posted for sentencing. Upon hearing the accused, death sentence was imposed by the trial court. The High Court, by the impugned judgment, called for the records and went through them thoroughly, finding that there is non-compliance of Sections 207, 226, 227 and 230 of the CrPC, 1973, set aside the conviction and sentence awarded by the trial Court, and ordered for a *de novo* trial. Incidentally, the approach adopted by the Trial Court was found fault with.

50. Assailing the impugned judgment on merit, the informant has filed Criminal Appeal No. 3924 of 2023. Aggrieved over the observations made by the High Court, the learned Trial Judge has filed Criminal Appeal Nos. 3926-3927 of 2023.

Criminal Appeal No. 3925 of 2023

51. Criminal Appeal No. 3925 of 2023 has been filed by the very same learned Judge who rendered a similar conviction and sentenced the accused to life imprisonment for remainder of natural life, without any remission, against the observations made by a Coordinate Bench of the High Court, which took note of the earlier judgment rendered by the Coordinate Bench. It has been brought to our notice that the disciplinary proceedings initiated were dropped on the administrative side. However, an application in I.A. No. 29814 of 2023 has been filed by the learned Judge *inter alia* alleging that certain administrative work has been taken away from him, apparently on the basis of the impugned judgments, and therefore, he should either be restored with the said power or transferred to some other place.

52. Insofar as the Criminal Appeal No. 3925 of 2023 is concerned, there is no appeal filed on behalf of the victim. Therefore, the only question for consideration is as to whether the observation made against the appellant, is justified or not, especially when he has not been heard. On facts, even in this case, the trial had commenced and concluded in a single day.

SUBMISSIONS ON BEHALF OF THE APPELLANT

Criminal Appeal No. 3924 of 2023 and Criminal Appeal Nos. 3926-3927 of 2023.

53. Mr. Vikas Singh, learned senior counsel appearing for both the informant and the learned Trial Judge, submitted that the procedure established by law has been followed. The appellant has kept in mind the rigour of Section 309 of the CrPC, 1973 read with the provisions contained under the POCSO Act, 2012. Even assuming that there is a procedural flaw, in view of the mandate contained under Section 465 of the CrPC, 1973 there is no need for remittal. During the course of trial, the counsel for the respondent-accused has not raised any serious objection.

Criminal Appeal No. 3925 of 2023

It is further submitted that the appellant has discharged his judicial function and, therefore, any action without hearing him is contrary to law. Though the charges have been dropped, the observations made would be detrimental to his future career progression. The accused had antecedents and, therefore, the Trial Court rightly exercised due caution. It is a case where no witness was produced on behalf of the defence. To buttress his submission, learned senior counsel appearing for the appellant has relied upon the following decisions,

- Munna Pandey v. State of Bihar, AIR 2023 SUPREME COURT 5709.
- Akil v. State (NCT of Delhi), (2013) 7 SCC 125.
- Sakshi v. Union of India, (2004) 5 SCC 518.
- State of Maharashtra v. Mahesh Kariman Tirki, (2022) 10 SCC 207.
- Pradeep S. Wodeyar v. State of Karnataka, (2021) 19 SCC 62.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

54. *Per contra*, Mr. C. U. Singh, learned senior counsel appearing for the High Court and the accused submitted that admittedly there are serious procedural violations. Prejudice was sufficiently demonstrated before the court. It would be impossible for a Judge to deliver the judgment within such a short span of time. No opportunity was given at every stage of the trial to the accused. It is a clear case of "*justice*

hurried is justice buried". There is no question of giving an opportunity to the appellant, the judicial officer, as no action is pending against him. In any case, the accused is still under incarceration.

DISCUSSION

55. On perusal, we find that the High Court, while passing both the impugned judgments, has not only called for the records and rendered findings of fact, but has also considered them in detail. At every stage, the accused was denied due opportunity to defend himself. The appellant judicial officer was obviously acting in utmost haste. Every trial is a journey towards the truth and a Presiding Officer is expected to create a balanced atmosphere in the mind of the prosecution and the defence. It seems to us that the decision was rendered in utmost haste. It would be humanly impossible to deliver the judgment within half an hour's time running into 27 pages consisting of 59 paragraphs in the first case and similarly in the other. The lawyer for the defence cannot fight against the court. It is the court which has to follow a balanced approach. At every stage, including framing of charges, there was a constant denial of due opportunity and hearing. The accused was not able to consult his lawyer. He was not even served with the copies, though his lawyer received the same before framing of the charges. Receiving of documents by his lawyer would not be sufficient compliance, unless there was sufficient time given for him to peruse them and thereafter have a consultation. Admittedly, neither the provisions of the Witness Protection Scheme, 2018 have been invoked nor the Rules for Video Conferencing for Courts, 2020 were followed. The accused was merely shown the court's proceedings and the writing was on the wall for him. We are not willing to say anything on the merits of the case. On facts, even in Criminal Appeal No. 3925 of 2023, the trial had commenced and concluded in a single day. Additionally, no lawyer could be engaged by the accused and, therefore, as per the recommendations of the prosecutor, another one was engaged. Otherwise, the facts are more or less similar in both the cases and, therefore, we are not inclined to go into it in detail. When the charges are very serious, Courts should be more circumspect in discharging their solemn duty.

56. We do not think that the decisions relied upon by the learned senior counsel for the appellant have any bearing on the present case. The appellant judicial officer is fortunate that no action was taken against

him. We do not wish to say anything more on this, except by stating that in the absence of any proposed action, there is no question of hearing the appellant. Thus, we are not inclined to interfere on the merits of the case with respect to non-compliance of the mandatory provisions, as the accused is still under incarceration.

57. On the application filed seeking intervention over the action taken on the administrative side, it is for the appellant to approach the High Court. It is an administrative action taken and, therefore, the same does not require any interference on the judicial side by us, especially in light of the discussion made above. Suffice it is to state that liberty is given to the appellant to approach the High Court on the administrative side.

58. For the foregoing reasons, the appeals stand dismissed with the following directions :

    (1.) The trial court shall keep in mind the mandate of POCSO Act, 2012 while recording the evidence of the victim.

    (2.) The trial court shall conduct and complete the trial expeditiously in view of Section 35 of the POCSO Act, 2012.

    (3.) The Government of India represented by the Secretary for the Ministry of Law and Justice shall file an affidavit on the feasibility of introducing a comprehensive sentencing policy and a report thereon, within a period of six months from today, as indicated above.

    (4.) The Registry shall forward a copy of this judgment to the Department of Justice, Ministry of Law and Justice, Government of India.

59. Consequently, IA No. 29814/2023 stands dismissed.

60. Pending application(s), are allowed.

Result of the case: Appeals dismissed.

†*Headnotes prepared by: Divya Pandey*

[2024] 5 S.C.R. 730 : 2024 INSC 443

Bano Saiyed Parwaz
v.
Chief Controlling Revenue Authority and Inspector General of Registration and Controller of Stamps & Ors.

(Civil Appeal No. 6533 of 2024)

17 May 2024

[B.R. Gavai and Prashant Kumar Mishra,* JJ.]

Issue for Consideration

The High Court dismissed the appellant's demand for refund of Stamp Duty paid towards an un-executed conveyance deed.

Headnotes†

Maharashtra Stamp Act, 1958 – s.47 and s.48 – Bombay Stamp Rules, 1939 – Rules 21 and 22A – Stamp Duty – Refund of – Appellant agreed to purchase a property from vendor – To that effect, a deed of conveyance was prepared and it was sent for payment of stamp duty, which was assessed at Rs.25,34,350/- – Accordingly, the appellant paid this sum and purchased the stamp duty on 13.05.2014 – However, the said conveyance deed was not lodged for registration as the vendor was playing fraud on the appellant – Appellant applied for refund on 22.10.2014 – Thereafter, the appellant decided to cancel the said transaction and executed cancellation deed on 13.11.2014 – Appellant's case for refund was rejected by respondent nos. 1 & 2 on the ground that the application was filed beyond the limitation period – The High Court upheld the orders of respondent nos. 1 and 2 – Correctness:

Held: Admittedly, the appellant being a bonafide purchaser is a victim of fraud played upon her by the vendor – She has paid a sum of Rs.25,34,400/- towards stamp duty for registration of conveyance deed – However, the conveyance deed was not lodged for registration as she become aware of the fraud played by the vendor and thereafter, she immediately applied online on 22.10.2014 for refund of the stamp duty – Her effort to contact the vendor to execute a cancellation deed did not fructify immediately because of unavailability of the vendor which led to a police complaint and it is only at this point of time, due to intervention of

* Author

the Police, the vendor could be traced, and a cancellation deed was executed on 13.11.2014 – From the above admitted facts, *prima facie* it appears that the appellant herein was pursuing her remedies in law and she was not lax in her approach towards seeking refund of the said stamp duty paid by her and she has been denied the same only on the ground of limitation – While submitting the online application there was no caution to the appellant that all of the documents and materials for the satisfaction of the Collector should be filed with the application- either online or hard copy- itself and the finding of the High Court is contrary to the requirements stipulated by Sections 47 & 48 which envisages only the application for relief under Section 47 of the Act to be made within six months of the date of the instrument which *prima facie* is appeared to have been done by the appellant in the present case – The case of the appellant is fit for refund of stamp duty in so far as it is settled law that the period of expiry of limitation prescribed under any law may bar the remedy but not the right and the appellant is held entitled to claim the refund of stamp duty amount on the basis of the fact that the appellant has been pursuing her case as per remedies available to her in law and she should not be denied the said refund merely on technicalities. [Paras 10, 11, 12, 16]

Case Law Cited

In Committee-GFIL v. Libra Buildtech Private Limited & Ors. [2015] 11 SCR 420 **: (2015) 16 SCC 31 – relied on.**

List of Acts

Maharashtra Stamp Act, 1958; Bombay Stamp Rules, 1939.

List of Keywords

Stamp duty; Unexecuted conveyance deed; Fraud by vendor; Refund of stamp duty; Limitation; Expiry of limitation; Pursuance of legal remedies; Denial of refund on basis of technicalities; Cancellation deed; Bonafide purchaser.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6533 of 2024

From the Judgment and Order dated 02.08.2019 of the High Court of Judicature at Bombay in WP No. 281 of 2019

Appearances for Parties

Subodh Markandeya, Sr. Adv., Sahil, Rahul Aggarwal, Amit Pratap Singh, Narender Kumar Verma, Advs. for the Appellant.

Aaditya Aniruddha Pande, Siddharth Dharmadhikari, Bharat Bagla, Sourav Singh, Aditya Krishna, Ms. Preet S. Phanse, Adarsh Dubey, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Prashant Kumar Mishra, J.

Leave granted.

2. The instant appeal is directed against the judgment and order impugned dated 02.08.2019 passed by the High Court of Judicature at Bombay in Writ Petition No. 281 of 2019 whereby the High Court, dismissed the appellant's demand for refund of Stamp Duty paid towards an un-executed conveyance deed. In effect, the impugned order has upheld the orders of respondent nos. 1 and 2 dated 09.06.2015 & 25.02.2016 rejecting the aforesaid demand of the appellant.

3. Briefly stated, the facts of the matter are that the appellant agreed to purchase the property bearing C.T.S. No.340.340/1 to 340/14 of Kurla-1 Division situated lying and being Fitwalla Cottage, Fitwalla Compound Bazaar Ward, Old Agra Road, Kurla (West), Mumbai-400070 from the Vendor - Mohammed Hanif Ahmed Fitwala and to that effect, they prepared a deed of conveyance which was sent for adjudication to respondent no.1 on 07.05.2014 for payment of stamp duty, which was assessed at Rs.25,34,350 (Rupees Twenty-Five Lakhs Thirty-Four Thousand Three Hundred Fifty Only). Accordingly, the appellant paid this sum and purchased the stamp duty on 13.05.2014 for registration of conveyance deed.

4. *Albeit,* the stamp duty was paid by the appellant to respondent no.1 on 13.05.2014, said conveyance deed was not lodged for registration as the vendor of the appellant by playing fraud on the appellant had earlier sold the said property to a third party in 1992. However, before executing the said conveyance deed, the appellant had given a public notice but nobody objected to the said

transaction. Thereafter, in view of these facts, the appellant decided to cancel the said transaction, for which he tried to contact the said vendor but he was not available, compelling the appellant to file a complaint with the Police Authority. Thereafter, the Vendor executed the cancellation deed on 13.11.2014. However, the appellant had on 22.10.2014 already applied online for refund of the said amount as per Section 48 of the Maharashtra Stamp Act, 1958[1] and had filed written application on 06.12.2014 along with the documents. The appellant's case was rejected by respondent nos.1 & 2 on the ground that the application filed by her was beyond the limitation period as per Section 48 of the Act.

5. The learned counsel for the appellant submits that the appellant's case is squarely covered within the circumstances laid down in Section 47 (c) [1] and [5] of the Act and Rules 21 and 22A of the Bombay Stamp Rules, 1939[2] which read as under:

> ***"47. (c) the stamp used for an instrument executed by any party thereto which—***
>
> *(1) has been afterwards found 1[by the party] to be absolutely void in law from the beginning; 2[1A] has been afterwards found by the Court, to be absolutely void from the beginning under section 31 of the Specific Relief Act, 1963;*
>
> *****
>
> *(5) by reason of the refusal of any person to act under the same, or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;"*
>
> ***"21. Evidence as to circumstances of claim to refund or renewal.***
>
> *The collector may require any person claiming a refund or renewal under chapter v of the Act, or his duly authorized agent, to make*

1. *'Act'*
2. *'Rules'*

oral deposition oath or affirmation, or to file an affidavit, setting forth the circumstances under which the claim has arisen, and may also' if he thinks fit, call for the evidence of witnesses in support of the statement set forth in any such deposition or affidavit.

NOTES

Claim for refund of stamp duty.

Under rule 21 where a claim for refund of stamp duty is made, the procedure laid down under the rule to take evidence by the Collector. Accordingly, the Collector may direct any person claiming a refund under Chapter v to make an oral deposition on oath or affirmation or to file an affidavit, setting forth the circumstances under which the claim has arisen and if he thinks fit call all evidence of witnesses in support of the statement set forth in any such deposition or affidavit. Rule 22A deals with matters relating deducting to deduction to be made from the amount of spoiled or misused or unused stamps. The word "spoiled stamps" is not expressly defined either in the Act or in the Rules but Section 47 describe instances of such spoiled stamps for the purpose of claiming refund.

22A, Rule of deduction from the amount of stamps, allowance for spoiled, misused or unused etc.

When any person is in possession of –

(a) spoiled stamps, under section 47, misused stamps under section 50, or printed forms on-stamped paper no longer required under section 49 and he applies to the collector for making allowance in respect or the same.

(b) a stamp or stamps which have not been spoiled or rendered unfit or useless for the purpose intended, but, for which he has no immediate use and he delivers up the same to

> *the collector for cancellation, then the collector may, give in lieu thereof may repay to such person, the same, value in money of such stamp or stamps or printed forms on stamped papers, after deducting rupees ten for each stamp or printed form on stamped paper or amount equal to (ten per cent) of the value of such stamp or such printed form, whichever is more".*

6. The learned counsel for the appellant further submitted that the law of refund embodied in Sections 47 and 48 of the Act and Rules 21 and 22A of the Rules, envisages two separate and distinct stages for refund of stamp duty i.e., i) making of application for refund within six months and ii) holding of enquiry and leading of evidence as per Rules made by the State Government, to satisfy the Collector that case of refund is covered by one or more of the circumstances (a) (b) and (c) [1] to [8] set out in Section 47 of the Act.

7. The learned counsel for the appellant would further submit that the respondent no. 2 and the High Court as well misconstrued the provisions of Sections 47 & 48 of the Act and has also overlooked Rules 21 and 22A of the Rules. In as much as, the appellant's application was within time and the same could not have been rejected as barred by limitation.

8. *Per contra,* the learned counsel for the respondents vehemently opposed the present appeal and submitted that in the present proceeding though the appellant filed application for refund of stamp duty on 22.10.2014, but the cancellation deed executed between the appellant and the seller of the said property was dated 13.11.2014 i.e., beyond the limitation period of six months from the date of purchase of stamp duty, after cancellation of those documents, as prescribed under Section 48 of the Act. As per Section 48 of the Act, the last date for applying for the refund was 12.11.2014, therefore, the application filed by the appellant was beyond the period of limitation.

9. We have heard both the counsel for the parties and perused the pleadings.

10. Admittedly, the appellant being a bonafide purchaser is a victim of fraud played upon her by the vendor. She has paid a sum of Rs.25,34,400/- towards stamp duty for registration of conveyance

deed. However, the conveyance deed was not lodged for registration as she become aware of the fraud played by the Vendor and thereafter, she immediately applied online on 22.10.2014 for refund of the stamp duty. Her effort to contact the vendor to execute a cancellation deed did not fructify immediately because of unavailability of the Vendor which Led to a police complaint and it is only at this point of time, due to intervention of the Police, the vendor could be traced, and a cancellation deed was executed on 13.11.2014.

11. From the above admitted facts, prima facie it appears that the appellant herein was pursuing her remedies in law and she was not lax in her approach towards seeking refund of the said stamp duty paid by her and she has been denied the same only on the ground of limitation.

12. The finding returned by the High Court in the impugned order that the appellant's application for refund dated 22.10.2014 is not maintainable in law as it has been filed before the cancellation of the conveyance deed dated 13.11.2014 is misplaced in so far as while submitting the online application there was no caution to the appellant that all of the documents and materials for the satisfaction of the Collector should be filed with the application- either online or hard copy- itself and the finding of the learned single judge is contrary to the requirements stipulated by Sections 47 & 48 which envisages only the application for relief under Section 47 of the Act to be made within six months of the date of the instrument which *prima facie* is appeared to have been done by the appellant in the present case.

13. The evidence required and enquiry to be made in terms of Section 47 of the Act is a separate process altogether and apropos circumstances for refund under Section 47 (c) [1] & [5] of the Act, evidence is not required to be filed along with the application- either the online application or separately on the same day by way of hard copy.

14. ***In Committee-GFIL v. Libra Buildtech Private Limited & Ors.***[3]**,** wherein the issue of refund of stamp duty under the same Act was in question, this Court has observed and held *inter alia* as under:

> *"29. This case reminds us of the observations made by M.C. Chagla, C.J. in Firm Kaluram Sitaram v. Dominion*

3 [2015] 11 SCR 420 : (2015) 16 SCC 31

of India [1953 SCC OnLine Bom 39 : AIR 1954 Bom 50] . The learned Chief Justice in his distinctive style of writing observed as under in para 19: (Firm Kaluram case, SCC OnLine Bom)

"19. … we have often had occasion to say that when the State deals with a citizen it should not ordinarily rely on technicalities, and if the State is satisfied that the case of the citizen is a just one, even though legal defences may be open to it, it must act, as has been said by eminent Judges, as an honest person."

We are in respectful agreement with the aforementioned observations, as in our considered opinion these observations apply fully to the case in hand against the State because except the plea of limitation, the State has no case to defend their action.

xxx xxx xxx

32. In our considered opinion, even if we find that applications for claiming refund of stamp duty amount were rightly dismissed by the SDM on the ground of limitation prescribed under Section 50 of the Act yet keeping in view the settled principle of law that the expiry of period of limitation prescribed under any law may bar the remedy but not the right, the applicants are still held entitled to claim the refund of stamp duty amount on the basis of the grounds mentioned above. In other words, notwithstanding dismissal of the applications on the ground of limitation, we are of the view that the applicants are entitled to claim the refund of stamp duty amount from the State in the light of the grounds mentioned above."

15. The legal position is thus settled in ***Libra Buildtech*** (supra) that when the State deals with a citizen it should not ordinarily rely on technicalities, even though such defences may be open to it.

16. We draw weight from the aforesaid judgment and are of the opinion that the case of the appellant is fit for refund of stamp duty in so far as it is settled law that the period of expiry of limitation prescribed under any law may bar the remedy but not the right and the appellant is held entitled to claim the refund of stamp duty amount on the

basis of the fact that the appellant has been pursuing her case as per remedies available to her in law and she should not be denied the said refund merely on technicalities as the case of the appellant is a just one wherein she had in bonafide paid the stamp duty for registration but fraud was played on her by the Vendor which led to the cancellation of the conveyance deed.

17. For the foregoing reasons, the appeal is allowed, and we set aside the impugned order dated 02.08.2019 as well as orders of respondent nos.1 and 2 dated 09.06.2015 and 25.02.2016 and direct the State to refund the said stamp duty amount of Rs. 25,34,400/- deposited by the appellant.

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Ankit Gyan

[2024] 5 S.C.R. 739 : 2024 INSC 439

M/s Sundew Properties Limited
v.
Telangana State Electricity Regulatory Commission & Anr.

(Civil Appeal No. 8978 of 2019)

17 May 2024

[Sanjiv Khanna and Dipankar Datta,* JJ.]

Issue for Consideration

Whether the designation of an entity as a Special Economic Zone-developer ipso facto qualifies the entity to be a deemed distribution licensee, obviating the need for an application u/s. 14 of the Electricity Act; whether Regn 12 of the Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013, and by implication r. 3(2) of the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 are applicable to a SEZ developer recognised as a deemed distribution licensee under the proviso to s. 14(b) read with Regn 13 of the 2013 Regulations; and whether the condition imposed by the State Electricity Regulatory Commission to infuse additional capital as per r. 3(2) of the 2005 Rules read with Regn 12 of the 2013 Regulations, justifiable or extraneous.

Headnotes†

Electricity Act, 2003 – s. 14(b) proviso – Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005 – r. 3(2) – Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013 – Regns 12, 13 – Application for grant of Distribution Licence in the area of supply of an existing Distribution Licensee – Procedure to get identified as deemed distribution licensee – On facts, designation of an entity-appellant as a Special Economic Zone-SEZ developer by the Ministry – Appellant, if ipso facto qualifies the entity to be a deemed distribution licensee, obviating the need for an application u/s. 14 – Regn 12 of the 2013 Regulations and by implication r. 3(2) of the 2005 Rules, if applicable to a SEZ developer recognised as a deemed distribution licensee under the proviso to s. 14(b) read with Regn 13 of the 2013 Regulations – Condition imposed by the

* Author

State Electricity Regulatory Commission to infuse additional capital as per r. 3(2) of the 2005 Rules read with Regn 12 of the 2013 Regulations, if justifiable or extraneous:

Held: Being a SEZ developer in terms of the 2010 Notification does not ipso facto confer upon the appellant the status of a deemed licensee without any scrutiny and without being under any requirement to apply – It is required to make an application in accordance with the 2013 Regulations – This condition has been fulfilled as the status of the appellant as a deemed licensee was upheld pursuant to the application made in accordance with r. 13 of the 2013 Regulations – As regards the applicability of Regn 12 of the 2013 Regulations and r. 3(2) of the 2005 Rules, none of the nine provisos to s. 14, apply to the appellant – Sixth proviso to s. 14 does not pertain to deemed licensees and, thus, the 2005 Rules not applicable to the appellant – Furthermore, it cannot be said that Regn 12 applies implicitly to a deemed licensee as well – Regn 12 pertains solely to regular distribution licensees not to deemed licensees – 'Reading up' Regn 12 so as to expand its ambit to include within it deemed licensees, especially when the Electricity Act does not stipulate any such inclusion, runs counter to proviso to clause (b) of s. 14 of the Electricity Act, which is impermissible and cannot be approved – Thus, the recognition of the status of a deemed distribution licensee cannot hinge on compliance with r. 3(2) of the 2005 Rules read with Regn 12 of the 2013 Regulations – Having been statutorily exempted from complying with Regns 4 to 11, the appellant, being a deemed licensee, would also be exempt from the concomitant obligation of complying with Regn 12 – Condition imposed on appellant to infuse an additional capital, not justified and contrary to the statutory scheme – Judgments and orders of the State Electricity Regulatory Commission and the Appellate Tribunal for Electricity set aside to this extent – Order of the State Electricity Regulatory Commission granting the status of a deemed licensee to the appellant, subject to the condition that its promoters infuse additional capital modified to the extent of excluding such condition. [Paras 25, 37, 28, 29, 34, 35, 37]

Interpretation of statutes – Principles of statutory interpretation – Reading down and reading up:

Held: Reading down and reading up are two principles in the realm of statutory interpretation – Reading down refers to the practice of interpreting a statute narrowly, limiting its scope or

application to specific situations or individuals – This approach is commonly employed when the language of a statute is ambiguous or when there is a need to avoid potential conflicts with other laws or constitutional provisions – If a law is unclear about whether it applies to certain types of businesses, a court may choose to read down the statute to only include those businesses explicitly mentioned in the text – Reading up involves interpreting a statute broadly, extending its scope or application beyond what is expressly stated in the text – Reading up is a concept that is invoked with great caution within the legal framework because it can lead to judicial activism or judicial overreach – Practice of reading up a provision can only be justified when it aligns with legislative intent, maintains the fundamental character of the law, and ensures that the resulting interpretation remains consistent with the original context to which the law applies – This holds especially true for subordinate legislation, which require greater scrutiny – Reading up a provision of subordinate legislation in a manner that it militates against the primary legislation not permissible. [Paras 30, 32]

Legislation – Enabling/primary legislation and subordinate legislation – Harmonization between – Requirement:

Held: Authority to enact subordinate legislation is derived from the enabling/primary legislation and it is imperative that such legislation harmonizes with the provisions outlined in the primary legislation – Electricity Act has conferred power on the Central Government to make Rules and on the Central Electricity Authority and the Central Commission to make Regulations – All such rules/regulations are to be made consistent with the Electricity Act – Rules/Regulations are enacted to supplement the main provision, not to supplant it – They serve the crucial role of bridging potential gaps within the primary legislation, yet, their function is not to create webs and voids merely to clog and hamper their implementation – Any gaps addressed by Rules/Regulations must be discernible within the framework of primary legislation. [Para 33]

Case Law Cited

Sesa Sterlite Limited. v. Orissa Electricity Regulatory Commission and Others [2014] 13 SCR 426 : **(2014) 8 SCC 444;** *State of Bombay v. Pandurang Vinayak Chaphalkar* [1953] 1 SCR 773 : **(1953) 1 SCC 425;** *B.R. Kapur v. State of Tamil Nadu* [2001] Supp. 3 SCR 191 : **(2001) 7 SCC 231 – referred to.**

List of Acts

Electricity Act, 2003; Special Economic Zones Act, 2005; Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013; Andhra Pradesh Reorganisation Act, 2014; Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005.

List of Keywords

Designation of entity; SEZ developer; Deemed distribution licensee; Condition to infuse additional capital; 2010 Notification; Deemed licensee status; Lack of specificity; Legislative intent; Deemed licence; Reading up'; Reading down; Statutory interpretation; Primary legislation; Subordinate legislation.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 8978 of 2019

From the Judgment and Order dated 27.09.2019 of the Appellate Tribunal for Electricity, New Delhi in Appeal No. 03 of 2017

Appearances for Parties

Maninder Singh, Sr. Adv., Mahesh Agarwal, Rishi Agrawala,, Ms. S. Lakshim Iyer, Ms. Anwesha Padhi, Abhishek Munot, Kunal Kaul, Samikrith Rao Puskuri, Ms. Ashita Chawla, Amarpal Singh Dua, E.C. Agrawala, Advs. for the Appellant.

C.S. Vaidyanathan, Sr. Adv., Somanadri Goud Katam, Sirajuddin, D. Abhinav Rao, Vinayak Goel, Gunnalan, Nitish Raj, Rahul Jajoo, Devadipta Das, Ms. Prerna Robin, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Dipankar Datta, J.

THE CHALLENGE

1. This is a statutory appeal before us under section 125 of the Indian Electricity Act, 2003[1]. It registers a challenge to the judgment and

1 Electricity Act

order dated 27th September, 2019 passed by the Appellate Tribunal for Electricity[2] dismissing an appeal carried under section 111 of the Electricity Act by the appellant from the judgment and order dated 15th February, 2016 passed by the Telangana State Electricity Regulatory Commission[3]. Consequently, the impugned judgment and order of the TSERC was upheld.

BRIEF FACTS

2. The basic facts giving rise to this appeal are not disputed. A brief overview of the facts and the trajectory of proceedings, relevant for a decision on the present appeal, are set out hereunder:

a) The appellant was notified by the Ministry of Commerce & Industry (Department of Commerce), Government of India[4] as a 'Developer', in terms of sections 3 and 4 of the Special Economic Zones Act, 2005[5], to establish a sector-specific Special Economic Zone[6] unit for *Information Technology/Information Technology Enabled Services sector* in Madhapur, Ranga Reddy District, Hyderabad, in the former State of Andhra Pradesh.

b) MoCI, *vide* a Notification bearing No.SO 528(E) dated 3rd March, 2010[7] introduced a proviso to section 14(b) of the Electricity Act. The proviso accords upon the developer of a SEZ, the status of a deemed distribution licensee under the provisions of the Electricity Act.

c) Pursuant to the 2010 Notification, the appellant filed an application[8] before the erstwhile Andhra Pradesh Electricity Regulatory Commission seeking identification as a deemed distribution licensee, in terms of the proviso to section 14(b) of the Electricity Act read with regulation 13 and Schedule-2 of the Andhra Pradesh Electricity Regulatory Commission (Distribution Licence) Regulations, 2013[9] and section 49 of the SEZ Act.

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2 APTEL

3 TSERC

4 MoCI

5 SEZ Act

6 SEZ

7 2010 Notification

8 O.P. No. 10 of 2015

9 2013 Regulations

Upon the Andhra Pradesh Reorganisation Act, 2014 coming into force, the application was transferred to the TSERC.

d) By its aforesaid judgment and order dated 15th February, 2016, the TSERC identified and accorded the status of a deemed licensee to the appellant. However, this grant of status was made conditional upon the appellant satisfying the requirements stipulated in rule 3 of the Distribution of Electricity Licence (Additional Requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005[10], compliance whereof was mandatory per regulation 12 [which stipulates that an applicant for grant of distribution licence shall, in addition to regulations 4 to 11, comply with the 2005 Rules] read with regulation 49 of the 2013 Regulations [which stipulates that all the general conditions applicable to a distribution licensee are also equally applicable to a deemed licensee]. The appellant was, therefore, directed to infuse an additional capital of Rs. 26.90 crore as equity share capital, contributed by its promoters, into its power distribution business *via* account payee cheques by 31st March, 2016. The relevant part of the judgment and order of the TSERC is extracted hereunder:

> "16. […] On a close reading of the provisions of section 14, we are of the view that the 'provisos' to section 14 are not applicable to a deemed licensee. The status of a deemed licence to a person under Section 14(b) of the Electricity Act, 2003 emanates from the Notification given under Section 49(1) of the SEZ Act to a developer of SEZ provided the deemed Licensee satisfies the other provisions of the Act.
>
> […]
>
> 18. We are of the view that the provisions contained in sub-section (2), (3), (4), (5) & (6) of Section 15 of the Act are not applicable to a deemed licensee. Moreover, [A.P. Distribution Licence Regulations] contains the Rules relating to procedure for granting of a distribution licensee from Rules 4 to 11 […]

10 2005 Rules

The Rule 13 of the Regulation stipulates that Rules contained in 4 to 11 are not applicable to a deemed licensee and these Rules contain the procedure for granting of a distribution licence to a person. […]

19. The Rule 13 of the [A.P. Distribution Licence Regulations] stipulates that a deemed licensee shall make an application in the form specified in Schedule - 2 to the Commission to get identified as a deemed licensee and rules 4 to 11 in the Regulations are not applicable to a deemed licensee, Thus, the Rule 13 […] has excluded the application of Rules laid down from Rules 4 to 11 […] As observed earlier, the Rules 4 to 11 basically deal with the procedure to be followed by a person for obtaining a licence from the Commission. By implication, Rule 12 is applicable to a deemed licensee also […]

20. We are not able to appreciate the argument of the petitioner that Rule 12 is not applicable to a deemed licensee. In our view, Rule 49 stipulates that all the general conditions applicable to a distribution licensee are also equally applicable to a deemed licensee. Thus, in our view, the Rule 12 is applicable to the petitioner.

21. The next issue that arises is whether the petitioner has complied with the provisions of Rule 12? […] As a stand-alone entity the petitioner does riot fulfil the. conditions laid down in Rule 3 of the Capital Adequacy Rules. However, the Rule 3(2) also stipulates that the net worth of the promoters of the petitioner can be considered for the purpose of computation of the Debt Equity ratio of 30:70 […].

26(A). The [Commission], in exercise of the powers conferred under Section 14 (b) of the Electricity Act, hereby identifies and recognises M/s. Sundew Properties Ltd. […] as a deemed licensee.

26(D). […] the promoters have to contribute 30% of the total anticipated investment of Rs. 89.53 Crores

> which works out to Rs.26.9 Crores on or before 31.03.2016."

e) Aggrieved, the appellant carried an appeal[11] from the aforesaid order of the TSERC to the APTEL. According to the appellant, the directions of the TSERC were in excess of jurisdiction. APTEL dismissed the appeal, as noticed above. It held that the TSERC was justified in ordering infusion of additional equity by the appellant to the tune of Rs.26.90 crore (being 30% of the total anticipated investment of Rs.89.53 crore) as a pre-condition for being identified as a deemed distribution licence. The operative part of the judgment and order passed by the APTEL reads as follows:

> "8.14 […] while the Appellant is not required to apply for grant of license but being a deemed distribution licensee has to fulfil other technical and financial requirements as per prevailing rules and regulations of the State Commission which is mandated to regulate the Electricity business in the state whether it is a DISCOM or any other deemed distribution licensee as in the present case. Accordingly, we are of the opinion that the State Commission has passed the impugned order with careful consideration and proper interpretation of the statute and also considering the judgments passed by Hon'ble Supreme Court in Sesa Sterilite [sic] case (supra) […]"

f) It is this judgment and final order that the appellant has subjected to challenge in this statutory appeal by invoking the appellate jurisdiction of this Court under section 125 of the Electricity Act.

SUBMISSIONS

3. Mr. Singh, learned senior counsel appearing for the appellant, challenged the validity of the orders of the TSERC and the APTEL by advancing the following submissions:

a) The TSERC and the APTEL erred in failing to recognize that under section 14(b) of the Electricity Act, a developer of an SEZ is *ipso facto* and unconditionally deemed to be a distribution

11 Appeal No.3 of 2017

licensee, thus eliminating the need for a separate licence application. Recognition of the status of a deemed distribution licensee is a ministerial act, effected automatically upon fulfilment of conditions laid down in the SEZ Act, independent of rule 3(2) of the 2005 Rules read with regulation 12 of the 2013 Regulations.

b) The status of deemed distribution licensee stands bestowed upon the appellant by virtue of the 2010 Notification, requiring no further action. This position has been recognized and approved by both the TSERC and the APTEL.

c) Under the 2013 Regulations, there are two types of licensees: first, those who apply for a distribution licence under regulations 2(d) and 12, and secondly, those already deemed licensees, seeking recognition of their status as such, under regulations 2(h) and 13. The appellant belongs to the latter category.

d) Regulation 12 of the 2013 Regulations applies to general applicants seeking a distribution licence, mandating compliance with both the 2005 Rules and the procedures prescribed in regulations 4 to 11. It cannot apply to a deemed licensee under regulation 13. The TSERC's finding, as approved by the APTEL, that the 2005 Rules are in-built into the 2013 Regulations and therefore have to be satisfied by the appellant because of implied application of regulation 12 to deemed licensees, is contrary to the provisions of the Electricity Act and the very scheme of the 2013 Regulations.

e) APTEL erred by agreeing with the TSERC's reasoning that the requirement to infuse Rs. 26.90 crore in equity was imposed on the appellant under section 16 of the Electricity Act, despite recognising the appellant as a deemed distribution licensee. Conditions under section 16, whether general or specific, must be 'specified' by the Appropriate Commission through regulations according to section 2(62) of the Electricity Act.

4. Resting on the aforesaid submissions, learned senior counsel urged this Court to allow the appeal and set-aside the orders of the TSERC and the APTEL to the extent requiring the appellant to comply with the conditions stipulated in rule 3 of the 2005 Rules and infuse additional capital to gain the status of a deemed licensee.

5. *Per* contra, Mr. Vaidyanathan, learned senior counsel appearing for the second respondent (Southern Power Distribution Company of Telangana Limited), joined by Mr. Goud, learned counsel appearing for respondent no. 1 (TSERC), supported the impugned judgment and order and advanced the following submissions:

a) No doubt, the appellant, a SEZ developer, may be granted the status of a deemed licensee; however, the 2005 Rules and the 2013 Regulations will be applicable to the appellant as per the law laid down by this Court in ***Sesa Sterlite Limited. v. Orissa Electricity Regulatory Commission and others***[12].

b) The appellant cannot be deemed to be a distribution licensee on its own without making an application under regulation 13.

c) There is a necessity to harmoniously interpret the SEZ Act and the Electricity Act to uphold the provisions of both enactments. The appellant cannot argue that the 2005 Rules and the 2013 Regulations do not apply to it, being a SEZ developer.

d) TSERC is empowered to impose general and specific conditions at its discretion. The purpose of requiring the appellant to infuse an additional capital under the 2005 Rules was to assess the credit-worthiness of the appellant as it had accumulated losses at the end of the financial year 2013-2014 and more than 50% of its net-worth has been wiped-out, a fact which is reflected from the Statutory Auditor's report.

6. No case for interference having been set up by the appellant, learned counsel for respondents prayed for dismissal of the appeal.

STATUTORY FRAMEWORK

7. Before proceeding further, it is imperative to refer to certain statutory provisions.

8. Section 14 of the Electricity Act deals with the grant of a licence:

> "**14. Grant of Licence –** The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person –

12 [2014] 13 SCR 426 : (2014) 8 SCC 444

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader,

in any area as may be specified in the licence:

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

Provided also that in case an Appropriate Government transmits electricity or distributes electricity or undertakes trading in electricity, whether before or after the commencement of this Act, such Government shall be deemed to be a licensee under this Act, but shall not be required to obtain a licence under this Act:

Provided also that the Damodar Valley Corporation, established under sub-section (1) of section 3 of the Damodar Valley Corporation Act, 1948, shall be deemed to be a licensee under this Act but shall not be required to obtain a licence under this Act and the provisions of the Damodar Valley Corporation Act, 1948, in so far as they are not inconsistent with the provisions of this Act, shall continue to apply to that Corporation:

Provided also that the Government company or the company referred to in sub-section (2) of section 131 of this Act and the company or companies created in pursuance of the Acts specified in the Schedule, shall be deemed to be a licensee under this Act:

Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements [relating to the capital adequacy, credit-worthiness, or code of conduct] as may be prescribed by the Central Government, and no such applicant, who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:

Provided also that in a case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate licence from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply:

Provided also that where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under section 53:

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity."

9. To determine who qualifies as a deemed licensee under the Electricity Act, we may refer to the 2013 Regulations.

10. Regulation 2(i)(h) of the 2013 Regulations defines "deemed licensee" as follows:

> "(h) 'Deemed Licensee' means a person authorised under sub-section (b) of Section 14 and also under the first, second, third, and fifth provisos to section 14 of the Act to operate and maintain a distribution system for supply of electricity to the consumers in his area of supply."

11. Regulation 13 of the 2013 Regulations stipulates the procedure to get identified as a deemed distribution licensee. It reads:

> "13. The deemed licensees shall make application in the form specified in Schedule- 2 to the Commission to get identified as the deemed Licensee. Provided that nothing in Regulations 4 to 11 shall apply to deemed licensees."

12. Insofar as a developer under the SEZ Act is concerned, a reference may be made to the scheme of the SEZ Act to ascertain its status as deemed distribution licensee.

13. The policy for SEZs was introduced with an objective to create a competitive export environment and to attract foreign investment. It levels the playing field for domestic businesses globally and introduces favourable policies in investment, taxation, trade, customs, and labour regulations. In line with this, for the purpose of ensuring consistent and high-quality power supply to these SEZ units, the MoCI, *vide* the 2010 Notification [under clause (b) of sub-section (1) of section 49 of the SEZ Act] has specified that the 'developer' of the SEZ shall be deemed to be a 'distribution licensee' under the provisions of the Electricity Act. The proviso inserted in clause (b) of section 14 of the Electricity Act, *vide* the 2010 Notification, reads as follows:

> "Provided that the Developer of a Special Economic Zone notified under sub-section (1) of Section 4 of the Special Economic Zones Act, 2005, shall be deemed to be a licensee for the purpose of this clause, with effect from the date of notification of such Special Economic Zone."

14. With the inclusion of the aforementioned proviso to section 14(b) of the Electricity Act, it is evident that a SEZ developer is deemed to be a distribution licensee.

15. The main contention of the parties that whether the TSERC imposed condition to infuse additional capital per rule 3(2) of the 2005 Rules read with regulation 12 of the 2013 Regulations is justifiable or

extraneous is deliberated at length in a later part of this judgment. Regulation 12 provides that a person applying for a grant of a distribution licence shall, in addition to regulations 4 to 11, comply with the 2005 Rules. Regulation 12 is extracted below:

> "**12. Application for grant of Distribution Licence in the area of supply of an existing Distribution Licensee** – A person applying for grant of a licence for distribution of electricity through his own distribution system within the same area of supply of an existing Distribution Licensee shall, in addition to the provisions of Regulation 4 to 11, comply with "Distribution of Electricity Licence (additional requirements of Capital Adequacy, Creditworthiness and Code of Conduct) Rules, 2005" issued by the Central Government."

16. Rule 3 is extracted hereunder:

> "**3. Requirements of capital adequacy and creditworthiness. –**
>
> (1) The Appropriate Commission shall, upon receipt of an application for grant of licence for distribution of electricity under sub-section (1) of section 15 of the Electricity Act, 2003, decide the requirement of capital investment for distribution network after hearing the applicant and keeping in view the size of the area of supply and the service obligation within that area in terms of section 43.
>
> (2) The applicant for grant of licence shall be required to satisfy the Appropriate Commission that on a norm of 30% equity on cost of investment as determined under sub-rule (1), he including the promoters, in case the applicant is a company, would be in a position to make available resources for such equity of the project on the basis of net worth and generation of internal resources of his business including of promoters in the preceding three years after excluding his other committed investments."

ISSUES

17. Having noticed the relevant statutory framework, we are now tasked with deciding two short issues:

a) Whether the designation of an entity as a SEZ developer by the MoCI *ipso facto* qualifies the entity to be a deemed distribution licensee, obviating the need for an application under section 14 of the Electricity Act?

b) Whether regulation 12 of the 2013 Regulations, and by implication rule 3(2) of the 2005 Rules, are applicable to a SEZ developer recognised as a deemed distribution licensee under the proviso to section 14(b) of the Electricity Act read with regulation 13 of the 2013 Regulations?

ANALYSIS

18. We have considered the submissions advanced by learned counsel for the parties and have also perused the materials on record.

Issue (a)

19. It would not be inapt to be reminded of what was stated by a Bench of two Hon'ble Judges of this Court in ***State of Bombay v. Pandurang Vinayak Chaphalkar***[13] nearly seventy years ago:

> "11. […] When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion."

20. In view of the existing facts, we are inclined to the view that the very purpose of the deeming fiction in the proviso to section 14(b) of the Electricity Act is to confer upon an entity like the appellant a status which is otherwise available in accordance with the Electricity Act. In other words, as an effect of the 2010 Notification inserting the proviso to section 14(b), the appellant is entitled to the privilege of being acknowledged as a (deemed) distribution licensee under the Electricity Act for supply of power within its SEZ area. Once the appellant is a (deemed) distribution licensee, certain benefits and/or privileges do enure in its favour.

13 [1953] 1 SCR 773 : (1953) 1 SCC 425

21. The respondents have heavily relied on ***Sesa Sterlite Limited*** (supra) to assert that there has to be a harmonious construction of both the SEZ Act and the Electricity Act to give effect to the provisions of both the enactments, so long as they are not inconsistent with each other.

22. A Bench of two Hon'ble Judges of this Court in ***Sesa Sterlite Limited*** (supra) held:

> "43. The reading of Section 49 of the SEZ Act would reveal that the Central Government has got the authority to direct that any of the provisions of a Central Act and the rules and regulations made thereunder would not apply or to declare that some of the provisions of the Central Acts shall apply with exceptions, modifications and adaptation to the special economic zone. So, under the scheme of the Special Economic Zones Act, the Central Government has to first notify as to what extent the provision of the other Acts are to be made applicable or applicable with modification or not applicable for the special economic zone area. It is in furtherance thereto, the Government of India, Ministry of Commerce and Industry through its Notification dated 21-3-2012, with regard to power generation in special economic zone, has declared that all the provisions of the Electricity Act, 2003 and the Electricity Rules, 2005 shall be applicable to the generation, transmission and distribution of power, whether stand-alone or captive power. This notification would clarify that there is no inconsistency between the Special Economic Zones Act, 2005 and the Electricity Act, 2003.
>
> […]
>
> 46. To recapitulate briefly, in the present case no doubt by virtue of the status of a developer in the SEZ area, the appellant is also treated as deemed distribution licensee. However with this, it only gets exemption from specifically applying for licence under Section 14 of the Act."

23. The question in ***Sesa Sterlite Limited*** (supra), was whether the appellant - a deemed distribution licensee, being a developer of Special Economic Zone (SEZ) and having a unit in the SEZ, is liable to pay Cross-Subsidy Surcharge (CSS). It was held that the appellant

would be liable to pay CSS for several reasons, including on the facts that it was using dedicated transmission lines belonging to the distribution licensee for the area in question. This Court interpreted the expression 'open access' and the rationale behind CSS and additional surcharge to observe that the former was payable by a distribution licensee and the latter was to meet the fixed cost of the distribution licensee of the area. The provision of open access, it is observed, balances the right of the consumers to purchase from a source of their choice. The rationale and the ratio of the decision, therefore, is that a deemed distribution licensee is treated at par and not different from a distribution licensee. Accordingly, if CSS is payable by a distribution licensee, the deemed distribution licensee is equally liable to pay the same. This decision, in other words, equates deemed distribution licensee with the distribution licensee for the purpose of supply of electricity to the consumers. ***Sesa Sterlite Limited*** (supra) is not a decision for the proposition that deemed distribution licensee, to qualify as a deemed distribution licensee, must meet the criteria, including the capital requirements as applicable by regulations to a distribution licensee.

24. Further, the provisos to section 14 of the Electricity Act distinguish between entities that are *ipso facto* deemed distribution licensees and those that are merely declared as deemed licensees without clarity on the necessity of making an application to obtain a licence. For instance, the third and fourth provisos to section 14 not only confer the status of deemed licensees to the State Government and the Damodar Valley Corporation, respectively, but also explicitly exempt them from the requirement to obtain a licence. Entities not covered by these specific provisos would, therefore, be required to obtain a licence. The requirement of obtaining a license has to be read into the other provisos to section 14 since, for instance, the second and fifth provisos to section 14 grant deemed licensee status to Central/ State Transmission Utility and a government company, respectively, but neither specifies the requirement to obtain a license nor exempts them from obtaining license.

25. As far as the 2010 Notification is concerned, the proviso to section 14(b) introduced by the said Notification, confers deemed licensee status on SEZ developers. However, such conferment does not explicitly exclude the requirement of obtaining a licence. This lack of specificity, especially when compared with the clear provisions for

other entities, suggests that the legislative intent was not to *ipso facto* grant SEZ developers the status of deemed distribution licensees, thereby obliging them to obtain a licence by making an application in terms of regulation 13. TSERC is, therefore, empowered to scrutinise such applications in accordance with law, however, only limited to the provisions which are applicable to deemed licensees. Verification and acceptance recognise their status as deemed licensees.

Issue (b):

26. Issue (b) revolves around rule 3(2) of the 2005 Rules, which per the TSERC and the APTEL, the appellant is bound to adhere by infusing additional capital in order to qualify as a deemed licensee. While the appellant contends that the 2010 Notification, by necessary consequence, grants upon the appellant the status of a deemed licensee, the respondents submit that the identification of the appellant as a deemed distribution licensee is conditional upon the appellant satisfying the other requirements of the Electricity Act, specifically the sixth proviso to section 14 of the Electricity Act which provides for compliance with additional requirements like capital adequacy which as per the respondents includes rule 3 of the 2005 Rules read with regulation 12 of the 2013 Regulations.

27. It is contended by the respondents that the application of 2005 Rules to the appellant, a SEZ developer, stems from the sixth proviso to section 14 read with regulation 12 of the 2013 Regulations.

28. Let us now deal with the provisos to section 14. Upon a bare reading of the provision, it becomes crystal clear that not only does the sixth proviso, but none of the nine provisos to section 14, apply to the appellant, a SEZ developer. Even the TSERC and the APTEL are *ad idem* with this view. The status of a SEZ developer as a deemed licensee emanates from the 2010 Notification, which introduced the proviso to section 14(b), conferring deemed licensee status to SEZ developers. Reading anything beyond this would defeat the very purpose of the proviso and the concept of the deemed licence. The sixth proviso does not pertain to deemed licensees and, therefore, the 2005 Rules are not applicable to the appellant.

29. Upon closer examination of regulation 12, it becomes apparent that its application does not extend to applicants who are otherwise deemed licensees. The interpretation of regulation 12 as requiring

additional capital infusion for an applicant for acceptance of a deemed licensee status appears to be at odds with the language and intent of the 2013 Regulations itself. TSERC has, in essence, interpreted regulation 12 by reading it up to mean that it also applies to a person who is a deemed licensee, and in doing so, the TSERC has aimed to achieve indirectly what it could not directly.

30. Reading down and reading up are two principles often discussed in legal contexts, particularly in the realm of statutory interpretation. Reading down, which has been firmly ingrained in our jurisprudence, refers to the practice of interpreting a statute narrowly, limiting its scope or application to specific situations or individuals. This approach is commonly employed when the language of a statute is ambiguous or when there is a need to avoid potential conflicts with other laws or constitutional provisions. For example, if a law is unclear about whether it applies to certain types of businesses, a court may choose to read down the statute to only include those businesses explicitly mentioned in the text. On the other hand, reading up involves interpreting a statute broadly, extending its scope or application beyond what is expressly stated in the text. Reading up is a concept that is invoked with great caution within our legal framework because it can lead to judicial activism or judicial overreach, where courts expand the reach of laws beyond what the legislature intended.

31. A Constitution Bench of this Court in ***B.R. Kapur v. State of Tamil Nadu***[14], while stating that reading up of a statute is not permissible, held thus:

> "39. Section 8(4) opens with the words 'notwithstanding anything in sub-section (1), sub-section (2) or sub-section (3)', and it applies only to sitting members of Legislatures. There is no challenge to it on the basis that it violates Article 14. If there were, it might be tenable to contend that legislators stand in a class apart from non-legislators, but we need to express no final opinion. In any case, if it were found to be violative of Article 14, it would be struck down in its entirety. There would be, and is no question of so reading it that its provisions apply to all, legislators

14 [2001] Supp. 3 SCR 191 : (2001) 7 SCC 231

> and non-legislators, and that, therefore, in all cases the disqualification must await affirmation of the conviction and sentence by a final court. That would be 'reading up' the provision, not 'reading down', and that is not known to the law."

32. The literal rule of interpreting a statute empowers courts to iron out the creases within legislation but without altering the very fabric of which it is made. The practice of reading up a provision can only be justified when it aligns with legislative intent, maintains the fundamental character of the law, and ensures that the resulting interpretation remains consistent with the original context to which the law applies. This holds especially true for subordinate legislation, which require greater scrutiny in this regard. Reading up a provision of subordinate legislation in a manner that it militates against the primary legislation is not permissible.

33. The authority to craft subordinate legislation is derived from the enabling/primary legislation and it is imperative that such legislation harmonizes with the provisions outlined in the enabling/primary legislation. The Electricity Act has conferred power on the Central Government to make Rules [see section 175], and on the Central Electricity Authority and the Central Commission to make Regulations [see sections 176 and 177, respectively]. All such rules/regulations are to be made consistent with the Electricity Act. Section 181 of the Electricity Act confers power on the State Commissions to make Regulations but such regulations too must be consistent with the provisions of the primary enactment and the rules framed thereunder generally. Rules and Regulations are enacted to supplement the main provision, not to supplant it. They serve the crucial role of bridging potential gaps within the primary legislation, yet, their function is not to create webs and voids merely to clog and hamper their implementation. Any gaps addressed by Rules and Regulations must be discernible within the framework of the primary legislation.

34. In the present case, the TSERC, in paragraph 19, asserted that regulation 12 applies implicitly to a deemed licensee as well. We do not agree with this reasoning, mainly for two reasons. First, the primary legislation, the Electricity Act, through the proviso inserted in section 14(b), confers deemed licensee status upon SEZ developers without imposing any specific conditions. Secondly, the

2013 Regulations make a clear distinction between an applicant seeking a licence [as defined under regulation 2(d)] and a deemed distribution licensee seeking recognition as such [as defined under regulation 2(h)]. Regulation 2(d) defines an "applicant" as "a person who has submitted an application to the Commission for the grant of a distribution licence". In contrast, regulation 2(h) defines a "deemed licensee" as "a person authorized under sub-section (b) of Section 14, and also under the first, second, third, and fifth provisos to section 14 of the Act, to operate and maintain a distribution system for supplying electricity to consumers in their area of supply". The 2013 Regulations clearly delineate distinct categories of licensees. Regulation 12 pertains solely to regular distribution licensees as defined under regulation 2(h), not to deemed licensees. 'Reading up' regulation 12 so as to expand its ambit to include within it deemed licensees, especially when the Electricity Act does not stipulate any such inclusion, runs counter to the subsequently inserted proviso to clause (b) of section 14 of the Electricity Act—an exercise which is impermissible and which we cannot approve. Therefore, the recognition of the status of a deemed distribution licensee cannot hinge on compliance with rule 3(2) of the 2005 Rules read with regulation 12 of the 2013 Regulations.

35. The language of regulation 12 merits careful scrutiny. It states that an applicant shall, "in addition to the provisions of Regulation 4 to 11", comply with the provisions of the 2005 Rules. It is evident that it is a normal applicant [as defined under regulation 2(d)], which is tasked with complying with regulations 4 to 11, that has to comply with the 2005 Rules. However, the appellant herein, as discussed previously, is not a regular applicant but a deemed distribution licensee [as defined under regulation 2(h)], and is governed by regulation 13, the proviso to which specifically states that nothing in regulations 4 to 11 would apply to deemed licensees. Having thus been statutorily exempted from complying with regulations 4 to 11, we are of the opinion that the appellant, being a deemed licensee, would also be exempt from the concomitant obligation of complying with regulation 12, in view of the language of the provision, which imposes the burden of complying with regulation 12 only on those applicants who come within the purview of regulations 4 to 11. The appellant falling outside the scope of the latter, would thus necessarily fall outside the scope of the former too.

36. TSERC's reliance on regulation 49 of the 2013 Regulations to enforce the applicability of regulation 12 also appears to be flawed. Regulation 49, situated within Chapter-4 [General Conditions of Distribution Licence] of the 2013 Regulations, specifies that "these general conditions shall apply to distribution licensees and to all deemed distribution licensees". A straightforward reading reveals that the term 'general conditions' in regulation 49 pertains exclusively to the general conditions outlined in Chapter-4. By no stretch of imagination could the scope of this provision be widened so as to include within its ambit regulation 12, which forms part of Chapter-3 [Procedure for Grant of Distribution Licence] of the 2013 Regulations.

CONCLUSION

37. To sum up, being a SEZ developer in terms of the 2010 Notification does not *ipso facto* confer upon the appellant the status of a deemed licensee without any scrutiny and without being under any requirement to apply; it is required to make an application in accordance with the 2013 Regulations. We have been apprised that this condition has been fulfilled as the status of the appellant as a deemed licensee has already been upheld pursuant to the application made in accordance with rule 13 of the 2013 Regulations. The first issue is answered accordingly. As far as the second issue is concerned, the condition stipulated in rule 3(2) of the 2005 Rules, as imposed by the TSERC with a direction to infuse an additional capital of Rs. 26.90 crore is not justified and contrary to the statutory scheme as discussed aforesaid. The judgments and orders of the TSERC and the APTEL are set aside to this extent. The order of the TSERC, which grants the status of a deemed licensee to the appellant, however, subject to the condition that its promoters infuse additional capital is accordingly modified to the extent of excluding such condition.

38. The appeal is partly allowed in the aforesaid terms. No costs.

Result of the case: Appeal partly allowed.

[†]*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 761 : 2024 INSC 387

Child in Conflict with Law Through his Mother
v.
The State of Karnataka and Another

(Criminal Appeal No. 2411 of 2024)

07 May 2024

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

Issue for Consideration

(i) Whether the period provided for completion of preliminary assessment u/s. 14(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015 is mandatory or directory; (ii) Whether the words 'Children's Court' and 'Court of Sessions' in Juvenile Justice (Care and Protection of Children) Act, 2015 and the 2016 Rules shall be read interchangeably; (iii) What is the time period to file an appeal u/s. 101(2) of the Act against an order of the Board passed u/s. 15 of the Act; (iv) Whether all the orders passed by the Courts, Tribunals, Boards and the Quasi-Judicial Authorities, the names of the Presiding Officer and/or the Members who sign the orders shall be mentioned; (v) Whether the Presiding Officers and/or Members, while passing the order shall properly record presence of the parties and/or their counsels, the purpose for which the matter is being adjourned and the party on whose behalf the adjournment has been sought and granted.

Headnotes†

Juvenile Justice (Care and Protection of Children) Act, 2015 – s. 14(3) – Whether the period provided for completion of preliminary assessment u/s.14(3) of the 2015 Act is mandatory or directory:

Held: The preliminary assessment into the heinous offence by the Board in terms of Section 15(1) of the Act has to be concluded within a period of three months in terms of Section 14(3) of the Act – The Act as such does not provide for any extension of time and also does not lay down the consequence of non-compilation of inquiry within the time permissible – In the absence thereof the provision prescribing time limit of completion of inquiry cannot be held to be mandatory – Thus, the provision of Section 14(3) of the Act, providing for the period of three months for completion of a preliminary assessment under Section 15 of the Act, is not

* Author

mandatory – The same is held to be directory – The period can be extended, for the reasons to be recorded in writing, by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate – As in the process of preliminary inquiry there is involvement of many persons, namely, the investigating officer, the experts whose opinion is to be obtained, and thereafter the proceedings before the Board, where for different reasons any of the party may be able to delay the proceedings, the time so provided in Section 14(3) cannot be held to be mandatory, as no consequences of failure have been provided as is there in case of enquiry into petty offences in terms of Section 14(4) of the Act. [Paras 9.13, 9.14, 18(i)]

Juvenile Justice (Care and Protection of Children) Act, 2015 – Juvenile Justice (Care and Protection of Children) Model Rules, 2016 – Whether the words 'Children's Court' and 'Court of Sessions' in Juvenile Justice (Care and Protection of Children) Act, 2015 and the 2016 Rules shall be read interchangeably:

Held: From a conjoint reading of the provisions of the Act and the 2016 Rules, wherever words 'Children's Court' or the 'Sessions Court' are mentioned both should be read in alternative – In the sense where Children's Court is available, even if the appeal is said to be maintainable before the Sessions Court, it has to be considered by the Children's Court – Whereas where no Children's Court is available, the power is to be exercised by the Sessions Court – The words 'Children's Court' and 'Court of Sessions' in Juvenile Justice (Care and Protection of Children) Act, 2015 and the 2016 Rules shall be read interchangeably – Primarily jurisdiction vests in the Children's Court – However, in the absence of constitution of such Children's Court in the district, the power to be exercised under the Act is vested with the Court of Sessions. [Paras 12.2, 18(ii)]

Juvenile Justice (Care and Protection of Children) Act, 2015 – What is the time period to file an appeal u/s. 101(2) of the Act against an order of the Board passed u/s. 15 of the Act:

Held: Appeal, under Section 101(2) of the Act against an order of the Board passed under Section 15 of the Act, can be filed within a period of 30 days – The appellate court can entertain the appeal after the expiry of the aforesaid period, provided sufficient cause is shown – Endeavour has to be made to decide any such appeal filed within a period of 30 days. [Para 18(iii)]

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Juvenile Justice (Care and Protection of Children) Act, 2015 – Whether all the orders passed by the Courts, Tribunals, Boards and the Quasi-Judicial Authorities, the names of the Presiding Officer and/or the Members who sign the orders shall be mentioned:

Held: In all the orders passed by the Courts, Tribunals, Boards and the Quasi-Judicial Authorities the names of the Presiding Officer and/or the Members who sign the orders shall be mentioned – In case any identification number has been given, the same can also be added. [Para 18(vii)]

Juvenile Justice (Care and Protection of Children) Act, 2015 – Whether the Presiding Officers and/or Members, while passing the order shall properly record presence of the parties and/or their counsels, the purpose for which the matter is being adjourned and the party on whose behalf the adjournment has been sought and granted:

Held: The Presiding Officers and/or Members while passing the order shall properly record presence of the parties and/or their counsels, the purpose for which the matter is being adjourned and the party on whose behalf the adjournment has been sought and granted. [Para 18(viii)]

Juvenile Justice (Care and Protection of Children) Act, 2015 – ss. 7, 3 – Juvenile Justice (Care and Protection of Children) Model Rules, 2016 – An FIR was registered against the Child in Conflict with Law (CCL) u/ss. 376(i), 342 IPC and ss. 4, 5, 6, 7 and 8 POCSO Act – Arguments regarding whether the CCL is to tried by the Board or as an adult by the Children's Court were heard by the Principal Magistrate and the Member of the Board – Matter was adjourned to 05.04.2022 for order – On 05.04.2022, the Principal Magistrate of the Board passed an order holding that as per preliminary assessment report and the social investigation report, the CCL is to be tried as an adult by the Children's Court – However, when the file was put up before the Member of the Board for signatures, he recorded that he was having a dissenting view and would pass a detailed order – No separate order was passed – On 12.04.2022, the matter was heard afresh by two Members of the Board without there being the Principal Magistrate – Order was passed that as per the preliminary assessment report and the social investigation report, the enquiry regarding the

alleged offence committed by the CCL has to be conducted by the Board as a juvenile – Correctness:

Held: Section 7 of the Act deals with the procedure in relation to the Board – Sub-Section 3 thereof provides that the Board may act notwithstanding absence of any member of the Board – No order passed by the Board shall be invalid by reason only of absence of any member during any stage of proceedings – The proviso thereto provides that at the time of final disposal of the case or making an order under Section 18(3) of the Act, there shall be at least two members including the Principal Magistrate – Section 7(4) of the Act provides that in case there is any difference of opinion in the interim or the final disposal, the opinion of the majority shall prevail – Where there is no such majority, the opinion of the Principal Magistrate shall prevail – A perusal of the record shows that after the order was reserved on 29.03.2022, the matter was listed on 05.04.2022 for orders – The Principal Magistrate recorded his opinion that the CCL is to be tried by the Children's Court – The other member of the Board recorded his dissent though, no detailed reasons were given as such – In such a situation the opinion of the Principal Magistrate will prevail – In the case in hand the order was signed by the Principal Magistrate – Even if the other member of the Board had not signed the order and had merely mentioned that he had a dissenting view, without any reasons being recorded, the order of the Principal Magistrate will prevail – Thus, order passed by the Board as signed by the Principal Magistrate on 05.04.2022 was final. [Paras 15.2, 15.4, 15.5]

Case Law Cited

Topline Shoes Ltd. v. Corporation Bank [2002] 3 SCR 1167 **: (2002) 6 SCC 33 : 2002 INSC 287;** *Kailash v. Nanhku and Others* [2005] 3 SCR 289 **: (2005) 4 SCC 480 : 2005 INSC 186;** *State of Bihar and Others v. Bihar Rajya Bhumi Vikas Bank Samiti* [2018] 7 SCR 1147 **: (2018) 9 SCC 472 : 2018 INSC 648;** *C. Bright v. District and Others* [2020] 7 SCR 997 **: (2021) 2 SCC 392 : 2020 INSC 633 – relied on.**

Bhola v. State of Madhya Pradesh **(2019) SCC OnLine MP 521;** *Neeraj and Others v. State of Haryana* **(2005) SCC OnLine P&H 611***; X v. State* **(2019) SCC OnLine Del 11164;** *CCL v. State (NCT) of Delhi* **(2023) SCC OnLine Del 5063 – approved.**

**Child in Conflict with Law Through his Mother v.
The State of Karnataka and Another**

Balaji Baliram Mupade and Another v. State of Maharashtra and Others **(2021) 12 SCC 603;** *Barun Chandra Thakur v. Master Bholu & Anr.* **[2022] 10 SCR 595 : 2022 INSC 716;** *Shilpa Mittal v. State (NCT of Delhi)* **[2020] 2 SCR 478 : (2020) 2 SCC 787 : 2020 INSC 25;** *SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd.* **[2019] 3 SCR 1050 : (2019) 12 SCC 210 : 2019 INSC 187;** *Afcons Infrastructure Limited and Another v. Cherian Varkey Construction Company Private Limited and Others* **(2010) 8 SCR 1053 : (2010) 8 SCC 24 : 2010 INSC 431;** *Surjit Singh Kalra v. Union of India and Another* **[1991] 1 SCR 364 : (1991) 2 SCC 87 : 1991 INSC 36;** *Rajbir Singh Dalal (Dr.) v. Chaudhari Devi Lal University, Sirsa and Another* **[2008] 11 SCR 992 : (2008) 9 SCC 284 : 2008 INSC 913;** *Central Bureau of Investigation, Bank Securities and Fraud Cell v. Ramesh Gelli and Others* **[2016] 1 SCR 762 : (2016) 3 SCC 788 : 2016 INSC 134 – referred to.**

Books and Periodicals Cited

Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., pp.71-76 **– referred to.**

List of Acts

Juvenile Justice (Care and Protection of Children) Act, 2015; Juvenile Justice (Care and Protection of Children) Model Rules, 2016.

List of Keywords

Child in Conflict with Law (CCL); Juvenile Justice; Principal Magistrate of the Board; Preliminary assessment report; Social investigation report; Preliminary assessment u/s. 14(3) of the Juvenile Justice (Care and Protection of Children) Act, 2015; Children's Court' and Court of Sessions; Time period to file an appeal u/s. 101(2) of the Juvenile Justice (Care and Protection of Children) Act, 2015; Recording presence of the parties and/or their counsels.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2411 of 2024

From the Judgment and Order dated 15.11.2023 of the High Court of Karnataka at Bengaluru in CRLRP No. 1243 of 2023

Appearances for Parties

S. Nagamuthu, Sidharth Luthra, Sr. Advs., Ms. Sakshi Kakkar, Shakti Singh, R Karthik, T Hari, Advs. for the Appellant.

Aman Panwar, A.A.G., V. N. Raghupathy, Manendra Pal Gupta, Shivam Singh Baghel, Harsh Gattani, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Rajesh Bindal, J.

Leave granted.

BRIEF FACTS

2. The present appeal has been filed by Child in Conflict with Law[1] impugning the order[2] passed by the High Court[3].

3. Vide aforesaid order, the High Court set aside the order dated 10.04.2023 passed by the Board[4].

4. Briefly, the facts as available on record are that FIR[5] was registered against the CCL for commission of offences under sections 376(i), 342 IPC and sections 4, 5, 6, 7 and 8 of Protection of Children from Sexual Offences Act, 2012[6]. After his apprehension on 03.11.2021, the CCL was produced before the Board. On 09.11.2021, he was released on bail. After completion of investigation, charge-sheet was filed. The Board was called upon to decide the issue as to whether the CCL is to be tried by the Board or as an adult by the Children's Court. The arguments in the matter were heard on 29.03.2022 by the Principal Magistrate and a Member of the Board. The matter was adjourned to 05.04.2022 for order.

   4.1 On 05.04.2022, the Principal Magistrate of the Board passed an order holding that as per preliminary assessment report

1 Hereinafter referred to as "CCL".

2 Order dated 15.11.2023 passed in Criminal Revision Petition No. 1243 of 2023.

3 High Court of Karnataka at Bengaluru.

4 Additional Juvenile Justice Board, Bangalore City.

5 Crime No. 239/2021 dated 03.11.2021.

6 Hereinafter referred to as "2012 Act".

and the social investigation report, the CCL is to be tried as an adult by the Children's Court. The record was directed to be transferred to the Court concerned. However, when the file was put up before the Member of the Board for signatures, he recorded: "*I am having a dissenting view to abovesaid order. I will pass detailed order on next date of hearing*.". The matter was adjourned to 12.04.2022. No separate order, as recorded by the Member of the Board on 05.04.2022, was passed by him. On 12.04.2022 the matter was apparently heard afresh by two Members of the Board without there being the Principal Magistrate. Order was passed that as per the preliminary assessment report and the social investigation report, the enquiry regarding the alleged offence committed by the CCL has to be conducted by the Board as a juvenile.

4.2 An application under Section 19 of the Juvenile Justice (Care and Protection of Children) Act, 2015[7] dated 18.10.2022 was filed by the complainant/mother of the victim before the Board for termination of proceedings and transferring the matter to the Children's Court, to which objections were filed by the CCL.

4.3 Vide order dated 10.4.2023, the Board dismissed the application.

4.4 Impugning the aforesaid order, revision petition[8] was filed by the Complainant before the High Court, which was allowed. The impugned order dated 10.04.2023 passed by the Board was set aside. The Board was directed to transmit the record to the Children's Court for trial.

4.5 The aforesaid order is under challenge before this Court by the CCL.

ARGUMENTS OF THE APPELLANT

5. Mr. Sidharth Luthra and Mr. S. Nagamuthu, learned senior counsel appearing for the CCL, submitted that the practice of passing order while stating that the reasons will follow has been deprecated by this Court. It deprives the party concerned to avail of his appropriate

7 Hereinafter referred to as "the Act".

8 Criminal Revision Petition No. 1243 of 2023.

remedy, when no reasons are available. In the case in hand, firstly the Principal Magistrate mentioned that the order was being passed by him and another Member of the Board. However, the Member of the Board did not sign the same. He only mentioned that he disagrees with the views of the Principal Magistrate and will pass a detailed order on the next date. The matter was kept for 12.04.2022. In support of the arguments, reliance was placed upon the judgment of this Court in **Balaji Baliram Mupade and Another v. State of Maharashtra and Others[9].**

5.1 It was further argued that the order passed on 05.04.2022 is not an order in the eyes of law. The matter being listed on 12.04.2022, the arguments were heard by two Members of the Board including the Member who had earlier not signed the order. An order was passed directing that the enquiry into the offence shall be conducted by the Board, treating the CCL as juvenile. He further referred to the documents placed on record with Crl. M.P. No. 28749 of 2024 that even the Principal Magistrate was present in Court on that date. He had also heard the arguments but did not sign the order. There was a well-considered order passed on 12.04.2022, against which the only remedy available to the victim was to file an appeal. However, the same was not availed of within the period provided for under Section 101 of the Act.

5.2 It was further submitted that after the commencement of trial before the Board, nearly six months thereafter an application was filed for terminating the proceedings before the Board and transferring the matter to the Children's Court, to which objections were filed by the CCL. The Board appreciated the position of law correctly and dismissed the application filed by the mother of the victim.

5.3 It was submitted that even if for arguments' sake it is assumed that the order passed on 12.04.2022 cannot be legally sustained. It may, at the most, revive the order dated 05.04.2022 against which the CCL has a remedy of filing an appeal. However, in view of the developments which had taken place since the passing of the order on 12.04.2022, the CCL has been deprived

9 (2021) 12 SCC 603

of his remedy of appeal. If this Court is of the view that the order passed on 05.04.2022 was an order, the CCL be given liberty to avail remedy of appeal against the same, as with the passing of the impugned order by the High Court, the CCL has been left remediless against the order.

5.4 Section 15(1) of the Act provides for preliminary assessment regarding mental status and physical capacity of the CCL, who had allegedly committed heinous offence. In case the Board is satisfied, that enquiry into the matter has to be conducted by the Board, it shall follow the procedure as prescribed. However, an order can also be passed in terms of Section 18(3) of the Act for trial of the CCL by the Children's Court. It is only the assessment, as to whether the Board or the Children's Court has to hold inquiry or conduct trial.

5.5 Section 18(3) of the Act provides that after preliminary assessment under Section 15 of the Act, the Board shall pass an order that there is a need for trial of the CCL as an adult. The records of the case have to be transferred for trial to the Children's Court having jurisdiction.

5.6 Section 17 of the Act provides for procedure in relation to the Board. It was submitted that the Board as such is not a court and any proceeding conducted by the Board are not to be treated as an order. It is merely an opinion. The Board, as defined in section 2(10) of the Act, means the Board as constituted under section 4 thereof. It shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class, not being the Chief Metropolitan Magistrate or Chief Judicial Magistrate with at least three years' experience and two social workers selected in the manner prescribed, one of them has to be a woman.

5.7 Section 7(3) of the Act provides that there shall be at least two members including the Principal Magistrate present at the time of final disposal of a case or make an order under Section 18(3) of the Act.

5.8 It was further submitted that the appeal against an order passed under Section 18(3) of the Act by the Board, directing trial of the CCL by the Children's Court would lie to the Court of Sessions.

5.9 The term Children's Court has been defined in Section 2(20) of the Act. It means a Court established as such under the Commissions for Protection of Child Rights Act, 2005[10] or a Special Court under the 2012 Act, and where such Courts have not been designated, the Court of Sessions having jurisdiction. The argument is, that two separate authorities have been mentioned in sub-sections (1) and (2) of Section 101 of the Act, otherwise separate provisions were not required. This is the spirit of the law.

5.10 Section 19 of the Act deals with the powers of Children's Court. After receipt of the preliminary assessment from the Board under Section 15, the Children's Court may decide that the child is to be tried as an adult or that there is no need for trial of the CCL as an adult. An order passed by the Children's Court is appealable before the High Court in terms of Section 101(5) of the Act.

5.11 Reference was made to Rule 10A of the **Juvenile Justice (Care and Protection of Children) Model Rules, 2016**[11] which prescribes the procedure for preliminary assessment regarding the age of the CCL under Section 14, and inquiry by the Board or trial by the Children's Court under Section 15 of the Act.

5.12 Referring to the aforesaid scheme of the Act, it was submitted that an assessment under Section 15 of the Act does not envisage passing of an order. It is merely a satisfaction recorded, and there is no final satisfaction recorded by the Board on 05.04.2022 as next date of hearing had been given. The matter had to be considered by the Board subsequently. In fact, no order had been passed under Section 18(3) of the Act. Subsequent orders passed by the Board showed that the inquiry had already commenced. It was at a later stage that the Complainant filed an application for termination of proceedings before the Board, which was dismissed on 10.04.2023. The order was appealable under Section 101(1) of the Act. However, no appeal was filed. A revision was filed before the High Court

10 Hereinafter referred to as "2005 Act".

11 Hereinafter to be referred as "the 2016 Rules".

under Section 397 read with Section 399 of the Cr.P.C., which was not maintainable.

5.13 It was further argued that in terms of Section 14(3) of the Act preliminary assessment under Section 15 thereof, has to be made within a period of three months from the date of first production of CCL before the Board. In the case in hand, the child was produced before the Board for the first time on 03.11.2021. The period of three months expired on 02.02.2022. No order could possibly be passed by the Board on 05.04.2022. The result thereof is that the CCL is to be tried by the Board and no order for his trial by the Children's Court could be passed thereafter.

5.14 Reliance was placed upon the judgment of this Court in **Barun Chandra Thakur vs. Master Bholu & Anr.**[12] to submit that this Court opined that the timelines provided for under the Act have to be adhered to. If the time provided for in Section 14(3) for preliminary assessment under Section 15 cannot be extended, no order for trial of the CCL by the Children's Court can be passed. Reliance was also placed upon judgment of this Court in **Shilpa Mittal vs. State (NCT of Delhi)**[13].

ARGUMENTS OF RESPONDENTS

6. On the other hand, learned counsel for the State submitted that even after the order is passed by the Board transferring the matter to the Children's Court for trial of the CCL, it can be reconsidered by the Children's Court under Section 19(1) of the Act. Any order passed by the Children's Court is appealable under Section 101(5) of the Act. The scope of Section 101(1) and 101(2) is different. Sub-section (1) deals with final orders, whereas sub-section (2) deals with preliminary assessment. The trial of the offence is only by the Children's Court.

6.1 It was further submitted that, in terms of proviso to Section 15(1) of the Act, the Board may take assistance of experienced psychologists, psycho-social workers or other experts to enable the Board to reach a proper conclusion.

12 [2022] 10 SCR 595 : 2022 INSC 716

13 (2020) 2 SCR 478 : (2020) 2 SCC 787 : 2020 INSC 25

6.2 In this case, a report dated 01.02.2022 has been submitted by the Department of Child and Adolescent Psychiatry, NIMHANS-DWCO. It was in response to a letter dated 12.01.2022 from the Police Inspector, Marathahalli Police Station to the Psychiatrist, NIMHANS Hospital, Bengaluru. Going backward, learned counsel for the State referred to the interim order of the Board dated 09.11.2021 in terms of which the Board had called for the social investigation report of the child to enable the Board to pass further order in terms of Section 18(3) of the Act. However, no report was produced on 06.12.2021. The matter was adjourned from 06.12.2021 to 11.01.2022, and thereafter to 21.02.2022. The Social Investigation Report was received by the Board on 19.02.2022.

6.3 The arguments on the issue of trial of the CCL by the Children's Court or inquiry by the Board, were completed on 29.03.2022 and the matter was adjourned to 05.04.2022 for orders, when the Principal Magistrate passed an order directing for trial of the CCL by the Children's Court. Another member of the Board did not append his signature and recorded that he had a dissenting view and would pass the detailed order on the next date i.e. 12.04.2022. In fact, in terms of Section 7(4) of the Act, the proceeding for determination of the forum, which was to conduct the inquiry or trial, concluded on that day itself, as the opinion of the Principal Magistrate is final. The manner in which the case was dealt with subsequently, is strange. Subsequent order dated 12.04.2022 was passed by different members of the Board. The entire proceedings were *non-est*. There was no error in the application moved by the victim for termination of proceedings before the Board and referring the matter to the Children's Court, for which an order had already been passed by the Principal Magistrate on 05.04.2022.

6.4 It was further argued that merely because proceedings under Section 15 of the Act could not be concluded within three months, by default the CCL will not be tried by the Board. The provision cannot be held to be mandatory, as no consequence of such a default has been provided in the Act. Even proviso to Section 14(4) provides for extension of time in case the inquiry as envisaged under Section 14(1) cannot be concluded within the time prescribed.

6.5 It was further submitted that though there is no direct judgment of this Court in this matter dealing with Section 14(3) of the Act. However, the learned counsel for the State referred to the following judgments of the Madhya Pradesh, Punjab & Haryana and Delhi High Courts **Bhola vs State of Madhya Pradesh**[14]**, Neeraj and Others vs State of Haryana**[15] and **X vs. State**[16]**.**

6.6 It was further argued that the inquiry envisaged under Section 15 of the Act provides for taking opinion from experienced psychologists or psycho-social workers or other experts. The role of investigating officer is also relevant as he is investigating the same. There can be intentional delays caused in the process also to take benefit, in case by default CCL in a heinous offence is to be tried by the Board. As in the case in hand the investigating officer himself took about two months in getting the report from NIMHANS. In such a situation the Board should not be treated as powerless to extend the time for reasons to be recorded. No doubt, in such a matter all the proceedings have to be completed as expeditiously as possible.

6.7 It was further submitted that there is no merit in the arguments raised by the learned counsel for the appellant, to give him liberty to challenge the order dated 05.04.2022 in case he has grievance against the same. Much water has flown thereafter. All possible arguments were raised in the revision decided by the High Court, and considered. To give liberty to the appellant to raise the same before a lower authority would be an exercise in futility. The same would rather result in delaying the process further. The prayer is for the dismissal of the appeal.

DISCUSSION

7. Heard learned counsel for the parties and perused the relevant referred record. We have divided our judgment in different parts, as mentioned below:

14 2019 SCC OnLine MP 521

15 2005 SCC OnLine P&H 611

16 2019 SCC OnLine Del 11164

I. RELEVANT PROVISIONS

8. The relevant provisions of various statutes and the Rules applicable in the matter are extracted below:

EXTRACTS OF RELEVANT PROVISIONS OF THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

"Section 2(10). "Board" means a Juvenile Justice Board constituted under section 4**.**

Section 2(13). "child in conflict with law" means a child who is alleged or found to have committed an offence and who has not completed eighteen years of age on the date of commission of such offence.

Section 2(20). "Children's Court" means a court established under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court under the Protection of Children from Sexual Offences Act, 2012 (32 of 2012), wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act.

Section 2(22). "Committee" means Child Welfare Committee constituted under section 27.

Section 2(23). "court" means a civil court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts.

Section 2(33). "heinous offences" includes the offences for which the minimum punishment under the Indian Penal Code (45 of 1860) or any other law for the time being in force is imprisonment for seven years or more.

x x x

Section 4. Juvenile Justice Board.—

(1) xx xx

(2) A Board shall consist of a Metropolitan Magistrate or a Judicial Magistrate of First Class not being Chief Metropolitan Magistrate or Chief Judicial Magistrate (hereinafter referred to as Principal Magistrate) with at least three years experience and two social workers selected in such manner as may be prescribed, of whom at least one shall be a woman, forming a Bench and every such Bench shall have the powers conferred by the Code of Criminal Procedure, 1973 (2 of 1974) on a Metropolitan Magistrate or, as the case may be, a Judicial Magistrate of First Class.

(3) to (7) xx xx

Section 7. Procedure in relation to Board.—

(1) & (2) xx xx

(3) A Board may act notwithstanding the absence of any member of the Board, and no order passed by the Board shall be invalid by the reason only of the absence of any member during any stage of proceedings:

Provided that there shall be atleast two members including the Principal Magistrate present at the time of final disposal of the case or in making an order under sub-section (3) of section 18.

(4) In the event of any difference of opinion among the members of the Board in the interim or final disposal, the opinion of the majority shall prevail, but where there is no such majority, the opinion of the Principal Magistrate, shall prevail.

x x x

Section 14. Inquiry by Board regarding child in conflict with law.—(1) Where a child alleged to be in conflict with law is produced before Board, the Board shall hold an inquiry in accordance with the provisions of this Act and may pass such orders in relation to such child as it deems fit under sections 17 and 18 of this Act**.**

(2) The inquiry under this section shall be completed within a period of four months from the date of first production of the child before the Board, unless the period is extended, for a maximum period of 2 more months by the Board, having regard to the circumstances of the case and after recording the reasons in writing for such extension.

(3) A preliminary assessment in case of heinous offences under section 15 shall be disposed of by the Board within a period of three months from the date of first production of the child before the Board.

(4) If inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated:

Provided that for serious or heinous offences, in case the Board requires further extension of time for completion of inquiry, the same shall be granted by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

(5) xx xx

x x x

Section 15. Preliminary assessment into heinous offences by Board.—(1) In case of a heinous offence alleged to have been committed by a child, who has completed or is above the age of sixteen years, the Board shall conduct a preliminary assessment with regard to his mental and physical capacity to commit such offence, ability to understand the consequences of the offence and the circumstances in which he allegedly committed the offence, and may pass an order in accordance with the provisions of sub-section (3) of section 18:

Provided that for such an assessment, the Board may take the assistance of experienced psychologists or psycho-social workers or other experts.

Explanation.—For the purposes of this section, it is clarified that preliminary assessment is not a trial, but is to assess the capacity of such child to commit and understand the consequences of the alleged offence.

(2) Where the Board is satisfied on preliminary assessment that the matter should be disposed of by the Board, then the Board shall follow the procedure, as far as may be, for trial in summons case under the Code of Criminal Procedure, 1973 (2 of 1974):

Provided that the order of the Board to dispose of the matter shall be appealable under sub-section (2) of section 101.

Provided further that the assessment under this section shall be completed within the period specified in section 14.

x x x

Section 17. Orders regarding child not found to be in conflict with law.—(1) Where a Board is satisfied on inquiry that the child brought before it has not committed any offence, then notwithstanding anything contrary contained in any other law for the time being in force, the Board shall pass order to that effect.

(2) In case it appears to the Board that the child referred to in sub-section (1) is in need of care and protection, it may refer the child to the Committee with appropriate directions.

Section 18. Orders regarding child found to be in conflict with law.—

(1) & (2) xx xx

(3) Where the Board after preliminary assessment under section 15 pass an order that there is a need for trial of the said child as an adult, then the Board may order transfer of the trial of the case to the Children's Court having jurisdiction to try such offences.

Section 19. Powers of Children's Court.—(1) After the receipt of preliminary assessment from the Board under section 15, the Children's Court may decide that—

(i) there is a need for trial of the child as an adult as per the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) and pass appropriate orders after trial subject to the provisions of this section and section 21, considering the special needs of the child, the tenets of fair trial and maintaining a child friendly atmosphere;

(ii) there is no need for trial of the child as an adult and may conduct an inquiry as a Board and pass appropriate orders in accordance with the provisions of section 18.

(2) The Children's Court shall ensure that the final order, with regard to a child in conflict with law, shall include an individual care plan for the rehabilitation of child, including follow up by the probation officer or the District Child Protection Unit or a social worker.

(3) The Children's Court shall ensure that the child who is found to be in conflict with law is sent to a place of safety till he attains the age of twenty-one years and thereafter, the person shall be transferred to a jail:

Provided that the reformative services including educational services, skill development, alternative therapy such as counselling, behaviour modification therapy, and psychiatric support shall be provided to the child during the period of his stay in the place of safety.

(4) The Children's Court shall ensure that there is a periodic follow up report every year by the probation officer or the District Child Protection Unit or a social worker, as required, to evaluate the progress of the child in the place of safety and to ensure that there is no ill-treatment to the child in any form.

(5) The reports under sub-section (4) shall be forwarded to the Children's Court for record and follow up, as may be required.

x x x

Section 101. Appeals. —(1) Subject to the provisions of this Act, any person aggrieved by an order made by the Committee or the Board under this Act may, within thirty days from the date of such order, prefer an appeal to the Children's Court, except for decisions by the Committee related to Foster Care and Sponsorship After Care for which the appeal shall lie with the District Magistrate:

Provided that the Court of Sessions, or the District Magistrate, as the case may be, may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time and such appeal shall be decided within a period of thirty days.

(2) An appeal shall lie against an order of the Board passed after making the preliminary assessment into a heinous offence under section 15 of the Act, before the Court of Sessions and the Court may, while deciding the appeal,

take the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board in passing the order under the said section.

(3) No appeal shall lie from any order of acquittal made by the Board in respect of a child alleged to have committed an offence other than the heinous offence by a child who has completed or is above the age of sixteen years.

(4) No second appeal shall lie from any order of the Court of Session, passed in appeal under this section.

(5) Any person aggrieved by an order of the Children's Court may file an appeal before the High Court in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974).

(6) & (7) xx xx

102. Revision.—The High Court may, at any time, either on its own motion or on an application received in this behalf, call for the record of any proceeding in which any Committee or Board or Children's Court, or Court has passed an order, for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit: Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

EXTRACTS OF RELEVANT RULES 10, 10A, 11 & 13 OF THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) MODEL RULES, 2016

"Rule 10. Post-production processes by the Board.- (1) On production of the child before the Board, the report containing the social background of the child, circumstances of apprehending the child and offence alleged to have been committed by the child as provided by the officers, individuals, agencies producing the child shall be reviewed by the Board and the Board may pass such orders in relation to the child as it deems fit, including orders under sections 17 and 18 of the Act, namely:

(i) disposing of the case, if on the consideration of the documents and record submitted at the time of his first appearance, his being in conflict with law appears to be unfounded or where the child is alleged to be involved in petty offences;

(ii) referring the child to the Committee where it appears to the Board that the child is in need of care and protection;

(iii) releasing the child in the supervision or custody of fit persons or fit institutions or Probation Officers as the case may be, through an order in Form 3, with a direction to appear or present a child for an inquiry on the next date; and

(iv) directing the child to be kept in the Child Care Institution, as appropriate, if necessary, pending inquiry as per order in Form 4.

(2) In all cases of release pending inquiry, the Board shall notify the next date of hearing, not later than fifteen days of the first summary inquiry and also seek social investigation report from the Probation Officer, or in case a Probation Officer is not available the Child Welfare Officer or social worker concerned through an order in Form 5.

(3) When the child alleged to be in conflict with law, after being admitted to bail, fails to appear before the Board, on the date fixed for hearing, and no application is moved for exemption on his behalf or there is not sufficient reason for granting him exemption, the Board shall, issue to the Child Welfare Police Officer and the Person-in-charge of the Police Station directions for the production of the child.

(4) If the Child Welfare Police Officer fails to produce the child before the Board even after the issuance of the directions for production of the child, the Board shall instead of issuing process under section 82 of the Code of Criminal Procedure, 1973 pass orders as appropriate under section 26 of the Act.

(5) In cases of heinous offences alleged to have been committed by a child, who has completed the age of sixteen years, the Child Welfare Police Officer shall produce the statement of witnesses recorded by him and other documents prepared during the course of investigation within a period of one month from the date of first production of the child before the Board, a copy of which shall also be given to the child or parent or guardian of the child.

(6) In cases of petty or serious offences, the final report shall be filed before the Board at the earliest and in any case not beyond the period of two months from the date of information to the police, except in those cases where it was not reasonably known that the person involved in the offence was a child, in which case extension of time may be granted by the Board for filing the final report.

(7) When witnesses are produced for examination in an inquiry relating to a child alleged to be in conflict with law, the Board shall ensure that the inquiry is not conducted in the spirit of strict adversarial proceedings and it shall use the powers conferred by section 165 of the Indian Evidence Act, 1872 (1 of 1872) so as to interrogate the child and proceed with the presumptions in favour of the child.

(8) While examining a child alleged to be in conflict with law and recording his statement during the inquiry under section 14 of the Act, the Board shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence which has been alleged against the child, but also in respect of the home and social surroundings, and the influence or the offences to which the child might have been subjected to.

(9) The Board shall take into account the report containing circumstances of apprehending the child and the offence alleged to have been committed by him and the social investigation report in Form 6 prepared by the Probation Officer or the voluntary or non- governmental organisation,

along with the evidence produced by the parties for arriving at a conclusion.

Rule 10A. Preliminary assessment into heinous offences by Board.- (1) The Board shall in the first instance determine whether the child is of sixteen years of age or above; if not, it shall proceed as per provisions of section 14 of the Act.

(2) For the purpose of conducting a preliminary assessment in case of heinous offences, the Board may take the assistance of psychologists or psycho-social workers or other experts who have experience of working with children in difficult circumstances. A panel of such experts may be made available by the District Child Protection Unit, whose assistance can be taken by the Board or could be accessed independently.

(3) While making the preliminary assessment, the child shall be presumed to be innocent unless proved otherwise.

(4) Where the Board, after preliminary assessment under section 15 of the Act, passes an order that there is a need for trial of the said child as an adult, it shall assign reasons for the same and the copy of the order shall be provided to the child forthwith.

Rule 11. Completion of Inquiry.- (1) Where after preliminary assessment under section 15 of the Act, in cases of heinous offences allegedly committed by a child, the Board decides to dispose of the matter, the Board may pass any of the dispositional orders as specified in section 18 of the Act.

(2) Before passing an order, the Board shall obtain a social investigation report in Form 6 prepared by the Probation Officer or Child Welfare Officer or social worker as ordered, and take the findings of the report into account.

(3) All dispositional orders passed by the Board shall necessarily include an individual care plan in Form 7 for the child in conflict with law concerned, prepared by a Probation Officer or Child Welfare Officer or a recognised

voluntary organisation on the basis of interaction with the child and his family, where possible.

(4) Where the Board is satisfied that it is neither in the interest of the child himself nor in the interest of other children to keep a child in the special home, the Board may order the child to be kept in a place of safety and in a manner considered appropriate by it.

(5) Where the Board decides to release the child after advice or admonition or after participation in group counselling or orders him to perform community service, necessary direction may also be issued by the Board to the District Child Protection Unit for arranging such counselling and community service.

(6) Where the Board decides to release the child in conflict with law on probation and place him under the care of the parent or the guardian or fit person, the person in whose custody the child is released may be required to submit a written undertaking in Form 8 for good behaviour and well-being of the child for a maximum period of three years.

(7) The Board may order the release of a child in conflict with law on execution of a personal bond without surety in Form 9.

(8) In the event of placement of the child in a fit facility or special home, the Board shall consider that the fit facility or special home is located nearest to the place of residence of the child's parent or guardian, except where it is not in the best interest of the child to do so.

(9) The Board, where it releases a child on probation and places him under the care of parent or guardian or fit person or where the child is released on probation and placed under the care of fit facility, it may also order that the child be placed under the supervision of a Probation Officer who shall submit periodic reports in Form 10 and the period of such supervision shall be maximum of three years.

(10) Where it appears to the Board that the child has not complied with the probation conditions, it may order the child to be produced before it and may send the child to a special home or place of safety for the remaining period of supervision.

(11) In no case, the period of stay in the special home or the place of safety shall exceed the maximum period provided in clause (g) of sub-section (1) of section 18 of the Act.

x x x

Rule 13. Procedure in relation to Children's Court and Monitoring Authorities.-

(1) Upon receipt of preliminary assessment from the Board the Children's Court may decide whether there is need for trial of the child as an adult or as a child and pass appropriate orders.

(2) Where an appeal has been filed under sub-section (1) of section 101 of the Act against the order of the Board declaring the age of the child, the Children's Court shall first decide the said appeal.

(3) Where an appeal has been filed under sub-section (2) of section 101 of the Act against the finding of the preliminary assessment done by the Board, the Children's Court shall first decide the appeal.

(4) Where the appeal under sub-section (2) of section 101 of the Act is disposed of by the Children's Court on a finding that there is no need for trial of the child as an adult, it shall dispose of the same as per section 19 of the Act and these rules.

(5) Where the appeal under sub-section (2) of section 101 of the Act is disposed of by the Children's Court on a finding that the child should be tried as an adult the Children's Court shall call for the file of the case from the Board and dispose of the matter as per the provisions of the Act and these rules.

(6) The Children's Court shall record its reasons while arriving at a conclusion whether the child is to be treated as an adult or as a child.

(7) Where the Children's Court decides that there is no need for trial of the child as an adult, and that it shall decide the matter itself:

(i) It may conduct the inquiry as if it were functioning as a Board and dispose of the matter in accordance with the provisions of the Act and these rules.

(ii) The Children's Court, while conducting the inquiry shall follow the procedure for trial in summons case under the Code of Criminal Procedure, 1973.

(iii) The proceedings shall be conducted in camera and in a child friendly atmosphere, and there shall be no joint trial of a child alleged to be in conflict with law, with a person who is not a child.

(iv) When witnesses are produced for examination the Children's Court shall ensure that the inquiry is not conducted in the spirit of strict adversarial proceedings and it shall use the powers conferred by section 165 of the Indian Evidence Act, 1872 (1 of 1872).

(v) While examining a child in conflict with law and recording his statement, the Children's Court shall address the child in a child-friendly manner in order to put the child at ease and to encourage him to state the facts and circumstances without any fear, not only in respect of the offence which is alleged against the child, but also in respect of the home and social surroundings and the influence to which the child might have been subjected.

(vi) The dispositional order passed by the Children's Court shall necessarily include an individual care

plan in Form 7 for the child in conflict with law concerned, prepared by a Probation Officer or Child Welfare Officer or recognized voluntary organisation on the basis of interaction with the child and his family, where possible.

(vii) The Children's Court, in such cases, may pass any orders as provided in sub-sections (1) and (2) of section 18 of the Act.

(8) Where the Children's Court decides that there is a need for trial of the child as an adult:

(i) It shall follow the procedure prescribed by the Code of Criminal Procedure, 1973 of trial by sessions and maintaining a child friendly atmosphere.

(ii) The final order passed by the Children's Court shall necessarily include an individual care plan for the child as per Form 7 prepared by a Probation Officer or Child Welfare Officer or recognized voluntary organisation on the basis of interaction with the child and his family, where possible.

(iii) Where the child has been found to be involved in the offence, the child may be sent to a place of safety till the age of twenty-one years.

(iv) While the child remains at the place of safety, there shall be yearly review by the Probation Officer or the District Child Protection Unit or a social worker in Form 13 to evaluate the progress of the child and the reports shall be forwarded to the Children's Court.

(v) The Children's Court may also direct the child to be produced before it periodically and at least once every three months for the purpose of assessing the progress made by the child and the facilities provided by the institution for the implementation of the individual care plan.

(vi) When the child attains the age of twenty-one years and is yet to complete the term of stay, the Children's Court shall:

(a) interact with the child in order to evaluate whether the child has undergone reformative changes and if the child can be a contributing member of the society.

(b) take into account the periodic reports of the progress of the child, prepared by the Probation Officer or the District Child Protection Unit or a social worker, if needed and further direct that institutional mechanism if inadequate be strengthened.

(c) to (cd) xx xx

(vii) xx xx"

EXTRACT OF RELEVANT PROVISION OF PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012

"Section 28. Designation of Special Courts.—

(1) For the purposes of providing a speedy trial, the State Government shall in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, designate for each district, a Court of Session to be a Special Court to try the offences under the Act:

Provided that if a Court of Session is notified as a children's court under the Commissions for Protection of Child Rights Act, 2005 (4 of 2006) or a Special Court designated for similar purposes under any other law for the time being in force, then, such court shall be deemed to be a Special Court under this section.

(2) While trying an offence under this Act, a Special Court shall also try an offence [other than the offence referred to in subsection (1)], with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.

(3) The Special Court constituted under this Act, notwithstanding anything in the Information Technology Act, 2000 (21 of 2000) shall have jurisdiction to try offences under section 67B of that Act in so far as it relates to publication or transmission of sexually explicit material depicting children in any act, or conduct or manner or facilitates abuse of children online."

II. WHETHER THE PERIOD PROVIDED FOR COMPLETION OF PRELIMINARY ASSESSMENT UNDER SECTION 14(3) OF THE ACT IS MANDATORY OR DIRECTORY.

9. Section 15 of the Act enables the Board to make preliminary assessment into heinous offences where such an offence alleged to have been committed by a child between 16 and 18 years of age. The preliminary assessment is to be conducted with regard to his mental and physical capacity to commit such an offence, ability to understand the consequences of the offence and the circumstances in which the offence was allegedly committed. Proviso to the aforesaid section provides that for making such an assessment the Board may take assistance of an experienced psychologist or psycho-social worker or other experts. Explanation thereto provides that the process of preliminary assessment is not a trial but merely to assess the capacity of such a child to commit and understand the consequences of the alleged offence. The importance of the assistance from the expert is even evident from Section 101(2) of the Act. While considering the appeal against an order passed under Section 15, the appellate authority can also take assistance of experts other than those who assisted the Board.

9.1 The importance of the aforesaid provision was considered by this Court in **Barun Chandra Thakur's case (supra)** where requirement of such assistance was held to be mandatory, even though the words used in proviso to Section 15(1) and Section 101(2) of the Act are 'may'.

9.2 Section 14(3) of the Act provides that the preliminary assessment in terms of Section 15 is to be completed by the Board within a period of three months from the date of first production of the child before the Board.

9.3 In case the Board after preliminary assessment under Section 15 of the Act comes to a conclusion that the trial of the CCL is to be conducted as an adult, then the Board shall transfer the records to the Children's Court having jurisdiction.

9.4 The argument raised by learned counsel for the appellant was that the CCL was produced before the Board on 03.11.2021. The period of three months having expired on 02.02.2022, any order passed by the Board thereafter is *non-est,* and the trial of CCL cannot now be transferred to the Children's Court.

9.5 What we need to consider is as to whether the timeline for the conclusion of inquiry as envisaged under Section 14 is mandatory or directory?

9.6 As per the scheme of Section 14 of the Act, sub-section (1) thereof provides that, when a CCL is produced before the Board, after holding inquiry, it may pass order in relation to such CCL as it deems fit under Section 17 and 18 of the Act.

9.7 Section 17 of the Act envisages the order regarding a child not found to be in conflict with the law. Whereas Section 18 (1) envisages an order passed in case a child is found to be in conflict with law. It includes child of the age of 16 years and above, who is involved in a heinous offence, but inquiry to be conducted by the Board.

9.8 Section 14(2) of the Act provides that the inquiry as envisaged under Section 14(1) thereof shall be completed within a period of four months from the date of first production of the child before the Board. The time is extendable by the Board for a maximum period of two months, for the reasons to be recorded. The consequences of non-conclusion of any such inquiry have been provided in Section 14(4) of the Act, only with reference to petty offences. The aforesaid sub-section provides that if inquiry by the Board under sub-section (2) for petty offences remains inconclusive even after the extended period, the proceedings shall stand terminated. Proviso to the aforesaid sub-section provides that in case the Board requires further extension of time for completion of inquiry into serious and heinous offences, the same shall be granted by the Chief Judicial Magistrate or,

as the case may be, the Chief Metropolitan Magistrate, for reasons to be recorded in writing.

9.9 Meaning thereby that as far as inquiry of CCL, as envisaged under Section 14(1) of the Act, by the Board for heinous offences is concerned, there is no deadline after which either the inquiry cannot be proceeded further or has to be terminated.

9.10 Now coming to the issue in hand. It is not in dispute that the CCL has allegedly committed a heinous offences. The argument is with reference to the period provided for the conclusion of preliminary assessment under Section 15 of the Act and passing of an order under Section 15(2) or 18(3) of the Act, namely as to whether the matter is to be enquired into by the Board or is to be transferred to the Children's Court for trial of the CCL as an adult.

9.11 We may add here that apparently the placement of Section 18(3) does not seem to be appropriate. Sub-sections (1) and (2) of Section 18 deal with final orders to be passed by the Board on inquiry against the CCL, whereas sub-section (3) envisages passing of an order by the Board as to whether the trial of CCL is to be conducted by the Children's Court in terms of preliminary assessment, as envisaged in Section 15 thereof. Passing of such an order could very well be placed in Section 15 itself after sub-section (2) thereof.

9.12 The inquiry as envisaged in Section 15(1) of the Act enables the Board to take assistance from experienced psychologists or psycho-social workers or other experts. The proviso has nexus with the object sought to be achieved. The Act deals with the CCL. The preliminary assessment as envisaged in Section 15 has large ramifications, namely, as to whether inquiry against the CCL is to be conducted by the Board, where the final punishment, which could be inflicted is lighter or the trial is to be conducted by the Children's Court treating the CCL as an adult, where the punishment could be stringent.

9.13 As noticed earlier, the preliminary assessment into the heinous offence by the Board in terms of Section 15(1) of the Act has to be concluded within a period of three months in terms of Section 14(3) of the Act. The Act as such does not provide for any

extension of time and also does not lay down the consequence of non-compilation of inquiry within the time permissible. In the absence thereof the provision prescribing time limit of completion of inquiry cannot be held to be mandatory. The intention of the legislature with reference to serious or heinous offences is also available from the language of Section 14 of the Act which itself provides for further extension of time for completion of inquiry by the Board to be granted by the Chief Judicial Magistrate or Chief Metropolitan Magistrate for the reasons to be recorded in writing. It is in addition to two months' extension which the Board itself can grant.

9.14 As in the process of preliminary inquiry there is involvement of many persons, namely, the investigating officer, the experts whose opinion is to be obtained, and thereafter the proceedings before the Board, where for different reasons any of the party may be able to delay the proceedings, in our opinion the time so provided in Section 14(3) cannot be held to be mandatory, as no consequences of failure have been provided as is there in case of enquiry into petty offences in terms of Section 14(4) of the Act. If we see the facts of the case in hand, the investigating officer had taken about two months' time in getting the report from the NIMHANS.

9.15 Where consequences for default for a prescribed period in a Statute are not mentioned, the same cannot be held to be mandatory. For this purpose, reference can be made to the following decisions of this Court.

9.16 This Court in **Topline Shoes Ltd vs Corporation Bank**[17] while interpretating Section 13(2)(a) of the repealed Consumer Protection Act, 1986 prescribing time limit for filing reply to the complaint, held the same to be directory in nature. Relevant para 11 thereof is extracted below:

> "11. We have already noticed that the provision as contained under clause (a) of sub-section (2) of Section 13 is procedural in nature. It is also clear that with a view to achieve the object of the enactment, that

17 [2002] 3 SCR 1167 : (2002) 6 SCC 33 : 2002 INSC 287

there may be speedy disposal of such cases, that it has been provided that reply is to be filed within 30 days and the extension of time may not exceed 15 days. This provision envisages that proceedings may not be prolonged for a very long time without the opposite party having filed his reply. No penal consequences have however been provided in case extension of time exceeds 15 days. Therefore, it could not be said that any substantive right accrued in favour of the appellant or there was any kind of bar of limitation in filing of the reply within extended time though beyond 45 days in all. The reply is not necessarily to be rejected. All facts and circumstances of the case must be taken into account. The Statement of Objects and Reasons of the Act also provides that the principles of natural justice have also to be kept in mind."

(emphasis supplied)

9.17 This Court in **Kailash vs Nanhku and Others**[18] while interpretating Order VIII Rule 1 CPC prescribing time limit for filing written statement, held the same to be directory in nature. Relevant paras 30 and 46 thereof are extracted below:

"30. It is also to be noted that though the power of the court under the proviso appended to Rule 1 Order 8 is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

x x x

18 [2005] 3 SCR 289 : (2005) 4 SCC 480 : 2005 INSC 186

46. We sum up and briefly state our conclusions as under:

(i) - (iii) xxxx

(iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.

(v) Though Order 8 Rule 1 CPC is a part of procedural law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for the asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the court on its being satisfied. Extension of time may be allowed if it is needed to be given for circumstances which are exceptional, occasioned by reasons beyond the control of

> the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."
>
> (emphasis supplied)

9.18 This Court in **State of Bihar and Others vs Bihar Rajya Bhumi Vikas Bank Samiti**[19] while section 34 (5) and (6) of the Arbitration and Conciliation Act, 1996 held the period prescribed in sub-section (6) to be directory. The relevant paras 23, 25 and 26 are extracted below:

> "23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences.
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> x x x
>
> 25.We come now to some of the High Court judgments. The High Courts of Patna [Bihar Rajya Bhumi Vikas Bank Samiti v. State of Bihar, 2016 SCC OnLine Pat 10104], Kerala [Shamsudeen v. Shreeram Transport Finance Co. Ltd., 2016 SCC OnLine Ker 23728], Himachal Pradesh [Madhava Hytech Engineers (P) Ltd. v. Executive Engineers, 2017 SCC OnLine HP 2212], Delhi [Machine Tool India Ltd. v. Splendor Buildwell (P) Ltd., 2018 SCC OnLine Del 9551],

19 [2018] 7 SCR 1147 : (2018) 9 SCC 472 : 2018 INSC 648

and Gauhati [Union of India v. Durga Krishna Store (P) Ltd., 2018 SCC OnLine Gau 907] have all taken the view that Section 34(5) is mandatory in nature. What is strongly relied upon is the object sought to be achieved by the provision together with the mandatory nature of the language used in Section 34(5). Equally, analogies with Section 80 CPC have been drawn to reach the same result. On the other hand, in Global Aviation Services (P) Ltd. v. Airport Authority of India [Global Aviation Services (P) Ltd. v. Airport Authority of India, 2018 SCC OnLine Bom 233] , the Bombay High Court, in answering Question 4 posed by it, held, following some of our judgments, that the provision is directory, largely because no consequence has been provided for breach of the time-limit specified. When faced with the argument that the object of the provision would be rendered otiose if it were to be construed as directory, the learned Single Judge of the Bombay High Court held as under: (SCC OnLine Bom para 133)

> "133. Insofar as the submission of the learned counsel for the respondent that if Section 34(5) is considered as directory, the entire purpose of the amendments would be rendered otiose is concerned, in my view, there is no merit in this submission made by the learned counsel for the respondent. Since there is no consequence provided in the said provision in case of non-compliance thereof, the said provision cannot be considered as mandatory. The purpose of avoiding any delay in proceeding with the matter expeditiously is already served by insertion of appropriate rule in the Bombay High Court (Original Side) Rules. The Court can always direct the petitioner to issue notice along with papers and proceedings upon other party before the matter is heard by the Court for admission as well as for final hearing. The vested rights

> of a party to challenge an award under Section 34 cannot be taken away for non-compliance of issuance of prior notice before filing of the arbitration petition."
>
> The aforesaid judgment has been followed by recent judgments of the High Courts of Bombay [Maharashtra State Road Development Corpn. Ltd. v. Simplex Gayatri Consortium, 2018 SCC OnLine Bom 805] and Calcutta [Srei Infrastructure Finance Ltd. v. Candor Gurgaon Two Developers and Projects (P) Ltd., 2018 SCC OnLine Cal 5606].
>
> 26. We are of the opinion that the view propounded by the High Courts of Bombay and Calcutta represents the correct state of the law. However, we may add that it shall be the endeavour of every court in which a Section 34 application is filed, to stick to the time-limit of one year from the date of service of notice to the opposite party by the applicant, or by the Court, as the case may be. In case the Court issues notice after the period mentioned in Section 34(3) has elapsed, every court shall endeavour to dispose of the Section 34 application within a period of one year from the date of filing of the said application, similar to what has been provided in Section 14 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015. This will give effect to the object sought to be achieved by adding Section 13(6) by the 2015 Amendment Act."
>
> (emphasis supplied)

9.19 This Court in **C. Bright vs District and Others**[20] while interpretating the nature of section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 held the period prescribed therein mandating the District Magistrate to deliver possession of a

20 [2020] 7 SCR 997 : (2021) 2 SCC 392 : 2020 INSC 633

secured asset within 30 days, extendable to an aggregate of 60 days, to be directory in nature. The relevant paras 8 and 11 are extracted below:

> "8. A well-settled rule of interpretation of the statutes is that the use of the word "shall" in a statute, does not necessarily mean that in every case it is mandatory that unless the words of the statute are literally followed, the proceeding or the outcome of the proceeding, would be invalid. It is not always correct to say that if the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid [State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912] and that when a statute uses the word "shall", prima facie, it is mandatory, but the Court may ascertain the real intention of the legislature by carefully attending to the whole scope of the statute [State of U.P. v. Babu Ram Upadhya, AIR 1961 SC 751]. The principle of literal construction of the statute alone in all circumstances without examining the context and scheme of the statute may not serve the purpose of the statute [RBI v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424].
>
> x x x
>
> 11. In a judgment reported as Remington Rand of India Ltd. v. Workmen [Remington Rand of India Ltd. v. Workmen, AIR 1968 SC 224], Section 17 of the Industrial Disputes Act, 1947 came up for consideration. The argument raised was that the time-limit of 30 days of publication of award by the Labour Court is mandatory. This Court held that though Section 17 is mandatory, the time-limit to publish the award within 30 days is directory inter alia for the reason that the non-publication of the award within the period of thirty days does not entail any penalty."
>
> (emphasis supplied)

9.20 As against above, where consequences of non-compliance within the period prescribed for anything to be done in the statute have been mentioned, the same was held to be mandatory by this Court in **SCG Contracts (India) (P) Ltd. v. K.S. Chamankar Infrastructure (P) Ltd.**[21] It was with reference to Order VIII Rule 1 CPC as amended for suits relating to commercial disputes in terms of Commercial Division and Commercial Appellate Division of High Courts Act, 2015. Relevant paras of the judgment are extracted hereinbelow:

> "10. Several High Court Judgments on the amended Order 8 Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. See *Oku Tech (P) Ltd. v. Sangeet Agarwal*, 2016 SCC OnLine Del 6601 by a learned Single Judge of the Delhi High Court dated 11-8-2016 in CS (OS) No.3390 of 2015 as followed by several other judgments including a judgment of the Delhi High Court in *Maja Cosmetics v. Oasis Commercial (P) Ltd.,* 2018 SCC OnLine Del 6698.
>
> 11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught."
>
> (emphasis supplied)

9.21 The judgment of this Court in **Barun Chandra Thakur's case (supra)** does not come to the rescue of the appellant. This Court in the aforesaid judgment had only noticed the scheme of the Act in paras 59 and 60 and concluded that the conclusion of the inquiry and trials under Act should be expeditious, is the scheme of the Act.

21 [2019] 3 SCR 1050 : (2019) 12 SCC 210 : 2019 INSC 187

9.22 Hence, we are of the opinion that the time provided in Section 14(2) of the Act to conduct inquiry is not mandatory but directory. The time so provided in Section 14(3) can be extended by the Chief Judicial Magistrate or the Chief Metropolitan Magistrate, as the case may be, for the reasons to be recorded in writing.

9.23 After holding that the period as provided for under Section 14(3) for completion of preliminary assessment is not mandatory, what further? We deem it our duty to clarify the position further. For this purpose, the tools of interpretation as were used in **Afcons Infrastructure Limited and Another vs Cherian Varkey Construction Company Private Limited and Others**[22] could be aptly used to clarify the position further. In the aforesaid case, the consideration before this Court was the interpretation of Section 89 CPC. (See: paragraphs 20 and 21)

9.24 The rule of *causus omissus* i.e. 'what has not been provided in the Statute cannot be supplied by the courts' in the strict rule of interpretation. However, there are certain exceptions thereto. Para '19' of the judgment of this Court in **Surjit Singh Kalra vs. Union of India and Another**[23] throws light thereon. The same is extracted below:

> "19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words" (Craies Statute Law, 7th edn., p.109). Similar are the observations in *Hameedia Hardware Stores v. B. Mohan Lal Sowcar, (1988) 2 SCC 513, 524-25* where it was observed that the court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the court should construe it in a harmonious

22 [2010] 8 SCR 1053 : (2010) 8 SCC 24 : 2010 INSC 431

23 [1991] 1 SCR 364 : (1991) 2 SCC 87 : 1991 INSC 36

> way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See: *Sirajul Haq Khan v. Sunni Central Board of Waqf, 1959 SCR 1287, 1299:AIR 1959 SC 198)*"
>
> (emphasis supplied)

9.25 The issue was thereafter considered by this Court in **Rajbir Singh Dalal (Dr.) vs. Chaudhari Devi Lal University, Sirsa and Another**[24]**.** In the aforesaid case this Court observed as: '*where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a strict construction which leads to absurdity or deprives certain existing words of all meaning, and in this situation it is permissible to supply the words (vide Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., pp.71-76)*'. This Court also considered the traditional principles of interpretation known as the 'Mimansa rules of interpretation'. The issue under consideration in the aforesaid case was regarding requisite academic qualification for appointment to the post of Reader in the University in Public Administration. Applying the tools of interpretation, this Court opined that 'relevant subject' should be inserted in the qualification required for the post of Reader after the words 'at the Masters degree level' to give the rules a purposive interpretation by filling in the gap.

9.26 The same principles were followed by this Court in **Central Bureau of Investigation, Bank Securities and Fraud Cell vs. Ramesh Gelli and Others**[25].

9.27 In our opinion, the guidance as is evident from sub-section (4) of section 14 of the Act enabling the Chief Judicial Magistrate or Chief Metropolitan Magistrate to extend the period of inquiry as envisaged under Section 14(1), shall apply for extension of period as envisaged in sub-section (3) also. Such an extension can be granted for a limited period for the reasons to be recorded in writing. While considering the prayer for extension of time,

24 [2008] 11 SCR 992 : (2008) 9 SCC 284 : 2008 INSC 913

25 [2016] 1 SCR 762 : (2016) 3 SCC 788 : 2016 INSC 134

the delay in receipt of opinion of the experts shall be a relevant factor. This shall be in the spirit of the Act and giving the same a purposive meaning.

9.28 We approve the views expressed by the High Court of Madhya Pradesh in **Bhola vs State of Madhya Pradesh**[26] and the High Court in Delhi in **CCL vs State (NCT) of Delhi**[27] who while dealing with the provisions of section 14 of the Act have held that the time period prescribed for completion of the preliminary assessment is not mandatory but merely directory in nature. We also approve the views expressed by the High Court of the Punjab and Haryana in **Neeraj and Others vs State of Haryana**[28] and by the High Court of Delhi in **X (Through his Elder Brother) vs State**[29] who also expressed similar views while dealing with the *pari materia* provisions of the repealed Juvenile Justice (Care and Protection of Children) Act, 2000.

III. EXERCISE OF REVISIONAL POWER BY THE HIGH COURT

10. The order under challenge in the present appeal was passed by the High Court in revision filed by the complainant, impugning the order dated 10.04.2023 passed by the Board *vide* which the application filed by her under section 19 of the Act for termination of proceedings before the Board and transferring the case to the Children's Court for trial, was rejected. It was for the reason that the order passed by the Principal Magistrate on 05.04.2022 was final in terms of Section 7(4) of the Act, as no majority opinion could have been given.

10.1 In terms of the provision of law, the CCL could have grievance against that order and availed of his remedy against the same but, the proceedings were allowed to be continued further. Lesser said the better as to how two members of the Board without the Principal Magistrate being there had conducted the proceedings taking a different view in the matter. It is relevant to note that when subsequent order was passed by two members of the Board on 12.04.2022, the Principal Magistrate had already been

26 2019 SCC OnLine MP 521

27 2023 SCC OnLine Del 5063

28 2005 SCC OnLine P&H 611

29 2019 SCC OnLine Del 11164

transferred, as is evident from impugned order of the High Court (para 19). In fact, the order passed by the two members of the Board on 12.04.2022 directing inquiry in the case by the Board was *non-est* in the eyes of law, if considered strictly in terms of Section 7(4) of the Act. From various orders passed by the Board, it is evident that the inquiry could not proceed further either on account of the absence of the Presiding Officer or APP (Public Prosecutor) or the witnesses summoned. At that stage, an application was moved by the complainant for termination of proceedings before the Board and transferring the matter to the Children's Court, to which objections were filed by the appellant. The Board *vide* order dated 10.04.2023 dismissed the application holding that the complainant had a right of appeal against the order dated 12.04.2022, which could have been availed and the Board does not have any power to review its order. The aforesaid order was challenged by the complainant before the High Court by filing the Revision Petition invoking power under Section 397 read with Section 399 Cr.P.C. It is the order passed in the aforesaid petition which is impugned before this Court.

10.2 Firstly, the issue is mentioning of Section 397 read with Section 399 Cr. P.C for filing revision petition before the High Court and about its maintainability on that account. Nothing hinges on that, as it was mere mentioning of a wrong section in the petition. The High Court otherwise has the power to deal with the subject-matter. Section 102 of the Act enables the High Court to exercise its revisional powers with reference to any order or proceeding by the Board or the Children's Court. Hence, on that account we do not find that the revision should have been dismissed.

10.3 Another argument raised by learned counsel for the appellant was that there being remedy of appeal available with the complainant against the order dated 12.04.2024 *vide* which two members of the Board had directed inquiry into the offence allegedly committed by CCL by the Board. In our opinion, even though such a remedy may be available to the complainant which should normally be availed, but what is evident from the facts of the case is that there was an earlier order passed by the Principal Magistrate on 05.04.2022, which was final regarding conduct of trial of the

CCL by the Children's Court, still subsequently two members of the Board without the Principal Magistrate being there passed an order on 12.04.2022 directing inquiry into the offence by the Board. In fact, the subsequent order was totally *non-est*. Even if in such a situation the aforesaid order was not challenged by availing the remedy of appeal, in our opinion the revision under Section 102 of the Act cannot be said to be not maintainable.

10.4 Firstly, there is no time limit provided for filing a revision therein, and secondly it could be on an application filed by any of the parties. The High Court can exercise its revisional powers for satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit. Besides the legality of the order dated 12.04.2022, the case in hand is such where even the propriety of the proceeding was also in question. The proceedings before the Board could not continue after the passing of the order dated 05.04.2022, in terms of Section 7(4) of the Act.

10.5 Hence, non-availment of the remedy of appeal by the complainant in such a situation cannot be held to be fatal. We may also add here that even the appellant could have availed the remedy of appeal against the order dated 05.04.2022, but he thought of continuing before the Board in a *non-est* proceeding.

IV. ANOMALY IN SECTION 101 OF THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

(A) REGARDING THE TERMS USED AS 'CHILDREN'S COURT' AND 'COURT OF SESSIONS'

11. Section 101 of the Act provides for appeal against various orders as provided therein. Sub-section (1) thereof provides that any person aggrieved by an order made by the Committee or the Board under the Act may within 30 days from the date of such order prefer an appeal to the Children's Court, with an exception that against decision of the Committee relating to foster care and sponsorship care the appeal shall lie to the District Magistrate. The term 'Committee' has been defined in Section 2(22) of the Act to mean 'Child Welfare Committee' constituted under Section 27 thereof.

The proviso to sub-section (1) of section 101 provides that the Court of Sessions or District Magistrate, as the case may be, may entertain

the appeal after expiry of the period of 30 days in case sufficient cause is shown for the delay in filing.

11.1 Sub-section (2) of Section 101 provides that an appeal against the order passed by the Board after making preliminary assessment under Section 15 of the Act shall lie before the Court of Sessions. While deciding the appeal, the Court can take assistance of experienced psychologists and medical specialists, other than those whose assistance was taken by the Board while passing the order impugned. It shows independent examination of the issue. Sub-section (4) provides that, no second appeal will be maintainable from the order passed by the Court of Sessions. In **Barun Chandra Thakur's case (supra)** the provisions have been held to be mandatory.

11.2 Some anomalies are evident in the aforesaid proviso, as pointed out by the learned counsel for the parties at the time of hearing. Their contention was that the anomalies should also be addressed, so as to streamline the procedure in future. We also think in the same direction, keeping in view the spirit of law.

11.3 The term Court of Sessions as such has not been defined in the Act. The trial of CCL, who is of the age of 16 years or above and is involved in a heinous offence is to be conducted by the Children's Court, treating him as an adult.

11.4 'Children's Court' has been defined in the Act in Section 2(20) to mean the Court established under the 2005 Act or a Special Court established under the 2012 Act. Where such Courts are not existing, the Court of Sessions shall have jurisdiction to try the offence under the Act. Meaning thereby the Presiding Officer of the Children's Court and the Court of Sessions have been put in same bracket. There is no doubt with the proposition that a Sessions Judge would include an Additional Sessions Judge as well.

11.5 Section 25 of the 2005 Act provides that for providing speedy trial of offences against children or violation of child rights, the State Government in concurrence with the Chief Justice of the High Court by notification specify at least a Court in the State or for each district a Court of Sessions to be a Children's Court. Meaning thereby the Special Court under the 2005 Act is at the level of the Sessions Court.

11.6 Section 101(1) of the Act deals with filing of appeals against certain orders passed by the Board or the Committee before the Children's Court, as the case may be. The proviso to the aforesaid sub-section provides that in case there is any delay in filing the appeal, the power of condonation has been vested with the Court of Sessions. The word 'Children's Court' is not mentioned, though appeal is maintainable before Children's Court.

11.7 Sub-section (2) of Section 101 of the Act provides for an appeal against an order passed by the Board under Section 15 of the Act. The appellate authority is stated to be Court of Sessions.

11.8 Rule 13 of the 2016 Rules deals with the procedure in relation to Children's Court and Monitoring Authorities. Sub-rules (3) and (4) thereof which deal with appeal filed under Section 101(2) of the Act refer the appellate authority as the 'Children's Court' though in Section 101(2) of the Act appeal is stated to be maintainable before the Court of Sessions. From the above provision also, it is evident that the words 'Court of Sessions' and the 'Children's Court' have been used interchangeably.

12. Section 102 of the Act provides for revisional power of the High Court. This again talks of calling for records of any proceedings in which a Committee or a Board or Children's Court or Court has passed an order. It does not talk of exercise of revisional power against the order passed by the Sessions Court. To put the record straight, it is added that the term 'court' has been defined in the Act in Section 2(23) to mean a civil court, which has jurisdiction in matters of adoption and guardianship and may include the District Court, Family Court and City Civil Courts.

12.1 Similarly, sub-section (2) provides that against an order passed by the Board after preliminary assessment under Section 15 of the Act, the appeal is maintainable before the Court of Sessions. The Board is headed by the Principal Magistrate. Here, the word Children's Court is not mentioned.

12.2 From a conjoint reading of the aforesaid provisions of the Act and the 2016 Rules, in our opinion, wherever words 'Children's Court' or the 'Sessions Court' are mentioned both should be read in alternative. In the sense where Children's Court is

available, even if the appeal is said to be maintainable before the Sessions Court, it has to be considered by the Children's Court. Whereas where no Children's Court is available, the power is to be exercised by the Sessions Court.

(B) TIME FOR FILING APPEAL AGAINST ORDER OF THE BOARD UNDER SECTION 15 OF THE ACT

13. Though, the right of appeal has been provided in Section 15(2) and Section 101(2) of the Act against an order passed under Section 18(3) after preliminary assessment under Section 15 of the Act, however, neither any time has been fixed for filing the appeal nor any provision is provided for condonation of delay in case need be.

13.1 In our opinion, the same being an omission. In order to make the Act workable and putting timelines for exercise of statutory right of appeal which always is there, we deem it appropriate to fill up this gap, which otherwise does not go against the scheme of the Act. Hence, for the period for filing of appeal in Section 101(2), we take guidance from Section 101(1) of the Act. The period provided for filing the appeal therein is 30 days and in case sufficient cause is shown the power to condone the delay has also been conferred on the appellate authority. Timeline has also been provided for decision of appeal.

13.2 Ordered accordingly.

(C) REGARDING SECOND APPEAL

14. In sub-section (4), it is provided that no second appeal shall lie from the order of Sessions Court. Sub-section (5) provides for appeal to the High Court against an order of Children's Court, for this procedure of CrPC is applicable, as if the second appeal may lie against the order passed by the Children's Court. High Court has also been conferred revisional powers under Section 102 of the Act.

14.1 The aforesaid provisions will also need examination in detail for seamless working of the provisions of the Act removing anomalies. However, as this is not the issue involved in the present appeal and no arguments have been addressed thereon, hence, we leave this issue open to be considered in some appropriate case.

V. VALIDITY OF ORDER PASSED BY THE BOARD ON 05.04.2022

15. In the case in hand, after receipt of the report dated 01.02.2022 submitted by the Department of Child and Adolescent Psychiatry, NIMHANS-DWCO, the arguments of learned counsel for the parties were heard by the Board and vide order dated 29.03.2022 the matter was kept for orders on 05.04.2022. On that day, the Principal Magistrate passed the order, after considering the preliminary assessment report and the social investigation report, that the CCL is to be tried by the Children's Court as an adult. The records of the case were directed to be transferred to the Children's Court, Bengaluru. When the file was put up before the member of the Board for signature, he recorded as under:

> "I am having a dissenting view to above said order. I will pass detailed order on next date of hearing."

15.1 The matter was directed to be put up on 12.04.2022. On the next date, the Principal Magistrate being not there and another person having been appointed as a member of the Board, the arguments apparently were reheard by the two members of the Board in the absence of the Principal Magistrate, and it was directed that enquiry into the offence allegedly committed by the CCL is to be conducted by the Board.

15.2 Section 7 of the Act deals with the procedure in relation to the Board. Sub-Section 3 thereof provides that the Board may act notwithstanding absence of any member of the Board. No order passed by the Board shall be invalid by reason only of absence of any member during any stage of proceedings. The proviso thereto provides that at the time of final disposal of the case or making an order under Section 18(3) of the Act, there shall be at least two members including the Principal Magistrate.

15.3 When the arguments in the matter were heard with reference to the order under Section 18(3) of the Act, and the order was reserved on 29.03.2022 the Board consisted of a Principal Magistrate and a Member.

15.4 Section 7(4) of the Act provides that in case there is any difference of opinion in the interim or the final disposal, the

opinion of the majority shall prevail. Where there is no such majority, the opinion of the Principal Magistrate shall prevail.

15.5 A perusal of the record shows that after the order was reserved on 29.03.2022, the matter was listed on 05.04.2022 for orders. The Principal Magistrate recorded his opinion that the CCL is to be tried by the Children's Court. The other member of the Board recorded his dissent though, no detailed reasons were given as such. In terms of Section 7(4) of the Act, the opinion of the majority is to prevail. The case in hand does not fall in that category, as the Board on that date consisted of the Principal Magistrate and a Member, and the Member had recorded his dissent. In such a situation the opinion of the Principal Magistrate will prevail. In the case in hand the order was signed by the Principal Magistrate. Even if the other member of the Board had not signed the order and had merely mentioned that he had a dissenting view, without any reasons being recorded, the order of the Principal Magistrate will prevail. Needless to add that reasons in any order are 'heart and soul' and are helpful for the next higher Court to examine the matter. The proceedings with reference to the opinion of the Board regarding inquiry or trial of the CCL, either by the Board or Children's Court, stood culminated. Any further proceedings in that matter were *non-est* and without jurisdiction. Much less to say anything more about the same. The opinion of the High Court in that regard does not call for any interference.

VI. REMEDY OF APPEAL TO APPELLANT

16. In our opinion, considering the facts of the case in hand, the appellant deserves to be granted that right.

16.1 Initially the application filed by the complainant was rejected by the Board. Aggrieved against the same, the complainant preferred revision before the High Court. The High Court decided the same merely on the issue of finality of the opinion of the Board. It was in terms of Section 7(4) of the Act, which provides that where majority opinion is not possible, the opinion of the Principal Magistrate shall prevail. An appeal is a valuable right. The arguments, if any, which the CCL may have against the order dated 05.04.2022 passed by the Board directing for his trial by the Children's Court, have not been considered. The impugned order only noticed as fact that the Board had formed

opinion after considering the opinion received from NIMHANS. If scheme of the Act is considered, an appeal against order of the Board passed under Section 15 of the Act lies to the Court of Sessions. The appellate authority, to examine the issues, is entitled to get the assistance of experienced psychologists and medical specialists other than those whose assistance has been obtained by the Board. Hence, independent examination is envisaged. The said process has not been followed in the case in hand. We do not want to prejudice the rights of the parties in that regard.

16.2 Hence, we are of the opinion that the CCL can exercise his right of appeal against order dated 05.04.2022 passed by the Board within 10 days and appeal, if any filed, shall be decided by the appellate authority within two months thereafter.

VII. ADDITIONAL ISSUES

17. Before parting with the judgment, we quote with approval para 25 of the impugned order passed by the High Court. The same is extracted below:

> "25. One more point observed by this Court is that while signing the order sheet and also orders, the names of the Judicial Member as well as Non-judicial Members are not noted below their signatures. This is coming in the way of anyone knowing the names of the members who were present and who were absent. Therefore, only on the basis of signatures, this Court was able to distinguish as to who was the Non-Judicial Member present on 05.04.2022 and who was the third member who joined in expressing dissenting opinion on 12.04.2022. This Court is of the considered opinion that it would be appropriate to mention the names of the members below their signatures, which would also help the transparency in conduct of the said proceedings and put the members on guard about their roles played in the said proceedings."

17.1 The High Court has noticed an important issue which arises in judicial and quasi-judicial proceedings throughout the country. The Presiding Officers or Members of the Board, as the case in hand, or Tribunals do not mention their names when the order is passed. As a result of which it becomes difficult to find out

later on, as to who was presiding the Court or Board or Tribunal or was the member at the relevant point of time. There may be many officers with the same name. Insofar as the judicial officers are concerned, unique I.D. numbers have been issued to them.

17.2 We expect that wherever lacking, in all orders passed by the Courts, Tribunals, Boards and the quasi-judicial authorities, the names of the Presiding Officers or the Members be specifically mentioned in the orders when signed, including the interim orders. If there is any identification number given to the officers, the same can also be added.

17.3 The matter does not rest here. In many of the orders the presence of the parties and/or their counsels is not properly recorded. Further, it is not evident as to on whose behalf adjournment has been sought and granted. It is very relevant fact to be considered at different stages of the case and also to find out as to who was the party delaying the matter. At the time of grant of adjournment, it should specifically be mentioned as to the purpose therefor. This may be helpful in imposition of costs also, finally once we shift to the real terms costs.

VIII. RELIEFS AND DIRECTIONS

18. In view of our aforesaid discussions, the present appeal is disposed of with the following directions:

(i) The provision of Section 14(3) of the Act, providing for the period of three months for completion of a preliminary assessment under Section 15 of the Act, is not mandatory. The same is held to be directory. The period can be extended, for the reasons to be recorded in writing, by the Chief Judicial Magistrate or, as the case may be, the Chief Metropolitan Magistrate.

(ii) The words 'Children's Court' and 'Court of Sessions' in Juvenile Justice (Care and Protection of Children) Act, 2015 and the 2016 Rules shall be read interchangeably. Primarily jurisdiction vests in the Children's Court. However, in the absence of constitution of such Children's Court in the district, the power to be exercised under the Act is vested with the Court of Sessions.

(iii) Appeal, under Section 101(2) of the Act against an order of the Board passed under Section 15 of the Act, can be filed

within a period of 30 days. The appellate court can entertain the appeal after the expiry of the aforesaid period, provided sufficient cause is shown. Endeavour has to be made to decide any such appeal filed within a period of 30 days.

(iv) There is no error in exercise of revisional jurisdiction by the High Court in the present matter.

(v) There is no error in the order dated 15.11.2023 passed by the High Court dealing with the procedure as provided for under the Act in terms of Section 7(4) thereof.

(vi) Order passed by the Board as signed by the Principal Magistrate on 05.04.2022 was final. However, the same is subject to right of appeal of the aggrieved party. The appellant shall have the right of appeal against the aforesaid order within a period of 10 days from today. The appellate authority shall make an endeavour to decide the same within a period of two months from the date of filing.

(vii) In all the orders passed by the Courts, Tribunals, Boards and the Quasi-Judicial Authorities the names of the Presiding Officer and/or the Members who sign the orders shall be mentioned. In case any identification number has been given, the same can also be added.

(viii) The Presiding Officers and/or Members while passing the order shall properly record presence of the parties and/or their counsels, the purpose for which the matter is being adjourned and the party on whose behalf the adjournment has been sought and granted.

19. A copy of the judgment be sent to all the Registrar Generals of High Courts for further circulation amongst the Judicial Officers and the Members of the Juvenile Justice Boards, the Directors of the National Judicial Academy and the State Judicial Academies.

Result of the case: Appeal disposed of.

†*Headnotes prepared by:* Ankit Gyan

[2024] 5 S.C.R. 813 : 2024 INSC 416

C. Subbiah @ Kadambur Jayaraj and Others
v.
The Superintendent of Police and Others

(Criminal Appeal No. 2582 of 2024)

15 May 2024

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

Issue for Consideration

Matter pertains to the permissibility of suing the accused for a civil wrong, in relation to the benami transactions, as a corollary, allowing criminal prosecution of the accused in relation to the same cause of action.

Headnotes†

Benami Transactions (Prohibition), Act 1988 – s. 4 – Benami transaction – Initiation of civil suit/criminal proceedings by the real owner of the benami property – Permissibility – Complainant-government teacher, previously doing real estate business, fraudulently allured and induced by the accused persons to invest in various land deals to earn high profits – Purchased properties not registered in complainant's name despite the investments made by him and thereafter, the accused failed to deliver the plots or profits as agreed and thereby committed fraud and criminal breach of trust – Registration of FIR and filing of chargesheet – On the same set of allegations, the complainant filed civil suit against the accused persons, which is pending – Petition by the accused seeking quashing of the FIR and the chargesheet – Dismissed by the High Court:

Held: Dispute is regarding the quantification of profits and full satisfaction of the share claimed by the complainant proportional to the investments made by him after sale of some plots – Complainant after being appointed in Government service would be conscious that indulging in land deals may land him in departmental proceedings, thus, must have agreed that the lands not be registered in his name – By virtue of s. 4(1) and 4(2), the complainant in spite of having made investments in the land deals in the names of other persons which were evidently benami transactions, was prohibited from instituting civil proceedings for recovery against

* Author

the accused persons-appellants – As a corollary, allowing criminal prosecution of the accused in relation to the self-same cause of action would be impermissible in law – Thus, in view of the clear bar contained in s. 4, the complainant could not have sued the accused for the same set of facts and allegations which were made the foundation of the criminal proceedings – Since, if such allegations did not constitute an actionable civil wrong, allowing the prosecution of the accused for the very same set of facts, would tantamount to abuse of the process of law – Furthermore, no allegation to persuade the Court to hold that the intention of the accused was to defraud the complainant right from the inception of the transactions – Also necessary ingredients of the offences punishable u/ss. 406, 420, 294(b) and 506(ii) IPC not made out against the accused – Dispute which is purely civil in nature was given a colour of criminal prosecution alleging fraud, breach of trust and criminal intimidation by misusing the tool of criminal law – Criminal prosecution instituted against the accused in pursuance of the totally frivolous FIR tantamounts to sheer abuse of the process of law – Thus, the impugned order quashed and set aside. [Paras 36, 38, 42-48]

Benami Transactions (Prohibition), Act 1988 – s. 4 – Benami transaction – Prohibition of the right to recover property held benami:

Held: s. 4(1) makes it clear that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person, shall lie or on behalf of a person claiming to be real owner of such property – Such person cannot raise a defence based on any right in respect of any property held benami either against the person in whose name the property is held or against any other person – s. 4(2) prohibits the institution of any suit, claim or any other action by and on behalf of a person claiming to be the real owner of such property. [Para 35]

Case Law Cited

State of Haryana and Others v. Bhajan Lal and Others [1990] Suppl. 3 SCR 259 **: 1992 Supp. 1 SCC 335;** *Indian Oil Corpn. v. NEPC India Ltd. and Others* [2006] Supp. 3 SCR 704 **: (2006) 6 SCC 736;** *Anand Kumar Mohatta and Another v. State(NCT of Delhi), Department of Home and Another* [2018] 13 SCR

**C. Subbiah @ Kadambur Jayaraj and Others v.
The Superintendent of Police and Others**

1028 : (2019) 11 SCC 706; *Union of India v. Ganpati Dealcom (P) Ltd.* **[2022] 12 SCR 320 : (2023) 3 SCC 315;** *Sarabjit Kaur v. State of Punjab and Anr.,* **2023 SCC OnLine SC 210;** *Vijay Kumar Ghai v. State of W.B.* **[2022] 1 SCR 884 : (2022) 7 SCC 124 – referred to.**

List of Acts

Penal Code, 1860; Code of Criminal Procedure, 1973; Prevention of Corruption Act, 1988; Benami Transactions (Prohibition), Act 1988.

List of Keywords

Civil wrong; Benami transactions; Criminal prosecution; Cause of action; Fraudulently allured and induced; Fraud; Criminal breach of trust; Departmental proceedings; Quantification of profits; Criminal intimidation; Abuse of the process of law.

Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 2582 of 2024

From the Judgment and Order dated 23.04.2018 of the High Court of Judicature at Madras at Madurai in CRLOP No. 3846 of 2013

Appearances for Parties

Dama Seshadri Naidu, Sr. Adv., Pai Amit, Tushar Bakshi, Mrs. Naresh Bakshi, Abhiyudaya Vats, Ashish Jacob Mathew, Advs. for the Appellants.

D. Kumanan, Veshal Tyagi, M.P. Parthiban, Ms. Priyaranjani Nagamuthu, Ms. Shalini Mishra, R. Sudhakaran, T. Hari Hara Sudhan, Bilal Mansoor, Shreyas Kaushal, P.V.K. Deivendran, Advs. for the Respondents.

Judgment / Order of the Supreme Court

Judgment

Mehta, J.

1. Leave granted.

2. The instant appeal by special leave is filed against the judgment dated 23rd April, 2018 passed by learned Single Judge of the Madras High Court, Madurai Bench dismissing the CRL.O.P.(MD) No. 3846 of 2013

preferred by the appellants herein seeking quashing of proceedings of Criminal Case No. 250 of 2012 pending in the Court of learned Judicial Magistrate No. II, Kovilpatti for offences punishable under Sections 420 read with Section 120B, Section 294(b), Section 506(ii) read with Section 114 of the Indian Penal Code, 1860(hereinafter being referred to as the 'IPC').

Brief facts:-

3. Respondent No. 3(hereinafter being referred to as the 'complainant') lodged a complaint in the Court of learned Judicial Magistrate No. II, Kovilpatti alleging *inter alia* that he was having a qualification of M.Sc., MD Graduate. He was appointed as a Government teacher on 8th October, 2007. Before being appointed as a Government teacher, the complainant was doing real estate business for earning his livelihood for past 16 years.

4. The complainant was knowing Kannabiran(hereinafter being referred to as 'A-3') who was working as a Manager in the State Bank of India(SBI), Kovilpatti Branch. While being engaged in the real estate business, the complainant came into contact with Subbiah @ Kadambur Jeyaraj(hereinafter being referred to as 'A-1') and his wife A. Vijaya(hereinafter being referred to as 'A-2'). Through A-1 and A-2, the complainant came into contact with Chandrasekar(hereinafter being referred to as 'A-4'), his son Pandiyaraj(hereinafter being referred to as 'A-6'), his wife(S. Pandiyammal, hereinafter being referred as 'A-5'), and his brother (K.Shanmugiah, hereinafter being referred as 'A-8') who were also engaged in real estate business.

5. The complainant claimed that he always trusted his partners in business. Taking undue advantage of the trusting nature of the complainant, the accused persons induced him to join their real estate business claiming that they had strong political connections. The accused allured and induced the complainant to enter into land deals with the intention to defraud the complainant right at the inception of the transactions. The complainant was told that the documents need not be registered in his own name and instead the registration may be carried out in the name of his sister-in-law. An alternative option was given that if the documents were registered in the names of the accused, the plots could be sold immediately to earn higher profits. By flaunting their political connections, the accused influenced the

complainant to make investments into lands assuring that he would reap huge benefits out of these deals.

6. The complainant was also fraudulently induced to believe that out of the chunks of lands so purchased, smaller plots would be carved out and sold to different persons which would frequently require physical presence of the seller and since the complainant was a teacher, he would face inconvenience if the land parcels were to be registered in his name. In this manner, the complainant was not allowed to get the purchased properties registered in his name despite he making the investments. The complainant was given assurances that the plots would be sold for huge profit in a very short duration and he would be given his share. By using this mode of inducement, A-1, A-3, A-4, and A-6 infused a sense of trust in the complainant with the ulterior motive to defraud him and to commit breach of trust.

7. It was further alleged that before the complainant had come in touch with the accused, he and his brother-in-law Chandrasekar, S/o Krishnasamy Naicker had entered into an agreement for sale with A. Sairam in respect of a chunk of land at Allampatti village, admeasuring 8 acres, but the sale could not be finalized because a suit was pending in the District Court, Tuticorin in respect of the said land. In the meantime, the complainant was appointed as a teacher. The suit pending before the District Court, Tuticorin was disposed in favour of A. Sairam.

8. Having given the fraudulent allurements to the complainant, the accused got registered a sale deed in their name as Document No. 1839 of 2008 dated 27th February, 2008 on the file of Sub Registrar Office, Kovilpatti in respect of some plots of land situated in the Allampatti village of total area 7.618 acres. The complainant invested a sum of Rs. 1,01,47,800/- towards this transaction whereas, the accused invested proportionately much lesser amounts in the said land deal. A-1, A-3, A-4, and A-6 along with the complainant, purchased the said parcel of land from A. Sairam for a total consideration of Rs. 3,08,33,600/-. However, as per the complainant, the accused never gave him the plots equivalent to the investment made by him and thereby, committed fraud and breach of trust.

9. The complainant further alleged that A-2 and A-5 had conspired with A-1, A-3, A-4, and A-6 to cheat him. The accused made the complainant believe that the business of real estate is generally

carried on by word of mouth and trust. However, at a later point of time, the accused started indulging in criminal breach of trust with the ulterior motive of cheating the complainant.

10. A-1, A-3, A-4 and A-6 invested the amount provided by the complainant towards his share in the land deal and completed the sale of the suit property on 27th February, 2008 with A. Sairam. However, despite the assurances, the accused conspired and refused to give the due share of plots to the complainant thereby committing breach of trust. Therefore, a Panchayat meeting was convened on 19th July, 2010 and a settlement deed was also executed wherein, it was agreed that 52 plots admeasuring 256.51 cents would be handed over by A-1 and A-2 to the complainant towards the investment made by him.

11. Under the same settlement, A-4 and A-6 were given 45 plots to the extent of 233.50 cents for the investment made by them after deducting land to the extent of 16.50 cents towards the passages. On the very date of execution of the settlement deed, all the accused entered into an agreement with Dharamraj(hereinafter being referred to as 'A-7'), brother-in-law of A-4 and executed a General Power of Attorney(GPA) in his favour after receiving a sum of Rs. 30,00,000/- towards plots Nos. 68, 69, 70 and 71 which were a part and parcel of the settlement deed.

12. The complainant alleged that the accused failed to pay a sum of Rs. 19,00,000/- which would be the share amount due to the complainant out of the sale price of Rs. 30,00,000/-. Thus, the accused persons despite being signatories to the settlement deed did not act as promised under the settlement and thereby, committed breach of trust.

13. The accused had also promised to execute the sale deeds of some plots in favour of the persons to be nominated by the complainant. The complainant provided names of three persons for these plots. Three sale deeds were got prepared on stamp papers worth Rs. 90,000/-. The accused gave their photographs and ID-proofs and signed the sale deeds, but they failed to appear at the Sub-Registrar Office, Kovilpatti at the scheduled time for registration of the sale deeds. When the complainant enquired from A-1 and A-3 as to why they were indulging in such fraudulent acts, they abused the complainant and threatened to get rid of him. A-1 threatened the complainant that if the matter is reported to the police, he would shoot and kill

the complainant and his family members by using a revolver. While saying so, A-1 brandished a revolver and handed it over to A-3.

14. It was further alleged that A-1 further induced the complainant to pay a sum of Rs. 41,00,000/- on 14th November, 2011, whereafter, the sale deed for one of the properties forming a part of the settlement memorandum was executed. However, for some of the properties, the accused were not abiding by the terms of the memorandum and had fraudulently transferred the same to other investors. Some land brokers were also present at the time when this incident occurred.

15. Being aggrieved of these continued criminal activities of the accused, the complainant submitted a complaint dated 29th June, 2010 at the Kovilpatti West Police Station but no action was taken thereupon. Having failed to get any action on his complaint, the complainant approached the Madras High Court, Madurai Bench by filing CRL.O.P.(MD) No. 1396 of 2011 and as per the directions of the High Court, he submitted a fresh complaint to the District Superintendent of Police, Tuticorin, but still the FIR was not registered. Ultimately, the complainant was compelled to file a complaint in the Court of the Jurisdictional Magistrate with a prayer to forward the same to the police under Section 156(3) of Code of Criminal Procedure, 1973.

16. Under the direction of the learned Magistrate, the complaint was forwarded to Police Station Kovilpatti West, where FIR No. 305 of 2011 dated 6th March, 2011 came to be registered. After investigation, the Investigating Agency, proceeded to file a charge sheet against eight accused with the following conclusions: -

> "By these Criminal Acts accused 1 to 6 have made to believe the complainant by their honey coated words have purchased lands, along with the complainant, in Alampatti Village in Survey No.218/B - 1.5 Acres, Survey No. 219 - 2.74 Acres, Survey No.218/1 - 1 Acre, Survey No.221/1 - 2.37 Acres totaling in all 7 Acres 61 cents which are valued Rs.6,18,500/- as per guideline value but paid Rs.3,08,33,600/- and registered the sale deed as Doc.No.1839/08 on the file of SRO Kovilpatti, out of the said sale consideration have paid the complainant Rs.10,00,100/- as per his proportionate share of his investment and without paying the balance

sale consideration of Rs.91,47,700/- towards his share received from the sale consideration or by not giving the proportionate land in alternate, they indulged in cheating activities. Therefore the acts committed by the accused or criminal nature and they appear to have committed the criminal acts which are punishable under the following Sections:

The 1st accused punishable under Section 420 IPC r/w. 120(B) IPC and Section 294(b), 506(ii) of IPC.

The 2nd accused punishable under Section 420 IPC r/w Section 120(B) IPC.

The 3rd accused punishable under Section 420 IPC r/w. 120(B) IPC and Section 294(b), 506(ii) of IPC r/w 114 of IPC.

The 4th accused punishable under Section 420 IPC r/w Section 120(B) IPC.

The 5th accused punishable under Section 420 IPC r/w Section 120(B) of IPC.

The 6th accused punishable under Section 420 IPC r/w Section 120(B) of IPC.

The 7th accused punishable under Section 420 IPC r/w Section120(B) of IPC.

The 8th accused punishable under Section 420 IPC r/w Section 120(B) of IPC."

17. It may be mentioned that for the very same set of allegations, the complainant had also filed a civil suit by impleading A-1 to A-6 as defendants which is pending on the file of District Judge, Tuticorin in O.S. No. 06 of 2012.

18. A-1, A-2, A-3, A-4, A-5, A-6, A-7, and A-8 being the appellants herein, approached the Madras High Court, Madurai Bench for assailing the FIR and the charge sheet by filing a CRL.O.P.(MD) No. 3846 of 2013. The learned Single Judge of Madras High Court proceeded to dismiss the said petition preferred by the appellants vide order dated 23rd April, 2018 which is subject matter of challenge in this appeal by special leave.

Submissions on behalf of appellants: -

19. Learned senior counsel, Mr. Dama Seshadri Naidu representing the appellants vehemently and fervently contended that even if the allegations set out in the FIR and the charge sheet are treated to be true on the face of record, the same do not constitute the necessary ingredients of the offences alleged. He contended that looking at the admitted facts as set out in the complaint, the dispute, if any, between the parties is purely of civil nature and thus, continuance of the proceedings pursuant to the charge sheet filed against the accused appellants would tantamount to gross abuse of process of law. The charge sheet clearly spells out that a part of the sale proceeds from the land deals were paid to the complainant, but the entire amount as per his entitlement was not paid. Thus, as per Shri Naidu, for alleged part performance of contractual obligations, the tool of criminal law has been misused by the complainant.

20. He further submitted that the complainant being a teacher serving in the Government establishment was not entitled to indulge in property transactions and thus, at his own risk, he made the investments through the accused appellants herein and when the profit sharing quotient towards the land deals did not work out to the complainant's satisfaction, the process of criminal law was misused so as to launch a purely frivolous prosecution against the accused appellants.

21. The contention of the learned senior counsel was that there is no material whatsoever on the record of the case to show that the intention of the accused appellants was to defraud the complainant right at the time of the inception of the transactions. Furthermore, since the allegation of the complainant is regarding disproportionate sharing of profits enuring from the land deals which he entered with the accused appellants with open eyes, the offence of criminal breach of trust would also not be made out against the accused appellants.

22. He urged that the essential ingredients of the offences alleged are not made out from the highest allegations levelled by the complainant as set out in the charge sheet warranting continuation of the criminal proceedings against the accused appellants. He placed reliance on the judgments of this Court in ***State of Haryana and Others v.***

Bhajan Lal and Others[1]***; Indian Oil Corpn. v. NEPC India Ltd. and Others***[2] ***and Anand Kumar Mohatta and Another v. State(NCT of Delhi), Department of Home and Another***[3] in support of his contentions and buttressed that the criminal proceedings sought to be taken against the appellants as a consequence to the charge sheet are fit to be quashed as the same amount to a sheer abuse of process of Court apart from the fact that the charge sheet does not disclose the necessary ingredients of any cognizable offence.

Submissions on behalf of respondents-complainant and State:-

23. *Per contra*, learned counsel for the respondent complainant as well as the learned Standing Counsel representing the State vehemently and fervently opposed the submissions advanced by the learned counsel for the appellants. It was contended that, the accused appellants won over the trust of the complainant by using honey quoted language, and thereby, fraudulently induced him to make huge investments in land deals. The complainant was assured time and again by the accused that he would be given his due share of profits or the plots from the lands, as the case may be, which would be purchased in the name of the accused because the complainant being a Government teacher could not indulge into such transactions. The complainant fell for the allurements given by the accused appellants and invested huge sums of money for land deals placing blind faith on the assurances given by accused. However, the accused appellants resiled from their promises and defrauded the complainant by failing to give him the requisite number of plots which would fall in his share commensurate with the investment made by him. The complainant was also deprived of his rightful share in the profits reaped after some of the plots had been sold.

24. They submitted that merely because the complainant has also availed civil remedy for the same grievances, that by itself cannot disentitle him from invoking jurisdiction of the criminal Court to prosecute the accused appellants for their fraudulent acts because the allegations set out in the complaint constitute both the civil wrong as well as criminal offences and thus parallel proceedings can continue. On these grounds,

1 [1990] Supp. 3 SCR 259 : 1992 Supp(1) SCC 335

2 [2006] Supp. 3 SCR 704 : (2006) 6 SCC 736

3 [2018] 13 SCR 1028 : (2019) 11 SCC 706

learned counsel for the complainant and the learned Standing Counsel for the State implored the Court to dismiss the appeal.

Consideration of submissions and material on record: -

25. Heard the learned counsel for the parties at length and perused the impugned order as well as the complaint and the charge sheet filed against the accused appellants.

26. The arguments were heard, and the judgment was reserved on 16th February, 2024. Thereafter, we thought it fit to seek a clarification from the learned counsel for the parties because on going through the material available on record, we were *prima facie* of the opinion that the case presents sufficient material to direct inquiry under the provisions of Section 13(1)(b) and Section 13(2) of the Prevention of Corruption Act, 1988(hereinafter being referred to as 'PC Act') because, manifestly, the complainant being a public servant had indulged in large scale benami land transactions without disclosing the same to his employer. Accordingly, learned counsel for the complainant was put to notice and he has submitted a short clarificatory note mentioning therein that the complainant is an Income Tax assessee from the year 2000. It is also submitted in the note that the complainant started the business of real estate from the year 2004 onwards and had acquired significant wealth during the course of this business. The complainant was appointed as a teacher in the Government School only in the year 2007 when he was nearly 45 years of age. He has superannuated in the year 2022 without any pensionary benefits. Thus, it was submitted that whatever money the complainant invested in the disputed land deals entered into with the accused, were genuine investments made by using his valid and declared sources of income and savings. A chart was also set out along with this explanation regarding the sources from where the complainant received various amounts which he claims to have invested in the disputed land deals.

27. Being satisfied with the explanation so offered, we do not find any justifiable cause so as to direct an enquiry against the complainant for the offences under the PC Act.

28. Now, we proceed to appreciate the merits of the present appeal.

29. At the outset, we may note that the complainant has come out with a clear case that he was already involved in real estate business before being selected as a Government teacher in the year 2007.

Hence, it can safely be assumed that he was well versed with the nitty gritties of such business and the innocence and ignorance feigned by him in the complaint *qua pros* and *cons* of fallouts of property dealings cannot *ex facie* be countenanced.

30. The complainant has alleged in the FIR, that the accused fraudulently allured him into buying the lands by using honey quoted words and that they also took advantage of the fact that the complainant was a teacher serving in a Government institution and hence he was persuaded to get the lands registered in the name of the accused. However, these allegations are one sided and do not present the true picture. The complainant after having been appointed in Government service would be conscious that indulging in land deals may land him in departmental proceedings. It was precisely for that reason, the complainant must have agreed that the lands to be purchased may not be registered in his name. On the face of the record, the property deals allegedly made in the names of other persons by using the funds partially provided by the complainant were benami transactions.

31. We may, at this stage, refer to the relevant provisions of the Benami Transactions (Prohibition), Act 1988(hereinafter being referred to as the 'Benami Act')(applicable at the time of the alleged transactions), and particularly Section 2(a), Section 2(c) and Section 4 thereof: -

> **"2. Definitions-** In this Act, unless the context otherwise requires,--
>
> (a) benami transaction means any transaction in which property is transferred to one person for a consideration paid or provided by another person;
>
> (b) …….
>
> (c) property means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property
>
> **"4. Prohibition of the right to recover property held benami-**
>
> (1) No suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other

person shall lie by or on behalf of a person claiming to be the real owner of such property.

(2) No defence based on any right in respect of any property held benami, whether against the person in whose name the property is held or against any other person, shall be allowed in any suit, claim or action by or on behalf of a person claiming to be the real owner of such property.

(3) Nothing in this section shall apply,--

(a) where the person in whose name the property is held is a coparcener in a Hindu undivided family and the property is held for the benefit of the coparceners in the family; or

(b) where the person in whose name the property is held is a trustee or other person standing in a fiduciary capacity, and the property is held for the benefit of another person for whom he is a trustee or towards whom he stands in such capacity**."**

32. As per Section 2(a), any transaction in which property is transferred to one person for a consideration paid or provided by another person would be a "benami transaction".

33. As per Section 2(c), "property" means property of any kind, whether movable or immovable, tangible or intangible, and includes any right or interest in such property.

34. Sections 3 of the Benami Act have been declared unconstitutional by this Court in the case of ***Union of India v. Ganpati Dealcom (P) Ltd***[4]. A review petition is, however, pending against the said judgment.

35. Section 4(1) of the Benami Act makes it clear that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person, shall lie or on behalf of a person claiming to be real owner of such property. Such person cannot raise a defence

4 [2022] 12 SCR 320 : (2023) 3 SCC 315

based on any right in respect of any property held benami either against the person in whose name the property is held or against any other person. Section 4(2) prohibits the institution of any suit, claim or any other action by and on behalf of a person claiming to be the real owner of such property.

(emphasis supplied)

36. It is, thus, clear that the complainant in spite of having made investments in the land deals which were evidently benami transactions, could not have instituted any civil proceedings for recovery against the person(s) in whose name, the properties were held which would be the accused appellants herein. Since by virtue of the provisions contained in Sections 4(1) and 4(2) of the Benami Act, the complainant is prohibited from suing the accused for a civil wrong, in relation to these benami transactions, as a corollary, allowing criminal prosecution of the accused in relation to the self-same cause of action would be impermissible in law.

37. Going by the allegations as set out in the FIR and the charge sheet, it is apparent that it is the admitted case of the complainant that the accused appellants made over a part of the purchased lands/plots to the complainant and also paid a part of the profits to him. However, when the exact share of the investment on pro-rata basis was not being given to the complainant, he was compelled to convene a Panchayat meeting wherein a Memorandum of Settlement was arrived at. Even despite the settlement, the actual share of the lands and profits enuring to the complainant was not paid to him. The relevant extract from the complaint is reproduced hereinbelow: -

> "10. As a per the Memorandum of Settlement it has been ensured that a Plot measuring 169 cents in the Property Item No.5 should be given to the complainant for his investment. It is also been assured that 32 cents to the 3rd accused Kannabiran and 55.50 cents to the 1st accused Subbiah @ Kadambur Jeyaraj. Upon the continuous insistence of the complainant to register the sale on 169 cents in his favour, the 1st and 3rd accused and all other accused informed the complainant that they will come on 9.9.2010 to register the complainant's share. But on 9.9.2010 the 3rd accused Kannabiran only came to the Sub - Registrar Office, Kovilpatti. The complainant asked the 3rd accused

about the other accused, he replied that he did not know about them and he said the complainant pays the entire amount for 32 cents he is ready to execute the sale deed and therefore the complainant paid the entire amount for 32 cents and after receiving the same on 09.09.2010 the 3rd accused executed a sale deed in respect of his 1/4th undivided share and the same was registered as Doc. No.8124 of 2010 then he left. For the investment amount made by the complainant, he has to get 169 cents, adding the plots to the extent of 32 cents settled by the 3rd accused Kannabiran the complainant has to get in total 201 cents. Out of this Kannabiran has got right to sell his 1/4th undivided share which is equivalent to 103 cents only. The 1st accused C.Subbiah @ Kadambur Jeyaraj can execute the Plots only to an extent of 100 cents to the complainant. But having committed the breach of trust and cheating the complainant without coming to the Sub Registrar Office on 9.9.2010 and keeping the 1 acre without executing in favour of the complainant, he is not only committing a breach of trust but also intimidating the complainant by threatening the complainant continuously with dire consequences that he is having political influence and no one can do anything.

11. Since the 1st Accused expressed his willingness to execute a sale deed in respect of the Property Item No.2 in the Memorandum of Settlement dated 19.10.2010 which is plots situate in Nehru Maha College Road, Malumichampatti Village, Kovai Corporation, if the complainant pays a sum of Rs.41,00,000/- to the 1st Accused. Believing his words the complainant on 14.1.2011 paid a sum of Rs.41,00,000/- to the 1st Accused and completed the sale. And also gave an assurance that they will act in accordance with the Settlement and on the very same date executed an Agreement of Execution. But they have been cheating the complainant without transferring the complainant's share in the Property Item No.5 as per the settlement dated 19.07.2010. Also it is found in the Memorandum of Settlement dated 19.7.2010 that as for as the Item No.1 concern only the 1st accused has to get the release after paying Rs.31,52,000/- to the Complainant. The 1st accused is cheating even without executing the same. And as per

> the Memorandum of Settlement dated 19.7.2010 as for as the 3rd Item is concern they have to divide the property in proportionate to their respective investments. Item No.4 has already been sold by the investors."

38. It is thus clear that from the complaint, there is no such allegation therein which can persuade the Court to hold that the intention of the accused appellants was to defraud the complainant right from the inception of the transactions. The accused appellants have unquestionably, passed on some plots as well as part profits from the land deals to the complainant but the dispute is regarding the quantification of profits and full satisfaction of the share claimed by the complainant proportional to the investments made by him.

39. These allegations can at best give a cause to the complainant to sue the accused appellants in a civil Court. However, as discussed above, such remedy is barred by Section 4 of the Benami Act.

40. The complainant has clearly alleged that the accused caused him monetary loss because the appropriate share of profits was not passed on to him after some plots from the entire chunk had been sold. This Court in the case of ***Sarabjit Kaur v. State of Punjab and Anr***[5] observed that: -

> "A breach of contract does not give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. Merely on the allegation of failure to keep up the promise will not be enough to initiate criminal proceedings".

41. Similarly, in the case of ***Vijay Kumar Ghai v. State of W.B.***[6], this Court while tracing the earlier decisions on the subject observed as under:

> **24.** This Court in *G. Sagar Suri v. State of U.P. [G. Sagar Suri v. State of U.P., (2000) 2 SCC 636]* observed that it is the duty and obligation of the criminal court to exercise a great deal of caution in issuing the process, particularly when matters are essentially of civil nature.

5 2023 SCC OnLine SC 201

6 [2022] 1 SCR 884 : (2022) 7 SCC 124

> **25.** This Court has time and again cautioned about converting purely civil disputes into criminal cases. This Court in Indian Oil Corpn. *[Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736]* noticed the prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. The Court further observed that *: (Indian Oil Corpn. case [Indian Oil Corpn. v. NEPC India Ltd., (2006) 6 SCC 736)*
>
> > "13. … Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure through criminal prosecution should be deprecated and discouraged."

42. Thus, we are of the firm view that the necessary ingredients of the offences punishable under Section 406 and Section 420 IPC are not made out against the accused appellants from the admitted allegations set out in the complaint and the charge sheet. It cannot be doubted that a dispute which is purely civil in nature has been given a colour of criminal prosecution alleging fraud and criminal breach of trust by misusing the tool of criminal law.

43. The Investigating Officer has also applied offences under Section 294(b) and Section 506(ii) read with Section 114 IPC in the charge sheet. On going through the entire charge sheet, we do not find any such material therein which can justify invocation of the offence under Section 294(b) IPC which reads as below: -

> **"294. Obscene acts and songs.**—Whoever, to the annoyance of others,
>
> (a) ….
>
> (b) sings, recites or utters any obscene song, ballad or words, in or near any public place,
>
> Shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

44. The complainant alleged that the accused abused him by using profane language. Section 294(b) IPC would clearly not apply to such an act. Apart from a bald allegation made by the complainant that A-1 abused him and intimidated him on 28th July, 2010, there is

no material which can show that the accused indulged in criminal intimidation of the complainant so as to justify invocation of the offence punishable under Section 506(ii) IPC.

45. We have to be conscious of the fact that the complainant has tried to misuse the tool of criminal law by filing the patently frivolous FIR dated 6th March, 2011, wherein the allegation is levelled regarding the so-called incident of criminal intimidation dated 28th July, 2010. The said allegation otherwise is also belied for the reason that in the FIR, the complainant states that he filed a complaint dated 29th July, 2010 in Kovilpatti West Police Station, but the RTI reply from the said police station clearly states that no such complaint was ever received.

46. Thus, we are persuaded to accept the contention of learned counsel for the accused appellants to hold that the criminal prosecution instituted against the accused appellants in pursuance of the totally frivolous FIR tantamounts to sheer abuse of the process of law.

47. At the cost of repetition, it may be reiterated that in view of the clear bar contained in Section 4 of the Benami Act, the complainant could not have sued the accused appellants for the same set of facts and allegations which are made the foundation of the criminal proceedings. Since, if such allegations do not constitute an actionable civil wrong, in such circumstances, allowing the prosecution of the accused appellants for the very same set of facts, would tantamount to abuse of the process of law.

48. Consequently, the impugned order whereby the petition filed by the appellants seeking quashing of the Criminal Case No. 250 of 2012 and FIR No. 305 of 2011 was dismissed, does not stand to scrutiny, thus, the same is hereby quashed and set aside.

49. As a result, all proceedings sought to be taken against the appellants in pursuance of the charge sheet dated 10th August, 2011 are also quashed.

50. The appeal is allowed accordingly.

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

Result of the case: Appeal allowed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 831 : 2024 INSC 435

Kolkata Municipal Corporation & Anr.
v.
Bimal Kumar Shah & Ors.

(Civil Appeal No. 6466 of 2024)

16 May 2024

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

Issue for Consideration

State Municipal Corporation having claimed to have acquired the property of respondent-land bearer in exercise of powers u/s.352 of the Kolkata Municipal Corporation Act, 1980, the High Court, if justified in holding that there was no such power of compulsory acquisition of immovable property u/s.352 of the Act.

Headnotes†

Kolkata Municipal Corporation Act, 1980 – s. 352 – Power to acquire lands and buildings for public streets and for public parking places – Interpretation of s. 352 – If there is power of compulsory acquisition of immovable property u/s. 352 – On facts, Kolkata Municipal Corporation claims to have acquired the property of respondent-land bearer in exercise of powers u/s. 352 – Single Judge and the Division Bench of the High Court concurrently held that there was no such power of compulsory acquisition of immovable property u/s. 352 – Interference with:

Held: Not called for – Scheme of the Act makes it clear that s. 352 empowers the Municipal Commissioner to identify the land required for the purpose of opening of public street, square, park, etc. and u/s. 537, the Municipal Commissioner has to apply to the Government to compulsorily acquire the land – Upon such an application, the Government may, in its own discretion, order proceedings to be taken for acquiring the land – s. 352 is thus, not the power of acquisition – It cannot be said that s. 352 enables the Municipal Commissioner to acquire land – s. 352 is only intended to enable the Municipal Commissioner to decide whether a land is to be acquired for public purpose – Power of acquisition is in fact vested with the State u/s. 537 and it will exercise it, in its own discretion, whenever the Municipal Commissioner makes an application to that effect – s. 363 is not a provision for compensation for compulsory acquisition – Valid power of acquisition coupled with the provision

* Author

for fair compensation by itself would not complete and exhaust the power and process of acquisition – Prescription of the necessary procedures, before depriving a person of his property is an integral part of the 'authority of law', u/Art. 300A and, s. 352 of the Act contemplates no procedure whatsoever – Thus, the exercise of the power is illegal, illegitimate and caused great difficulty to the respondent-land-bearer – Single Judge held that the appellant-Corporation acted in blatant violation of statutory provisions – High Court justified in rejecting the case of the Corporation acquiring land u/s. 352 – Costs quantified at Rs. 5,00,000/- to be paid to the respondent no. 1-land bearer. [Paras 22, 23, 32-35]

Kolkata Municipal Corporation Act, 1980 – Scheme of the Act – Explained. [Paras 14-23]

Constitution of India – Art. 300 A – Right to property – Net of intersecting rights – Seven sub-rights or procedures to right to property:

Held: Under the constitutional scheme, compliance with a fair procedure of law before depriving any person of his immovable property is well entrenched – Art 300A which declares that "no person shall be deprived of his property save by authority of law" has been characterised both as a constitutional and also a human right – Twin conditions of the acquisition being for a public purpose and subjecting the divestiture to the payment of compensation in lieu of acquisition were mandated – Although not explicitly contained in Art 300A, these twin requirements have been read in and inferred as necessary conditions for compulsory deprivation to afford protection to the individuals who are being divested of property – Furthermore, binary reading of the constitutional right to property must give way to more meaningful renditions, where the larger right to property is seen as comprising intersecting sub-rights, each with a distinct character but interconnected to constitute the whole – Seven such sub-rights can be identified, albeit non-exhaustive – These are, the right to notice; the right to be heard; the right to a reasoned decision; the duty to acquire only for public purpose; the right of restitution or fair compensation; the right to an efficient and expeditious process; and the right of conclusion – These seven rights are foundational components of a law that is tune with Art. 300A, and the absence of one of these or some of them would render the law susceptible to challenge – These seven sub-rights may be procedures, but they do constitute

the real content of the right to property u/Art. 300A, non-compliance of these would amount to violation of the right, being without the authority of law – Seven principles are integral to the authority of law enabling compulsory acquisition of private property – Union and State statutes have adopted these principles and incorporated them in different forms. [Paras 24-29]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right to notice – Importance of:

Held: Prior notice informing the bearer of the right that the State intends to deprive them of the right to property is a right in itself – Its a linear extension of the right to know embedded in Art. 19(1)(a) – Constitution does not contemplate acquisition by ambush – Notice to acquire must be clear, cogent and meaningful – s. 4 of the Land Acquisition Act, 1894, s. 3(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, s. 11 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and s. 3A of the National Highways Act, 1956 reflect statutory incorporation of the right to notice before initiation of the land acquisition proceedings. [Para 30.1]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right to be heard – Importance of:

Held: Right to be heard against the proposed acquisition must be meaningful and not a sham – Property-bearer has right to communicate his objections and concerns to the authority acquiring the property – s. 5A of the Land Acquisition Act, 1894, s. 3(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, s. 15 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and s. 3C of the National Highways Act, 1956, are the statutory embodiments of this right. [Para 30.2]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right to a reasoned decision – Importance of:

Held: It is incumbent upon the authority to take an informed decision and communicate the same to the objector – Authorities have heard and considered the objections is evidenced only through a reasoned order – Declaration of the decision to acquire, is

mandatory, failing which, the acquisition proceedings would cease to have effect – s. 6 of the Land Acquisition Act, 1894, s. 3(2) of the Requisitioning and Acquisition of Immovable Property Act, 1952, s. 19 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and s. 3D of the National Highways Act, 1956, are the statutory incorporations of this principle. [Para 30.3]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of duty to acquire only for public purpose – Importance of:

Held: Acquisition must be for a public purpose is inherent and an important fetter on the discretion of the authorities to acquire – This requirement, which conditions the purpose of acquisition must stand to reason with the larger constitutional goals of a welfare state and distributive justice – If the court arrives at a conclusion that that there is no public purpose involved in the acquisition, the entire process can be set-aside – ss. 4 and 6 of the Land Acquisition Act, 1894, ss. 3(1) and 7(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, ss. 2(1), 11(1),15(1)(b) and 19(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and s. 3A(1) of the National Highways Act, 1956 depict the statutory incorporation of the public purpose requirement of compulsory acquisition. [Para 30.4]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right of restitution or fair compensation – Importance of:

Held: Person's right to hold and enjoy property is an integral part to the constitutional right u/Art 300A – Deprivation or extinguishment of that right is permissible only upon restitution, in the form of monetary compensation, rehabilitation or other similar means – Compensation is an integral part of the process of acquisition – Fair and reasonable compensation is the sine qua non for any acquisition process – s. 11 of the Land Acquisition Act, 1894, ss. 8 and 9 of the Requisitioning and Acquisition of Immovable Property Act, 1952, s. 23 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and ss. 3G and 3H of the National Highways Act, 1956 are the statutory incorporations of the right to restitute a person whose land has been compulsorily acquired. [Para 30.5]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right to an efficient and expeditious process – Importance of:

Held: Acquisition process is traumatic for the administrative delays in identifying the land, conducting the enquiry and evaluating the objections, leading to a final declaration, consume time and energy – Further, passing of the award, payment of compensation and taking over the possession are equally time consuming – It is necessary for the administration to be efficient in concluding the process and within a reasonable time – This obligation must necessarily form part of Art. 300A – ss. 5A(1), 6, 11A, and 34 of the Land Acquisition Act, 1894, ss. 6(1A) and 9 of the Requisitioning and Acquisition of Immovable Property Act, 1952, ss. 4(2), 7(4), 7(5), 11(5), 14, 15(1), 16(1), 19(2), 25, 38(1), 60(4), 64 and 80 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and ss. 3C(1), 3D(3) and 3E(1) of the National Highways Act, 1956, prescribe for statutory frameworks for the completion of individual steps in the process of acquisition of land within stipulated timelines. [Para 30.6]

Constitution of India – Art. 300 A – Right to property – Compulsory acquisition of immovable property – Principle of right of conclusion – Importance of:

Held: Upon conclusion of process of acquisition and payment of compensation, the State takes possession of the property in normal circumstances – With the taking over of actual possession after the normal procedures of acquisition, the private holding is divested and the right, title and interest in the property, along-with possession is vested in the State – Without final vesting, the State's, or its beneficiary's right, title and interest in the property is inconclusive and causes lot of difficulties – After taking over possession, the process of land acquisition concludes with the vesting of the land with the concerned authority – Obligation to conclude and complete the process of acquisition is also part of Article 300A – s. 16 of the Land Acquisition Act, 1894, ss. 4 and 5 of the Requisitioning and Acquisition of Immovable Property Act, 1952, ss. 37 and 38 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and ss. 3D and 3E of the National Highways Act, 1956, statutorily recognise this right of the acquirer. [Para 30.7]

Case Law Cited

State of Kerala v. T.N. Peter [1980] 3 SCR 290 : **(1980) 3 SCC 554;** *Girnar Traders (3) v. State of Maharashtra* [2011] 3 SCR 1 : **(2011) 3 SCC 1;** *Bankatlal v. Special Land Acquisition Officer* [2014] 7 SCR 879 : **(2014) 15 SCC 116;** *Nagpur Improvement Trust v. Vithal Rao* [1973] 3 SCR 39 : **(1973) 1 SCC 500;** *Lachhman Dass v. Jagat Ram* [2007] 2 SCR 980 : **(2007) 10 SCC 448;** *Vidya Devi v. State of Himachal Pradesh* [2020] 1 SCR 749 : **(2020) 2 SCC 569;** *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga* [1952] 1 SCR 889 : **(1952) 1 SCC 528;** *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* [2005] Supp. 3 SCR 388 : **(2005) 7 SCC 627;** *K.T. Plantation Pvt. Ltd. v. State of Karnataka* [2011] 13 SCR 636 : **(2011) 9 SCC 1;** *Narendrajit Singh v. State of U.P.* [1970] 3 SCR 278 : **(1970) 1 SCC 125;** *State of Mysore v. Abdul Razak Sahib* [1973] 1 SCR 856 : **(1973) 3 SCC 196;** *Narinderjit Singh and Ranjit Singh v. State of U.P.* [1973] 2 SCR 698 : **(1973) 1 SCC 157;** *Competent Authority v. Barangore Jute Factory* [2005] Supp. 5 SCR 421 : **(2005) 13 SCC 477;** *Nandeshwar Prasad v. State of U.P.* [1964] 3 SCR 425 : **AIR (1964) SC 1217;** *Union of India v. Shiv Raj* [2014] 8 SCR 751 : **(2014) 6 SCC 564;** *Kamal Trading (P) Ltd. v. State of W.B.* [2011] 13 SCR 529 : **(2012) 2 SCC 25;** *Gojer Bros. (P) Ltd. v. State of W.B.* [2013] 12 SCR 489 : **(2013) 16 SCC 660;** *Mohan Singh v. International Airport Authority of India* [1996] Supp. 8 SCR 569 : **(1997) 9 SCC 132;** *Project Director, Project Implementation Unit v. P.V. Krishnamoorthy* [2020] 14 SCR 86 : **(2021) 3 SCC 572;** *Somawanti v. State of Punjab* **(1962) SCC OnLine SC 23;** *Daulat Singh Surana v. First Land Acquisition Collector* [2006] Supp. 8 SCR 1076 : **(2007) 1 SCC 641;** *Union of India v. Jaswant Rai Kochhar* [1996] 3 SCR 206 : **(1996) 3 SCC 491;** *D. Hanumanth SA v. State of Karnataka* [2010] 12 SCR 1098 : **(2010) 10 SCC 656;** *Munshi Singh v. Union of India* [1973] 1 SCR 973 : **(1973) 2 SCC 337;** *Madhya Pradesh Housing Board v. Mohd. Shafi* [1992] 1 SCR 657 : **(1992) 2 SCC 168;** *State of U.P. v. Manohar* [2004] Supp. 6 SCR 911 : **(2005) 2 SCC 126;** *M. Naga Venkata Lakshmi v. Visakhapatnam Municipal Corpn.* [2007] 10 SCR 12 :**(2007) 8 SCC 748;** *NHAI v. P. Nagaraju* [2022] 8 SCR 1070 :**(2022) 15 SCC 1;** *Roy Estate v. State of Jharkhand* [2009] 7 SCR 343 : **(2009) 12 SCC 194;** *Union of India v. Mahendra Girji* **(2010) 15 SCC 682;** *Mansaram v.*

S.P. Pathak [1984] 1 SCR 139 **: (1984) 1 SCC 125;** *Kerala State Housing Board v. Ramapriya Hotels (P) Ltd.* [1994] Supp. 2 SCR 338 **: (1994) 5 SCC 672;** *Ram Chand v. Union of India* [1993] Supp. 2 SCR 558 **: (1994) 1 SCC 44;** *Ambalal Purshottam v. Ahmedabad Municipal Corpn.* [1968] 3 SCR 207 **: (1968) 3 SCR 207;** *Khadim Hussain v. State of U.P.* [1976] 3 SCR 1 **: (1976) 1 SCC 843;** *State of W.B. v. Vishnunarayan & Associates (P) Ltd.* [2002] 2 SCR 557 **: (2002) 4 SCC 134;** *Jilubhai Nanbhai Khachar v. State of Gujarat* [1994] 1 SCR 807**:1995 Supp 1 SCC 596;** *P. Chinnanna v. State of A.P.* [1994] Supp. 2 SCR 426 **: (1994) 5 SCC 486;** *Delhi Development Authority v. Reena Suri* [2016] 2 SCR 396 **: (2016) 12 SCC 649;** *Fruit & Vegetable Merchants Union v. Delhi Improvement Trust* [1957] 1 SCR 1 **:1956 SCC OnLine SC 37;** *Union of India v. Tarsem Singh* [2019] 13 SCR 49 **: (2019) 9 SCC 304 – referred to.**

Sweet v. Rechel, **159 US 380 (1895) : 40 L.Ed. 188;** *Delaware L. & W.R. Co. v. Morristown,* **276 US 182 (1928) : 72 L.Ed. 523;** *United States v. Caltex (Philippines),* **344 US 149 (1952) : 97 L.Ed. 157 – referred to.**

List of Acts

Kolkata Municipal Corporation Act, 1980; Constitution of India; Land Acquisition Act, 1894; Requisitioning and Acquisition of Immovable Property Act, 1952; Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013; National Highways Act, 1956.

List of Keywords

Power of compulsory acquisition of immovable property; Public purpose; Fair compensation; Costs; Right to property; Net of intersecting rights; Seven sub-rights or procedures to right to property; Right to notice; Right to be heard; Right to a reasoned decision; Duty to acquire only for public purpose; Right of restitution or fair compensation; Right to an efficient and expeditious process; Right of conclusion.

Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 6466 of 2024

From the Judgment and Order dated 17.12.2019 of the High Court at Calcutta in APO No. 523 of 2017

Appearances for Parties

Jaideep Gupta, Sr. Adv., Sujoy Mondal, Satish Vig, Partha Sil, Ms. Sayani Bhattacharya, Abhiraj Choudhary, Chirag Joshi, Sanjiv Kr. Saxena, Advs. for the Appellants.

Mukul Rohatgi, Huzefa Ahmadi, Sr. Advs., Ms. Ranjeeta Rohatgi, Sagnik Majumdar, Rishabh Karnani, Ms. Shrika Gautam, Ms. Madhumita Bhattacharjee, Sandeep, Ms. Srija Chodhury, Ms. Osheen Bhat, Ms. Nitipriya Kar, Chanchal Kumar Ganguli, Shreyas Awasthi, Ms. Ripul Swati Kumari, Ms. Astha Sharma, Advs. for the Respondents.

Judgment / Order of the Supreme Court

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Judgment

Pamidighantam Sri Narasimha, J.

1. Leave granted.

Introduction: The Kolkata Municipal Corporation claims to have acquired the property of respondent no. 1 in exercise of powers under Section 352 of the Kolkata Municipal Corporation Act, 1980. A single Judge and the Division Bench of the High Court have concurrently held

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

that there is no such power of compulsory acquisition of immovable property under Section 352. While upholding the decision of the High Court, we have given our additional reasons by interpreting the *text* and the *context* in which Section 352 is placed in the Act. Rejecting the alternative argument of the appellant-Corporation that there is also a provision for compensation under Section 363 of the Act when land is acquired under Section 352, we have examined the constitutional position of acquisition of immovable property whereunder the mere presence of power to acquire coupled with a provision for payment of fair compensation by itself is not sufficient for a valid acquisition. Interpreting "*authority of law*" in Article 300A of the Constitution, we have held that a minimum content of a constitutional right to property comprises of seven sub-rights or procedures such as the right to notice, hearing, reasons for the decision, to acquire only for public purpose, fair compensation, efficient conduct of the procedure within timelines and finally the conclusion. These sub-rights have synchronously formed part of our laws and have attained judicial recognition. Therefore, as Section 352 does not provide for these sub-rights or procedures, it can never be a valid power of acquisition. Before we deal with the submissions and analyse the provisions, we will first narrate the necessary facts.

2. ***Facts:*** The property in question, Premises No. 106C, situated at Narikeldanga North Road, Kolkata – 700011[1], belongs to Mr. Birinchi Bihari Shah[2] having succeeded it through a deed of settlement executed by his father. As Birinchi Shah was minor at the time when his father passed away, his elder brother managed and administered the Property and, in that process, he also let out the premises admeasuring 2 *bighas* 18 *kathas* 6 *chitaks* and 40 square feet in favour of one M/s Arora Film Corporation. Upon attaining majority, the Property was mutated in the name of Birinchi Shah in the assessment book of the appellant-Corporation. It is affirmatively stated that all municipal dues including taxes with respect to the Property were paid regularly. It is also stated that the appellant-Corporation acknowledged the same and by its letter dated 07.04.2000 admitting that there are no outstanding dues with respect to property tax.

1 Hereinafter, referred to as the "Property".

2 Hereinafter, referred to as "Birinchi Shah".

3. In the year 2009, when an attempt was made by the appellant-Corporation to forcefully enter and occupy the Property, Birinchi Shah filed a writ petition being W.P. No. 126 of 2009 before the High Court seeking a restraint order against the appellant-Corporation.

4. As there was no real contest about the title in the Property and the appellant-Corporation having not filed any affidavit-in-opposition, the High Court disposed of the writ petition by an order dated 17.09.2009 directing that the appellant-Corporation must hold an enquiry about the encroachments. The High Court further directed the appellant-Corporation not to make any construction over the Property.

5. In July 2010, Birinchi Shah received information that the appellant-Corporation had deleted his name from the category of owner and had inserted its own name in the official records. Aggrieved, he approached the High Court by filing a writ petition bearing W.P. No. 981 of 2010, not only for correction of the entries but also to restrain the appellant-Corporation from interfering with his peaceful possession over the Property. What happened in this writ petition is of seminal importance. The learned single Judge, by an order dated 08.01.2015, recorded the statement of the appellant-Corporation that they are unable to controvert the averments made in the writ petition with respect to title and ownership of the Property. The writ petition was disposed of restraining the appellant-Corporation from interfering with the possession of Birinchi Shah and also injuncted them from giving effect to the wrongful recording of its name in the official records. The appellant-Corporation was also directed to remove its men and material from the Property within two weeks from the date of the said order. The specific finding of the High Court that the appellant-Corporation could not establish its right and the title in the Property is significant.

6. Dissatisfied, the appellant-Corporation filed a writ appeal bearing A.P.O. No. 51 of 2015 against the order of the single Judge and contended that their affidavit-in-opposition could not be filed before the Single Judge as the records were misplaced. It is more or less an admitted fact that a plea of acquisition was taken for the first time before the Division Bench, and this seems to be the reason for the Division Bench to remand the matter back to the single Judge after imposing a cost of Rs. 50,000/- on the appellant-Corporation. After remand, the appellant-Corporation filed an affidavit-in-opposition

before the single Judge claiming that the land was acquired. In view of new developments, Birinchi Shah sought permission to withdraw the pending writ petition with the liberty to file a fresh writ petition. The High Court permitted this by an order dated 11.08.2016.

7. Accordingly, Writ Petition No. 930 of 2016 was filed by the respondent no. 1, the executor to the estate of Birinchi Shah, *inter alia*, seeking an order quashing the alleged acquisition as illegal and to restore their name as owners in the official records.

8. The learned single Judge of the High Court, allowing the writ petition by order dated 14.09.2017, formulated two questions. The first question relates to the maintainability of the writ petition, which was answered in the affirmative. As there is no contest to this issue, we will not deal with it. The second issue relates to the legality and validity of acquisition of the Property in exercise of power under Section 352 of the Kolkata Municipal Corporation Act, 1980[3]. Answering the second question, the learned single Judge held that the appellant-Corporation purported to acquire the Property under Section 352(a) of the Act when there is no power of compulsory acquisition therein. The learned single Judge therefore quashed and set-aside the alleged action of acquisition.

9. The appellant-Corporation as well as the respondent no. 1 assailed the order of learned single Judge in writ appeals bearing APO No. 523 of 2017 and APO No. 210 of 2018, respectively.

10. The Division Bench of the High Court, by the judgment impugned herein, affirmed the order of the Single Judge and accordingly, disposed of the appeals with a direction that the appellant-Corporation may initiate acquisition proceedings for the Property under Section 536 or 537 of the Act, within five months, or in the alternative, restore the name of the last recorded owner as the owner of the Property.

11. It is against this judgment and order of the Division Bench of the High Court, that the appellant-Corporation is in appeal before us.

12. ***Submission of Counsels*****:** Mr. Jaideep Gupta, learned senior counsel, representing the appellant-Corporation, has submitted that the appellant-Corporation has the requisite statutory *power* to

3 Hereinafter, referred to as the "Act".

acquire a property under Section 352 of the Act for the purposes of constructing a park, as is the case here. He has referred to Section 363 of the Act provisioning *compensation* for acquisitions made under Section 352 of the Act and submitted that acquisition under this chapter is therefore complete and stands on its own footing. He contended that the single and division benches of the High Court erred in concluding that Section 537 of the Act is the only provision for acquisition. Relying on *State of Kerala v. T.M. Peter*[4], he would submit that for differential schemes and purposes of acquisition, different compensation structures will not violate Article 14 of the Constitution. On the same point, he also relied on the decisions of this Court in *Girnar Traders (3) v. State of Maharashtra*[5], and *Bankatlal v. Special Land Acquisition Officer*[6].

13. Mr. Mukul Rohatgi and Mr. Huzefa Ahmadi, learned senior counsels, appearing for the respondents, while supporting the judgment of the High Court, impugned herein, submitted that the *power* of acquisition is only in Section 537 of the Act and that invocation of Section 352 read with Section 363 is illegal and violative of Article 300A of the Constitution. In support of their submissions, they relied on the judgment of this Court in *Nagpur Improvement Trust v. Vithal Rao*[7].

14. ***Scheme of the Act:*** The Kolkata Municipal Corporation Act, 1980 extends to 636 Sections, followed by 9 Schedules. It has IX Parts, of which we are concerned only with Part VI of which Chapter XXI – relating to *Streets and Public Places* and Part VIII of which Chapter XXXIII – relating to *Acquisition and Disposal of Property*. As the appellant-Corporation invoked Section 352 of the Act to acquire the Property for the purpose of opening a park and ward office, we need to examine the provision. Section 352 of the Act provides as under:

> *"**Section 352:- Power to acquire lands and buildings for public streets and for public parking places**:– The Municipal Commissioner may, subject to the other provisions of this Act –*

4 [1980] 3 SCR 290 : (1980) 3 SCC 554

5 [2011] 3 SCR 1 : (2011) 3 SCC 1

6 [2014] 7 SCR 879 : (2014) 15 SCC 116

7 [1973] 3 SCR 39 : (1973) 1 SCC 500

(a) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street, square, park or garden or of making a new one, together with any building standing upon such land;

(b) acquire, in relation to any land or building as aforesaid, such land with building thereon outside the regular line or the projected regular line of such public street;

(c) acquire any land for the purpose of laying out or making a public parking place."

15. The appellant-Corporation has also relied on Section 363 of the Act relating to payment of compensation. The said provision is as under:

"**Section 363-*Compensation to be paid***:– *(1) Compensation shall be paid by the Corporation to the owner of any building or land acquired for a public street, square, park or garden under the provisions of this Chapter:*

Provided that any increase or decrease in the value of the remainder of the property, of which building or the land so acquired formed part, likely to accrue from the setting back to the regular line of a public street, shall be taken into consideration in determining the amount of such compensation.

(2) If any additional land, which will be included in the premises of any person permitted or required by an order under sub-section (2) of section 360 to set forward a building to the regular line of a public street, belongs to the Corporation, such order shall be a sufficient conveyance to the owner of such land; and the price to be paid to the Corporation by the owner for such additional land and the other terms and conditions of the conveyance shall be set forth in such order.

(3) The Corporation shall pay compensation in respect of land or building acquired under this Chapter at the following scale:

(i)….

(ii)…."

16. A close examination of the text of Section 352 of the Act coupled with the context with respect to the placement of the section in the Act, clarifies the purpose and object of the provision. The text of Section 352 of the Act provides that the Municipal Commissioner may acquire any land required for the purpose of opening, widening, extending, etc. of a street, square, park, etc. The purpose of this provision is to declare that if the Municipal Commissioner is of the view that any land is required for the purpose of opening a street, park, etc., such a land may be acquired. Once the Municipal Commissioner takes the decision to acquire a piece of land, what would then be the process of acquisition is not provided in Section 352. It is provided in Section 535 occurring in Chapter XXXIII of Part VIII of the Act which relates to '*Acquisition of Property*'.

17. Before we deal with the Section 535, it is sufficient to conclude that Section 352 merely contemplates the power and duty of the Municipal Commissioner to identify the land intended for opening of a street, park etc., and once that decision is taken, the Municipal Commissioner would take steps to acquire such a property, for a public purpose.

18. The context in which Section 352 is located in Chapter XXI of Part VI of the Act relating to '*streets for public place*', also makes the position clear that this provision relates to vesting of public street, squares, parks and gardens in the appellant-Corporation but does not provide for the power of acquisition. In the following paragraph, we have explained how the text and the context of the expression, '*The Municipal Commissioner may acquire*' in Section 352 is not at all the power of acquisition.

19. Upon arriving at a decision to acquire any land for the purpose of opening a street, square, park, etc., under Section 352, the Municipal Commissioner will then apply to the Government under Section 537 of the Act to initiate the process of acquisition. Section 537 is located in Chapter XXXIII Part VIII of the Act relating to '*Acquisition of Property*'. This Chapter commences with Section 535 which specifically provides that the appellant-Corporation shall have the power to acquire and hold immovable property. It is followed by the power to acquire properties through an agreement under Section 536 of the Act or in the alternative, through compulsory acquisition of immovable property as provided in Section 537 of the Act.

20. The position is thus, clear. Upon application of the Municipal Commissioner under Section 537 for the acquisition of land for opening of a street, square, park etc., the Government may order proceedings to be taken for acquiring land on behalf of the appellant-Corporation as if the land is needed for a public purpose within the meaning of the Land Acquisition Act, 1894.

21. Sections 535, 536 and 537 of the Act are extracted hereinbelow for ready reference:

> "***Section 535. Acquisition of property***. – *The Corporation shall, for the purposes of this Act, have power to acquire and hold movable and immovable property or any interest therein, whether within or outside the limits of Kolkata.*
>
> ***Section 536. Acquisition of immovable property by agreement***.—
>
> *(1) Whenever it is provided in this Act that the Municipal Commissioner may acquire, or whenever it is necessary or expedient for any purpose of this Act that the Municipal Commissioner shall acquire, any immovable property, such property may be acquired by the Municipal Commissioner on behalf of the Corporation by agreement on such terms and at such rates or prices or at rates or prices not exceeding such maxima as may be approved by the Mayor-in-Council either generally for any class of cases or specially in any particular case.*
>
> *(2) Whenever, under any provision of this Act, the Municipal Commissioner is authorised to agree to pay the whole or any portion of the expenses of acquiring any immovable property, he shall do so on such terms at such rates or prices or at rates or prices not exceeding such maxima as may be approved by the Mayor-in-Council either generally or in particular as aforesaid.*
>
> *(3) The Municipal Commissioner may on behalf of the Corporation acquire by agreement any easement affecting any immovable property vested in the Corporation and the provisions of sub-sections (1) and (2) shall apply to such acquisition.*

> ***Section 537. Procedure when immovable property cannot be acquired by agreement.*** *– (1) Whenever the Municipal Commissioner is unable under section 536 to acquire by agreement any immovable property or any easement affecting any immovable property vested in the Corporation or whenever any immovable property or any easement affecting any immovable property vested in the Corporation is required for the purpose of this Act, the State Government may, in its discretion, upon application of the Municipal Commissioner, made with the approval of the Mayor-in-Council and subject to other provisions of this Act, order proceedings to be taken for acquiring the same on behalf of the Corporation, as if such property or easement were land needed for public purpose within the meaning of the Land Acquisition Act, 1894 (I of 1894)*
>
> *(2)…..*
>
> *(3) For the purpose of acquisition of immovable property under this section, the Land Acquisition Act, 1894, shall be subject to the amendment that the market value of any land or building to be acquired shall be deemed, for the purpose of sub-section (1) of section 23 of the Act, to be the market-value determined according to the disposition of such immovable property at the date of declaration under sub-section (1) of section 4 thereof in respect of such immovable property.*
>
> *(4) The amount of compensation awarded and all other charges incurred in the acquisition of any such property shall, subject to all other provisions of this Act, be forthwith paid by the Municipal Commissioner and thereupon such property shall vest in the Corporation."*

22. The scheme of the Act makes it clear that Section 352 empowers the Municipal Commissioner to identify the land required for the purpose of opening of public street, square, park, etc. and under Section 537, the Municipal Commissioner has to apply to the Government to compulsorily acquire the land. Upon such an application, the Government may, in its own discretion, order proceedings to be

taken for acquiring the land. Section 352 is therefore, not the power of acquisition. We, therefore, reject the submission on behalf of the appellant-Corporation that Section 352 enables the Municipal Commissioner to acquire land.

23. We will now deal with the other submission of Mr. Jaideep Gupta that there is also a provision for compensation under Section 363 where land is acquired under Section 352. In so far as Section 363 relating to payment of compensation is concerned, the High Court has clarified that this provision relates to payment of compensation upon an agreement and not for compulsory acquisition. We are in agreement with this finding of the High Court.

24. ***The Right to property: A net of intersecting rights:*** There is yet another aspect of the matter. Under our constitutional scheme, compliance with a fair procedure of law before depriving any person of his immovable property is well entrenched. We are examining this issue in the context of Section 352 of the Act which is bereft of any procedure whatsoever before compulsorily acquiring private property. Again, assuming that Section 363 of the Act provides for compensation, compulsory acquisition will still be unconstitutional if proper procedure is not established or followed before depriving a person of their right to property. We find it compelling to clarify that a rather undue emphasis is laid on provisions of compensation to justify the power of compulsory acquisition, as if compensation by itself is the complete procedure for a valid acquisition.

25. While it is true that after the 44th Constitutional Amendment[8], the right to property drifted from Part III to Part XII of the Constitution, there continues to be a potent safety net against arbitrary acquisitions, hasty decision-making and unfair redressal mechanisms. Despite its spatial placement, Article 300A[9] which declares that "*no person shall be deprived of his property save by authority of law*" has been characterised both as a constitutional and also a human right[10]. To assume that constitutional protection gets constricted to the

8 Constitution (Forty-Fourth Amendment) Act, 1978.

9 300A of the Constitution: "*Persons not to be deprived of property save by authority of law. – No person shall be deprived of his property save by authority of law.*"

10 *Lachhman Dass v. Jagat Ram* (2007) 10 SCC 448; *Vidya Devi v. State of Himachal Pradesh* (2020) 2 SCC 569

mandate of a fair compensation would be a disingenuous reading of the text and, shall we say, offensive to the egalitarian spirit of the Constitution.

26. The constitutional discourse on compulsory acquisitions, has hitherto, rooted itself within the 'power of eminent domain'. Even within that articulation, the twin conditions of the acquisition being for a public purpose and subjecting the divestiture to the payment of compensation in lieu of acquisition were mandated[11]. Although not explicitly contained in Article 300A, these twin requirements have been read in and inferred as necessary conditions for compulsory deprivation to afford protection to the individuals who are being divested of property[12]. A post-colonial reading of the Constitution cannot limit itself to these components alone. The binary reading of the constitutional right to property must give way to more meaningful renditions, where the larger right to property is seen as comprising intersecting sub-rights, each with a distinct character but interconnected to constitute the whole. These sub-rights weave themselves into each other, and as a consequence, State action or the legislation that results in the deprivation of private property must be measured against this constitutional net as a whole, and not just one or many of its strands.

27. What then are these sub-rights or strands of this swadeshi constitutional fabric constituting the right to property? Seven such sub-rights can be identified, albeit non-exhaustive. These are: i) duty of the State to inform the person that it intends to acquire his property – *the right to notice*, ii) the duty of the State to hear objections to the acquisition – *the right to be heard*, iii) the duty of the State to inform the person of its decision to acquire – *the right to a reasoned decision*, iv) the duty of the State to demonstrate that the acquisition is for public purpose – *the duty to acquire only for public purpose*, v) the duty of the State to restitute and rehabilitate – *the right of restitution or fair compensation*, vi) the duty of the State to conduct the process of acquisition efficiently and within prescribed timelines of the proceedings – *the right to an efficient and expeditious process*,

11 *State of Bihar v. Maharajadhiraja Sir Kameshwar Singh of Darbhanga* (1952) 1 SCC 528

12 *Hindustan Petroleum Corporation Ltd v. Darius Shapur Chenai* (2005) 7 SCC 627; *K.T. Plantation Pvt Ltd v. State of Karnataka* (2011) 9 SCC 1

and vii) final conclusion of the proceedings leading to vesting – *the right of conclusion*.

28. These seven rights are foundational components of a law that is tune with Article 300A, and the absence of one of these or some of them would render the law susceptible to challenge. The judgment of this Court in *K.T. Plantations* (supra)[13] declares that the law envisaged under Article 300A must be in line with the overarching principles of rule of law, and must be *just*, *fair*, and *reasonable*. It is, of course, precedentially sound to describe some of these sub-rights as 'procedural', a nomenclature that often tends to undermine the inherent worth of these safeguards. These seven sub-rights may be procedures, but they do constitute the real content of the right to property under Article 300A, non-compliance of these will amount to violation of the right, being without the *authority of law*.

29. These sub-rights of procedure have been synchronously incorporated in laws concerning compulsory acquisition and are also recognised by our constitutional courts while reviewing administrative actions for compulsory acquisition of private property. The following will demonstrate how these seven principles have seamlessly become an integral part of our Union and State statutes concerning acquisition and also the constitutional and administrative law culture that our courts have evolved from time to time.

30. Following are the seven principles:

    30.1. ***The Right to notice***: (i) A prior notice informing the bearer of the right that the State intends to deprive them of the right to property is a right in itself; a linear extension of the right to know embedded in Article 19(1)(a). The Constitution does not contemplate acquisition by ambush. The notice to acquire must be clear, cogent and meaningful. Some of the statutes reflect this right.

    (ii) Section 4 of the Land Acquisition Act, 1894, Section 3(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, Section 11 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and

13 *K.T. Plantation Pvt. Ltd. v. State of Karnataka* (2011) 9 SCC 1

Resettlement Act, 2013, and Section 3A of the National Highways Act, 1956 are examples of such statutory incorporation of the right to notice before initiation of the land acquisition proceedings.

(iii) In a large number of decisions, our constitutional courts have independently recognised the right to notice before any process of acquisition is commenced[14].

30.2. ***The Right to be heard*****:** (i) Following the right to a meaningful and effective prior notice of acquisition, is the right of the property-bearer to communicate his objections and concerns to the authority acquiring the property. This right to be heard against the proposed acquisition must be meaningful and not a sham.

(ii) Section 5A of the Land Acquisition Act, 1894, Section 3(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, Section 15 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and Section 3C of the National Highways Act, 1956, are some statutory embodiments of this right.

(iii) Judicial opinions recognizing the importance of this right are far too many to reproduce. Suffice to say that that the enquiry in which a land holder would raise his objection is not a mere formality[15].

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14 In *Narendrajit Singh v. State of U.P.* (1970) 1 SCC 125, it was held that a notification under Section 4 of the Land Acquisition Act, 1894, even in urgent cases falling under Section 17 of the Land Acquisition Act, 1894 is the *sine qua non* of the process of acquisition. In *State of Mysore v. Abdul Razak Sahib* (1973) 3 SCC 196, it was held that a notice under Section 4 of the Land Acquisition Act, 1894 is necessary for completing the land acquisition process. In *Narinderjit Singh and Ranjit Singh v. State of U.P.* (1973) 1 SCC 157, this Court held that the notice under Section 4 of the Land Acquisition Act, 1894 is mandatory and if no notice is published, the entire process of land acquisition is vitiated. In *Competent Authority v. Barangore Jute Factory* (2005) 13 SCC 477, this Court held that if the initial notification under Section 3A of the National Highways Act, 1956 is bad, the entire process which is followed in pursuance of it is vitiated.

15 In *Nandeshwar Prasad* v. *State of U.P.,* AIR 1964 SC 1217, this Court has held the right under Section 5A of the Land Acquisition Act, 1894 to be a substantial one and it cannot be taken away. In *Hindustan Petroleum Corpn. Ltd.* v. *Darius Shapur Chenai* (2005) 7 SCC 627, this Court has held that the right of submitting objections under Section 5A of the Land Acquisition Act, 1894 is a valuable right and the hearing given in pursuance of exercise of this right must not be rendered to a mere formality. In *Union of India* v. *Shiv Raj* (2014) 6 SCC 564, this Court held that the rules of natural justice have been ingrained in the scheme of Section 5A of the Land Acquisition Act, 1894. In *Competent Authority* v. *Barangore Jute Factory* (2005) 13 SCC 477, this Court observed that in the process from the initial notification to the final

30.3. ***The Right to a reasoned decision*****:** i) That the authorities have heard and considered the objections is evidenced only through a reasoned order. It is incumbent upon the authority to take an informed decision and communicate the same to the objector.

(ii) Section 6 of the Land Acquisition Act, 1894, Section 3(2) of the Requisitioning and Acquisition of Immovable Property Act, 1952, Section 19 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and Section 3D of the National Highways Act, 1956, are the statutory incorporations of this principle.

(iii) Highlighting the importance of the declaration of the decision to acquire, the Courts have held that the declaration is mandatory, failing which, the acquisition proceedings will cease to have effect[16].

30.4. ***The Duty to acquire only for public purpose:*** (i) That the acquisition must be for a public purpose is inherent and an important fetter on the discretion of the authorities to acquire. This requirement, which conditions the purpose of acquisition must stand to reason with the larger constitutional goals of a welfare state and distributive justice.

(ii) Sections 4 and 6 of the Land Acquisition Act, 1894, Sections 3(1) and 7(1) of the Requisitioning and Acquisition of Immovable Property Act, 1952, Sections 2(1), 11(1),15(1)(b) and 19(1) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and Section 3A(1) of the National Highways Act, 1956 depict the statutory incorporation of the public purpose requirement of compulsory acquisition.

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declaration, objections play a vital road. In *Kamal Trading (P) Ltd.* v. *State of W.B.* (2012) 2 SCC 25, this Court quashed the land acquisition proceedings when a proper hearing under Section 5A of the Land Acquisition Act, 1894 was not accorded. In *Gojer Bros. (P) Ltd.* v. *State of W.B.* (2013) 16 SCC 660, this Court held quashed the land acquisition proceedings when it was observed that a mere formality was rendered in the name of a hearing under Section 5A of the Land Acquisition Act, 1894.

16 In *Mohan Singh* v. *International Airport Authority of India* (1997) 9 SCC 132, this Court held that publication of a declaration under Section 6 of the Land Acquisition Act, 1894 is mandatory. In *Project Director, Project Implementation Unit* v. *P.V. Krishnamoorthy* (2021) 3 SCC 572, this Court held that if a declaration is not published under Section 3D of the National Highways Act, 1956 then the initial notification and resultantly, the acquisition proceedings cease to have effect.

(iii) The decision of compulsory acquisition of land is subject to judicial review and the Court will examine and determine whether the acquisition is related to public purpose. If the court arrives at a conclusion that that there is no public purpose involved in the acquisition, the entire process can be set-aside. This Court has time and again reiterated the importance of the underlying objective of acquisition of land by the State to be for a public purpose[17].

30.5. ***The Right of restitution or fair compensation:*** (i) A person's right to hold and enjoy property is an integral part to the constitutional right under Article 300A. Deprivation or extinguishment of that right is permissible only upon restitution, be it in the form of monetary compensation, rehabilitation or other similar means. Compensation has always been considered to be an integral part of the process of acquisition.

(ii) Section 11 of the Land Acquisition Act, 1894, Sections 8 and 9 of the Requisitioning and Acquisition of Immovable Property Act, 1952, Section 23 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and Sections 3G and 3H of the National Highways Act, 1956 are the statutory incorporations of the right to restitute a person whose land has been compulsorily acquired.

(iii) Our courts have not only considered that compensation is necessary, but have also held that a fair and reasonable compensation is the *sine qua non* for any acquisition process[18].

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17 In *Somawanti* v. *State of Punjab*, 1962 SCC OnLine SC 23, this Court held that the Constitution permits acquisition of private land by the State only for a public purpose. The rationale of taking away private land by the State for a public purpose is that private interest must give way to public interest as observed by the Court in *Daulat Singh Surana* v. *First Land Acquisition Collector* (2007) 1 SCC 641. In *Union of India* v. *Jaswant Rai Kochhar* (1996) 3 SCC 491 and *D. Hanumanth SA* v. *State of Karnataka* (2010) 10 SCC 656, this Court held acquisition proceedings to be valid even if there was a change in the public purpose, so long as there is a public purpose for which the land is acquired. The importance of the communication of public purpose as an ingredient of the notification for acquisition was reiterated by this Court in *Munshi Singh* v. *Union of India* (1973) 2 SCC 337 when acquisition proceedings were set aside since the public purpose was mentioned as "*planned development of the area*" which was observed to be wholly insufficient and conveyed no idea as to the specific purpose. Similarly, in *Madhya Pradesh Housing Board* v. *Mohd. Shafi* (1992) 2 SCC 168, wherein this Court quashed the acquisition proceedings on the ground that the public purpose was mentioned as "*residential*" which was too vague.

18 In *State of U.P.* v. *Manohar* (2005) 2 SCC 126, this Court held that payment of compensation is an integral part of the process of land acquisition. In *M. Naga Venkata Lakshmi* v. *Visakhapatnam Municipal Corpn.* (2007) 8 SCC 748, this Court held that wherever promised, compensation is ought to be paid. In *NHAI* v. *P. Nagaraju* (2022) 15 SCC 1, this Court held that compensation must be adequate and must be arrived at keeping in mind the market value of the acquired land. In *Vidya Devi v. State of H.P.* (2020) 2

30.6. ***The Right to an efficient and expeditious process:*** (i) The acquisition process is traumatic for more than one reason. The administrative delays in identifying the land, conducting the enquiry and evaluating the objections, leading to a final declaration, consume time and energy. Further, passing of the award, payment of compensation and taking over the possession are equally time consuming. It is necessary for the administration to be efficient in concluding the process and within a reasonable time. This obligation must necessarily form part of Article 300A.

(ii) Sections 5A(1), 6, 11A, and 34 of the Land Acquisition Act, 1894, Sections 6(1A) and 9 of the Requisitioning and Acquisition of Immovable Property Act, 1952, Sections 4(2), 7(4), 7(5), 11(5), 14, 15(1), 16(1), 19(2), 25, 38(1), 60(4), 64 and 80 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and Sections 3C(1), 3D(3) and 3E(1) of the National Highways Act, 1956, prescribe for statutory frameworks for the completion of individual steps in the process of acquisition of land within stipulated timelines.

(iii) On multiple occasions, upon failure to adhere to the timelines specified in law, the courts have set aside the acquisition proceedings[19].

30.7. ***The Right of conclusion:*** (i) Upon conclusion of process of acquisition and payment of compensation, the State takes

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SCC 569, this Court held that even though compensation is not expressly provided for under Article 300A of the Constitution, it can be inferred therein. In the American jurisprudence, payment of compensation has been made part of due process (See *Sweet* v. *Rechel* [159 US 380 (1895) : 40 L.Ed. 188], *Delaware L. & W.R. Co.* v. *Morristown* [276 US 182 (1928) : 72 L.Ed. 523] and *United States* v. *Caltex (Philippines)* [344 US 149 (1952) : 97 L.Ed. 157).

19 In *Roy Estate* v. *State of Jharkhand* (2009) 12 SCC 194; *Union of India* v. *Mahendra Girji* (2010) 15 SCC 682 and *Union of India* v. *Mahendra Girji* (2010) 15 SCC 682, this Court has underscored the importance of following the timelines fixed by the statute. In *Mansaram* v. *S.P. Pathak* (1984) 1 SCC 125, this Court has held that the powers relevant to the land acquisition process must be exercised within a reasonable time. In *Kerala State Housing Board* v. *Ramapriya Hotels (P) Ltd.* (1994) 5 SCC 672, this Court has held that if the concerned legislation does not stipulate the time-frames within which the process or its components are to be completed, it amounts to a violation of Article 14 and Article 21 of the Constitution. In *Ram Chand* v. *Union of India* (1994) 1 SCC 44, this Court has acknowledged the realisation of the Parliament that the authorities are not completing the acquisition proceedings within a reasonable time and thus, the Parliament has introduced time-limits. In *Ambalal Purshottam* v. *Ahmedabad Municipal Corpn.* (1968) 3 SCR 207, this Court held that a notification under Section 6 of the Land Acquisition Act, 1894 must be followed by a proceeding for determination of compensation without any unreasonable delay. In *Khadim Hussain* v. *State of U.P.* (1976) 1 SCC 843, this Court held that excessive intervening delay between notifications under Sections 4 and 6 of the Land Acquisition Act, 1894, keeping the landowner in suspense throughout, is illegal.

possession of the property in normal circumstances. The culmination of an acquisition process is not in the payment of compensation, but also in taking over the actual physical possession of the land. If possession is not taken, acquisition is not complete. With the taking over of actual possession after the normal procedures of acquisition, the private holding is divested and the right, title and interest in the property, along-with possession is vested in the State. Without final vesting, the State's, or its beneficiary's right, title and interest in the property is inconclusive and causes lot of difficulties. The obligation to conclude and complete the process of acquisition is also part of Article 300A.

ii) Section 16 of the Land Acquisition Act, 1894, Sections 4 and 5 of the Requisitioning and Acquisition of Immovable Property Act, 1952, Sections 37 and 38 of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, and Sections 3D and 3E of the National Highways Act, 1956, statutorily recognise this right of the acquirer.

iii) This step of taking over of possession has been a matter of great judicial scrutiny and this Court has endeavoured to construe the relevant provisions in a way which ensures non-arbitrariness in this action of the acquirer[20]. For that matter, after taking over possession, the process of land acquisition concludes with the vesting of the land with the concerned authority. The culmination of an acquisition process by vesting has been a matter of great importance. On this aspect, the courts have given a large number of decisions as to the time, method and manner by which vesting takes place[21].

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20 In *State of W.B.* v. *Vishnunarayan & Associates (P) Ltd.* (2002) 4 SCC 134, this Court held that possession can be resumed by the acquirer only in a manner known to or recognised by law and it cannot resume possession otherwise than in due course of law. In *Jilubhai Nanbhai Khachar* v. *State of Gujarat,* 1995 Supp (1) SCC 596, this Court held that though eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity, even then the right to take possession of a private property must be exercised in the manner directed by the Constitution and the laws of the State, since deprivation of property must take place after following the procedure of law and upon ensuring due process.

21 In *Girnar Traders (3) v. State of Maharashtra* (2011) 3 SCC 1, this Court held that under the Land Acquisition Act, 1894, upon the payment of compensation and taking of possession of a land so acquired, the land is vested in the State free of encumbrances and the completion of such vesting of the land in the State amounts to the transfer of title from the owner to the State by a legal fiction. In *P. Chinnanna* v.

31. The seven principles which we have discussed are integral to the *authority of law* enabling compulsory acquisition of private property. Union and State statutes have adopted these principles and incorporated them in different forms in the statutes provisioning compulsory acquisition of immovable property. The importance of these principles, independent of the statutory prescription have been recognised by our constitutional courts and they have become part of our administrative law jurisprudence.

32. ***Conclusions:*** Returning to the legal submissions of the counsel for the appellant-Corporation, as we have noticed that Section 352 does not provide for any procedure whatsoever, we reject the contention that it contemplates the power of acquisition. We have already held that Section 352 is only intended to enable the Municipal Commissioner to decide whether a land is to be acquired for public purpose. The power of acquisition is in fact vested with the State under Section 537 and it will exercise it, in its own discretion, whenever the Municipal Commissioner makes an application to that effect. We have also agreed with the decision of the High Court that Section 363 is not a provision for compensation for compulsory acquisition. In this context, we have also held that a valid power of acquisition coupled with the provision for fair compensation by itself would not complete and exhaust the power and process of acquisition. Prescription of the necessary procedures, before depriving a person of his property is an integral part of the '*authority of law'*, under Article 300A and, Section 352 of the Act contemplates no procedure whatsoever.

33. We are not referring to the detailed facts of the case involving multiple rounds of litigation where the respondents have taken inconsistent stands about the ownership and acquisition of the Property. There is no doubt in our mind that the exercise of the power is illegal, illegitimate and has caused great difficult to the respondent-land-

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State of A.P. (1994) 5 SCC 486 and *Delhi Development Authority* v. *Reena Suri* (2016) 12 SCC 649, this Court held that mere passing of award under the Land Acquisition Act, 1894 will not suffice to vest the land in the State since taking possession is of utmost importance. In *Fruit & Vegetable Merchants Union v. Delhi Improvement Trust,* 1956 SCC OnLine SC 37, this Court held that once the land is vested in the State, it is vested neither for a limited purpose nor for a limited duration. Further, in *Union of India* v. *Tarsem Singh* (2019) 9 SCC 304, this Court observed that the National Highways Act, 1956 has an object of reducing delay in the process of land acquisition in order to speedily implement projects pertaining to highways. It is in this context that this Court held that under Section 3D of the National Highways Act, 1956, the land to be acquired vests in the Union upon the publication of a notification declaring the acquisition, which is done after the disposal of objections of the land-owner, if any.

bearer. It is necessary to refer to the findings of the learned single Judge that the appellant-Corporation acted in blatant violation of statutory provisions, these findings are as follows:

> "*The facts disclosed by the Corporation in the Affidavit-in-Opposition evidently shows that the acquisition was made by invoking Section 352(a) of the said Act by exercising the power of eminent domain. There was a doubt in the mind of some of the Municipal Authorities whether such sovereign power can be exercised by the Statutory Authority like the Corporation and a legal opinion was sought by the Chief Municipal Law Officer from one of the Senior Advocates. The Senior Advocate, however, doubted over the said exercise of power and also highlighted the anomalies in such action. On the basis of such opinion the Chief Municipal Officer made the following remark: -*
>
> *"Doubt has arisen in the past on the question whether the Municipal Commissioner could under Section 352(a) of the CMC Act, 1980 straightway compulsorily acquire any land by giving notice to owner/occupiers also in contract Newspapers and pay compensation under Section 363(3) of the Act. The former Ch. Mpl. Law Officer had referred the question to Mr. P.K. Ghoah Senior Advocate for his opinion. A copy of his opinion is placed below for persual. I have nothing more to add. If in spite of the anomalies in the statute pointed out by Mr. P.K.Ghosh the Mpl. Commissioner proceeds to take possession of the land in question, I have no comment to make. If the aggrieved party moves the Court, then the Court will resolve the anomalies."*
>
> *It is curious to note that despite the same, the then Mayor put a note that the Corporation may proceed to acquire the property by invoking powers under Section 352(a) and the note of the Chief Municipal Law Officer was simply kept in the file. It would further appear from the subsequent noting of the Chief Municipal Law Officer put on 08.01.1991 wherein it is noted that the act is silent as to when the possession is to be taken either before or after the payment of compensation under Section 363 and according to him, the possession can only be*

taken after the payment of compensation under Section 363(3) of the said Act. Despite the aforesaid noting, the Municipal Commissioner passed an order of acquisition on 18.01.1991 directing to acquire the subject land under Section 352(a) of the Act with immediate effect and the possession should also be taken immediately. There is a serious dispute whether the possession was in fact taken in terms of the said order of the Municipal Commissioner or not. However, it is seen from the notes put on 16.03.1991 that the possession was taken. The fact remains that no compensation has been paid as yet. The Corporation has further disclosed a letter allegedly written by the recorded owner on 14.11.1991 wherein it is categorically stated that the possession has not been taken. Though it appears from the noting that the possession was taken way back in 1991 but the record maintained by the Corporation was not altered and/or corrected and in fact the Corporation continued to accept the property tax paid by the recorded owner in respect of the said property. Even in the year 2000, the Corporation mutated the name of the Birinchi Behari Shaw and also issued the No Due Certificate to him. It is only in the year 2010 the Corporation deleted the name of the said owner and incorporated its name as owner thereof. Yet, showing the huge outstanding on account of property tax with interest and penalty in the letter of intimation issued on 17.07.2010. The explanation is sought to be offered that there is no synchronization between the two departments of the Corporation and a mistake has been committed, which cannot confer any equity or right in favour of the Petitioner.

I am unable to persuade myself to agree with such explanation. For the sake of argument, if it is accepted that possession was taken way back in 1991, there was no occasion to accept the property tax for more than a decade without altering the entries made in the assessment register.

This Court, therefore, finds that the Corporation acted blatantly in violation of the statutory provision in acquiring the property as such acquisition should have been

facilitated by approaching the State under Section 537(1) of the said Act. The entire action concerning the acquisition of property by invoking Section 352(a) of the Act is per se illegal, invalid and in clear contravention to the provisions of the Act and are hereby quashed and set aside."

34. In the above analysis, we are of the considered opinion that the High Court was fully justified in allowing the writ petition and rejecting the case of the appellant-Corporation acquiring land under Section 352 of the Act. The impugned judgment does not brook interference on any count.

35. Having considered the matter in detail, we dismiss the appeal arising out of SLP (C) No. 4504 of 2021 filed by the appellant-Corporation against the judgment of the High Court of Calcutta in APO No. 523 of 2017 dated 17.12.2019 with costs quantified at Rs. 5,00,000/-, to be paid to respondent no. 1 within a period of sixty days from today.

36. Pending application(s), if any, shall be disposed of.

Result of the case: Appeal dismissed.

†*Headnotes prepared by:* Nidhi Jain

[2024] 5 S.C.R. 859 : 2024 INSC 445

Bijay Kumar Manish Kumar HUF
v.
Ashwin Bhanulal Desai

(I.A. No.120219 of 2020)
In
Special Leave Petition (C) No.4049 of 2020

17 May 2024

[J.K. Maheshwari and Sanjay Karol,* JJ.]

Issue for Consideration

The interlocutory applications have been filed seeking direction for payment of rent and other associated benefits in connection with the property which is the subject matter of the dispute.

Headnotes†

Rent Control and Eviction – Non-payment of rent – The *lis* governs four different tenancies – Petitioner-applicant landlord alleges non-payment of rent and has filed applications in the pending SLPs seeking direction for payment of '*monthly occupational charges*' following the prevalent market rate:

Held: On account of non-payment of rent, the lease was forfeited/determined – However, the respondent-tenant has neither delivered the possession of the property nor paid the rent – Also, the petitioner submitted a report of an independent valuer – The assessment of the rentals, made by the valuer, is @ INR 41/- per Sq.ft. – It is settled that a tenant who once entered the property in question lawfully, continues in possession after his right to do so stands extinguished, is liable to compensate the landlord for such time period after the right of occupancy expires – *Prima facie*, it is clear that the respondent-tenant had delayed the payment of rent and/or other dues, payable to the petitioner-applicant landlord – This denial of monetary benefits accruing from the property, when viewed in terms of the unchallenged market report forming part of the record is undoubtedly substantial – This order for deposit of the amount claimed by the petitioner-applicant is being passed, to ensure

* Author

complete justice inter se the parties – It is important to note that when a property is rented out, it is to ensure that the landlord by way of the property is able to secure some income – If the income remains static over a long period of time or in certain cases, as in the present case, yields no income, then such a landlord would be within his rights, subject of course, to the agreement with their tenant, to be aggrieved by the same – Therefore, the respondent is directed to deposit the amount of Rs. 5,15,05,512/-. [Paras 13, 19, 21 and 23]

Case Law Cited

Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd. [2004] Supp. 6 SCR 843 **: (2005) 1 SCC 705;** *State of Maharashtra & Anr. v. Super Max International Private Limited and Ors.* [2009] 13 SCR 801 **: (2009) 9 SCC 772;** *Achal Misra v. Ram Shanker Singh & Ors.* [2005] 3 SCR 439 **: (2005) 5 SCC 531;** *Achal Misra (2) v. Rama Shankar Singh & Ors.* [2006] Supp. 1 SCR 617 **: (2006) 11 SCC 498;** *G.L. Vijain v. K. Shankar* [2006] Supp. 9 SCR 583 **: (2006) 13 SCC 136;** *Martin and Harris (P) Ltd. v. Rajendra Mehta* [2022] 16 SCR 38 **: (2022) 8 SCC 527;** *Indian Oil Corporation Ltd. v. Sudera Realty Private Limited* [2022] 19 SCR 462 **: (2022) SCC OnLine 1161;** *Mohammad Ahmed & Anr. v. Atma Ram Chauhan & Ors.* [2011] 6 SCR 822 **: (2011) 7 SCC 755 – relied on.**

Books and Periodicals Cited

Halsbury's Laws of England 3rd Edn. Vol. 23; Wharton's Law Lexicon Seventeenth Edn.; Burton's Legal Thesaurus 3rd Edn. **– referred to.**

List of Acts

West Bengal Tenancy Act, 1997; Transfer of Property Act, 1882.

List of Keywords

Rent; Non-payment of Rent; Monthly Occupational charges; Independent valuer; Possession of property; Right of occupancy; Denial of monetary benefits; *Corpus Juris Secundum*; Tenancy at sufferance; Mesne Profit; Expiry of lease; Determination of lease; Forfeiture; Termination.

Bijay Kumar Manish Kumar HUF v. Ashwin Bhanulal Desai

Case Arising From

CIVIL APPELLATE JURISDICTION: I.A. No. 120219 of 2020

In

Special Leave Petition (C) No. 4049 of 2020

With

I.A. No. 120227 of 2020 In SLP(C) No. 4050 of 2020, I.A. No. 120235 of 2020 In SLP(C) No. 4051 of 2020 and I.A. No. 120248 of 2020 In SLP(C) No. 4052 of 2020

Appearances for Parties

Rana Mukherjee, Sr. Adv., Ms. Vijaya Bhatia, Ganesh Shaw, Kunal Chatterji, Ms. Maitrayee Banerjee, Rohit Bansal, Ms. Kshitij Singh, Sohhom Sau, Samarth Mohanty, Arjun Bhatia, Advs. for the Petitioner.

Rupak Ghosh, Debdut Mukherjee, Ms. Sonia Dube, Ms. Kanchan Yadav, Ms. Surbhi Anand, Tanishq Sharma, Ms. Saumya Sharma, M/s. Legal Options, Advs. for the Respondent.

Judgment / Order of the Supreme Court

Judgment

Sanjay Karol, J.

1. These petitions for special leave to appeal seek to lay a challenge to the judgment and order dated 7th November 2019 passed in C.O.Nos.1582-85 of 2019 by the High Court of Calcutta. The learned Single Judge while deciding the issue as to whether the West Bengal Tenancy Act, 1997[1] or the Transfer of Property Act, 1882[2] was to be applied for framing of the issues in the instant landlord-tenant dispute, held that the Tenancy Act would govern the same.

2. Impugning the judgment of the learned Single Judge, the present Special Leave Petitions were filed before this Court. However, the reasoning adopted therein is not within the scope of the present adjudication. During the pendency of these Special Leave Petitions

1 Tenancy Act

2 T.P. Act

interlocutory applications have been filed seeking direction for payment of rent and other associated benefits in connection with the property which is the subject matter of the present dispute. It is these Interlocutory Applications that are sought to be disposed of by way of the present judgment.

3. It would, however, be apposite to have a bird's eye view of the controversy. It is not in dispute that the *lis* governs four different tenancies. Due to alleged non- payment of rent, the lease was forfeited, and the petitioner-applicant initiated proceedings for ejectment under the T.P. Act. Suit(s) were filed before the City Civil Court at Calcutta seeking *inter alia, a)* recovery of possession by eviction of defendant (respondent- tenant herein); *b)* permanent injunction against the present respondents and his agents, servants, employees or associates etc., from alienating, transferring or parting with possession of the property. The respondent-tenant, in opposition thereto, filed an application seeking the rejection of the plaint, on the grounds of jurisdiction, and for the premises to be governed under the Tenancy Act alleging particularly that, possession has been sought in respect of a lease that is yet undetermined; the claim is bad in law, illegal and arbitrary; the suit has been misvalued and the plaint is insufficiently stamped, among others. The same came to be rejected by the concerned Court by order dated 3rd February 2015[3]. It was observed: –

> "…Without a full-fledged trial and evidence the court cannot come to conclusion that the averments made in the plaint are false and frivolous or that there is any suppression of material fact. Notice of determination of lease, if not at all served upon the defendant and if it is mandatory, then the suit may fill in future. But that cannot come under the ambit of the provision of O 7 R 11 CPC. This court cannot take the view for rejection of plaint without giving or affording opportunity to the parties to bring evidence justifying their plea. On the other hand, because of action of the suit has to be found out on the conjoint reading of all paragraphs of the plaint. Because of

3 Annexure P 11 of the paper book at page 132

> action does not mean only a date. Above all, the Plaintiff has specifically mentioned cause of action in paragraph 15 of the plaint. The allegations or the averments made in the plaint has to be proved by the Plaintiff had the time of trial by producing evidence and it is the duty of the Plaintiff to prove that the lease has been determined properly or not."

Allowing the matter not to rest there, the respondent-tenant pursued the matter further. The High Court, in its Civil Revisional Jurisdiction under Article 227 of the Constitution of India, *vide* order dated 31st March 2015[4] upheld the dismissal of the application under Order VII Rule 11. Eventually, this Court *vide* judgment and order dated 12th December 2018[5] directed the remand of the matter, observing thus: –

> "9. Taking into consideration the peculiar facts and circumstances of the case, since the suit is still in the preliminary stage, we dispose of the appeal is directing the trial court to frame the issue, relating to the maintainability of the suit and applicability of enactments, as mentioned supra and decide the same in accordance with law as a preliminary issue as expeditiously as possible, preferably within a period of 6 months from the date of communication of this judgment."

4. The Trial Court thereafter framed the following issues:-

> "1. Is the suit triable under the provisions of the W.B.P.T Act, 1997 or the Transfer of Property Act 1882?
>
> 2. Whether the suit is maintainable as framed or at all?"

5. The Trial Court in all four suits, answered the issues in favour of the plaintiff, primarily on the ground that since the tenancy, subject matter of the suit, was created with w.e.f. 20th November 1992 and the Tenancy Act came into force w.e.f. 10th July 2001. The agreement *inter se* the parties, therefore, was governed only by the T.P. Act. The observation of the trial court is extracted as under: –

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4 Annexure P 12 of the paper book at page 138

5 Annexure P - 29 of paper book

> "… It is pertinent to mention here that the lease deed was executed on 20.11.1992 for the period of 99 years and the W. B. P. T. Act, 1997 came into force on 10. 07. 01 i.e. much more earlier than the enforcement of the W. B. P. T. Act, 1997 and there is or was no express word in the W. B. P. T. Act, 1997 that alright accrued by any party from the prevailing any law will be extinguished since the W. B. P. T. Act, 1997 came into force on 10. 07.01. Therefore, it can be said that the present suit squarely governed by the T. P. Act and no under West Bengal Premises tenancy act, 1997 and in view of such factual aspect the present is perfectly maintainable…"

6. It is in appeal from such order of the Trial Court that the impugned judgment with particulars as noticed above, came to be passed. The High Court while upholding the jurisdictional issue in favour of the respondent-tenant, dismissed all the four suits of the plaintiff for the same not to be maintainable. Thus, the issue as already observed is as to whether the order passed by the High Court holding the respondent-tenant to be governed by the Tenancy Act, is legally sustainable or not.

7. In these Special Leave Petitions preferred by the landlord, notice was issued on 17th February 2020.

8. During the course of the hearing on 15th February 2024 petitioner-applicant (landlord) had offered time to the tenants to vacate the premises. Certain suggestions for amicably resolving the dispute for all times to come were exchanged, and as such the matters were adjourned. We are now informed that the petitioner-landlord's offer of giving time to the tenant to hand over the vacant possession of the premises stands rejected. Thus, the landlord insisted on the disposal of the applications asking the tenant to pay the rent at the market rate for the *lis* to have been determined at the institution of the plaint.

I.A. No.120219/2020 in SLP(C)No.4049/2020 :

9. The Interlocutory Application bearing the above particulars has been taken as the primary application for the sake of facts. It is noted that similar applications seeking similar prayer have been filed in other special leave petitions which shall be disposed of in accordance with this order.

10. We notice that these applications in issue have been pending for almost three years.

11. The applicant (petitioner in the SLP) seeks direction for payment of '*monthly occupational charges*' following the prevalent market rate. The prayer as made, is reproduced below:-

> "(a) Direct the Respondent to forthwith pay monthly occupational charges at the rate of INR 41/- (Indian Rupees Forty One) per Square feet, for 1208 Sq.ft = INR 49528/- since August, 2007 during the pendency of the present Special Leave Petition in respect of the present lease in dispute…"

12. Certain facts are required to be taken note of. The property in question is situated in the Dalhousie area, which has been termed as a commercial hub in Kolkata. The lease Agreement *inter se* the parties was entered into on 23rd February 1991 executed by the predecessor-in-interest of the petitioner. It is alleged that the respondent has been in default on payment of rent since 2002 and in default on payment of his share of municipal tax since 1996.

13. On account of non-payment of rent, the lease was forfeited/ determined. However, the respondent has neither delivered the possession of the property nor paid the rent. The petitioner has submitted a report of an independent valuer dated 12th March 2020. The assessment of the rentals, made by the valuer, it is submitted, is fair and reasonable @ INR 41/- per Sq.ft.

14. It is submitted on behalf of the respondent that since no court has declared the end of the landlord-tenant relationship, the petitioner-applicant asking the respondent to pay occupational charges as opposed to contractual rent would amount to the re-writing of the tenancy Agreement. Further, it is argued that occupation charges are only payable after the lease is validly determined or after the decree of eviction. Since both these eventualities are yet to occur, no question of such payment arises. It is also urged that the petitioner-applicant accepted rent from the respondent till August 2002 but thereafter refused to do so. According to the respondent-tenant, a total amount of Rs,2,06,400/- is payable on their part to the petitioner-applicant in the following terms :-

PARTICULARS

	ARREARS OF RENT FROM SEPTEMBER, 2002 TO FEB, 2024	INTEREST CALCULATED @10% TILL FEB, 2024	TOTAL
Tenancy 1 (Car Parking)	Rs.50/- X 258 months = Rs.12900/-	Rs.14625/-	Rs.27525/-
Tenancy 2 (Godown1)	Rs.150/- X 258 months = Rs.38700/-	Rs.43875/-	Rs.82575/-
Tenancy 3 (Godown 2)	Rs.250/- X 258 months = Rs.64500/-	Rs.73125/-	Rs.137625/-
Tenancy 4 (Office Space)	Rs.350/- X 258 months = Rs.90300/-	Rs.102375/-	Rs.192675/-
TOTAL 2,06,400 + 2,34,400 = Rs.4,40,400/-			

15. On the other hand, the petitioner-applicant's(landlord) calculation is tabulated as under:-

SLP No.	**SLP(C) 4049 of 2020**	**SLP(C) 4050 of 2020**	**SLP(C) 4051 of 2020**	**SLP(C) 4052 of 2020**
Date of Lease Deed	23.02.1991	20.11.1992	20.11.1992	20.11.1992
Area	1208 sqft	2500 sqft.	1650 sq.ft	800 sq.ft
Rent Amount per month	Area * Rs.41 per sq.ft =Rs.49,258/-	Area * Rs.41 per sq.ft =Rs.1,02,500	Area * Rs.41 per sq.ft =Rs.67,650	Area * Rs.41 per sq.ft =Rs.32,800/-
Rent due till date (from 2007)	Amount* (17 years* 12 months)= Rs.1,01,03712	Amount* (17 years* 12 months)= Rs.2,09,10,000/-	Amount* (17 years* 12 months)= Rs.1,38,00,600/-	Amount * (17 years * 12 months) =Rs.66,91,200
TOTAL				**Rs.5,15,05,512/-**

16. Landlord-tenant disputes often make their way to this Court, and obviously, the payment of rent/mesne profit/occupation charges/ damages becomes, more often than not a matter of high contest. Determination, as alleged to have taken place by the petitioner, can take place at the instance of both the landlord and the tenant. Halsbury's Laws of England 3rd Edn. Vol.23 defines 'determination by landlord' as follows :

> "The tenancy is impliedly determined by the landlord when he does any act on the premises which is inconsistent with

> the continuance of tenancy; for example, when he re-enters to take possession (b), or puts in a new tenant (c), or cuts down trees or carries away stone (d), the trees and stone not being excepted from the demise (e), and also when he does an act off the premises which is inconsistence with the tenancy, as when he conveys the reversion (f), or grants a lease of the premises to commence forthwith (g). An act done off the premises, however, does not determine the tenancy until the tenant has notice of it (h)."

16.1 According to the petitioner, as already taken note of above, the lease was 'forfeited' due to non-payment of rent. Forfeiture, as defined by *Corpus Juris Secundum* is "the right of the lessor to terminate a lease because of lessee's breach of covenant or other wrongful act". Further, it mentions as under :

> "The word as used in a lease does not, strictly speaking, refer to any right given to the lessee to terminate the lease. Accordingly, it has been held that provisions for forfeiture, cancelation or termination of a lease are usually inserted for the benefit of the lessor and because of some default on the part of the lessee. A forfeiture is in the nature of a penalty of doing of failing to do a particular thing, and results from failure to keep an obligation."

16.2 It would also be useful to refer to the concept of tenant at sufferance. As defined in the very same treatise, such a tenant is a person who enters upon a land by lawful title,but continues in possession after the title has ended without statutory authority and without obtaining consent of the person then entitled.

16.3 Wharton's Law Lexicon Seventeenth Edn. discusses 'tenancy at sufferance' in the following terms :

> "**Sufferance, Tenancy at**, This is the least and lowest estate which can subsist in realty. It is in strictness not an estate, but a mere possession only it arises when a person after his right to the occupation, under a lawful title, is at an end, continues (having no title at all) in possession of the land, without the agreement or disagreement of the person in whom

> the right of possession resides. Thus if A is a tenant for yes, and his terms expires, or is a tenant at will, and his lessor dies, and he continues in possession without the disagreement of the person who is entitled to the same, in the one and the other of these cases he said to have the possession by sufferance – that is, merely by permission or indulgence, without any right : the law esteeming it just and reasonable, and for the interest of the tenant, and also of the person entitled to the possession, to deem the occupation to be continued by the permission of the person who has the right, till it is proved that the tenant withholds the possession wrongfully, which the law will not presume. As the party came to the possession by right, the law will esteem that right to continue either in point of estate or by the permission of the owner of the land till it is proved that the possession is held in opposition to the will of that person."

17. Before adverting to the present facts and claims advanced by the parties it would be appropriate to refer to certain pronouncements of this Court where mesne profit, which is the mainstay of the interlocutory application(s) before us, have been awarded.

17.1 The respondent has referred to **Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.**[6] to submit that the landlord's claim for mesne profit is not maintainable, given that, no decree of ejectment stands passed by the concerned civil court. We may refer to the observations made in the said judgment, which are, thus:

> "**9**…….The power to grant stay is discretionary and flows from the jurisdiction conferred on an appellate court which is equitable in nature. To secure an order of stay merely by preferring an appeal is not a statutory right conferred on the appellant. So also, an appellate court is not ordained to grant an order of stay merely because an appeal has been preferred

6 [2004] Supp. 6 SCR 843 : (2005) 1 SCC 705

and an application for an order of stay has been made. Therefore, an applicant for order of stay must do equity for seeking equity. Depending on the facts and circumstances of a given case, an appellate court, while passing an order of stay, may put the parties on such terms the enforcement whereof would satisfy the demand for justice of the party found successful at the end of the appeal. In *South Eastern Coalfields Ltd. v. State of M.P.* [(2003) 8 SCC 648] this Court while dealing with interim orders granted in favour of any party to litigation for the purpose of extending protection to it, effective during the pendency of the proceedings, has held that such interim orders, passed at an interim stage, stand reversed in the event of the final decision going against the party successful in securing interim orders in its favour; and the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (*a*) the delivery to it of benefit earned by the opposite party under the interim order of the High Court, or (*b*) compensation for what it has lost, and to grant such relief is the inherent jurisdiction of the court. In our opinion, while granting an order of stay under Order 41 Rule 5 CPC, the appellate court does have jurisdiction to put the party seeking stay order on such terms as would reasonably compensate the party successful at the end of the appeal insofar as those proceedings are concerned.

x x x x

18. That apart, it is to be noted that the appellate court while exercising jurisdiction under Order 41 Rule 5 of the Code did have power to put the appellant tenant on terms. The tenant having suffered an order for eviction must comply and vacate the premises. His right of appeal is statutory but his prayer for grant of

stay is dealt with in exercise of equitable discretionary jurisdiction of the appellate court. While ordering stay the appellate court has to be alive to the fact that it is depriving the successful landlord of the fruits of the decree and is postponing the execution of the order for eviction. There is every justification for the appellate court to put the appellant tenant on terms and direct the appellant to compensate the landlord by payment of a reasonable amount which is not necessarily the same as the contractual rate of rent. In *Marshall Sons & Co. (I) Ltd. v. Sahi Oretrans (P) Ltd.* [(1999) 2 SCC 325] this Court has held that once a decree for possession has been passed and execution is delayed depriving the judgment-creditor of the fruits of decree, it is necessary for the court to pass appropriate orders so that reasonable mesne profits which may be equivalent to the market rent is paid by a person who is holding over the property."

(Emphasis supplied)

17.2 A Bench of three learned Judges in **State of Maharashtra & Anr. v. Super Max International Private Limited and Ors**[7] observed as under :

"67. The way this Court has been looking at the relationship between the landlord and the tenant in the past and the shift in the Court's approach in recent times have been examined in some detail in the decision in *Satyawati Sharma v. Union of India* [(2008) 5 SCC 287] . In that decision one of us (Singhvi, J.) speaking for the Court referred to a number of earlier decisions of the Court and (in para 12 of the judgment) observed as follows: (SCC pp. 304-05)

"*12*. Before proceeding further we consider it necessary to observe that there has been a definite shift in the Court's approach while interpreting the rent control legislations.

7 [2009] 13 SCR 801 : (2009) 9 SCC 772

> An analysis of the judgments of 1950s to early 1990s would indicate that in majority of cases the courts heavily leaned in favour of an interpretation which would benefit the tenant—*Mohinder Kumar v. State of Haryana* [(1985) 4 SCC 221] , *Prabhakaran Nair v. State of T.N.* [(1987) 4 SCC 238], *D.C. Bhatia v. Union of India* [(1995) 1 SCC 104] and *C.N. Rudramurthy v. K. Barkathulla Khan* [(1998) 8 SCC 275] . In these and other cases, the Court consistently held that the paramount object of every rent control legislation is to provide safeguards for tenants against exploitation by landlords who seek to take undue advantage of the pressing need for accommodation of a large number of people looking for a house on rent for residence or business in the background of acute scarcity thereof. However, a different trend is clearly discernible in the later judgments."

x x x x x

68. The learned Judge then referred to some later decisions and (in para 14 at SCC p. 306 of the judgment) quoted a passage from the decision in *Joginder Pal v. Naval Kishore Behal* [(2002) 5 SCC 397], to the following effect: (*Joginder Pal case* [(2002) 5 SCC 397] , SCC p. 404, para 9)

> "*14. … '9. … The courts have to adopt a reasonable and balanced approach while interpreting rent control legislations starting with an assumption that an equal treatment has been meted out to both the sections of the society. In spite of the overall balance tilting in favour of the tenants, while interpreting such of the provisions as to take care of the interest of the landlord*

> *the court should not hesitate in leaning in favour of the landlords. Such provisions are engrafted in rent control legislations to take care of those situations where the landlords too are weak and feeble and feel humble.'* "
>
> (emphasis in original)

x x x x x

> **79.** Before concluding the decision one more question needs to be addressed: what would be the position if the tenant's appeal/revision is allowed and the eviction decree is set aside? In that event, naturally, the status quo ante would be restored and the tenant would be entitled to get back all the amounts that he was made to pay in excess of the contractual rent. That being the position, the amount fixed by the court over and above the contractual monthly rent, ordinarily, should not be directed to be paid to the landlord during the pendency of the appeal/revision. The deposited amount, along with the accrued interest, should only be paid after the final disposal to either side depending upon the result of the case."

17.3 It has been held that tenants shall be liable to pay a rent equivalent to mesne profit, from the date they are found not to be entitled to retain possession of the premises in question. In **Achal Misra v. Ram Shanker Singh & Ors.**[8] this Court held -

> **"23.** From the material available on record it does not appear that any rate of rent was appointed at which rent would be payable by the respondents to the landlord. The respondents also do not seem to have taken any steps for fixation of rent of the premises in their occupation. They have been happy to have got the premises in a prime locality, occupying and enjoying the same for no payment. We make it clear

8 [2005] 3 SCR 439 : (2005) 5 SCC 531

> that the respondents shall be liable to pay the rent equivalent to mesne profits with effect from the date with which they are found to have ceased to be entitled to retain possession of the premises as tenant and for such period the landlord's entitlement cannot be held pegged to the standard rent. Reference may be had to the law laid down by this Court in *Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.* [(2005) 1 SCC 705]."

This position was reiterated in **Achal Misra (2) v. Rama Shankar Singh & Ors.**[9].

17.4 The power to grant stay on the execution proceedings which would then result into an order for payment of mesne profit is what has been described as incidental or subject to the final outcome of the case. This Court has observed, in **G.L. Vijain v. K. Shankar**[10] as under -

> **"10.** It must be borne in mind that incidental power is to be exercised in aid to the final proceedings. In other words an order passed in the incidental proceedings will have a direct bearing on the result of the suit. Such proceedings which are in aid of the final proceedings cannot, thus, be held to be on a par with supplemental proceedings which may not have anything to do with the ultimate result of the suit.
>
> **11.** Such a supplemental proceeding is initiated with a view to prevent the ends of justice from being defeated. Supplemental proceedings may not be taken recourse to in a routine manner but only when an exigency of situation arises therefor. The orders passed in the supplemental proceedings may sometimes cause hardships to the other side and, thus, are required to be taken recourse to when it is necessary in the interest of justice and not otherwise.

9 [2006] Supp. 1 SCR 617 : (2006) 11 SCC 498

10 [2006] Supp. 9 SCR 583 : (2006) 13 SCC 136

There are well-defined parameters laid down by the Court from time to time as regards the applicability of the supplemental proceedings.

12. Incidental proceedings are, however, taken recourse to in aid of the ultimate decision of the suit which would mean that any order passed in terms thereof, subject to the rules prescribed therefor, may have a bearing on the merit of the matter. Any order passed in aid of the suit is ancillary power."

17.5 This Court in **Martin and Harris (P) Ltd. v. Rajendra Mehta**[11] speaking through one of us (J.K. Maheshwari, J.) observed that -

"**18.** Thus, after passing the decree of eviction the tenancy terminates and from the said date the landlord is entitled for mesne profits or compensation depriving him from the use of the premises. The view taken in *Atma Ram* [*Atma Ram Properties (P) Ltd. v. Federal Motors (P) Ltd.*, (2005) 1 SCC 705] has been reaffirmed in *State of Maharashtra v. Super Max International (P) Ltd.* [*State of Maharashtra v. Super Max International (P) Ltd.*, (2009) 9 SCC 772 : (2009) 3 SCC (Civ) 857] by three-Judge Bench of this Court. Therefore, looking to the fact that the decree of eviction passed by the trial court on 3-3-2016 has been confirmed in appeal; against which second appeal is pending, however, after stay on being asked the direction to pay mesne profits or compensation issued by the High Court is in consonance to the law laid down by this Court, which is just, equitable and reasonable.

19. The basis of determination of the amount of mesne profits, in our view, depends on the facts and circumstances of each case considering the place where the property is situated i.e. village or city or metropolitan city, location, nature of premises i.e.

11 [2022] 16 SCR 38 : (2022) 8 SCC 527

> commercial or residential area and the rate of rent precedent on which premises can be let out are the guiding factor in the facts of individual case."

(Emphasis supplied)

18. A perusal of the judgments extracted above as also other cases where **Atma Ram Properties** (supra) one common factor can be observed, i.e., the decree of eviction stands passed and the same having been stayed, gives rise to the question of payment of mesne profit. As observed above, the respondent contends that since, in the present case no decree of eviction is passed, and there is no stay awarded, the question of such payment does not arise.

19. While the above-stated position is generally accepted, it is also within the bounds of law, that a tenant who once entered the property in question lawfully, continues in possession after his right to do so stands extinguished, is liable to compensate the landlord for such time period after the right of occupancy expires. In this regard, we may refer to **Indian Oil Corporation Ltd. v. Sudera Realty Private Limited**[12], wherein this Court in para 64 observed as under :

> **"64.** A tenant continuing in possession after the expiry of the lease may be treated as a tenant at sufferance, which status is a shade higher than that of a mere trespasser, as in the case of a tenant continuing after the expiry of the lease, his original entry was lawful. But a tenant at sufferance is not a tenant by holding over. While a tenant at sufferance cannot be forcibly dispossessed, that does not detract from the possession of the erstwhile tenant turning unlawful on the expiry of the lease. Thus, the appellant while continuing in possession after the expiry of the lease became liable to pay mesne profits."

(Emphasis supplied)

20. It is to be noted that the Court in **Sudera Realty** (supra) observed that mesne profits become payable on continuation of possession

12 [2022] 19 SCR 462 : 2022 SCC OnLine 1161

after 'expiry' of lease. In our considered view, the effect of the words 'determination', 'expiry', 'forfeiture' and 'termination' would, subject to the facts applicable, be similar, i.e., when any of these three words are applied to a lease, henceforth, the rights of the lessee/ tenant stand extinguished or in certain cases metamorphosed into weaker iteration of their former selves. Illustratively, Burton's Legal Thesaurus 3rd Edn. suggests the following words as being similar to 'expire' - cease, come to an end; 'determine' is similar to - come to a conclusion, bring to an end; 'forfeiture' is similar to – deprivation/ destruction of a right, divestiture of property; and 'terminate' is similar to – bring to an end, cease, conclude. Therefore, in any of the these situations, mesne profit would be payable.

21. Having considered the submissions made across the Bar, we note that the disputed nature of the lease deed, in other words, its continuation or forfeiture on account of non-payment is heavily contested and stemming therefrom, so is the nature of payment to be made. We also note that the location of demised premises is in the heart of Kolkata and if the submissions of the petitioner are to be believed, they have been deprived of rent for a considerable period of time. Taking a lock stock and barrel view of the present dispute, the averments and the documents placed before us, we may record a *prima facie* view, that the respondent-tenant has for the reasons yet undemonstrated, been delaying the payment of rent and/or other dues, payable to the petitioner-applicant landlord. This denial of monetary benefits accruing from the property, when viewed in terms of the unchallenged market report forming part of the record is undoubtedly substantial and as such, subject to just exceptions, we pass this order for deposit of the amount claimed by the petitioner-applicant, to ensure complete justice *inter se* the parties, After all, we cannot lose sight of the fact that the very purpose for which a property is rented out, is to ensure that the landlord by way of the property is able to secure some income. If the income remains static over a long period of time or in certain cases, as in the present case, yields no income, then such a landlord would be within his rights, subject of course, to the agreement with their tenant, to be aggrieved by the same. The factors considered by us have been referred to in **Martin and Harris** (Supra). We are supported in our conclusion by the observations and guidelines issued by this Court in **Mohammad Ahmed & Anr. v. Atma Ram Chauhan**

& Ors.[13]. We reproduce the ones relevant to the adjudication of the present dispute hereinbelow-

> **"21.** According to our considered view majority of these cases are filed because the landlords do not get reasonable rent akin to market rent, then on one ground or the other litigation is initiated…
>
> (*i*) The tenant must enhance the rent according to the terms of the agreement or at least by ten per cent, after every three years and enhanced rent should then be made payable to the landlord. If the rent is too low (in comparison to market rent), having been fixed almost 20 to 25 years back then the present market rate should be worked out either on the basis of valuation report or reliable estimates of building rentals in the surrounding areas, let out on rent recently.
>
> (*ii*) Apart from the rental, property tax, water tax, maintenance charges, electricity charges for the actual consumption of the tenanted premises and for common area shall be payable by the tenant only so that the landlord gets the actual rent out of which nothing would be deductible. In case there is enhancement in property tax, water tax or maintenance charges, electricity charges then the same shall also be borne by the tenant only.
>
> x x x x
>
> (*v*) If the present and prevalent market rent assessed and fixed between the parties is paid by the tenant then the landlord shall not be entitled to bring any action for his eviction against such a tenant at least for a period of 5 years. Thus for a period of 5 years the tenant shall enjoy immunity from being evicted from the premises.
>
> (*vi*) The parties shall be at liberty to get the rental fixed by the official valuer or by any other agency, having expertise in the matter.

13 [2011] 6 SCR 822 : (2011) 7 SCC 755

(*vii*) The rent so fixed should be just, proper and adequate, keeping in mind the location, type of construction, accessibility to the main road, parking space facilities available therein, etc. Care ought to be taken that it does not end up being a bonanza for the landlord."

22. Since the Special Leave Petitions are pending adjudication, we make it clear that directions made in the above-stated Interlocutory Applications herein are subject to the final outcome of the former. Keeping in view the location of the demised premises, the rent as agreed, the alleged non-payment of rent, the default in payment of interest, as alleged, and other such like factors we are inclined to accept the calculation of dues as made by the petitioner-applicant, submitted to this Court during hearing, as reproduced hereinabove.

23. Consequently, keeping in view the observations made in **Super Max International** (supra) and **G.L. Vijain** (supra), we direct the respondent to deposit the above-stated amount of Rs.5,15,05,512/- with the Registry of this Court within four weeks from today. An affidavit of compliance shall be filed in the Registry of this Court within a week thereafter. Failure to comply with the aforementioned shall entail all consequences within the law, including wilful disobedience of the order. The Registry is directed to place the amount received in a short-term, interest-bearing fixed deposit.

24. The Interlocutory Applications for directions seeking similar relief filed in SLP(C)Nos.4050 (I.A. No.120227/2020), 4051 (I.A. No.120235/2020), and 4052 (I.A. No.120248/2020) of 2020 shall stand disposed of in the same and similar terms as the I.A. No.120219/2020 filed in SLP(C)No.4049/2020, discussed above.

25. Let the Special Leave Petitions appear in the month of July, 2024.

Result of the case: IAs disposed of.

†*Headnotes prepared by:* Ankit Gyan